

# Constitutionalizing the EU in an Age of Emergencies

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## Abstract

Over the last decade especially, European authorities have successively invoked exceptional measures in the name of exceptional circumstances. This improvised mode of emergency response raises problems for EU legitimacy. After a brief analysis of the core patterns, the article examines the scope for reform. It considers the case for pre-emptively strengthening the EU's emergency powers in the form of an 'emergency constitution'. It goes on to argue for more radical EU constitutional change, focused not on regulating the exceptional moment but simplifying and democratizing executive power, such that when hard times arrive it is better tied to a critical public. A concluding section discusses what can be achieved by retrospective contestation, as an interim solution in advance of constitutional change.

**Keywords:** emergency; exception; constitution; European Union; democracy

## Introduction

Throughout the crisis politics of recent years, critical assessment of the EU has tended to focus on 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 organization that 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 are attained. Ends can obscure the means. This is the argument of those who call for more attention to how EU crisis decision-making 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, rationalized as necessary responses to exceptional and urgent threats – the use, that is, of emergency politics (White, 2015, 2019; Kreuder-Sonnen, 2019; cf. Goetz & Martinsen, 2021, pp. 1009ff.).

In the days after the Russian invasion of Ukraine in February 2022, the EU and its Member States adopted some striking emergency measures, including sanctions on Russia, military support for Ukraine, the opening of borders to Ukrainian refugees, and a push for accelerated candidate status for the country.<sup>1</sup> Such moves implied dramatic shifts in long-standing European and national security policy, generally towards greater militarization. To many, these measures seemed more than justified – the arguments in support 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,

<sup>1</sup><https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-ukraine-crisis/>.

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 those that lead up to them – for the (in)actions that shape preparedness for extreme circumstances, sometimes their very existence? 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 their democratic control.

This article starts with an overview of the transnational politics of emergency in its largely unregulated current form. On the logic of norm-exception-norm, executive authorities at various levels enact departures from standard constraints. Discussed are the challenges raised by this *improvised* mode of emergency rule and the driving factors in the EU. Continuities are traced from the economic malaise of the 2010s through to the public health and security crises of the 2020s. In the second section the article moves to its central question – how the constitutional issues arising might be handled more adequately. 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’, recently made by practitioners and scholars. Aimed at pre-emptively *regulating the exception*, that is, the exercise of power in extreme moments, this proposal retains the norm-exception-norm logic familiar from existing practice but seeks to make it more orderly and predictable. Yet an emergency constitution comes at some cost. Judging that such an addition would raise more problems than it solves, the article’s third section explores the case for a more radical *constitutionalization* of the EU. Rather than legitimize exceptional responses to exceptional circumstances, it would aim for stable executive authority anchored in a parliamentary regime. A durable EU constitution of this kind would involve only those supranational arrangements that could be endorsed on a permanent rather than temporary basis.

By moving beyond the logic of norm-exception-norm, such a model addresses the core problem whereby executive power becomes especially unbound in the moments of highest stakes. It challenges the relegation of democratic ideals to periods of relative calm. Yet while this seems the most principled way to constrain emergency politics, it is also very demanding. Given that the preconditions for a constitutional transformation of the EU presently still seem remote, the article concludes with some remarks on how emergency politics can be constrained under existing structural conditions, notably through the intervention of critical movements and parties. For as long as emergency exceptionalism is a pronounced feature of EU politics, *retrospective contestation* should be the minimum aim.

## I. Improvised Emergency Politics: The Status Quo

Emergency politics in today’s EU tends to proceed in a haphazard fashion. It is a largely unregulated mode of rule, at least until formalized retrospectively. Sometimes exceptionalism challenges the norms of domestic politics, for example to do with 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. Despite its improvised character, it is possible to identify

some key features. Here I focus on two kinds of emergency politics – supranational and multilateral (cf. Kreuder-Sonnen and White, 2022) – to highlight some patterns and causes. Expressions of each can be found throughout the 2010s and beyond. While they are not equally present at all times – pandemic politics varied in important ways from the handling of eurozone instability (Schmidt, 2022) – the factors that enable them endure. My assumption is that they remain a persistent possibility, whatever the specifics of a particular moment, and this is the crux when considering the constitutional implications.

