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Authority after Emergency Rule

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In the context of economic crisis, Europe has witnessed a spate of extraordinary political measures pressed by executive discretion. This paper examines what emergency rule of this kind implies for the possibility of normal rule thereafter. Political decision-makers face the challenge of drawing a line under the crisis so that the unconventional measures used to handle it do not compromise the polity's norms in lasting fashion. Based on an analysis of the preconditions for plausibly making such an act of separation, I suggest the principal resources for doing so in the EU case are missing. Emergency rule will tend to blend in with normal rule, to the detriment of the political order's legitimate authority. A more dubiously-grounded 'descriptive' authority may conversely be enhanced *by emergency rule, as may compliance for instrumental motivations, producing a polity that is stable even if weakly legitimate.**

Keywords: emergency, exception, authority, European Union, crisis, executive discretion

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Faced with what they designate an emergency, political executives are apt to take extraordinary measures. These include the suspension or overriding of selected norms, and the exploitation of the freedom this affords to set up new kinds of governing arrangement. An interesting and politically significant problem concerns what the legacy of such manoeuvres is likely to be. What is the effect of executive discretion under the heading of emergency for the later authority of the political community's norms?[1]

The question is valid for any polity's experience with emergency rule. The case that inspires the present paper concerns the EU's response to the Euro crisis beginning in 2010.[2] Emergency politics has here been a central component here in the political handling of socio-

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[1] A classical understanding of *discretion* is offered by Locke when outlining executive prerogative, i.e. as action 'without the prescription of law, and sometimes even against it' (J. Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: CUP, 1988), II 160). In this paper I understand discretion analogously but in relation to the wider concept of *norms* (see below), allowing the impact of emergency politics to be observed on widely-accepted standards of appropriate conduct which may or may not be codified in positive law, yet which are crucial for the legitimacy of political rule nonetheless.

[2] For an analysis of the succession of events commonly called the 'Euro crisis', and of the political stakes in these definitional questions, see: A. J. Menéndez, 'The Existential Crisis of the European Union' (2013) 14(5) *German Law Journal*, 453-526.

economic disturbance. Decision-makers have recurrently invoked conditions of crisis to justify significant displays of executive discretion.[3] One has seen interstate conditional loans apparently ruled out by treaty commitments employed to satisfy investors and reshape national economies, supported by derogations from such norms of representative democracy as the unhurried parliamentary scrutiny of legislative proposals and the legitimate mobilisation of dissenting opinion. Unconventional procedures have been used to set up policy regimes that are substantially new: steps, initially outside the EU framework, towards the ever-closer monitoring of national budgets, along with major innovations in the policy-making of the European Central Bank (ECB), are just some of the salient examples. Exceptionalism and improvisation have been widespread – and not always easy to distinguish, as purportedly temporary measures acquire a lingering quality. All such measures have been rationalised as necessary responses to exceptional and urgent threats.[4] Despite some peculiarities we shall examine, the EU experience displays many of the features typical of contemporary emergency politics, being extended in time, transnational in reach, and addressed to socio-economic affairs rather than matters of security traditionally understood.

In the paper's first section I specify the problem. I look at some of the fundamental norms challenged in the course of the Euro crisis, and set this in the context of the general contribution of norms to legitimate political authority. To fulfil this contribution, I suggest, they must be generally regarded as binding. The practices of emergency rule challenge their

[3] See C. Joerges, 'Law and politics in Europe's crisis: On the history of the impact of an unfortunate configuration' (2014) 21 *Constellations*, 249-261; C. Joerges, 'Europe's economic constitution in crisis and the emergence of a new constitutional constellation', in J. E. Fossum and A. J. Menéndez, *The European Union in Crises or the European Union as Crises? ARENA Report No 2/14* (Oslo: ARENA, 2014), esp. 12ff; C. Kreuder-Sonnen and B Zangl, 'Which post-Westphalia? International organizations between constitutionalism and authoritarianism' (forthcoming) *European Journal of International Relations*; D. Curtin, 'Challenging Executive Dominance in European Democracy' (2014) 77(1) *Modern Law Review*, 1-32; K. Dyson, 'Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency' (2013) 35(3) *Journal of European Integration*, 207-222; H. Brunkhorst, *Das doppelte Gesicht Europas. Zwischen Kapitalismus und Demokratie* (Frankfurt/Main: Suhrkamp, 2014); J. White, 'Emergency Europe' (2015) 62(2) *Political Studies*.

[4] Note that 'emergency' as used here describes a mode of rule, not the circumstances in which it is exercised. There is a risk one takes at face value the objective existence of an emergency whenever one speaks of emergency rule: to avoid this, I refrain from using 'emergency' when referring to objective conditions (using alternatives such as 'crisis' where appropriate).

binding character. Significant in this regard is not just the level of exceptionalism that has been displayed in the Euro crisis but also its visibility. Executives and commentators alike have acknowledged it – a function one must assume of its distinctly economic basis – with the result that retrospective denial is difficult. This poses with full force the question of exceptionalism's political legacy.

The second section examines the possibility that the problem is contained: that what emerges from a period of emergency politics is a set of norms of enduring credibility. Such an outcome would hang on a successful act of closure: a line is drawn under the crisis period, such that the extraordinary measures taken do not contaminate the institutional regime that ensues. By a successful act of partitioning, emergency rule is prevented from casting lingering doubt on the regularity of what follows. While this may be a widely-held goal, the analysis suggests it is elusive. To achieve it, decision-makers would need to make a convincing case for why they will not resort to extraordinary measures again. Specifically, they would need to make one of three claims: a) that the conditions of crisis will not recur (e.g. because better policy-making will ward them off), or b) that, should crisis recur, new procedures are in place that will minimise executive discretion, or c) that the identity of the decision-makers has changed, such that those with a proclivity for extraordinary measures have left the political stage. I suggest the preconditions for credibly making claims to this effect are absent in the EU context.

As the section thereafter argues, persistent weakness in the polity's norms must therefore be reckoned with. Those suspended, violated or evaded, as well as others not directly challenged, are put in question by emergency rule and deserve to be met with scepticism concerning their capacity to bind. The effect is a polity whose legitimate authority is compromised. While the current period of emergency rule reveals this truth with some clarity, the problem is not unique to the present. In different guises, the challenge of

exceptionalism has recurred in EU history. Though it differs in scale and details in each instance, as a form it is prone to repeat.

Emergency rule compromises the rightful authority of the polity, yet whether it then receives the critical attention it deserves is a different matter, as the final section underscores. While public perception of the binding character of norms may be dented, there are also ways in which emergency rule *strengthens* the confidence directed their way. Descriptive authority may consolidate, just as legitimate authority falters. Furthermore, even where perceptions of authority are not strong, levels of compliance may nonetheless rise due to considerations of power and political uncertainty. What emerges from emergency rule may therefore be a polity which, though weakly legitimate, is all the more functional in outward appearance.

How political exceptionalism might be constrained in future is beyond the scope of this paper, but the analysis carries some implications. These are flagged up in the conclusion.

Emergency rule in the Euro crisis

Much has been written on how the political response to the Euro crisis challenges specific legal provisions. Whether key manoeuvres of crisis management were compatible with specific articles in the EU's treaties has been central to the critical appraisal of executive power. The consistency of the emergency credit facilities with the 'no bail-out clause' of Article 125 (1) of the Treaty on the Functioning of the European Union (TFEU), and the legality of the ECB's 'Outright Monetary Transactions' (OMT) policy in light of Article 123, have been the main axes of this debate.[5] This emphasis on the standing of legal provisions

[5] See e.g. Ka. Tuori and Kl. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge: CUP, 2014), esp. chap. 5; M. Ruffert, 'The European Debt Crisis and European Union Law' (2011) 48 *Common Market Law Review* 1777–1806; S. Douglas-Scott, 'The Problem of Justice in the European Union: Values, Pluralism, and Critical Legal Justice', in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford: OUP, 2012); see also the CJEU's *Pringle* judgement.

mirrors the concerns of much of the wider theory of emergency rule, where the first casualties of exceptionalism are often considered to be norms that are legally enshrined (individual rights of movement and assembly for instance).[6]

Crucial as specific infringements may be, it deserves emphasis that the casualties of emergency politics are not reducible to commitments formally codified. At least as important for the problem of authority that concerns us is the transgression of norms which, though widely acknowledged and with some backing in the textual sources of positive law, are not easily traced to a unique source. The violation of such norms is arguably the crux of emergency rule: while in any imperfect political order there may be codified rules that cannot reasonably be upheld at all times, it is the infringement of fundamental principles, and of the institutional procedures that plausibly serve them, that warrants particular attention. Especially in a polity that lacks a comprehensive written constitution, the violation of such norms is the defining feature of emergency rule.[7] We may highlight just a few as they are found in the EU context, as a basis on which to proceed with an analysis of the longer-term implications of their transgression.[8]

One of the major sources of unease with the political response to the Euro crisis has been that it challenges a norm of *state sovereignty* on matters not transferred by national parliaments to the decision-making of EU institutions. The norm finds backing in treaty sources,[9] and has been conventionally expressed in the nationalised procedures of decision-

[6] The literature is large: for good overviews, see O. Gross and F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: CUP, 2006); V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge: CUP, 2008); A. Klieman, 'Emergency Politics: the Growth of Crisis Government' (1976) 70 *Conflict Studies*, 16ff.

