

From Emergency Politics to Authoritarian Constitutionalism? The Legal and Political Costs of EU Financial Crisis Management

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Abstract

In his lecture on *The Repressed State of Emergency*, Ernst-Wolfgang Böckenförde argues for the constitutional possibility of a partial superimposition of certain laws in times of emergency. Repressing the state of emergency would ultimately lead to greater and more permanent damage to the rule of law and liberal rights. This warning bears some similarities to Giorgio Agamben's analysis of the emergence of a permanent state of emergency, which loses the feature of exceptionality by becoming "the dominant paradigm of government in contemporary politics." Agamben thus proposes a shift from structure to practice, which focuses on the features of emergency politics instead of states of exceptions. The European Union's recent financial crisis is a promising object of research in this regard. After a brief discussion of Böckenförde's illuminating lecture on the repressed state of emergency, this Article will analyze a comment written by Böckenförde at the beginning of the Euro crisis. While this comment has sometimes been interpreted as an unconditional defense of unlawful emergency measures, a closer look at this statement reveals a much more nuanced argumentation. Böckenförde concurs with other legal scholars—such as Paul Kirchhof—in emphasizing the danger of an erosion of the rule of law through illegal measures. Böckenförde's intervention, however, leaves room for interpretation that this emergency action could—in principle and under specific circumstances—nevertheless be legitimate, although he was critical towards the handling of the crisis. On a more general level, this Article will discuss if the suspension of law can ever save the legal order it disregards. Next, the legality of EU crisis management—which has not been judged unanimously—will be scrutinized. At least, the circumvention and adaptation of EU primary law involved in this management has crucially changed the law of "normal affairs." Finally, this Article will argue that the managerial style of emergency politics challenges the EU's project of "integration through law," hollows out democratic procedures, and enforces, with its one-sided austerity policy, a form of economic integration that bears strong traces of an "authoritarian constitutionalism."

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A. Introduction

Since the terrorist attacks of 9/11 and the infamous “War on Terror,” there is a growing academic discourse on contemporary and historical instances of the state of exception—or emergency—which has become even more animated by recent declarations of the state of exception in France and Turkey. The frequent applications of this instrument have stimulated legal scholars, philosophers, and political scientists to reflect on the competitive relation between law and politics in exceptional times,¹ different constitutional framings of emergency competencies,² and theoretical layouts of the state of exception in the history of political ideas.³

In the course of these debates, Ernst-Wolfgang Böckenförde’s writings on the exception—which focused on the German Emergency Acts in 1968 and the state’s security policy directed towards the Red Army Faction (RAF) terrorists—attracted new scholarly attention. The re-reading of these writings—in particular Böckenförde’s inaugural lecture at the University of Freiburg in 1978 about *The Repressed State of Emergency*—seems especially justified as his warnings of the failures to contain the state of exception bear some similarities to Giorgio Agamben’s analysis of the emergence of a permanent state of emergency. In the latter, the feature of exceptionality is lost as it becomes “the dominant paradigm of government in contemporary politics.”⁴ To find some evidence for this thesis, it does not suffice to look at the frequent and often repeated official declamations of the state of exception, which allow governments to take extraordinary measures in order to fend off dangerous situations or—as in the case of Turkey—shut down political opposition. In contrast, analyzing the non-official, and sometimes subcutaneous, inscription of the exception into the normal working mode of law and politics, as Böckenförde did in his inaugural lecture, is a much more promising and demanding task.

While some authors—such as Günter Frankenberg—have observed the tendency towards a normalization of the state of exception in penal and police law, this Article addresses the emergency politics of the European Union in reaction to the recent and presumably still ongoing financial crisis. The War on Terror has certainly animated most discussions on the

¹ See, e.g., Markus Holzinger, *Regel und Ausnahme: Zur Theorie des Ausnahmezustands*, in WELTRISIKOGESELLSCHAFT ALS AUSNAHMEZUSTAND 29, 61–86 (Markus Holzinger, Stefan May & Wiebke Pohler eds., 2010).

² John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210 (2004); Kim Lane Scheppelle, *Legal and Extra-Legal Emergencies*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 165 (Keith Whittington, Daniel Keleman & Gregory Caldeira eds., 2008).

³ MATTHIAS LEMKE, DEMOKRATIE IM AUSNAHMEZUSTAND. WIE REGIERUNGEN IHRE MACHT AUSWEITEN 52–118 (2017).

⁴ GIORGIO AGAMBEN, STATE OF EXCEPTION 2 (Kevin Attell trans., 2005).

state of exception since the pivotal events of 9/11,⁵ but this fact should not belie that the fight against economic crises has often resorted to exceptional rules since the 20th century, too, usually circumventing foreseen legislative procedures by granting exceptional powers to the executive.⁶ Some commentators have emphasized several striking similarities between the handling of the economic crisis in the EU and the implementation of drastic structural reforms and social policy cuts by “presidential cabinets” in Germany after the great economic crash of 1929.⁷ Nevertheless, the fact that the context of the crisis today is far less dramatic than the situation in the Weimar Republic and in other European states—which were targeted by a plethora of anti-democratic forces and organized violence—must not be neglected. A closer look at the EU’s crisis politics may nevertheless be rewarding, as the search for structural effects of the publicly—but not legally—declared state of emergency allows inferences to be made about the democratic quality and legal constellation of the EU. Moreover, this discussion may also help liberate reflections on the state of emergency from a statist view—which is prevalent in the legal discourse on emergencies—especially in the traditional German *Staatsrechtslehre*. Taking the multilevel governance and legal system of the EU as an object of research should reveal a more complex constellation of emergency politics and policies that cannot be generally subsumed under the label “suspension of the rule of law.”

For this purpose, this Article will, in Section B, briefly discuss Böckenförde’s seminal lecture on the repressed state of emergency with regard to current discussion of an unlimited state of emergency. Section C will then shed light on a comment written by Böckenförde at the beginning of the Euro crisis, which has sometimes been interpreted as an unconditional defense of unlawful emergency measures, notably by Andreas Fischer-Lescano. A closer look at this public statement reveals a much more nuanced argumentation, as Böckenförde concurs with other legal scholars—such as Paul Kirchhof—in emphasizing the danger of an erosion of the rule of law through illegal measures. Böckenförde’s intervention, however, leaves room for the interpretation that this emergency action could—in principle and under specific circumstances—be nevertheless legitimate, although he was sharply critical towards the handling of the crisis. On a more general level, this Article will discuss if the suspension or superimposition of law can ever save the legal order it disregards. Next, the legality of EU crisis management will be scrutinized. This crisis management involved the circumvention and adaptation of EU primary law, which has not been judged unanimously by observers. However, it can at least hardly be overlooked that the law of “normal affairs” has been

⁵ See, e.g., POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM (Aniceto Masferrer ed., 2012).

⁶ See William E. Scheuerman, *The Economic State of Emergency*, 21 CARDOZO L. REV. 1869 (2000).

⁷ See, e.g., Lukas Oberndorfer, *Der neue Konstitutionalismus in der Europäischen Union und seine autoritäre Re-Konfiguration. WWU 2.0, New Economic Governance und Pakt(e) für Wettbewerbsfähigkeit*, in EUROPÄISCHE STAATLICHKEIT. ZWISCHEN KRISE UND INTEGRATION, 177, 177–78 (Hans-Jürgen Bieling & Martin Große Hüttmann eds., 2016).

changed by the facticity of crisis instruments. Finally, Section D will argue that the managerial style of emergency politics challenges the EU's project of "integration through law," often hollows out democratic procedures, and enforces, with its one-sided austerity policy, a form of economic integration that bears strong traces of an "authoritarian constitutionalism."