Emergency politics of a supranational kind involves supranational authorities citing urgent threats to sidestep the constraints that normally bind them. In the 2010s, the standout example was the Troika – a composite body made up of the European Central Bank (ECB), European Commission and International Monetary Fund, designed to restructure national economies and fiscal systems in the European South. Using the pressure of conditional lending, it enabled supranational authorities to overcome EU norms 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 power (Kreuder-Sonnen, 2019, pp. 117–151; Lokdam, 2020). In the pandemic response from spring 2020, ECB officials continued to expand their discretion with initiatives related only in the most elastic fashion to the Bank's founding mission, given coherence by the goal of stabilizing the EU economy in the face of disorder (van't Klooster, 2021). The ECB reserved the right to continue its pandemic emergency purchase programme (PEPP) until 'it considers that the Covid-19 crisis phase is over'.<sup>2</sup>

One finds supranational emergency politics also in the handling of migration since 2015, as Frontex and the Commission 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.<sup>3</sup> Some of these may be regularized retrospectively 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'.<sup>4</sup> 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. Goetz & Martinsen, 2021; Tesche, 2022).

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 were notable cases, allowing states to avoid treaty constraints. Such standalone formats have been coupled with considerable reliance on informal governance to circumvent the EU's procedures. Summits between heads of state provide a forum for off-the-record discussion and negotiation, as does the '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, it would be used again in 2020 to fashion the EU's economic response to the pandemic, in particular the design of the recovery fund. Throughout, the European Council has also been central – an organ which is today

<sup>2</sup>Decision ECB/2020/17 of 24 March 2020, <https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html>

<sup>3</sup><https://fragdenstaat.de/en/blog/2021/08/24/defund-frontex-build-sar/>

<sup>4</sup>23 September 2020 ([https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)). For critical assessment: <https://www.stiftung-mercator.de/content/uploads/2021/05/MEDAM-Assessment-Report-2021-1.pdf>, pp. 61ff.

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 is a largely *improvised* approach that raises a range of problems. One concerns functionality: decisions achieved in this makeshift way are often inefficient. Whereas crisis decision-making ideally benefits from scripts of action, so that officials under pressure can co-ordinate, 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 summarized as follows:

1 Emergency measures tend to be adopted with little democratic input (Auer, 2021; Goetz and Martinsen, 2021; White, 2019). Adopted swiftly to meet an urgent threat, in secret or informal contexts, there are typically few opportunities for public deliberation. Because they are rationalized 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 on executive institutions, political and technocratic, at the expense of parliaments, courts and wider publics. More precisely, it passes 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, centred on various leader networks (Papadopoulos, 2021; White, 2022). Who is in control, and what criteria they apply to decision-making, become difficult to discern, and 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 none 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 all this happen? Aside from exogenous factors, two structural features of the EU make it especially vulnerable to exceptionalism. The first concerns *constitutional structure*. Encouraging EU emergency politics in all its forms is the softness of its constitutional rules, combined with the diffusion of power. The avoidance of relations of hierarchy and sovereignty has been a defining feature of the EU. Power is spread across numerous sites, including states, supranational institutions and functional agencies. Processes of co-ordination are based on conventions of consultation rather than

codification. This means there is little to deter executive agents, singly or collectively, should they seek to improvise. As long as a critical number can agree on the ends, they can bend the EU framework or sidestep it. Both the European Parliament (EP) and the Court of Justice (CJEU) can offer little consistent resistance (Kreuder-Sonnen, 2021; Papadopoulos, 2021; see also below). Moreover, the diffusion of power creates an incentive to concentrate it when difficult situations arise. Impromptu decision-making allows the more powerful agents to coerce 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 to find agreement and act (on eurozone ‘governing by panic’, see 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.