[7] As Hjorth notes, the idea of exception presupposes a 'dense normative structure': while in some contexts a written constitution may be the clearest expression of such, in others this condition may be fulfilled without such a text – as for instance a close-knit international society such as the EU; cf. R. Hjorth, 'The poverty of exceptionalism in international theory' (2014) 10(2) *Journal of International Political Theory*, esp. 181ff.

[8] See also C. Joerges, 'Law and Politics …', n 3 above, 251; C. Joerges, 'Brother, can you paradigm?' (2014) 12(3) I•CON, 778; C. Kreuder-Sonnen, 'Global Exceptionalism and the Euro Crisis: Schmittian Challenges to Conflicts-Law Constitutionalism', in C. Joerges and C. Glinski (eds), *The European Crisis and the Transformation of Transnational Governance* (Oxford: Hart, 2014); C. Offe, *Europe Entrapped* (Cambridge: Polity, 2014).

[9] Something like a norm of enumerated powers can be found in Article 5(2) TEU: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States

making for taxation policy and welfare spending. A number of the key measures of crisis response have put this norm under pressure. The use of conditional loans as a way to enforce reductions in public expenditure in member-states dependent on financial support is a notable instance. Not only do these loan agreements specify the *level* of cuts to be made, but also *in what areas* they are to be made, with public-service provision to the fore.[10] Another encroachment is the requirement that Eurozone member-states make their national budgets available for supranational inspection so that the Commission may instruct their revision.[11] The imposition of these measures amounts to a sharp exercise of discretion by the European Council and its leading powers in departure from an established understanding of the division of powers in the Union.

Equally challenged by the handling of the Euro crisis has been a norm of *democratic control*. Before the crisis, a familiar rationalisation for the EU's distribution of powers was that policy-making with redistributive consequences was exclusively to be made by elected institutions.[12] The norm reflects basic intuitions about conflicts of interest and principle in the allocation of societies' resources. In the crisis period, it has been infringed not just by the use of the Commission to discipline national budgeting, but by the role of the ECB in establishing new policy regimes (Outright Monetary Transactions (OMT), quantitative easing) that have distributional consequences, as well as in resisting other outcomes (e.g. a member-state default) that would have distributional consequences too. The IMF has also played a central yet democratically questionable role, helping to set the conditions of loans and to monitor

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in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

[10] On the major policy shifts imposed on debtor states in areas beyond EU competence (e.g. public-service provision) by the application of 'Memoranda of Understanding', see A. Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding* (Baden-Baden: Nomos, 2014), 93ff.; also Tuori and Tuori, n 5 above, 99, 188.

[11] See esp. EU Reg. 1174/2011, where penalties for ignoring Commission 'recommendations' are outlined.

[12] See e.g. G. Majone, *Dilemmas of European Integration* (Oxford: OUP, 2005). Critics tended to dispute not the norm itself, but the suggestion that large areas of policy-making did *not* have redistributive implications and could therefore be decided by non-majoritarian institutions: see S. Hix and A. Follesdal, 'Why there is a Democratic Deficit in the EU: a Response to Majone and Moravcsik' (2006) 44(3) *Journal of Common Market Studies*, 533-562. The references to democracy in the EU treaties have tended to be quite general (cf. TEU, Preamble), but the norm finds clearer expression in some national constitutions (e.g. Germany's).

their compliance.[13] Even if one judges such manoeuvres to stop short of outright illegality, they challenge a basic political norm and the institutional arrangements that serve it.[14]

At stake has also been a widely-shared norm of *political contestation*. Introduced under the sign of emergency, the principal measures of this period have generally been implemented at speed, with opportunities for meaningful argument in parliaments and publics significantly reduced. The institutional routines designed to enable contestation, including parliamentary timetables and debates, have repeatedly been sidestepped or compressed, and the legitimacy of dissenting opinion questioned, in the Mediterranean countries especially but not only.[15] The attenuation of debate derives added significance from how certain measures – e.g. the budgetary rules associated with the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG / Fiscal Compact) – aim to effect constitutional change or its equivalent in the member-states. By calling for debt limits in domestic law, they significantly restrict the macro-economic policies that can be pursued.[16] By these extraordinary means, far-reaching political change has been enacted without the public scrutiny appropriate to it.

Finally, a further norm challenged in the present period is that of the *equality of states*. The norm has conventionally been honoured in the EU by using prescriptions of general application to govern interstate relations – e.g. the regulations of EU law – rather than contracts and commands targeted at particular states, and by the principle of unanimity in

[13] Tuori and Tuori, n 5 above, 97.
[14] As regards legality, the Attorney General of the CJEU has stated his opinion (14th January 2015) that the OMT policy was not illegal (http://www.altalex.eu/content/advocate-general-cjeu-purchase-government-bonds-omts-ecb-line-eu-law). On the normative point, Majone has had to revise his assessment of the EU such that he now speaks of a 'democratic default': G. Majone, 'From Regulatory State to a Democratic Default' (2014) 52(6) *Journal of Common Market Studies* 1216–1223.
[15] Cf. J. White, 'Politicising Europe: The Challenge of Executive Discretion', in S. Hobolt and O. Cramme (eds), *Democratic Politics in a European Union under Stress* (Oxford: OUP, 2014).
[16] See Article 3(1) TSCG: states are required to limit their structural budget deficit to 0.5% of GDP, with deviations allowed only in 'exceptional circumstances'. While the provision has precedents (in the Stability and Growth Pact, and another emergency measure - EU Reg. 1467/97) the requirement that it be embedded in domestic law (Article 3(2)) goes significantly further than hitherto. Cf. F. Scharpf, 'Political Legitimacy in a Non-optimal Currency Area', in S. Hobolt and O. Cramme (eds), *Democratic Politics in a European Union under Stress* (Oxford: OUP, 2014).

treaty-making and amendment.[17] Again, in the period in question this arrangement has been challenged: in addition to the conditionality mechanisms noted, which target individual states and embed sharp asymmetries between EU members, one may observe how, to accelerate its introduction, the Fiscal Compact was designed to come into effect before all EU members had ratified it.[18] While this may be consistent with international law, it breaks with how treaty-making has been traditionally conducted amongst EU states,[19] and suggests the consent of some EU members was of diminished importance relative to others. In such ways the norm of equality and its associated procedures have been transgressed in the name of decisive action to reassure the markets.

State sovereignty, *democratic control*, *political contestation* and the *equality of states*: these, and just as importantly the institutional procedures that concretise them, are just some of the norms of the EU breached by executive decision-making in this period. As these observations suggest, norms are to be understood as widely accepted standards of appropriate conduct.[20] They involve ideas of right action, coupled with scripts of routinized behaviour that are held to express these ideas. While some undoubtedly have a textual basis (norms thus codified typically being referred to as rules or laws), others are expressed principally in intersubjective agreement and tacit knowledge. These standards, we may stipulate, are the subject of broad consensus, even if constantly evolving and if, in a pluralist setting, persistently subject in some degree to second-order disagreements of interpretation.

As a category of both evaluation and action, norms pose a challenge of identification.[21] Settled practice may be an indicator, but an imperfect one given norms can persist for some

[17] Cf. D. Chalmers and M. Chaves, 'Union Democratic Overload and the Unloading of European Democracy', in S. Hobolt and O. Cramme (eds), *Democratic Politics in a European Union under Stress* (Oxford: OUP, 2014). A statement concerning the equality of states can be found in Article 4(2) TEU.
[18] See Article 14 (2) TSCG.
[19] See Article 48(4) and Article 48(6) TEU; cf. I. Bache, S. George, S. Bulmer and O. Parker, *Politics in the European Union* (Oxford: OUP, 2014), 227.
[20] Cf. G. Brennan, L. Eriksson, R. Goodin and N. Southwood, *Explaining Norms* (Oxford: OUP, 2013), esp. chaps. 1-2; S. Shapiro, *Legality* (Cambridge MA: Harvard UP, 2011), 41.
[21] Cf. I. Hurd, 'Legitimacy and Authority in International Politics' (1999) 53(2) *International Organization*, 379–408.

time in the breach, and given not all behavioural regularities are norm-guided.[22] Legal texts may provide a useful starting-point, though may be limited in what they say on how norms find institutional expression. The pronouncements of a judiciary may offer some clues, but only for norms of a legal type. Perhaps the most promising[23] indicator of the existence of norms is what happens when actors depart from them. Departures tend to be widely condemned as such, or advocated despite being such, by competent political observers, be these political figures, commentators, or ordinary citizens. The norm-breaches in the Euro crisis described have been the subject of considerable controversy, with MPs and MEPs, observers in the media and scholars all voicing unease at their transgression.[24] The capacity of these actions to provoke a measure of outrage reminds that, however imperfectly such norms were instantiated in the pre-crisis EU order – and there can be no suggestion they were universally well served – what happened in the Euro crisis marked a significant escalation in their evasion.