B. From the Repressed to the Permanent State of Emergency?

In his inaugural lecture at the University of Freiburg in 1978—fittingly dedicated to Carl Schmitt on the occasion of his ninetieth birthday—Ernst-Wolfgang Böckenförde addressed the urgent political question of how a *Rechtsstaat* should deal with exceptional circumstances that demand determined action not backed by the normal constitutional and legal framework. While the title of this lecture, *The Repressed State of Emergency (Der verdrängte Ausnahmezustand)*,⁸ not only evokes a Freudian constellation, but also seems to tie in with Schmitt's criticism of the Neo-Kantian neglect of the state of emergency,⁹ the unfolded argument is much more sober than Schmitt's celebration of the exception in the famous sentences in his *Political Theology*:

Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree. . . . The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.¹⁰

Unlike Schmitt—whose writings on the exception are infused by an antidemocratic orientation and a fascination with strong authority—Böckenförde was searching for a legal handling of states of emergency that promises the least rights-eroding results, which he saw in a constitutional provision for a clearly delimited state of exception. Thus he regarded the constitutional option to suspend parts of the legal order for a limited time, guided by precise procedural rules, as the best way to return in the most effective and secure way to the "state of normal affairs." Banning the possibility of the state of emergency from the constitution,

⁸ ERNST-WOLFGANG BÖCKENFÖRDE, *The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 108 (Mirjam Künkler & Tine Stein eds., 2017).

⁹ CARL SCHMITT, *POLITICAL THEOLOGY. FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 14–15 (George Schwab trans., 2005).

¹⁰ *Id.* at 15.

however, would entail unintended consequences in Böckenförde's view. For example, Germany banned this possibility after the Second World War with the intention of avoiding the systematic construction errors of the Weimar Constitution that paved the way for an extensive "constitutional dictatorship."¹¹ The central message of his lecture was that such a repression of the state of exception necessarily led to repressive results with regard to the law of the state of normal affairs by endangering its liberal foundations.

Reacting to the German Emergency Acts passed in 1968,¹² Böckenförde vehemently opposed this model of "anticipatory statutorification" that aimed for a "final *substantive* regulation of the state of emergency,"¹³ as he considered unpredictability an essential feature of emergencies. Böckenförde illustrated the likely consequences of such a process of statutorification—which inevitably had to be incomplete—by listing several examples of state action during the then recent *German Autumn*, which saw the culmination of the state's struggle against the German RAF: State authorities turned to illegal measures not provided for in the Act, which they justified by referring to a "supralegal state of emergency."¹⁴ Böckenförde was eager to show, however, that this argument could never become the legal basis for a state of exception, as the consequence would be "the creation of a perfect, inherently open general authorization to deal with emergency situations, against which every constitutional or legal elaboration and limitation of powers becomes *provisional*."¹⁵ According to Böckenförde, this solution would fatally blur the distinction between the state of emergency and the law of the normal state of affairs. Moreover, the "attempt to constantly 'juridify' concrete emergency situations that are experienced or imagined"¹⁶—such as the anti-terror legislation at that time—went in the same direction. To ensure the temporality of emergency action, the executive should avail itself of clearly communicated and regulated measures, not new restrictive laws. Böckenförde adopted Schmitt's distinction between laws and measures¹⁷ in order to limit the possible damage to

¹¹ See CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP. CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 29–73 (1948).

¹² LEMKE, *supra* note 3, at 121–66.

¹³ BÖCKENFÖRDE, *supra* note 8, at 119.

¹⁴ *Id.* at 111–15.

¹⁵ *Id.* at 114. Böckenförde discusses the dangers of including the figure of the "supralegal state of emergency" into constitutional dogmatics in Ernst-Wolfgang Böckenförde, *Ausnahmerecht und demokratischer Rechtsstaat*, in DIE FREIHEIT DES ANDEREN. FESTSCHRIFT FÜR MARTIN HIRSCH 259, 263 (Hans Jochen Vogel, Helmut Simon & Adalbert Podlech eds., 1981).

¹⁶ BÖCKENFÖRDE, *supra* note 8, at 125.

¹⁷ CARL SCHMITT, DICTATORSHIP 213, 214 (Michael Hoelzl & Graham Ward trans., 2014) ("It is intrinsic to a measure that its course of action is defined, in its content, by a concrete [*konkret*], given situation and that the measure itself is governed by a factual [*sachlich*] goal, so that it receives a different content from case to case, according to circumstances; hence it does not have a genuine legal form.").

the law of the state of normal affairs. Emergency measures were, in his view, characterized by “their temporary nature, purpose-dependence, their merely complementing and suspending effect,” and their proportionality,¹⁸ whereas laws had a greater dignity and permanence.¹⁹ When exceptional measures were turned into regular law, the law of the normal state of affairs—and first and foremost its protection of individual freedom—could not but suffer from this transformation.

While Böckenförde’s own proposition of a constitutional embedding of the state of exception—which was meant to uphold the dichotomies of exception and normalcy as well as measures and laws²⁰—has raised some immediate and subsequent criticism,²¹ his sharp analysis is of obvious relevance for current discussions on the potentially rights-eroding anti-terror legislation in France²² and other places. With regard to anti-terror law, Günter Frankenberg has shown that the paradigm of security has transformed parts of the penal and police law in such a way that “the state of exception has been normalized, the extraordinary has been reduced to a phenomenon of the everyday, and even the taboo of torture has been touched upon—also under cover of the rule of law”²³—a situation Böckenförde anticipated several decades ago. Furthermore, Böckenförde’s warnings of an unlimited state of exception partly coincide with Giorgio Agamben’s scrutiny of the state of emergency. While the first volume of Agamben’s *Homo Sacer* series develops a grand philosophical narrative that claims “the structure of exception . . . to be consubstantial with Western politics,”²⁴ his subsequent work *State of Exception* pays more attention to concrete European and American experiences with emergency regulations in the 20th and 21st centuries. Just as Böckenförde, Frankenberg, and others, Agamben is concerned with the dangers of an unlimited state of emergency. But unlike those legal scholars, Agamben focuses less on the permanent inscription of the exception into law and more on the

¹⁸ BÖCKENFÖRDE, *supra* note 8, at 130.

¹⁹ *Id.* at 127.

²⁰ *See id.* at 125–131; Böckenförde, *supra* note 15, at 264–72.

²¹ *See* Andreas Anter & Verena Frick, *Der verdrängte Carl Schmitt. Ernst-Wolfgang Böckenfördes Diagnostik des Ausnahmezustandes*, in AUSNAHMEZUSTAND. CARL SCHMITTS LEHRE VON DER KOMMISSARISCHEN DIKTATUR 128 (Rüdiger Voigt ed., 2013); Gertrude Lübbe-Wolff, *Rechtsstaat und Ausnahmerecht. Zur Diskussion über die Reichweite des § 34 StGB und über die Notwendigkeit einer verfassungsrechtlichen Regelung des Ausnahmezustandes*, 11 ZEITSCHRIFT FÜR PARLAMENTSFragen [ZPARL] 110 (1980). *See also* GÜNTER FRANKENBERG, POLITICAL TECHNOLOGY AND THE EROSION OF THE RULE OF LAW: NORMALIZING THE STATE OF EXCEPTION 119 (2014) (raising the important question whether Böckenförde’s emergency model structure actually conceptualizes “the unforeseeable, if it really unforeseeable, better . . . than, for instance, the emergency constitution of the Basic Law.”).