A second structural vulnerability to emergency politics lies in what can be called the EU’s *instrumentalist* orientation. Note the prominent role accorded to technocracy. What this foregrounds is a problem-solving ethos, with notions of success often defined in terms of maximizing a particular metric (for example, monetary stability, border security). For those of 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 of technocratic decision-making (Rauh, 2022). 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 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 within 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, as the Commission was accused of in 2020.<sup>5</sup> 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 when dependent on executive discretion. Especially as the EU and its Member States seek to become more active in security matters, revising long-held policy commitments and trialling new formats like the European peace facility, it is crucial that there be constitutional structures that can support 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 below, the pathologies of emergency politics are 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 important to think about these

<sup>5</sup><https://verfassungsblog.de/principled-generosity-mixed-with-unmanaged-market/>

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.

## II. Regulating the Exception: On Proposals for an EU Emergency Constitution

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. Instead of the largely *unregulated* form of emergency politics witnessed in recent years, the proposal is for the *pre-emptive regularization of the exception*.

Former senior Commission official Martin Selmayr is one person to have put the case.<sup>6</sup> 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.<sup>7</sup>

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 national level, especially in the context of the so-called 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. Common to all is the idea of an exceptional regime for exceptional times, laid out in advance, and intended both to enable and constrain the actions of decision-makers. This norm-exception-norm model centred on pre-emptive codification of the emergency response differs both from a model that seeks to design governing mechanisms for all seasons (*constitutionalization*, see next section), and from one that leaves emergency rule largely uncoded, its excesses to be dealt with after the fact (*retrospective contestation*, see final section).

A sophisticated proposal for an EU emergency constitution has been laid out by Kreuder-Sonnen (2021). 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 orderly, less harmful to law, and more reversible once conditions permit. In this scheme, emergency

<sup>6</sup>See also Tucker (2018, chapter 23).

<sup>7</sup><https://geopolitique.eu/en/2021/04/27/the-european-commission-as-a-political-engine-of-european-integration-in-conversation-with-martin-selmayr/>

actions are to be circumscribed *ex ante* and maintained within a legal framework, even as normal procedures are suspended. The intention is to provide at least temporary respite from the EU's constitutional fluidity. Wary of relying on courts alone, given their weakly democratic and often deferential character, Kreuder-Sonnen emphasizes 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 multiple organs of executive power, both national and supranational.<sup>8</sup>

Coherent and compelling as this proposal may be, I want to consider some of the arguments against. As with all efforts at EU reform, there are 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 really 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 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 split 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 willingly endorse an emergency constitution, given the extent to which they have historically relied on exceptionalism as a way to manage and advance European integration. In the context of increasing public disensus, they have added reason to embrace these methods (see Patberg in Heupel et al., 2021).<sup>9</sup> 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 when exceptional conditions can be cited, there is every prospect they would evade the constraints of an emergency constitution – if not because they are power-hungry then out of a belief that effective problem-solving depends on their discretion. This could take the form of trying to revoke it, 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 CJEU could sometimes step in to contain this, if given a clear mandate to police these powers, but the record of courts on this front is not good. An emergency constitution would probably be side-stepped should it get in the way of the major actors. If it were an adequate solution, there would not be a problem in the first place.

<sup>8</sup>Notably, Kreuder-Sonnen (2021, p. 9) argues that the power to identify exceptional circumstances in the EU case should generally lie with the Council rather than the Parliament.

<sup>9</sup>The problem is also thoroughly discussed by Kreuder-Sonnen (2021).

More interesting than issues of feasibility are those of desirability. To what extent would an emergency constitution be welcome if viable? Some reasons for scepticism are these. 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 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, p. 1816). Even if the power to identify an emergency is formally separated from the power to act on it, informal pressure can be applied on those responsible for the former – in 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 normalize 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. It encourages, that is, claims to be phrased in non-negotiable terms, something both intrinsically corrosive of public debate and likely to prompt an equally intransigent response (White, 2019, ch. 6). While an emergency constitution might resolve some practical issues, one may assume it would escalate the rhetoric of emergency and its debilitating effects.

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 – one 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, incentivizes leaving problems to fester. When authorities know that they can invoke extra powers when the going gets tough, they have less reason to pursue the hard choices and far-reaching reforms that get to the heart of things. They have a fallback option to rely on. Emergency politics is always in some sense the legacy of policy failure, and when that failure can be mopped up using exceptional measures it is that bit easier to indulge. Here one sees how the pre-emptive regularization of the exception can potentially be *worse* than the unregulated status quo.