In order for political authority to be legitimate, a polity's most basic norms must plausibly command the view that they are generally binding and consistently adhered to by all relevant parties. Rule that does not express the bindingness of core political norms ultimately becomes indistinguishable from arbitrary rule – rule that, while it may sometimes deliver acceptable results, does not do so on any predictable and responsive basis.[25] Moreover, the felt obligation to comply with a norm, though it may have a range of moral sources, is typically nurtured by this belief in its capacity to constrain.[26] This is why a significant breach

[22] Cf. Brennan et al, n 20 above, chaps. 1-2; Hurd, n 21 above.
[23] It remains imperfect – political observers do not speak with one voice, and are sometimes acquiescent in executive discretion, while executives themselves, as noted below, may have independent reason to proclaim their actions as exceptional.
[24] See e.g. the critical response of the German Bundestag in Nov. 2012 to the aid package for Greece agreed by Eurozone finance ministers and the IMF and to the limited opportunities for its parliamentary contestation.
[25] These broad observations are inspired by the account of republican freedom provided in Q. Skinner, *Liberty before Liberalism* (Cambridge: CUP, 1998). I do not discuss consequentialist forms of legitimacy in detail here, but assume they too require norm-based legitimacy if they are to be consistent with democratic standards of non-arbitrary rule.
[26] Principles of generality and bindingness are generally considered core elements of the rule of law – cf. B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: CUP, 2004).

of norms potentially poses a challenge to a polity's legitimate authority.[27] As the latter part of this paper explores, there are two relevant points of contrast: when a political order's norms lack demonstrable bindingness yet its decisions still widely command the view they should be followed (i.e. forms of *descriptive* authority, rooted e.g. in the perception that norms are more stably and generally binding than they really are), and when a political order lacks authority of any kind (and when, to the extent that its demands are complied with at all, it is due mainly to the wish to avoid sanction).

In contexts where the application of extraordinary methods can be concealed, the wider legacy of emergency rule may be limited. Where breaches of norms can be done covertly, and innovations presented as upholding the commitments of the existing order, larger questions of authority may be avoided.[28] But exceptionalism cannot always be hidden – in particular where its effectiveness is thought to depend on its visibility. Sometimes true in conventional security-driven states of emergency, this has certainly been the case with the politics of the Euro crisis. Executives have tended to be explicit about the degree to which they are exceeding existing norms: there has been little pretence to 'business as usual'.[29] The Commission President has spoken openly about 'exceptional measures for exceptional times',[30] the ECB chief has likewise spoken of 'exceptional measures'[31] and has asserted the 'full discretion' of the Bank's governing council to embark on a new monetary policy,[32] while

[27] In the EU context, questions of norm-adherence are typically approached in terms of the compliance of individual member-states rather than the EU institutions as a whole. Touching on the question of 'systemic' departures, see A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: what it is, what has been done, what can be done' (2014) 51 *Common Market Law Review*, 59–96.
[28] On undeclared states of emergency: Gross and Ní Aoláin, n 6 above, 305, 318-319.
[29] This instance of emergency rule resembles the so-called 'accommodation' model – i.e. selective suspensions, violations and improvisations around the margins of an ostensibly stable legal framework – rather than either 'business-as-usual' legality or the wholesale interruption of legality (cf. Gross and Ní Aoláin, n 6 above, chaps 1-3).
[30] Barroso, statement to the press following the meeting of eurozone Heads of State or Government, Brussels, 27 October 2011, speech/11/713.
[31] Draghi, *Die Zeit*, 29th August 2012: 'We have to […] ensure a single monetary policy and therefore price stability for all euro area citizens. This may at times require exceptional measures.' http://www.ecb.europa.eu/press/key/date/2012/html/sp120829.en.html.
[32] Draghi, press conference, 6th September 2012: 'Governing Council will decide on the start, continuation and suspension of Outright Monetary Transactions in full discretion ...' (http://www.bloomberg.com/news/2012-09-06/draghi-s-statement-on-ecb-outright-monetary-transactions-text.html).

heads of government have used high-profile summits to launch a succession of new initiatives (EFSF, ESM, the Fiscal Compact, etc.) with little suggestion that these are just the extension of existing treaty obligations.[33]

If the extent of executive discretion has been scarcely concealed, even openly proclaimed and celebrated, this is presumably the function of a belief that actions need to be advertised to be effective. The logic of reassuring the markets, so fundamental to the crisis response, seems to require not only that extraordinary measures be taken but that they be demonstrably taken.[34] Arguably this forms one of the distinctive features of the *economic* state of emergency:[35] were the measures adopted less visible, they would apparently lose some of their effectiveness in assuaging the concerns of market actors. This point is important, because the visibility of departures from norms is arguably more significant for their subsequent credibility than the fact of departure as such.[36] Generally speaking, a normative order can withstand plenty of evasion, but will do so more easily where these challenges are not widely recognised. Where exceptionalism has been open for all to see, it becomes harder later on for executive powers simply to deny its occurrence.[37] Rather, the bindingness of norms must be re-established.

Authority restored?

[33] To be sure, these actors have not proclaimed their exceptional measures to be *illegal*: efforts have been made, retrospectively and creatively, to show these measures were not expressly ruled out by the established regimes of EU and national law. What has been emphasised is rather discretion in the shape of departures from hitherto-accepted standards of conduct on which the law is silent or inconclusive.
[34] Cf. White, n 3 above.
[35] A useful overview of this underexplored type is: W. Scheuerman, 'The Economic State of Emergency' (2000) 21(5-6) *Cardozo Law Review*, 1869-1894.
[36] On the loose relationship between practices and norms, especially where practices are inconspicuous, see Brennan et al., n 20 above, 20ff.
[37] Though some may try: on efforts by the Commission and ECB to claim their actions of crisis management were consistent with democratic accountability, see B. Rittberger, 'Integration without Representation? The European Parliament and the Reform of Economic Governance in the EU' (2014) 52(6) *Journal of Common Market Studies*, 1174–1183.

The idea of a state of emergency implies the possibility of isolating a passage of time for a distinctive form of governing. In addition to the discourse of exception itself (i.e. the grounding of decision-making in appeals to emergency), the peculiarity of that period is marked by irregular institutional measures, coupled to a greater or lesser extent with a departure from political ethics.[38] The contention is that the usual modes of government – the procedures that compose them, the norms they instantiate – are inadequate for dealing with an extreme set of circumstances.[39] In all cases the logic of the claim is that there is a beginning and an end: normality is merely interrupted.[40] While the intervening period clearly must have *some* consequences for the period of normality expected to follow – commonly it is said to make the latter possible – it is not expected to merge with it or set precedents for it. As with Las Vegas, what happens in the exception stays in the exception.

If the political order is to carry legitimate authority – if, that is, people are to have good reason to see its norms as generally binding – then clearly much hinges on the possibility of delimiting the period of emergency rule in this way such that the irregularities it entails do not call into question the long-term status of those norms. An act of separation is needed such that it can be plausibly inferred that emergency rule has been concluded and its return is not imminent. In a well-developed constitutional order, it may be this act of separation can be performed by institutional means, i.e. by having two identifiably distinct governing regimes,

[38] For an overview of the institutional forms, see Gross and Ní Aoláin, n 6 above, Part I; Klieman, n 6 above; K. L. Scheppele, 'Legal and Extra-Legal Emergencies,' in K. Whittington, R. D. Kelemen, and G. Caldeira (eds) *Oxford Handbook of Law and Politics* (Oxford: OUP, 2008); J. Ferejohn and P. Pasquino, 'The Law of Exception: A Typology of Emergency Powers' (2004) 2 *International Journal of Constitutional Law*, 210-239; see also Ramraj, n 6 above. For accounts of the ethics of exception, see C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: Chicago UP, 2005); N. C. Lazar, *States of Emergency in Liberal Democracies* (Cambridge: CUP, 2009). Note that by conceiving emergency politics as acts of discretion rationalised as necessary responses to exceptional threats, I avoid reducing it to a particular formula (e.g. rule by decree), for which the institutional forms are too diverse.

[39] This applies to both the 'accommodation' and 'extra-legality' models of emergency rule (cf. Gross and Ní Aoláin, n 6 above, chaps. 1, 3). I say *contention* because a counter-perspective holds that extreme circumstances can be negotiated using the same legal and ethical framework as any other (i.e. with 'business-as-usual').

[40] See e.g. S. Sheeran, 'Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics' (2013) 34 *Michigan Journal of International Law*, 491-557 (esp. 500).

one associated with emergency rule and one with normality.[41] In the context of the EU, emergency rule does not have its own defined set of practices.[42] This stems from how the competences of its principal institutions are weakly codified, and more generally from the traditionally dispersed nature of sovereign power within it. As a consequence, the act of separation between exception and norm must take the form of a claim. Decision-makers must be in a position to advance some type of account of how emergency rule has been superseded.