²² *See France Approves Tough New Anti-Terror Laws*, BBC NEWS (Oct. 4, 2017), <http://www.bbc.com/news/world-europe-41493707>.

²³ FRANKENBERG, *supra* note 21, at x.

²⁴ GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 7 (Daniel Heller-Roazen trans., 1998).

“transformation of a provisional and exceptional measure into a technique of government.”²⁵ Thus, when Agamben speaks of the normalization of the state of exception, he has the gradual transformation of parliamentary democracy into the model of a governmental or executive democracy, on a national level, in mind.²⁶ While this is a rather broad and general thesis, it has found some support in studies by French historian and theoretician of democracy Pierre Rosanvallon,²⁷ which could, however, only be verified by a thorough comparative analysis.

Within this framework, the following analysis of the political management of the Eurozone crisis—the early manifestation of which Böckenförde commented on in a widely noticed newspaper article—will be directed at the legal constellation of this emergency situation, as well as at the style of European “emergency politics.”²⁸

C. Which Laws Does European Necessity Know?

In 2014, Joseph Vogl, one of the fiercest critics of the EU’s politics in recent years, angrily commented: “For six years now we’ve been good inhabitants of crisis [*Krisenbewohner*], and good inhabitants of crisis we shall continue to be.”²⁹ Vogl alluded to the striking fact that—despite some visible and occasionally militant protests against European crisis politics—a large part of the EU populace seemed to be rather docile, sometimes fatalistic recipients of the plethora of highly unusual measures they were confronted with by old and new crisis managers:

What happened needs to be understood as an exemplary endgame, as an illustration of the creation, development and logic of policy-making processes in the financial-economic regime. The consortium of public and private actors, the improvised meetings, the secret deals, the urgency dictated by the movements of the financial markets—the events of 2008 demonstrate how all this determines the action of government and the fate of contemporary economies and societies. From the hectic negotiations over the bailout of Lehman Brothers to the response to the European debt crisis, it is possible

²⁵ AGAMBEN, *supra* note 4, at 2.

²⁶ *Id.* at 16.

²⁷ PIERRE ROSANVALLON, *LE BON GOUVERNEMENT* (2015).

²⁸ Jonathan White, *Emergency Europe*, 63 *POL. STUD.* 300, 300 (2015).

²⁹ Joseph Vogl, *The Sovereignty Effect. Markets and Powers in the Economic Regime*, 23 *QUI PARLE* 125, 125 (2014).

to observe an informalization of policy-making in the grey zone between economy and politics, a deregulation of its procedures and authorities. Expert committees, governmental bodies, commissions, working groups, ‘Troikas’ of ‘Merkozy’ legitimized solely by special circumstances, extraordinary events, exigencies or exceptions, have effectively taken over government.³⁰

The—at times breathtaking—course of events and inventions of crisis management have contributed to a mentality that accepts the recourse to the exception as the normal operating mode of the EU governance system. Florian Rödl spoke of a “*Notstandsmentalität*” (emergency mentality) that was procedurally condensed into an “unwritten emergency constitution.”³¹ In justification of one of the many rescue packages in 2011, José Manuel Barroso, then President of the EU Commission, declared: “[T]hese are exceptional measures for exceptional times. Europe must never again find itself in this situation,”³² thereby setting the tone for further statements by fellow politicians. By equating the preservation of the euro with the fate of the EU, the presumed inevitability of those measures was underlined.

Ernst-Wolfgang Böckenförde was among the first observers to discuss the EU crisis in the context of the state of exception. In his commentary *Kennt die europäische Not kein Gebot?* (Does Necessity Have No Law?) published in the *Neue Zürcher Zeitung* (NZZ) in June 2010,³³ he depicted the causes for the crisis as well as the ambivalence of the measures taken to master it. Böckenförde accorded with many other observers that the establishment of a monetary union not accompanied by a political union with a coordinated economic policy was a “structural error” of the Maastricht Treaty, which made the eventual outbreak of a financial crisis very likely. He directly referred to the Maastricht decision by the German Constitutional Court’s Second Senate in which the judges—among them Böckenförde himself—had explicitly expressed their political concerns about the stability of a monetary union: “The decision to agree on a monetary union and put it into operation without a

³⁰ JOSEPH VOGL, *THE ASCENDANCY OF FINANCE* 4 (Simon Garnett trans., 2017).

³¹ Florian Rödl, *EU im Notstandsmodus*, 5 *BLÄTTER FÜR DEUTSCHE UND INTERNATIONALE POLITIK* 5, 5 (2012) (my trans.).

³² José Manuel Barroso, Statement at the Press Conference Following the Meeting of the Heads of State or Government of the Euro Area (Oct. 27, 2011) (speech 11/713, available at http://europa.eu/rapid/press-release_SPEECH-11-713_en.htm).

³³ Ernst-Wolfgang Böckenförde, *Kennt die europäische Not kein Gebot?*, *NEUE ZÜRCHER ZEITUNG* (June 21, 2010), https://www.nzz.ch/kennt_die_europaeische_not_kein_gebot-1.6182412.

simultaneous or immediately subsequent political union is a political one, for which the institutions with competence on the matter must take political responsibility.”³⁴

But more important than this retrospective self-affirmation, was Böckenförde’s judgment of EU crisis politics. His article reacted to the initial aid package for Greece—the first EU country struck by the economic crisis—and the subsequent installation of the European Financial Stability Facility (EFSF) in June 2010 which he deemed totally incompatible with the provisions of the Treaty on the Functioning of the European Union (TFEU),³⁵ especially with the “no bail-out clause” in Article 125, which prohibits any liability of EU member states for the debts of each other. While the EU legal framework provided no legal ground for this “transformation of a monetary union into the direction of a transfer union,”³⁶ Böckenförde acknowledged that the only justification for those measures could be the recourse to the state of exception: “Necessity has no law,” which, however, as he made clear, had no legal basis in the European treaties.

The likelihood of illegal action, open or covert, in such situations had already been depicted by Böckenförde in his 1978 Freiburg lecture. *Fiat iustitia pereat mundus* was not a real option for politicians in charge:

[B]ecause the pressure on the state organs to take action is much too strong, especially in states of emergency Should the constitution persist in refusing to recognize a legal state of emergency, this therefore leads not to non-action by state organs in such situations, but to action that ignores the established legal boundaries, which do not seem appropriate to the emergency, and to a transition to a realm devoid of legal constraints.³⁷

His 2010 NZZ statement, however, was not giving a diagnosis or a prediction of things to come, but could be read as an—albeit very reluctant—justification for emergency action presumably not compatible with the law of the state of normal affairs or ordinary legal procedures: “What can be argued in favor of the measures taken . . . is the principle that

³⁴ *Id.* Here I use Christian Joerges’s translation of this sentence, Joerges, *Three Transformations of Europe and the Search for a Way Out of Its Crisis*, in *THE EUROPEAN CRISIS AND THE TRANSFORMATION OF TRANSNATIONAL GOVERNANCE: AUTHORITARIAN MANAGERIALISM VERSUS DEMOCRATIC GOVERNANCE* 25, 31 (Christian Joerges & Carola Glinski eds., 2017).