Another drawback of an EU emergency constitution relates to the EU’s distinctive nature. Such a mechanism would interact negatively with one of the EU’s idiosyncrasies in particular – the way much of its politics is a turf war. Because the EU’s procedures have never been constitutionally fixed (see *constitutional structure* above), and because its institutions are expected to prioritize problem-solving over other considerations (see *instrumentalism* above), its leading figures tend 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 (for example, 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 unrelated issues about the institutional balance of power. Likewise, where calling the emergency was 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. Addressed as it is to the irregular moment, it locks in the problems associated with the norm-exception-norm model. One may leave open the question of whether such arrangements are desirable at the national level – clearly some points would suggest not, but others are tied to the specificities of today's EU (see Auer and Scicluna, 2021). 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 changes which should occupy us first – not least since they might also make an emergency constitution less necessary.

### III. Radical Reform: Towards a Durable EU Constitution

What, then, are the alternatives for shaping the exercise of power in extreme circumstances? Setting aside questions of feasibility for a moment, 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 effectively and acceptably. If weakly defined constitutional relations and an instrumentalist outlook are some 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 they adhere to and defined channels of co-ordination. Let us start with some general principles.

One thing such an EU constitution would need to provide is a simplified structure of executive power – not just in 'exceptional' times but generally. The complex diffusion of power 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. This would directly address some of the key problems of constitutional structure that make the EU vulnerable to emergency politics. 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 – it would break, in other words, 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 has ultimate 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 policy-makers to make a case for the measures they adopt, and in accessible rather than technical terms, thus broadening consent and discouraging measures 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 faced in difficult times, and in the restructuring required to keep them at bay, would be aired more thoroughly. A parliamentary EU would be better equipped to change its 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 policy-making would be set in a context where they can be openly debated. This would counter the instrumentalism that characterizes so much of EU affairs and encourages recourse to exceptionalism.

One of the lessons of Covid-19 is that countries with strong parliamentary systems 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 and Taiwan, parliaments not only played an immediate role in managing the crisis, scrutinizing emergency legislation and keeping tabs on transfers of power, but were involved in debating and passing socio-economic measures to address the inequalities exacerbated by the crisis and to support public health.<sup>10</sup> The key principle of governing in extreme circumstances is arguably not *speed*, as tends to be said by advocates of untrammelled executive authority. It is *consent*, something 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 crises. Again, the point is not simply to ensure the EP controls the allocation of *exceptional* 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 embed the Commission in the EP, for example by requiring its members to be MEPs too (see Lacey, 2017, pp. 221–3). Rather than tentatively politicize the Commission at the very top, in the heavily personalized

<sup>10</sup><http://bostonreview.net/politics/asli-u-bali-hanna-lemer-power-parliaments>

manner of the *Spitzenkandidaten* process, the effect would be to politicize the institution as a whole, 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.<sup>11</sup> The Council of Ministers would meanwhile persist as a secondary chamber, with a scrutinizing 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 recognized as official authorities. Such an arrangement would maximize 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 of enactment. 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 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 so 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. Partly this was 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,<sup>12</sup> 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 demands.<sup>13</sup>

In the swirl of current events, the prospects for meaningful change may be better. But it is important to recognize 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 change. The empowering of the legislature over the executive is a meaningful project to a minority at best – for others, these are largely indistinguishable expressions of far-away power. While one should be cautious about the idea that genuine EU constitutional change needs a pre-existing EU demos – such ties can be built in the

<sup>11</sup>The nationality principle applied to the composition of the Commission could be retained in this system, albeit with the expectation that its importance declines as partisan differences become more prominent.

<sup>12</sup>See, for example, the German governing coalition agreement of December 2021 ([https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag\\_2021-2025.pdf](https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf)), pp. 131ff.

<sup>13</sup>Ensuring, not least, that it would be a constitutional interstate *treaty* rather than the basis of a federal order.

process<sup>14</sup> – it remains true that cross-border politics today is still largely the preserve of elites. And for existing authorities it is convenient that it should be this way. A new constitutional settlement would most likely have to be imposed on them against their will, and the opportunities for this are rare. It would need a sense of urgency to mobilize support, but not so much as to destroy all deliberative credentials.