Certainly many of those wielding executive discretion in the latter period of the Euro crisis have invoked the goal of exiting an extraordinary period and returning to one more ordered. Discretion is generally said to be necessary only so as to establish a better rule-bound order,[43] and some of the extraordinary measures adopted can be seen as efforts to regularise previous acts of exceptionalism. There are furthermore good reasons why decision-makers might wish to argue there comes a moment when emergency politics ends and a new period of normality begins. The legitimacy of emergency rule is always questionable, not least because the exercise of power is more visible under such conditions. Government by emergency is a gamble, and whatever the short-term advantages it brings, at some point it becomes desirable for executives to say words to the effect that from now on, norms are sovereign.[44]

The question is whether executives are in a position to do this, i.e. plausibly to claim the resolution of emergency politics and the advent of a new period of normality in which norms are binding. What might be done such that those faced with the choice whether to comply

[41] Cf. Gross and Ní Aoláin, n 6 above, 174ff. As the authors and others have noted, maintaining the boundary is difficult even in the well-ordered constitutional context of a sovereign state. Whereas the ideal-typical emergency regimes of ancient Rome were clearly circumscribed institutionally – emergency power being concentrated in a single individual, responsible for executing emergency rule but not for declaring it – this formal clarity is rare in the modern world. On the 'emergency state', see Klieman, n 6 above.

[42] The special EU/IMF lending programmes associated with the 'bail-outs' mark an institutional separation of sorts, and their conclusion is sometimes heralded as the end of emergency measures (on the case of Portugal, see http://mobile.euobserver.com/economic/123999). These do not amount to well-established procedures however, and what follows them remains uncertain.

[43] E.g. H. Van Rompuy, with J. M. Barroso, J.-C. Juncker and M. Draghi, 'Towards a Genuine Economic and Monetary Union' (Brussels: Council, 2012).

[44] The discursive expression of this is well captured by the term 'desecuritisation': see L. Hansen, 'Reconstructing desecuritisation: The normative-political in the Copenhagen School and directions for how to apply it' (2012) 38(3) *Review of International Studies*, 525–546.

with them, as well as those who might urge such compliance of others, have good reason to regard them as worthwhile commitments and to be confident they will not be suspended or rendered irrelevant due to subsequent events?

I suggest there are three main ways in which a claim to this effect might be made, and that in the contemporary EU the conditions for each are unavailable.[45] We shall consider them in turn. The analysis highlights some of the limitations of the EU as presently configured, as well as some broader features of the structure of emergency rule, particularly as it pertains to the transnational sphere.

1. First it may be claimed that the conditions of crisis that made emergency rule necessary have passed and are unlikely to return for the foreseeable future. The threats have simply been overcome.[46] There will hence be no renewed need for suspensions and improvisations under the sign of emergency. Such a claim might rest on the idea that circumstances have changed, or that today's policy-making is qualitatively better than yesterday's at solving problems as they arise. A superior order has been instituted, better attuned to the challenges faced. The political order's norms should be regarded as credible because there will be no need to interfere with them in future.

   While executive actors in contemporary Europe have indeed made claims to this effect, centred on remedying the design flaws of the Eurozone,[47] there are reasons for cautious appraisal. This line of argument overstates the capacity of executives to allay fears of a return of crisis conditions. Even policy-making that is in some sense

[45] There is a fourth type of claim, in which the prospect of emergency rule is openly embraced should a situation be said to demand it. Given this amounts effectively to sacrificing the bindingness of norms (for they become conditional on an interpretation of political circumstances) the claim does not need detailed discussion here.
[46] Advancing this claim, see European Council President Van Rompuy in his March 2014 report 'The European Council in 2013' (www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141640.pdf, Luxembourg: Publications Office of the EU), where he writes of 2013: 'market tensions abated during the year, and we could safely say that the existential threats from the financial crisis were now firmly behind us.'
[47] In addition to Van Rompuy (see n 46 above), see the valedictory speech by Commission President Barroso to the European Parliament, 21 October 2014, Strasbourg: 'we are stronger, because we have a more integrated system of governance, because we have legislation to tackle abuses in the financial markets, because we have much clearer system of supervision and regulation.'

'optimal' is such only for a given set of circumstances and relative to certain values. To the extent that these background conditions inevitably change in unforeseeable ways, one can expect situations of maladjustment and extreme stress to recur. This holds particularly true if efforts to deal with previous crises sow the seeds of the next one. It is not unusual for crisis response to draw on the same ideas that the crisis itself put in question. In the EU context, prominent economists tell us that the austerity policies adopted as emergency measures in recent years will themselves increase the likelihood of future crises in the Eurozone and beyond.[48] The remedy contributes to the disease. Assertions that crisis has been left behind must ring hollow therefore.

Such a claim furthermore ignores the ambiguity of what constitutes a crisis. Executive discretion in the name of urgent threat is never born solely of necessity: it depends on actors' willingness to identify certain conditions as those of a crisis, and the willingness of others to accept this diagnosis.[49] Given those who have engaged in emergency politics may have derived advantage from doing so, there will be a persistent temptation to repeat it, irrespective of objective circumstances and notwithstanding the interim benefits of government by norms. A claim based on system capacity and a change in environmental conditions misses this important point. Moreover, in the economic domain, definitions of crisis are also heavily shaped by powerful private actors (investors and ratings agencies, for instance).[50] Given their role in co-producing and announcing the crisis, one may be sceptical of the capacity of executives to forecast the retreat of crisis conditions.

[48] E.g. M. Blyth, *Austerity: The History of a Dangerous Idea* (Oxford: OUP, 2013); W. Streeck, 'Ends of Capitalism' (2014) 87 *New Left Review*; Fossum and Menéndez, n 3 above, 4; A. Gamble, *Crisis without End: the Unravelling of Western Prosperity* (Basingstoke: Palgrave Macmillan, 2014).
[49] Recourse to emergency measures is for this reason always a contestable choice: cf. S. Holmes, 'In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror' (2009) 97(2) *California Law Review*, 301-355.
[50] Cf. White, n 3 above.

2. A second type of claim would hold that, although the prospect of crisis persists, when it comes it will not be handled with resort to executive discretion because a new framework has been instituted that will constrain the actions of executives. The post-crisis norms, it may be said, are better insulated from executive interference. On the grounds that there can be no unconventional manoeuvres next time, the norms of the day are pronounced as binding.

The credibility of such a claim hangs first on whether serious efforts are made to replace the emergency regime with a standardised decision-making structure. The accumulation of emergency measures tends to leave a fragmented institutional terrain. Either because they have been designed to allow decision-makers flexibility of action in dealing with crisis conditions, or because, introduced hastily, they clash with and duplicate one another, the provisions of emergency rule are unlikely themselves to be a reliable constraint on the future exercise of discretion. Any notion of legal hierarchy, as expressed in the primacy-of-EU-law doctrine, will be left disrupted by the resulting pluralisation of legal forms, and the level of opacity these arrangements produce allows further freedom from scrutiny.[51] A convincing claim to have moved beyond executive discretion thus depends on moves to repeal emergency provisions or integrate them into a new, more regularised structure. One need only look at the governing arrangements emerging from the Euro crisis to see that such a process is highly incomplete. On the contrary, some of the regulations passed seem actually to *embed* opportunities for the future exercise of executive discretion. Ostensibly firm rules are defined – cf. Reg. 1174/2011 – but with provisions for the Commission and Council to overlook them should 'exceptional economic circumstances' warrant it.[52] What constitutes exceptional

[51] On the proliferation of decision-making bodies in the EU-space and the resultant fragmentation: Tuori and Tuori, n 5 above, 95, 219.
[52] Cf. EU Reg. 1174/2011 'on enforcement measures to correct excessive macroeconomic imbalances in the euro area', esp. preamble 15 and Article 4 (6), where the 'exceptional economic circumstances' formula is used.

circumstances is itself dependent on their own empirical readings. Rather than the repeal or regularisation of emergency rule, this looks like its indefinite extension.[53]

More generally, a convincing claim to have limited the capacity for executive discretion is likely to depend on the visible empowerment of other institutions. It might hinge on legislative actors being given greater powers of decision-making, or judicial actors enjoying greater powers for holding executives to account. Insofar as new restraints on executive power have been conceived in the post-crisis EU setting however, these have tended to involve a diversity of executive actors constraining each other. The terms of the European Semester entail oversight by the Commission and Council, influenced in turn by other executive agencies such as the ECB and IMF.[54] The role of the CJEU remains uncertain, especially given the latitude for interpretation accorded to the Commission, and the Court's traditional weakness in the macroeconomic domain.[55] While the discretion of specific governments may be constrained, executive discretion in general remains the system's defining feature.[56]

Furthermore, even were there clear EU constitutional restraints, recent years have shown that executives retain the option of going outside the EU framework to make arrangements based on international law.[57] This is one of the distinctive challenges of decision-making in a transnational setting. Faced with the protracted processes of EU law-making, Europe's executive powers have tended to prefer ad hoc arrangements –