³⁵ Treaty on the Functioning of the European Union (Consolidated version 2016), 2016 OJ (C 202).

³⁶ Böckenförde, *supra* note 33 (my trans.).

³⁷ BÖCKENFÖRDE, *supra* note 8, at 118.

‘necessity has no law.’”³⁸ While this rather ambiguous formulation left open the extent to which Böckenförde endorsed this argument, he at least suggested that these measures could be considered legitimate, especially when he added that the given situation had to be characterized, indeed, as exceptional. Yet he did not mean for this argument to be *carte blanche* for any political decision. First, the use and reasonableness of the decisions were a matter of discussion. Second, in the absence of a written provision for the state of emergency in EU law, the implication of unwritten emergency competencies was highly dangerous as it would turn “European treaties into soft law at the will of politicians.”³⁹ This warning clearly echoed Böckenförde’s previous refusal to accept the invocation of a “supralegal state of emergency” as an ultimate justification for any breach of law because, in this case, any constitutional and procedural rule would bear the mark of the provisional. Moreover, the constitutional regulation of emergency powers for which he advocated was meant to prevent exactly such a situation in which the EU now seemed to be—to “prevent the maxim ‘necessity knows no law’ from prevailing and the stronger simply doing what he wants. It is simply an illusion to believe that by denying a situation a priori I can bring about that it won’t ever happen.”⁴⁰ Hence, Böckenförde was far from giving unconditional support to the exceptional measures taken in the name of emergency and underlined that ultimately the Court of Justice of the European Union (CJEU) was in charge of judging the legality of the emergency action, which it would later repeatedly and affirmatively do.

Despite these clarifications and caveats, Böckenförde’s article could still be interpreted as supporting—in extreme cases—unlawful measures, even though he illustrated the potentially dangerous political consequences of them. These were, in fact, the precise reasons he—in a national context—pressed for a constitutional embedding of the right to take measures. But, given the unfortunate absence of a constitutionalization of the state of emergency, the question remained whether political protagonists were nevertheless forced to take some necessary action that, by necessity, might be considered legitimate despite its likely illegality and potentially law-eroding character. Böckenförde did not discuss this point directly but seemed to leave a loophole for one significant argument: The damage of non-action or legally-oriented action that proved insufficient with regard to the crisis might cause greater damage than illegal action that might turn out to be successful.

Some legal scholars have indeed seen in Böckenförde’s intervention an insinuation that the value of legality could be ultimately trumped by measures backed by necessity. Andreas Fischer-Lescano reacted with great criticism, regarding this consideration as a violation of the very idea of the rule of law. He directly targets Böckenförde when he states:

³⁸ Böckenförde, *supra* note 33 (my trans.).

³⁹ *Id.*

⁴⁰ ERNST-WOLFGANG BÖCKENFÖRDE, *Biographical Interview with Ernst-Wolfgang Böckenförde*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 369, 385 (Mirjam Künkler & Tine Stein eds., 2017).

According to that school of thought, there is no longer any independent law. The law becomes an instrument of European governance—of political executives, global economic players and strong interest groups, which, in the state of emergency, create what is needed out of nothingness [T]hat deprives Europe, as a community based on the rule of law, of its *raison d'être* Therefore the European legal system cannot countenance a state of emergency. Nor can it allow a system of legal competences to be supplanted by practical political considerations. When authorities take decisions independently of the law, there is no law.⁴¹

Fischer-Lescano especially has the erosion of social rights in mind—which he sees as falling prey to the economic and fiscal adjustment politics since the developments of 2011, discussed at the end of this Article. But his argument is a principle defense of the rule of law, the stability and predictability of which does not, from his perspective, allow for any exception. The very idea of suggesting the potential legitimacy of law-breaking emergency measures would change the whole character of law, turning it indeed into soft law—an instrument bound to be opportunistically used by political and economic elites. As already discussed, this fear was also shared by Böckenförde, whose position Fischer-Lescano represented in a distorted way.

Paul Kirchhof—Böckenförde's former colleague in the Second Senate of the German Constitutional Court—has penned an even more solemn defense of the strict adherence to legal rules. His article *Verfassungsnot* (Constitutional Distress), published in the *Frankfurter Allgemeine Zeitung* in July 2012,⁴² seems to refer to Böckenförde's intervention when he takes a swipe at all those who avail themselves of the proverb "necessity has no law" in order to justify law-bending measures. He considers any temporary disregard of law for a good cause a "risky endeavor," scenting in it the seed of total legal decay and the relapse into a Hobbesian state of nature. In this public intervention, Kirchhof adopts the narrative of the comprehensive civilizing force of law, which defeats the rule of force and structural insecurity. Moreover, he reminds readers of the importance of law in the building of the European Union:

⁴¹ ANDREAS FISCHER-LESCANO, HUMAN RIGHTS IN TIMES OF AUSTERITY POLICY: THE EU INSTITUTIONS AND THE CONCLUSION OF MEMORANDA OF UNDERSTANDING, LEGAL OPINION COMMISSIONED BY THE CHAMBER OF LABOUR, VIENNA (IN COOPERATION WITH THE AUSTRIAN TRADE UNION FEDERATION, THE EUROPEAN TRADE UNION CONFEDERATION AND THE EUROPEAN TRADE UNION INSTITUTE) 3 (2014), https://media.arbeiterkammer.at/PDF/Human_Rights_in_Times_of-Austerity_Policy.pdf.

⁴² Paul Kirchhof, *Verfassungsnot!*, FRANKFURTER ALLGEMEINE ZEITUNG (July 12, 2012), <http://www.faz.net/aktuell/feuilleton/debatten/europas-zukunft/paul-kirchhof-zur-krise-der-eu-verfassungsnot-11817188.html>.

Without law as a condition for any exercise of sovereignty, there is no modern constitutional state, no European Union. Without law, a political mandate has no basis. The European Council, the Commission and its President, the Parliament and the European Court of Justice would lack all legitimacy and legally defined tasks.⁴³

This constructionist, creative force of law can certainly be witnessed in almost any functioning institutional, organizational, or political framework. But Kirchhof's argument becomes even more difficult to reject given the fact that law has always been deeply interwoven with the self-conception of the EU. Thus, when Kirchhof starts his article with the words "[t]he European Union is a community of law," this statement does not primarily betray a legalistic interpretation of the social world not uncommon to legal scholars, but alludes to the very heart of the public narrative and founding rationale of the EU, which was most prominently initiated by Walter Hallstein, the first President of the Commission of the European Economic Community.⁴⁴ As Andreas Vosskuhle—the President of the Federal Constitutional Court of Germany—acknowledged some years ago, however, the integrative force of this conception, beyond technocratic and functional considerations, is rather limited: "Law is not suited—unless in a very restricted sense—to serve as a source of inspiration for a stirring 'European narration.'"⁴⁵ This has become obvious in the failed project of constructing a European Constitution and especially in the wake of the multiple nationalist backlashes in many EU countries over the last few years. As all communities are "imagined communities,"⁴⁶ the nationalist arsenal of myths, rituals, and narratives is usually richer and more powerful than the complex legal construction of the EU or the narrative of law as the warrantor of peace and justice. Nevertheless, the EU's founding narrative of a legal community demonstrates why the breach of law in the state of emergency is a particularly sensitive issue.

⁴³ *Id.* (my trans.).