If such a transformation still deserves our attention, it is because problems of feasibility attend to all projects of EU reform, small as well as big. 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.

#### IV. In the Interim: Retrospective Contestation

What are we left with in the meantime? The very phrasing of the question is somewhat optimistic – what is difficult today may always be so – but let us continue the line of thought. In discussions of emergency rule, it is sometimes suggested that unregulated emergency government of the type we began with can be made a sustainable model if it is contested 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 and giving leaders reason for circumspection (Gross and Aoláin, 2006). Such a model retains the structure of norm-exception-norm, but with a focus on *retrospective contestation* rather than pre-emptive constraint.

It is hard to see this model as ideal. One of its problems 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 coherent decision-making. In many ways such a model would depart little from the chaotic and unchecked EU 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 figure 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 institutionalization 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 and discourage them in future (Patberg, 2021). For all its challenges,

<sup>14</sup>Efforts to determine the demos by sociological means – by reference to divisions of language, reported feelings of identity, and so on – are always liable to overstate the determining effect of existing structures. For an overview of the debate, see Wolkenstein (2018).

it would be rash to suggest 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 politicization of these in the 2010s. Denunciations of the EU's 'Caesarian' modes of rule by Greece's Syriza in 2015<sup>15</sup> 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 et al., 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 organizations are key. Parties of opposition are in a position to cultivate vigilance towards abuses of power. Critical approaches to emergency rule often place the burden of scrutiny on a broad public, but the mainstream media and the people in general may be too quick to accept 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. Modest institutional innovations such as a procedure for independent public inquiries would be one way to assist holding officials to account. While inquiries are limited tools (Elliott and McGuinness, 2002; though see Stark, 2018), they can usefully provide a focal point for critical activity and a way to get media attention. As one small contribution to fostering a European public sphere, they can act as markers for a more radical politics to follow.

One may also assume that parties can act directly on executive power, influencing executive institutions from within. Parties offer resources for binding elites to a larger structure. Mechanisms of intra-party democracy are one way the discretion of the few can be constrained. As associations defined by a programme, parties can help to embed decision-making in normative principles. Certainly, many of the EU's 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 democratization of executive power in the EU, they too can be viewed as 'preparatory' of further, more far-reaching changes (Wolkenstein, 2020; see also Patberg, 2020, ch. 9). If partisans co-ordinating cross-nationally can develop common programmes, be it on economic transformation, climate change or political reform itself, they give reason for a wider range of people to involve themselves in transnational politics and its institutional forms.

Such a model depends first and foremost on partisans getting their own houses in order. Many parties today 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 goes along with the weakness of these intermediary organizations. But parties retain untapped resources for renewing their identity as

<sup>15</sup><http://www.alexistsipras.eu/index.php/10-speeches/49-alexis-tsipras-speech-rome-7-02-2014?showall=&start=1>

associations of principle. Ongoing experiments with intra-party deliberation, the recall of representatives and the networking of parties with social movements, are some of the most significant, and the basis for more democratic iterations of the party form (White and Ypi, 2016, ch. 10; Invernizzi-Accetti and Wolkenstein, 2017).

What does this perspective offer to those whose primary concern is the EU's functionality? Does the partisan contestation of emergency politics promise more coherent and progressive policy in challenging conditions? The prospect of later censure may encourage officials to avoid resort 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 co-ordination 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 constitutional transformation the EU requires.

## 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, or told to make way for a return of the state. Any rounded assessment must take into account the governing methods employed. In recent years, these have tended to include a willingness to exceed established rules and norms and concentrate power informally. 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. In place of the improvised emergency politics of the present, it promises to regularize the exception by determining who should do what in challenging times. Coherent as the proposal may be, however, it is ultimately an unsatisfactory half-measure. Not only would it be hard to institute – that much applies to almost everything EU-related – but it could even 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 threatens to add new ingredients to the crises that Europe confronts.

The more radical change needed involves redrawing the EU's constitutional structure, making executive authority less baroque and more firmly subordinated to the European legislature. Constitutionalization in this deeper sense 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 aspires to become more militarized 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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