[53] That political will can also obstruct the unmaking of emergency measures is evident from the experiences of constitutional states: on 'permanent, complex and institutionalised' emergency regimes in such countries as Israel, the US and UK, see Gross and Ní Aoláin, n 6 above, 175ff.
[54] M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-crisis' (2013) 76(5) *Modern Law Review*, 817-844; Scharpf, n 16 above; Joerges, 'Brother, …', n 8 above.
[55] Cf. Tuori and Tuori, n 5 above, 39.
[56] There is some evidence of the strengthening of national parliaments in the Euro crisis, particularly – though not only – the *Bundestag* (cf. Curtin, n 3 above, 25ff.), but the process is an uneven one, and the capacity of parliamentarians to exercise their new powers is questionable (cf. Fossum and Menéndez, n 3 above, 16).
[57] Cf. the Fiscal Compact and European Stability Mechanism in particular. For discussion: E. Chiti and P. G. Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 *Common Market Law Review*, 683–708. NB the *Pringle* judgment affirms the right of member-states to do this, provided they do not thereby change the essential character of the EU institutions.

legal in form, yet in no sense part of a comprehensive legal framework.[58] This abundance of options for rule-making has the effect of reinforcing executive discretion, allowing frameworks to be sidestepped when they become inconvenient. As long as national governments retain the capacity to make foreign policy, when thwarted by the EU's institutions they are likely to seek 'coalitions of the willing' outside its structures. The price of keeping them inside may be agreements whose provisions are deliberately vague: hence the difficulty of *enforcing* executive compliance with norms. The implication is that the polity's norms following emergency rule will be as susceptible to suspension or marginalisation as those before. The possibility of credibly drawing a firm line under the emergency regime is difficult to accept.

3. A third type of claim would be that the identity of the decision-makers has changed: that those who engaged in emergency politics no longer hold office. Such a claim might take as its starting-point the idea that it will never be feasible to design institutions such that exceptionalism is impossible: rather, everything depends on the inclinations of the individuals in charge. Some will seek to maximise their discretion; others will seek to handle a crisis relying on established norms, and where revisions are necessary will submit these to a public process of deliberation rather than force them through as an urgent necessity. Following this line of argument, the reason why Europe's citizens should approach the EU's norms with renewed confidence in their authority is that those who (ab)used discretion in the past will not be in a position to do so again.

This type of claim may have some plausibility in the context of a democratic state. The difficulty in alternative settings is the lack of institutional mechanisms by which a change of personnel can be heralded. Elections are typically the means by which the ritual of catharsis is performed in political life. Yet there is no opportunity to

[58] Cf. C. Bickerton, D. Hodson and U. Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (forthcoming) *Journal of Common Market Studies*.

expel in one go the principal executive actors of the EU. The offices of the ECB are appointed on a long-term basis (eight-year terms for the presidency), and without an electoral component. The Commission's connection to electoral politics is notoriously weak, and the presentation of alternative would-be presidents (*Spitzenkandidaten*) in 2014 offered little additional capacity to a deliver a verdict on its actions in the preceding years.[59] Nor is the Council directly elected: its composition changes on what is – from a European perspective – an arbitrary basis, since it follows the varied rhythms and concerns of national politics.[60] The Parliament does have a basis in European elections, and on some readings has become a more powerful and assertive actor during the crisis period. Though little able to shape measures taken outside the EU framework, it has had some influence over the legal provisions known as the 'six-pack' and 'two-pack', consolidating its modest empowerment in the Treaty of Lisbon.[61] Still, it remains on balance one of the weaker EU institutions,[62] and can scarcely be treated as a major source of political discretion in recent years, certainly relative to the Council. To vote out its incumbents is hardly to vote out those responsible for the exercise of emergency rule. Again, it is not possible then to draw a clear line separating the emergency regime from something that might succeed it: at least for a significant period of time, the same people are responsible for both.

Even when that ceases to be true, clearly it remains the case that even an entirely different set of executive actors might still be inclined to behave the same way. If there are strong pressures emerging from the economic sphere (amongst others) that impel

[59] The unsuccessful candidate, Martin Schulz, returned to the same post he had held before the contest (President of the European Parliament).
[60] White, n 15 above.
[61] See C. Fasone, 'European Economic Governance and Parliamentary Representation: What Place for the European Parliament?' (2014) 20(2) *European Law Journal*, 169ff.; Rittberger, n 37 above; D. Dinan, 'Governance and Institutions: The Unrelenting Rise of the European Parliament' (2014) 52 *Journal of Common Market Studies*, Annual Review, 109–124.
[62] Fasone, n 61 above, esp. 173ff.

executives towards discretionary action,[63] and little opportunity for them to be held electorally accountable for their decisions, then there is little reason to attach great significance to a change in their individual composition.

In sum, given broadly the existing configuration of the EU, it is difficult to imagine how a line might credibly be drawn under the recent period of extraordinary measures, even should those involved in them wish to. The join between the emergency regime and its putative successor is seamless. A considerable portion of the former outlives the crisis, yet with little to suggest it will not itself be subject to discretionary intervention in future.

It is worth underlining that, under changed institutional conditions, stronger claims about the conclusion of emergency rule might be possible. An EU displaying stronger parliamentary powers would permit more convincing assertions concerning the restraint of executive discretion and the changeover of governing personnel. An EU that abandoned its commitment to austerity policies would permit more credible claims concerning the future avoidance of crisis conditions. Efforts to reorder the EU in such ways would invite a revised assessment. Admittedly, in the last instance executive discretion is not something that can be eradicated, and to this extent all claims to have moved beyond emergency rule must be met with caution. Norms are always to some degree susceptible to exceptionalism, as Schmitt and others have convincingly insisted.[64] But their pliability is a matter of degree, and in the circumstances analysed they must be considered persistently fragile.

Legitimate authority lacking

[63] W. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore: Johns Hopkins, 2014).
[64] Schmitt, n 38 above; C. Schmitt, *Dictatorship* (Cambridge: Polity, 2013 [1921]). On coping with discretion as an endemic feature of statecraft: K. L. Scheppele, 'Exceptions that Prove the Rule: embedding emergency governing in everyday constitutional life', in J. K. Tulis and S. Macedo (eds), *The Limits of Constitutional Democracy* (Princeton: PUP, 2010).

Given the noted difficulty politicians face in convincingly consigning the emergency regime to the past, it seems clear the norms of the political order must remain in question. If legitimate authority depends on people having good reason to see them as generally binding, the open-endedness of emergency rule poses a fundamental challenge, as it makes hard to dismiss the prospect of these norms being manipulated once more. Hard to reasonably sustain is the belief that they are stable and general commitments reliably adhered to. Such an appraisal invites itself particularly for those interested parties who might be called upon to respect those norms, including political actors such as governments (who, taken individually, are objects as much as authors of these frameworks), and commercial actors such as banks and corporations. Ordinary citizens too have little reason in these circumstances to approach the norms of their political order with confidence. Let us examine the difficulties for legitimate authority more closely.

Most obviously in question are the specific norms breached or suspended during the period of emergency politics. The suspicion must be that if this fate can befall them once it can do so again. Norms of the kind identified above – to do with state sovereignty, democratic control, political contestation and the equality of states, and the wealth of institutional procedures and routines that may be said to serve them – look persistently vulnerable in this regard. If a repeat of their violation can hardly be excluded, the credibility of such norms remains tarnished. There can be little reasonable basis for a belief in their capacity to constrain.

If such a fate befell only those norms suspended or transgressed, the significance would be local overall. An experimentalist rationale for the polity would still be possible: it could be defended as a form of spontaneous order, evolving by trial and error as much as conscious

direction.[65] But it is not just the norms directly challenged that are affected. The binding character of ostensibly unrelated norms – i.e. those neither breached nor evaded – is also at stake. The larger constellation of norms is put in question, and thus the political order as a whole.[66] This follows partly from the way political improvisation leads, as noted, to the accumulation of ad hoc measures which stand in a coherent relation neither to each other nor to the institutional structures that preceded them. Adopted swiftly for short-term goals and often with little deliberation, these measures may duplicate existing provisions, challenging the integrity of the wider framework.[67]

It follows also from the simple observation that if executives are willing to intervene with discretion in one area they may be willing to do so in another. The limits to political discretion become difficult to establish with confidence. The point is not, of course, that the majority of institutional norms will necessarily become subject to emergency-led suspensions, amendments and so on. Bureaucracies depend on a measure of continuity, in the EU no less than elsewhere. Without such continuity, the very idea of norms would be in doubt. But though the exercise of discretion may be limited in scale, the difficulty faced is how to know which norms are 'real' and which merely apparent. Clearly not all are equally likely to be transgressed: it is not a random matter, and an analysis of political and socio-economic power structures may provide some clues. But the course of emergency rule is sufficiently unpredictable, particularly if the underlying conditions of crisis are real, that few elements of a polity's legal and political architecture can be regarded as wholly secure. Not knowing which norms can be relied upon and which can safely be discounted, the observer must direct a measure of doubt towards all. They are interdependent as concerns their credibility.[68]

[65] F. Hayek, 'Rules and Order', vol. 1 of *Law, Legislation and Liberty* (London: Routledge & Kegan Paul, 1973).
[66] On 'systemic deficiency' in the legal norms of the EU, see von Bogdandy and Ioannidis, n 27 above, esp. 71ff. On the question of whether EU law amounts to a system, see Dickson in Dickson and Eleftheriades, n 5 above.
[67] Cf. Gross and Ní Aoláin, n 6 above.
[68] Cf. G. Falkner, 'Is the European Union Losing Its Credibility?' (2013) 51 *Journal of Common Market Studies*, Annual Review, 13–30.