⁴⁴ See Walter Hallstein, *Die EWG—Eine Rechtsgemeinschaft*, in *EUROPÄISCHE REDEN* 341 (Thomas Oppermann ed., 1979). See also Franz C. Mayer, *Europa als Rechtsgemeinschaft*, in *EUROPAWISSENSCHAFT* 429 (Gunnar Folke Schuppert, Ingolf Pernice & Ulrich Haltern eds., 2005); Michael Stolleis, *Unsere Rechtsgemeinschaft*, *FRANKFURTER ALLGEMEINE ZEITUNG* (June 3, 2016), <http://www.faz.net/aktuell/feuilleton/debatten/europas-zukunft/europas-rechtsgemeinschaft-als-antwort-auf-die-krise-14258665.html>.

⁴⁵ Andreas Vosskuhle, *Europa als Rechtsgemeinschaft—Gefährdungen und Herausforderungen. Vortrag vor der Berlin-Brandenburgischen Akademie der Wissenschaften Berlin* 17 (Mar. 6, 2014), http://jahresthema.bbaw.de/2013_2014/mediathek/EuropaKrise/AndreasVosskuhle_%20Europa%20als%20Rechtsgemeinschaft.pdf (my trans.).

⁴⁶ See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed., 2006).

In Kirchhof's opinion, the stability of law trumps all other arguments. He sees—in agreement with Böckenförde—the neglect of law, visible in the extensive public debt in many EU states, which violates the criteria that had been agreed upon in the course of the establishment of the monetary union, as one main cause for the emergence of the economic crisis. Any hope of restoring financial stability by bypassing legal rules would be a short-sighted step:

The instability of law outweighs financial instability If the authority of law could only be regained through a temporary waiving of economic growth and through a sporadic loss of prosperity, we would have to take this road. The inverse way of achieving financial stability through less and less legal stability, however, is not passable.⁴⁷

This is not passable, Kirchhof contends, because the new criteria of stability and the signing of loan contracts would also not be binding.

Kirchhof's argumentation largely coincides with Böckenförde's by demonstrating the law-eroding dangers of unrestricted emergency action. Kirchhof disagrees with Böckenförde, however, by denying that the financial crisis was deserving of the status of an emergency situation and by emphatically underlining the unconditional primacy of law—which, according to him—may not be trumped by any consideration. Kirchhof's stance, moreover, constitutes, in particular, a fundamental challenge to Carl Schmitt's main argument for the justification and necessity of a temporary suspension of law, which he expounded upon in his early work on dictatorship: "The justification for dictatorship consists in the fact that, although it ignores the existing law, it is only doing so in order to save it."⁴⁸ From this perspective, the actual validity of a law depends on a situation of normality to which the law is fitted.⁴⁹ In abnormal situations, such as when the existence of the state is at stake in a traditional scenario, legal order lacks its very foundation. From this view, this is not a Kelsenian *Grundnorm* but a structure of authority and enforcement, without which law would have no empirical validity.

Admittedly, Schmitt primarily had the legal (Roman) institution of dictatorship in mind and not just any despot pretending to save a particular legal order. He also made it clear that emergency measures should be temporary and purpose-dependent. In principle, this

⁴⁷ Paul Kirchhof, *supra* note 42 (my trans.).

⁴⁸ SCHMITT, *supra* note 17, at xliii.

⁴⁹ Schmitt writes more precisely that "every legal norm presupposes a normal condition as a homogeneous medium in which it is valid." *Id.* at 118.

argument of saving legal order by ignoring it and restoring the state of normal affairs could even be used in favor of an illegal suspension of law. In support of this position, it would be necessary, initially, to demonstrate that the abnormal situation to which an emergency action responds is an actual existential threat and not just a grave disturbance to political or social order, which both build the framework of legal order. Additionally, it would need to be shown—in contrast to following orderly legal procedures—that the suggested emergency measures would be the only ones that promise effective results: Acting on a path with “no alternatives,” as has become proverbial during the management of the financial crisis, is a common strategy of justification by politicians. The soundness and legitimacy of this argument, however, has to be constantly and critically assessed.⁵⁰ In any other case in which the suspension of law cannot be convincingly justified, “legalists” could doubt with good reason that these measures, even if effective from a functionalist perspective, contribute to restoring the state of normal affairs. The law of the latter will inevitably be changed as political and legal uncertainty increases: “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 they will be enforced,”⁵¹ which also holds true for already existing legal provisions. Thus, Jonathan White is correct in pointing out the fact that emergency rule decisively recalibrates the scale of normative and cognitive expectations, “of what is thought realistic to expect, perhaps even of what is thought acceptable.”⁵²

The order that crisis managers were attempting to uphold hinged on the common currency—the Euro. While they made it clear that the measures taken were “without alternative,” they did not dare to justify them as an unlawful necessity or an open breach of law. Undeniably, the impression of political action in a legal void would be misleading, and we are far from the model of commissary dictatorship suspending the legal order discussed by Schmitt—which becomes evident by returning to the concrete legal circumstances of EU emergency politics. The complex pluralist constellation of the EU and its main actors as a system bound by national, supranational, and international law makes the analysis of emergency actions’ legal consequences much more demanding than on a mere national level, which has traditionally served as the main point of discussion on the state of emergency by Schmitt and other scholars. While Böckenförde, Kirchhof, and many others underline that the credit agreements initiated in 2010 could not be supported by existing EU law, the heads of Euro states tried to circumvent this obstacle by turning to the option of

⁵⁰ See LEMKE, *supra* note 3, at 264–65.

⁵¹ Jonathan White, *Authority After Emergency Rule*, 4 MOD. L. REV. 585, 607 (2015).

⁵² *Id.* It should certainly not be overlooked that the “state of normal affairs” is also always accompanied by the dynamics of expectation building, as legal norms are always applied and enforced selectively, which cannot leave the expectations of legal subjects untouched.

international law.⁵³ This procedure had always been a possible path for some EU states when confronted with a lacking consensus among the EU member states—such as in the decision on the Schengen cooperation regime—and evidently belongs to the legal repertoire of sovereign nation states. Moreover, it was no surprise that this national reserve of sovereignty was especially asserted in times of crisis in which the normal working mode of politics was obstructed. Nevertheless, this avoidance of EU law is somehow at odds with the process of European integration, particularly with the political will to cooperate at the EU level as stated, for example, in the enhanced cooperation mechanism in the Treaty of Amsterdam.⁵⁴

The institution of the European Financial Stability Facility (EFSF), a joint-stock company situated in Luxembourg, is an instrument entirely constituted by the conclusion of contracts between respective governments, and is hence generated by private law. This solution was joined by the launch of the European Financial Stabilisation Mechanism (EFSM)—an EU funding program supervised by the Commission and to which all EU member states agreed.⁵⁵ In 2012, the European Stability Mechanism (ESM) was installed with the purpose of replacing these provisional devices. The ESM—constituted by an intergovernmental treaty between the Eurozone member states—is an intergovernmental organization operating under public international law. Finally, this mechanism was harmonized with the Treaty on the Functioning of the European Union (TFEU), especially with Article 125, by amending Article 136, the third paragraph of which now reads: “The Member States whose currency is the Euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the Euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”⁵⁶

⁵³ See Frank Schorkopf, *Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtssetzung*, 71 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTSWISSENSCHAFTLER [VVDStRL] 183, 205–11 (2012).