Note also that even where extraordinary measures do not explicitly contravene existing EU norms – e.g. because they are produced in heads-of-state meetings outside the EU framework – they may nonetheless put these latter in doubt, since they suggest their limited capacity to offer guidance in critical situations.[69] When push comes to shove, the rule of persons is seen to displace the rule of norms. Perhaps one should not be too surprised – it is arguably one of the tendencies latent in any political order[70] – but it is especially problematic for one that has relied heavily on ideas of integration-through-law to legitimise itself.

One might suppose the aspects of the political order spared this subversion are those that emerge for the first time in the context of emergency rule. These, after all, are yet to develop a record of suspension. Yet they too must have question-marks against them due to the conditions of their emergence. Measures taken under the auspices of emergency are inevitably associated with necessity rather than desirability, haste rather than reflection. They are likely to be tied closely to the details of a particular crisis, in a way that reduces their generalizability and long-term validity.[71] Often they are intended to solve immediate problems rather than to stake out context-independent principles: for this reason they may become quickly obsolete, generating the need for further extraordinary measures, which in turn require replacing too.[72] This piling up of problem-solving measures also introduces the likelihood of duplication, something which makes the status of each uncertain, as well as compromising the wider intelligibility of the order as a whole.

It seems clear then that, given the difficulty of separating the emergency regime from something one might call normality, the constraining character of norms in general is in question following a period of emergency rule. Good reasons to regard them as generally and

[69] This is why decisions taken outside the EU framework may compromise the EU's authority: even if they do not contradict EU norms, by supplementing and in some cases duplicating them with parallel institutional procedures they imply the insufficiency of those norms to deal with concrete situations.
[70] Cf. R. Bellamy, 'The Rule of Law and the Rule of Persons' (2001) 4 (4) *Critical Review of International Social and Political Philosophy*, 221-251.
[71] Cf. Gross and Ní Aoláin, n 6 above, 161.
[72] Consider the fast succession of market-stabilising measures (the European Semester, EFSF, Euro-Plus Pact, Six-Pack, ESM and Fiscal Compact), as well as repeated revisions to the Memoranda of Understanding.

stably binding are lacking. Given the prospect that the polity's norms will continue to be applied selectively, a significant component of arbitrariness lingers, and its legitimate authority is compromised.

It would be mistaken to see the experiences of the Euro crisis as wholly singular in this regard. A polity may experience dramatic episodes of emergency politics more than once, with the result that the erosion of its legitimate authority is cumulative. The concerns raised above to do with the difficulty of containing the exercise of emergency rule are borne out by the larger trajectory of European integration. There are several precedents in EU history for the emergency politics witnessed since 2010. The handling of the referenda rejections of the Constitutional Treaty in 2005 fit a pattern in some ways similar. The holding of referenda was consistent with norms of political contestation and democratic control, and brought into play norms specific to referenda as a mode of consultation, notably the expectation that a popular rejection should act as a veto of the initiative proposed. When, following the referenda outcomes, heads of government repackaged largely the same text in the form of a second treaty and proceeded with ratification, it can fairly be said these norms were evaded.[73] The rejection of this second (Lisbon) treaty by referendum in Ireland again resulted not in its redrafting but in the repetition of the referendum. These moves were widely defended as an existential necessity for the EU, the urgent threat posed by economic and institutional sclerosis. The effect of these manoeuvres was surely to undermine the norms surrounding EU referenda. Though in some ways rather different from the case under discussion – the appeal to emergency was largely the construct of political elites alone, without the direct involvement of economic actors, and the degree of political transformation it heralded was considerably lesser[74] – these actions nonetheless bear a structural similarity with emergency rule as described.

[73] Cf. M. Wilkinson, 'The Spectre of Authoritarian Liberalism' (2013) 14(5) *German Law Journal*, 529ff.
[74] Cf. J.-W. Müller, 'Beyond Militant Democracy ?' (2012) 73 *New Left Review,* 44.

If we extend our historical perspective to encompass the post-War period as a whole, we will note that executive discretion grounded in appeals to emergency has long been a feature of European transnationalism. The first steps of the post-War integration process were highly discretionary, taking the form of interstate diplomacy and cooperation amongst administrative elites, and promoted publicly often with reference to the geopolitical demands of the Cold War.[75] Given the norms of transnational European politics were barely formed at this stage, and the implications for national norms still uncertain, the challenge to authority remained limited. As the integration process continued, so distinctive norms and attendant institutional procedures developed, reflecting and consolidating the increasing regularisation of transnational politics.[76] Insofar as these emerging norms evolved to fit the requirements of executive power at the time, practices of evasion or violation were rare. Yet these emerging norms held the latent capacity to manifest themselves as constraints on executive power should conditions change and new problems arise.

The dialectic of rules and discretion referred to by legal theorists in the American pragmatist tradition is illuminating here: as policy-making becomes increasingly regularised, so the pressure for occasional discretionary intervention increases, which in turn creates new pressure for regularisation.[77] As societies evolve, in their socio-economic practices and political ideals, a mismatch is likely to emerge between the context in which norms crystallised and the context in which they are encountered, with pressure for their circumvention as the result. Combined with the intrinsic appeal of exceptionalism as a governing resource, and weak constitutional restraints on its exercise, its recurrence is to be expected. The subsequent trajectory of the European political order has displayed, in this fashion, frequent outbreaks of intense executive discretion, typically defended in the idiom of

[75] White, n 3 above.
[76] C. Bickerton, *European Integration: From Nation-States to Member-States* (Oxford: OUP, 2012).
[77] See e.g. R. Pound, 'Justice According to Law' (1913) 13 (8) *Columbia Law Review*, 696-713; M. Cohen, 'Rule vs Discretion' (1914) 11 *Journal of Philosophy, Psychology and Scientific Methods*, 208-215.

emergency, followed by the – ultimately impermanent – entrenchment of the governing arrangements thereby instituted.[78]

The precariousness of legitimate authority may thus be seen as a deep-seated feature of EU history, bound up in its longer-term status as an arena of executive discretion *par excellence*. The events of the Euro crisis have made this visible to a distinctive degree, but they are the continuation of a broader pattern. The pattern would seem to extend to a number of other transnational institutions where far-reaching executive discretion in the name of emergency has been recurrent. Observers of the UN Security Council note that it has come to act, in recent years especially, in ways that apparently compromise some of the constitutive norms of international politics – one thinks of UNSC's increasing, unconventional reliance on the emergency powers associated with Chapter VII of the UN Charter to intervene widely in the domestic affairs of sovereign states (Res. 1373, passed to facilitate the post-9/11 'war on terrorism', being the outstanding example).[79] Such actions likewise put the UN's legitimate authority in question, in a way that is not easily repaired.

Although in the EU this pattern of wayward executive discretion shows every chance of persisting, certain developments could interrupt it. One would be the emergence of genuine constitutional restraints on executive power, of the kind previously discussed. Another would be the political rejection of executive-led emergency politics. A critical question here is whether the spectre of emergency is likely to be an enduringly effective galvanising force or whether its repeated summoning depletes its power, making increasingly difficult the resort to

[78] On long-term tendencies towards executive discretion predating the Euro crisis, see Curtin, n 3 above, 3; see also Joerges in C. Joerges and C. Glinski (eds), *The European Crisis and the Transformation of Transnational Governance* (Oxford: Hart, 2014). On the EU's increasing reliance on loosely binding 'new governance' techniques, see i.a. J. Scott and D. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8(1) *European Law Journal*, 1-18.

[79] See J. L. Cohen, 'A global state of emergency or the further constitutionalization of international law: A pluralist approach' (2008) 15(4) *Constellations*, 456–484; S. Chesterman, 'UNaccountable? The United Nations, emergency powers, and the rule of law' (2009) 42 *Vanderbilt Journal of Transnational Law*, 1509–1541; C. Kreuder-Sonnen, *Der Globale Ausnahmezustand: Carl Schmitt und die Anti-Terror-Politik des UN Sicherheitsrates* (Baden-Baden: Nomos, 2012). On emergency politics in other international organisations such as the World Health Organisation: T. Hanrieder and C. Kreuder-Sonnen (forthcoming), 'WHO decides on the exception? Securitization and emergency governance in global health,' *Security Dialogue*.

extraordinary measures. This is a question of *descriptive* authority, examined in the final section.

Compliance without legitimate authority?

If emergency politics challenges norms in the way described, a natural inference is that the political order will widely come to be viewed with suspicion. Lacking good reasons to see its norms as generally binding, and lacking criteria by which to decide which ones are 'for real' and which are contingent, citizens and organised actors may be expected to lose faith in the polity, either by showing themselves unmoved by its demands or by losing their expectation that others will adhere to them. Having witnessed the willingness and enduring capacity of those 'at the top' to exercise discretion, they will withdraw their political consent. Compliance will be selective, in some areas non-existent, and a self-reinforcing process of decay will set in. A weakness of legitimate authority will, in other words, manifest itself also in a weakness of descriptive authority, which in turn will entail a highly unpredictable political realm.

This is certainly one feasible tendency shaping the legacy of emergency rule. The public visibility of executive discretion in the present instance cannot fail to convince some that the status of norms is highly uncertain. Sensing their recurrent circumvention under the sign of emergency can hardly be excluded, individuals and organisations may become sceptical. A degree of volatility may ensue, as demands are selectively disregarded or as the political regime itself is challenged. Such an outcome would be broadly in line with the 'politicisation' hypothesis, that sees transnational institutions as destined to be increasingly contested due to a mismatch between the extent of the powers they exercise and the limited

legitimating resources they can draw on.[80] In Europe, a repudiation of EU authority can be inferred in some measure from the dissent expressed towards EU decision-making by anti-establishment parties and movements of Left and Right. The sources of their opposition include not just hostility to the substance of policy-making but to the opportunistic use of crisis to rewrite the terms of the political order.[81] The resistance of certain judiciaries, notably the *Bundesverfassungsgericht*, to the emergency measures associated with the Euro-crisis can likewise be regarded as recognition of the affront they pose to the legitimate authority of the polity's norms and a willingness to contest executive discretion.[82]

Yet while increasing levels of contestation would be a plausible, even desirable outcome, there are reasons for circumspection: the wider legacy of emergency rule may be quite different. There are two respects in which the capacity of the polity to command day-to-day compliance may in fact be preserved, even boosted, by the experience of political exceptionalism. First, there are ways in which descriptive authority may be augmented by emergency rule, even as legitimate authority is challenged. Second, there are ways in which high levels of ordinary compliance may arise even as authority in general is compromised, due to considerations of power imbalance and political uncertainty. It is important to consider both outcomes in some detail, as these are the currents against which agential efforts to contest authority must move.

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[80] See P. de Wilde and M. Zürn, 'Can the politizisation of European integration be reversed?' (2012) 50(S1) *Journal of Common Market Studies*, 137–153; M. Zürn, M. Binder and M. Ecker-Ehrhardt, 'International authority and its politicization' (2012) 4(1) *International Theory*, 69-106.

[81] See e.g. SYRIZA leader Alexis Tsipras, address in Rome, 7th February 2014: 'by using the crisis as a mere pretext, the neoliberal establishment of Europe is attempting a violent re-arrangement of Europe's division of labour … [We are planning] to put an end to the Cesarean attitude of the European Union, as Gramsci would have put it, to domination as a tool for managing the crisis. … The neoliberal establishment in Europe has managed this crisis, not in order to resolve it, but in order to revise the European postwar political economy itself. In order to instigate an assault by capital against labour, in order to dismantle both the rights and the hard-earned gains on the part of the forces of labour throughout Europe's continent. … For that purpose it has succeeded in overriding the very institutional framework of the European Union. It has strangulated democracy. It has disregarded the multifariousness of institutions at a national level. It has gagged the peoples, forcing upon them the straight-jacket of austerity, discipline and deregulation.' (http://www.alexistsipras.eu/index.php/10-speeches/49-alexis-tsipras-speech-rome-7-02-2014?showall=&start=1)

[82] Though it is a form of resistance aimed at protecting the constitutional norms of Germany rather than of Europe as a whole: cf. Joerges, 'Europe's economic ...', n 3 above, esp. 299ff.

That descriptive authority might increase at the height of emergency rule is not difficult to see. If executives cannot plausibly disavow their exercise of discretion, the flipside is that they may claim credit for anything that passes for a positive development under their stewardship. Emergency rule, precisely by suggesting the non-bindingness of norms and their associated institutional routines, puts executives, their decisions and their personas to the fore. If their leadership can somehow be said to be effective, then a form of authority may be achieved – buttressed perhaps by technocratic claims by the same political elites to be those best placed to judge *whether* it is effective. This is one way to read the high levels of public satisfaction recorded for some executive powers at the height of the Euro crisis.[83] To be sure, this authority may be descriptive rather than legitimate. Being divorced from binding norms, it carries an unpredictable and arbitrary flavour. It is also vulnerable to a downturn in the polity's fortunes, and is thus a precarious basis for rule. But for a period of time it may be a potent source of popular support, as the wider history of emergency politics bears out.[84]

Less immediately apparent is that emergency rule may strengthen descriptive authority in the longer term. The discourse of exceptionalism is two-sided: while on the one hand it seeks to justify departures from norms, at the same time it consolidates the notion there is such a thing as 'normal times' in which norms are generally binding. Whenever the formula of 'exceptional measures for exceptional times' is announced, it evokes the accompanying idea of normality, arguably far more directly than most 'normal' forms of political discourse. In this way it cultivates receptivity to the idea that emergency rule can be superseded and an ordered setting restored. Moreover, by accentuating the distinction between order and chaos,

[83] The public approval for Italy's Prime Minister Mario Monti hit 52% after ten months in power: see *La Repubblica*, 'Più fiducia in Monti …', 17th September 2012 (http://www.repubblica.it/politica/2012/09/17/news/sondaggio_fiducia_monti-42667390/).

[84] On the use of emergency rule as an authoritarian device, see W. Scheuerman, 'Survey Article: Emergency Powers and the Rule of Law After 9/11' (2006) 14(1) *Journal of Political Philosophy*, 61–84; Gross and Ní Aoláin, n 6 above.

the discourse of exceptionalism feeds the desire to exit a period of arbitrariness irrespective of the details of the order that follows.[85]

The politics of emergency is conducive to descriptive authority also because the institutional structures that survive it, or the measures initiated under its auspices, may come to seem robust precisely because they have weathered a period of crisis. They should be approached with *extra* confidence, runs the thought, since they have proven their durability in extreme circumstances (just as those that were sacrificed merely revealed their irrelevance). The descriptive authority of the post-emergency order may be especially high if its provisions are thought to have contributed to resolving the crisis, as this lends them an aura of potency. In the EU case under consideration, the ECB has been widely credited with restoring market confidence in the Eurozone (or simply 'saving' it), in particular with the bond-buying policy initiated in September 2012.[86] Its activities achieve heightened descriptive authority accordingly, and what initially appeared instances of exceptionalism and improvisation – such as the OMT policy itself – can retrospectively come to seem norm-bound. Their demonstrated utility, it may be said, guards them against future acts of executive discretion. Such confidence would most likely be misplaced, for reasons already examined. It would be difficult to treat this descriptive authority as legitimate. Often it is tied to the eulogising of individuals, and thus to the persistent possibility of discretion.[87] Yet it clearly indicates how the legacy of emergency rule need not be disorder and non-compliance, indeed how successive periods of emergency politics may actually cultivate obedience.

Let us move to the second point, which is that high levels of everyday compliance may arise even if the polity's legitimate *and* descriptive authority is compromised by emergency rule. Actors may have strong reasons to comply with the polity's demands, even if they are

[85] Cf. Klieman, n 6 above, 17.
[86] Cf. n 32 above.
[87] Cf. the *Financial Times'* decision to make Draghi its 2012 Person of the Year and speculate on his role as 'the man who saved the eurozone', 13th December 2012: (http://www.ft.com/cms/s/0/8fca75b8-4535-11e2-838f-00144feabdc0.html#axzz33Tb2ilre).

unmoved by norm-based considerations. It is important to distinguish here between *following* norms and *conforming* to them. The former involves non-instrumental action: norms are adhered to because their demands are accepted as valid. Respecting them is the appropriate thing to do. By contrast, conforming involves action principally motivated by instrumental concerns. Norms are adhered to not *because* they are norms (their normative status may even be doubted), but because doing so brings some kind of advantage or avoidance of harm.[88] While the distinction is an analytical one, it usefully highlights the potential for compliance to prosper even where the authority of the political order is weak.