⁵⁴ Bruno de Witte, *Using International Law in the Euro Crisis. Causes and Consequences*, ARENA WORKING PAPER 4, 2 (2013), <http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2013/wp4-13.html>.

⁵⁵ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, May 12, 2010, 2010 OJ (L 118).

⁵⁶ TFEU art. 136(3).

The legal validity of all these creative measures was a contentious issue⁵⁷ but was backed by many legal experts⁵⁸—in particular by several supreme and constitutional courts, including the CJEU.⁵⁹ While some of the courts demanded adjustments concerning the procedural paths of EU crisis politics—such as the German Constitutional Court, which requested a deeper involvement of the German parliament in the ESM decision⁶⁰—it can hardly be denied that these courts are put under enormous pressure during proclaimed times of emergency. Christian Kreuder-Sonnen has argued with regard to the controversial “no bail-out clause”:

While the finding of a violation of this provision is certainly a matter of degree and legal interpretation, it is hardly surprising that the CJEU as well as the German Constitutional Court would not dare to interfere judicially with the political necessities apparent in this economic emergency situation. Present-day exceptionalism is more generally characterized by courts procedurally upholding the appearance of judicial checks on executive power while substantially providing legal cover for emergency measures through (sometimes far-fetched) teleological interpretations of authority functions.⁶¹

⁵⁷ See, e.g., Ulrich Hufeld, *Zwischen Notrettung und Rütlichschwur: der Umbau der Wirtschafts- und Währungsunion in der Krise*, 2 INTEGRATION 117, 122 (2011) (considering this kind of stability politics, by adopting Schmitt's terminology, a “constitution-breaking measure” [*verfassungsdurchbrechende Maßnahme*] and regarding the amendment of Article 136 as an attempt to give this measure a normative basis). Cf. CARL SCHMITT, CONSTITUTIONAL THEORY 154 (Ellen Kennedy trans., 2008).

⁵⁸ See Schorkopf, *supra* note 53, at 205.

⁵⁹ See Case C-370/12, Pringle v. Government of Ireland, Ireland and Attorney General of Ireland, ECLI:EU:C:2012:756.

⁶⁰ See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Feb. 28, 2012, 130 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 318.

⁶¹ See Christian Kreuder-Sonnen, *Global Exceptionalism and the Euro Crisis: Schmittian Challenges to Conflicts-Law Constitutionalism*, in THE EUROPEAN CRISIS AND THE TRANSFORMATION OF TRANSNATIONAL GOVERNANCE: AUTHORITARIAN MANAGERIALISM VERSUS DEMOCRATIC GOVERNANCE 71, 75 (Christian Joerges & Carola Glinski eds., 2017); see also White, *supra* note 28, at 306; for an overview of important court rulings, see Federico Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, 32 BERKELEY J. INT'L L. 64 (2014).

While many further authors lament this obedient acceptance of “the primacy of discretionary politics,”⁶² too, others appreciate this general political trend and embrace the Schmittian moment.⁶³

Even the acceptance of the legality of emergency measures, however, could not deny the fact that the law of normal affairs has been changed by the facticity of crisis instruments.⁶⁴ This holds true for the meaning of specific provisions such as Article 125, but applies to the character of the whole legal order. As Frank Schorkopf has convincingly argued, the circumvention of EU law, with its often protracted and politically complicated procedures, by means of international public law, which the heads of state turned to for pragmatic reasons, may ultimately put the entire idea of a supranational order as well as the image of the EU as a legal community into question.⁶⁵ This might also be seen as a deviation from the project of “integration through law.”⁶⁶

D. The Political and Social Costs of Crisis Management: Emergency Politics as Post-Democratic Governance and Authoritarian Constitutionalism?

Christian Joerges summarizes this constellation, alluding not only to Schmitt but also to Ernst Fraenkel’s path-breaking study on the “dual state”⁶⁷ during the NS regime, as a “coexistence or collision of supranational European law and an intergovernmental law of measures

⁶² Michelle Everson & Christian Joerges, *Who is the Guardian for Constitutionalism in Europe After the Financial Crisis?*, in LSE “EUROPE IN QUESTION” DISCUSSION PAPER SERIES 63, 23 (2013).

⁶³ See the pamphlet by ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 4* (2010), for possibly the most prominent example, in the context of the American debate, in which the authors declare in a triumphal fashion:

We live in a regime of executive-centered government, in an age after the separation of powers, and the legally constrained executive is now a historical curiosity. As against liberal constitutional theorists . . . and liberal theorists of the rule of law . . . we argue that in the modern administrative state the executive governs, subject to legal constraints that are shaky in normal times and weak or nonexistent in times of crisis.

It might be argued, however, that the authors have underestimated the veto power of American courts, as President Donald Trump has had to realize repeatedly.

⁶⁴ See Schorkopf, *supra* note 53, at 207.

⁶⁵ See *id.* at 208.

⁶⁶ Christian Joerges, *Europas Wirtschaftsverfassung in der Krise*, 51 DER STAAT 357, 357 (2012).

⁶⁷ See ERNST FRAENKEL, *THE DUAL STATE. A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941).

[*Maßnahmerecht*].⁶⁸ In his lecture on the repressed state of emergency, Böckenförde defended the usefulness of measures in times of crisis as clearly targeted action that was not ennobled and made permanent by the character of law. Fraenkel had previously demonstrated in *The Dual State* how unrestricted executive measures could easily become a permanent governing technique that would lead to an always extending “prerogative state” (*Maßnahmenstaat*)⁶⁹ disregarding legal and procedural prescriptions. Questions of formal legality aside, this mode of emergency politics Joerges has in mind calls for a further assessment of its functioning and political legitimacy. By looking for the consistent features of emergency politics, the exception stops being analyzed as exceptional, while this style of politics—which has a certain typicality to it, even in cases in which law is not circumvented or formally suspended—is tested for a permanent legacy or long-term damage. Hence, Agamben’s request to scrutinize the state of emergency no longer as a political-legal *structure*, but as a paradigm of government, a political *practice*, was a helpful suggestion seized by several scholars.⁷⁰

Lamenting a deficit of democracy in the governance structure of the EU has been a classical topos in the European academic and public debate for a long time.⁷¹ Böckenförde has repeatedly argued that a rich supranational democracy was contingent on the existence of a genuine European *demos*, in the—at least current—absence of which the strengthening of the EU’s federative structure respecting the national cultures of the member states would be the main task.⁷² In general, authors who tend to apply the standards of democratic systems on a national scale are much more critical in this regard than observers who take the EU as a political order *sui generis*, which has to be judged in their eyes by different means. Inspired by the long-time dominant academic projections of deliberative democracy, these last-mentioned authors tried to develop a model of deliberative supranationalism, which they saw as mainly inherent in the structure of EU comitology.⁷³ To them, expertocratic deliberation compensates for the often complained about lack of democracy and justifies the claim to consider the EU a fundamentally legitimate and just political

⁶⁸ Joerges, *supra* note 66, at 371 (my trans.).

⁶⁹ FRAENKEL, *supra* note 67, at 3–64.

⁷⁰ See, e.g., Oren Gross, *What “Emergency” Regime?*, 13 CONSTITUTIONS 74 (2006); also see White, *supra* note 28, for helpful information regarding the EU crisis.