Consider one set of provisions emerging from Europe's emergency regime of recent years – the new budgetary rules of the European Semester. Given their noted dissonance with the EU's fundamental norms as earlier described, perhaps few relevant parties will feel it necessary to comply with these provisions *because* of some sense they are normatively valid. Yet actors have instrumental reasons to adhere to them, including the fines associated with breaking their terms or the desire to maintain goodwill, even where they are doubtful of the permanence and even-handedness of these arrangements. That the sanctions associated with breaking these provisions are not always clear[89] does not mean actors can discount them. Indeed, the opposite is true: where sanctions are unclear, there is no basis on which to anticipate the costs of non-compliance. There can be no calculated decision to breach them based on a willingness to endure certain costs for the sake of a countervailing good. Thus when national governments submit budgetary proposals under the terms of the European Semester, they have every reason to comply with the assessments of the Commission, even if the consequences of not doing so are unclear. Clearly this holds particularly true to the extent

[88] Brennan et al, n 20 above, 218: 'We conform with a norm, in the sense we have in mind, when we act in accordance with the norm, not because of the norm, but because of other considerations associated with the norm. When an agent follows a norm, she treats the norm as a (non-instrumental) reason for acting in accordance with that norm: the norm is 'internalized'. When an actor conforms with a norm she treats the norm as providing *instrumental* reasons to act in accordance with the norm.' See also Hurd, n 21 above.
[89] Cf. above; also Chalmers and Chaves, n 17 above.

that sections of the wider public show little willingness to press for the contestation of such measures.[90]

The larger point is that emergency rule increases political uncertainty.[91] Uncertainty surrounds the mechanisms by which new measures are introduced, how far they are intended to be temporary or permanent, and to what extent and in what way they will be enforced. This compounds the uncertainty associated with the underlying socio-economic factors involved. Discretionary politics also leads to the personalisation of political relations.[92] Where norms are upheld selectively by executives rather than quasi-automatically by anonymous administration, the goodwill of particular actors (including the German Chancellor and other prominent members of the Council) is a precious commodity, and the consequences of sacrificing it scarcely knowable. The exigencies of 'rule of persons' are in this sense harder to ignore than those of the rule of law. Under such conditions, compliance – however difficult to enact, given changing demands – will generally present itself as the prudent option. Emergency rule may in this way foster conformity, even if norm-*following* is rendered more rare.

Finally, the capacity to command compliance, even where the polity lacks authority, is facilitated by one of the well-known dynamics of authoritarian drift. The effect of a period of pronounced discretionary decision-making is arguably to modify the expectations with which decision-making is met. Actions which once seemed an affront to the polity's norms become the new empirical standard against which conduct thereafter is assessed. They recalibrate the scale – of what is thought realistic to expect, perhaps even of what is thought acceptable.[93] Though ever more drastic discretionary manoeuvres may be advanced, each may appear both

[90] Cf. Wilkinson, n 73 above, 548.
[91] The more powerful executives enjoy a command of the situation which is strong only relative to other political actors – in their dealings with the economy they too face uncertainty.
[92] Observing this pattern in several historical instances of emergency politics (e.g. 1970s Philippines): Klieman, n 6 above, 11.
[93] Cf. O. Gross, 'What "Emergency" Regime?' (2006) 13(1) *Constellations*, 82; Gross and Ní Aoláin, n 6 above, 236; Klieman 1976, n 6 above, 1; White, n 3 above.

futile to resist (since they form a recurrent pattern) and merely an incremental advance on previous ones (since the wider shift they amount to is diffused over time). Acts of exceptionalism are in this way received less as sources of provocation than as sources of information about 'how things work'.[94] Public concern may therefore never reach the acuteness that invites outright repudiation, or may be diverted into a fatalist attitude.[95] Clearly, this should not be equated with the maintenance of authority: at any given moment these provisions are liable to appear as the expendable commitments executives treat them as. But this perpetual resetting of reference-points may make it easier for citizens to live with demands whose authority they weakly believe in. Emergency politics subverts the standards by which it is assessed, thereby insulating decision-makers from the critique to which they might otherwise be subject.[96] Here lies an explanation for why previous episodes of exceptionalism in the history of European integration – including the Lisbon Treaty's implementation as previously noted – have been limited in the resistance they produce. More powerfully than they provoke censure, they reduce expectations.

Whether then in the form of the maintenance or increase of descriptive authority, or in the form of conformity without authority but for instrumental reasons, there are discernible mechanisms by which emergency rule may *reduce* volatility rather than fuel it. It is as conducive to stability as to disarray. Though well-organised political movements may counter such tendencies – and important signs of dissent are present in some countries – the practices of emergency rule are less vulnerable to contestation than they might initially seem. This matters because although descriptive authority or instrumental conformism may be functionally adequate, achieving the outward appearance of order, both outcomes are clearly unsatisfactory. Where authority rests on misplaced faith in executive power or in the binding

[94] Muted public reactions to Edward Snowden's disclosure of mass surveillance by the US National Security Agency may be regarded an instance of the same phenomenon.
[95] On fatalism in EU public opinion: J. White, *Political Allegiance after European Integration* (Basingstoke: Palgrave MacMillan, 2011).
[96] Cf. von Bogdandy and Ioannidis, n 27 above, 73: 'Persons that encounter such a systemic failure of the rule of law thus modify their expectations instead of insisting on them.'

character of the order's norms, it expresses the autonomy of elites from their constituencies. Where norms are widely approached instrumentally, it expresses the view they are obstacles to be negotiated rather than expressions of collective self-rule, and reveals low confidence in the fairness and coherence of the system.[97] A kind of 'constitutional anomie' develops, in which the political order offers weak normative guidance to its citizens. Clearly in both cases the polity can still be held to a normative standard, but that standard will be of the observer's conceiving rather than one that is immanent in the institutional order itself. Prime amongst the legacies of emergency politics is a polity of weak ethical foundation.

Conclusion

Emergency rule presents itself as a self-contained episode, the interruption of something enduring. The very idea of exceptional measures implies the awaited resumption of political normality, with the connotations of legitimacy this widely implies. But it is less clear this resumption can happen. Once executives have shown the extent of their willingness to use discretion, their challenge is to demonstrate they can now step back from it. In the context of the contemporary EU, claims to this effect are difficult to make. The emergency regime is hard to consign to the past.

One must assume the stature of norms is consequently frail, and given the difficulty of individualising these, the stature of the political order more generally. There is a want of legitimate authority after emergency rule, not least because that 'after' itself is elusive. Day-to-day compliance may persist however, motivated by misplaced confidence in the binding character of norms, or by strategic calculation rather than an acceptance of their intrinsic validity. Indeed there is cause to suppose the politics of the extraordinary actually heightens

[97] See Gross and Ní Aoláin, n 6 above, 81, on popular disillusionment. On the limits of 'governance': C. Offe, 'Governance: An "Empty Signifier"?' (2009) 16(4) *Constellations*, 550-62.

the willingness to comply. This conformity is fragile admittedly, for it depends on a degree of obliviousness to the challenge emergency rule poses to legitimate authority. But as time passes and as normative standards are reset or become blurred, acceptance can be expected to harden. The resulting regime is weakly legitimate, yet risks being all the more functional for its brush with emergency rule.

Recognising the challenge that exceptionalism poses, it is sometimes suggested that measures introduced under the sign of emergency should be submitted to post-hoc public approval, e.g. by referendum, as a way of restoring legitimate authority. Emergency measures can then be submitted to the deliberative scrutiny absent at the point of their conception. The argument has been advanced for the EU in the wake of the discretionary activities discussed.[98] If, however, emergency politics is double-edged in the way described, tending to consolidate descriptive authority even as it compromises legitimate authority, this approach is clearly problematic. Public approval may be all too forthcoming, for it is consulted at a moment where opinion itself is likely to have been shaped by the experience of exceptionalism. Notwithstanding some honourable exceptions, even courts have a well-known tendency to adjust to the 'reality on the ground'.[99] Although the point cannot be developed here, this suggests they too may be a weak source of retrospective accountability, at least if we go by their existing record.[100]

A reckoning with the decisions taken under emergency rule may have to wait for ideologically committed actors such as parties and movements, robust enough to resist

[98] See e.g. S. Hix, 'Democratizing a Macroeconomic Union in Europe', in S. Hobolt and O. Cramme (eds), *Democratic Politics in a European Union under Stress* (Oxford: OUP, 2014); articulating the argument as it applies to emergency rule more generally, Ferejohn & Pasquino, n 38 above, 232; cf. O. Gross, 'Extra-Legality and the Ethic of Political Responsibility', in V. Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge: CUP, 2008).

[99] See e.g. W. Scheuerman, 'Human Rights Lawyers vs Carl Schmitt', in E. Criddle (ed), *Human Rights in Emergencies* (Cambridge: CUP, forthcoming); Sheeran, n 40 above; on courts in contemporary Europe, and especially the ECJ's *Pringle* judgement, see Joerges,'Europe's economic ...', n 3 above; M. Everson and C. Joerges (2014), 'Who is the guardian for constitutionalism in Europe after the financial crisis?', in J. E. Fossum and A. J. Menéndez (eds), *The European Union in Crises or the European Union as Crises?, ARENA Report No 2/14* (Oslo: ARENA, 2014).

[100] On the potential for courts better to perform their role of judicial oversight, see D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: CUP, 2006).

premature compromise with the emerging order, and sufficiently mindful of public opinion as to seek to influence it. Beyond disrupting the accretion of descriptive authority, their task would be to expose the agendas that lie behind emergency rule and to highlight the paths not taken, before seeking popular support for an institutional reordering or constitutional refounding. In the longer term there would seem to be no substitute for constraining executive discretion *ex ante*, both by strengthening the constitutional limits within which it must operate, and by the political means of reinforcing the institutions and actors that may contest its exercise in real time.