⁷¹ See, e.g., PETER MAIR, *RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY* 99–142 (2013); Vivien A. Schmitt, *Democracy and Legitimacy in the European Union*, in *THE OXFORD HANDBOOK OF THE EUROPEAN UNION* 661 (Erik Jones, Anand Menon & Stephen Weatherill eds., 2012); Armin Schäfer, *Nach dem permissiven Konsens. Das Demokratiedefizit der EU*, 34 LEVIATHAN 350 (2006).

⁷² ERNST-WOLFGANG BÖCKENFÖRDE, *Which Path is Europe Taking?*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 343, 360 (Mirjam Künkler & Tine Stein eds., 2017).

⁷³ See, e.g., Jürgen Neyer, *Justice or Democracy? Power and Justification in the EU and Other International Organizations*, in *CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND* 33 (Rainer Nickel ed., 2010).

structure—an epistemic reduction of the idea of deliberative democracy vehemently criticized by many commentators.⁷⁴ Even if the normative evaluation of EU governance varies with different conceptions of democracy and legitimacy, there is little dissent with regard to the fact that the EU system is dominated by executive power—a constellation which, unsurprisingly, has become even more obvious in the wake of the financial crisis—which naturally privileges members of the executive who are urged to take and claim for themselves the necessity of taking fast and efficient measures. The often time-consuming legitimation by procedure (Niklas Luhmann) is hollowed out and often trumped by shortsighted output legitimacy and a political style that has been termed “intrusive executive managerialism”⁷⁵ or “technocratic authoritarianism.”⁷⁶

Executive dominance does not entail a clear picture of sovereignty, as executive functions in such a complex edifice as the EU are necessarily dispersed or even fragmented.⁷⁷ When Schmitt famously defines the sovereign as the one “who decides on the exception,”⁷⁸ not a single person or collective agent emerges in the management of the financial crisis who qualifies as sovereign, whose power had to be impartible in the classical conception of sovereignty. On the one hand, as already shown, EU law does not allow a formal declaration of emergency and hence does not produce a sovereign qualified by such a suspension of law. On the other hand, interpreting Schmitt’s ambiguous term “to decide on the exception” in a different way, namely by focusing on the selection of emergency measures during or within the state of exception, also fails to bring a sovereign entity to the fore. Nevertheless, the absence of sovereignty in a strong sense does not preclude the search for dominant or hegemonic structures in the EU emergency regime.⁷⁹ After the Commission had lived up to its designated role of initiation in the first phase of the crisis by introducing the “European Semester”—a new survey procedure providing the Commission with an overview of member states’ national budget plans and allowing it to give explicit budget recommendations—the European Council soon took the leading position.⁸⁰ In 2011, Jürgen Habermas sourly

⁷⁴ For this debate and the basic ideas and challenges of deliberative democracy on supranational and transnational deliberation, see Jan Christoph Suntrup, *Zur Verfassung der deliberativen Demokratie. Strukturelle Probleme und Perspektiven*, 49 DER STAAT 605, 619–21 (2010).

⁷⁵ Joerges, *supra* note 34, at 41.

⁷⁶ ASTRID SÉVILLE, THERE IS NO ALTERNATIVE: POLITIK ZWISCHEN DEMOKRATIE UND SACHZWANG 341 (2017).

⁷⁷ See Deirdre Curtin, *Challenging Executive Dominance in European Democracy*, in THE EUROPEAN CRISIS AND THE TRANSFORMATION OF TRANSNATIONAL GOVERNANCE: AUTHORITARIAN MANAGERIALISM VERSUS DEMOCRATIC GOVERNANCE 203, 208 (Christian Joerges & Carola Glinski eds., 2017).

⁷⁸ SCHMITT, *supra* note 9, at 5.

⁷⁹ Franziska Brachthäuser & Anton Haffner, *Gekommen, um zu bleiben. Das Krisenregime in Europa und die Rede vom Ausnahmezustand*, 50 KRITISCHE JUSTIZ [KJ] 19, 25–26 (2017).

⁸⁰ Curtin, *supra* note 77, at 210–11.

commented on this drift by pointing to the deplorable antidemocratic consequences of the now-established emergency style, and, moreover, to the obvious power asymmetry in the Council itself, in which German Chancellor Angela Merkel and French President Nicolas Sarkozy projected as the main protagonists who framed the fate of the EU to come:

All signs point to the fact that the two leaders want to expand the executive federalism implicit in the Lisbon Treaty into a form of intergovernmental rule by the European Council, moreover, one which is at odds with the spirit of the treaty. Such a regime of central steering by the European Council would enable them to transfer the imperatives of the markets to the national budgets. This would involve using threats of sanctions and pressure on the disempowered national parliaments to enforce non-transparent and informal agreements. In this way, the heads of government would invert the European project into its opposite. The first supranational democracy would be transformed into an arrangement for exercising a kind of post-democratic, bureaucratic rule.⁸¹

Habermas calls attention to several aspects. He fears a subjection of politics to economic rationality—a tendency which Böckenförde and many other authors had already underlined before the crisis when criticizing the dominance of economic-functional integration.⁸² Furthermore, Habermas disapproves of the regress to intergovernmentalism—the power shift to the European Council, which is not backed by European primary law—and the disempowerment of the parliaments. Apart from the fact that the European Parliament has been mostly degraded to a bystander during crisis management,⁸³ Habermas mainly focuses on the consultation of national parliaments, the actual practice of which he deems post-democratic.

To what extent is this judgment adequate? As to the legitimacy structure of the EU, the European Council is not subject to any control by other European institutions, although the

⁸¹ JÜRGEN HABERMAS, *THE CRISIS OF THE EUROPEAN UNION: A RESPONSE* 52 (Ciaran Cronin trans., 2012; trans. reviewed).

⁸² See BÖCKENFÖRDE, *supra* note 72, at 350–57.

⁸³ Stephan Dreischer has argued that the avoiding of the EP is, given the dominance of the intergovernmental paradigm, less surprising than the fact that it has not received further competences with regard to the newly established structures which result from the executive emergency measures; see Dreischer, *Das Europäische Parlament—Fit durch die Krise? Parlamentarische Funktionserfüllung im Kontext von Lissabon-Vertrag und Finanzkrisenbewältigung*, in *SUPRANATIONALITÄT UND DEMOKRATIE. DIE EUROPÄISCHE UNION IN ZEITEN DER KRISE* 111, 129–30 (Nabila Abbas, Annette Förster & Emanuel Richter eds., 2015).

heads of state do have to justify their decisions in their respective countries' parliaments and public spheres. At times when the Council actually takes the role of a European quasi-legislator, it could be discussed if this procedure of legitimation suffices.⁸⁴ Formally, national parliaments have been involved in a legally prescribed way as they are tasked with ratifying treaties, such as the ESM or the European Fiscal Compact. Moreover, in the case of Germany, the Constitutional Court has emphasized the need for continuous consultation with the Bundestag whenever decisions with far-reaching consequences for budgetary policy are made.⁸⁵ In this regard, Germany can even be viewed as "[t]he most prominent example of national parliaments' empowerment"⁸⁶ during the crisis. Nevertheless, it must also be stated that the control function of several other parliaments suffered. Aleksandra Maatsch has shown in a comparative study on the formal involvement of all Eurozone members' national parliaments that especially southern European parliaments have become disempowered by different kinds of "emergency legislation" via fast-track procedures that were usually backed by national courts and supported by political and economic pressure on the national governments from abroad.⁸⁷ Thus, these power asymmetries damage the legitimacy of the economic governance at the European level.

Moreover, formal parliamentary involvement does not ensure that parliaments live up to their task as power-checking, representative, and deliberative institutions. Practical constraints systematically prevent a critical assessment of the matter to be decided on, a situation that is fostered by TINA-narratives—" [t]here is no alternative"⁸⁸—from the executive:

Whether it be the survival of the Euro, the EU, a country's economy or peaceful coexistence among Europeans (outcomes often merged into a single, existential question), the stakes are cast in maximal form. Political choices have been securitised, with drastic action presented as urgent and non-negotiable—to be accepted as a 'package' rather than pulled apart

⁸⁴ See Sonja Puntscher Riekmann, *Geld und Souveränität. Zur Transformation der Europäischen Union und der Mitgliedstaaten durch die Finanz- und Fiskalkrise (2008–2013)*, in *SUPRANATIONALITÄT UND DEMOKRATIE: DIE EUROPÄISCHE UNION IN ZEITEN DER KRISE* 203, 205 (Nabila Abbas, Annette Förster & Emanuel Richter eds., 2015).

⁸⁵ See Bundesverfassungsgericht, Sep. 12, 2012, 132 BVERFG 195.

⁸⁶ Aleksandra Maatsch, *Empowered or Disempowered? The Role of National Parliaments During the Reform of European Economic Governance* 11 (Max Planck Institut für Gesellschaftsforschung [MPfG], Discussion Paper No. 15/10, 2015).

⁸⁷ See *id.* at 2.

⁸⁸ See generally SÉVILLE, *supra* note 76; for information on the financial crisis, specifically, see SÉVILLE, *supra* note 76, at 271–411.

and discussed in its details, and to be adopted to a timetable of ultimatums. Investor confidence plays the role accorded in other settings to the terrorist's ticking time bomb.⁸⁹

This securitization proves even more effective through the asymmetry of information, which often results from a strategy of secrecy on the part of executive officials and is nurtured by a mode of emergency politics that relies in large part on secret negotiations.⁹⁰ The informal character of decision structures contributes to this lack of transparency.

The downplaying of substantial parliamentary power might even be considered legitimate in situations where urgent emergency measures are demanded to restore the state of normal affairs. One of the structural dangers of emergency politics, however, is that it produces often groundbreaking and almost revolutionary measures with long-term consequences that are worthy of special critical scrutiny and discussion. At the same time, the framing of this type of politics as "emergency" or "necessary" frequently precludes the exact possibility of critical evaluation.⁹¹ Even commentators who see the role of national parliaments upgraded in the course of the financial crisis primarily ascribe them a merely expressive function while denying them the status of a real institutional check on the executive.⁹²

In sum, the project of integration through law runs the risk of being replaced by a strategy of "integration through fear"—which aims at taming critical debate on competing political projects on the future of the EU⁹³ and thus falls short of the main political task Böckenförde identifies in the context of the crisis.⁹⁴ With regard to the idea of representative democracy, the consequence is—certainly to different degrees among the Eurozone member states—a lack of representation, as parliaments lose their role as a link between the polyvocal will of the national *demos* and the self-instituted crisis managers, especially neglecting those who are most affected by the crisis.⁹⁵ Thus, this hollowing-out of parliamentarism indeed

⁸⁹ White, *supra* note 28, at 307.

⁹⁰ Curtin, *supra* note 77, at 219–25.

⁹¹ White, *supra* note 28, at 307; Kreuder-Sonnen, *supra* note 61, at 79–80.

⁹² Frank Wendler, *Parliaments as Arenas of Representation and Public Contestation: Insights from the Eurozone Crisis*, in NATIONAL PARLIAMENTS AFTER THE LISBON TREATY AND THE EURO CRISIS: RESILIENCE OR RESIGNATION? 177, 180 (Davor Jančić ed., 2017).

⁹³ Joseph H.H. Weiler, *Editorial: Integration Through Fear*, 23 EJIL 1, 1–2 (2012).

⁹⁴ Böckenförde, *supra* note 33.

⁹⁵ See Johannes Pollak, *Compounded Representation in the EU: No Country for Old Parliaments?*, in POLITICAL REPRESENTATION IN THE EUROPEAN UNION: STILL DEMOCRATIC IN TIMES OF CRISIS? 19, 32 (Sandra Kröger ed., 2014).

deserves in many cases the label of “post-democracy,” which Colin Crouch coined in order to underline the discrepancy between the formal-procedural intactness of political regimes and their factual devaluation.⁹⁶ As a consequence, citizens’ alienation is likely to rise, leading to a further gap between citizens and the elite, which is expressed in the ascent of political parties hostile to the European Union.⁹⁷

Other instruments of crisis management, however, showed the lack of legitimacy on a more formal level. The prominent role of the European Central Bank (ECB) in the course of crisis management supported the impression of a technocratic and managerial shift of decision-making. This was especially visible when the ECB articulated its will to buy sovereign bonds issued by heavily indebted Eurozone members in the framework of its Outright Monetary Transactions Program (OMT). While this eventually proved very effective in the short run, it has often been considered a transgression of the ECB’s mandate.⁹⁸ When Joseph Vogl, however, polemically attacked the “informality of powerful executive bodies that might be described as hastily convened ‘committees of public safety,’”⁹⁹ he alluded in particular to the so-called “Troika” composed of the EU Commission, the ECB, and the International Monetary Fund (IMF). This ad hoc institution was the sharpest sword in the implementation of the austerity policy with which aid recipient countries were confronted. The grants for these countries were conditioned on massive structural reforms and forced saving measures that were agreed upon in “Memoranda of Understanding” (MoU) devised by the Troika. Not only was the procedurally dubious installation of this committee criticized from the start, but also its lack of accountability: While the Commission and the ECB were *per se* accountable to the European Parliament, the IMF was not exposed to such supervision, and neither was the body of the Troika in its entirety.¹⁰⁰ In a report, the European Parliament denounced *inter alia* this lack of accountability, the non-transparent mode in which the MoU were set, the disregard of social rights, and the general disputability of some of the prescribed economic measures.¹⁰¹

⁹⁶ See COLIN CROUCH, *POST-DEMOCRACY* (2004).

⁹⁷ See Puntscher Riekman, *supra* note 84, at 207.

⁹⁸ See Kreuder-Sonnen, *supra* note 61, at 76 (speaking of a “seizure of competences by executive self-empowerment”); also see Christoph Möllers, *Krisenzurechnung und Legitimationsproblematik in der Europäischen Union*, 43 *LEVIATHAN* 339, 349 (2015) for a more nuanced discussion.

⁹⁹ See VOGL, *supra* note 30, at 6.

¹⁰⁰ See Dermot Hodson, *The European Central Bank: New Powers and New Institutional Theories*, in *INSTITUTIONS OF THE EUROPEAN UNION* 213, 231–32 (Dermot Hodson & John Peterson eds., 4th ed. 2017).

¹⁰¹ European Parliament, *Report on the Enquiry on the Role and Operations of the Troika (ECB, Commission and IMF) with Regard to the Euro Area Programme Countries*, Feb. 28., 2014 (2013/2277(INI)).

While emergency politics within the framework of the War on Terror often entails the permanent erosion of liberal defensive rights—as Böckenförde has rightly argued—the austerity policy decreed by the crisis managers represents an attack on social rights and the continuation of the “emancipation from the *social* market economy”¹⁰² Böckenförde witnessed before. In this context, the exceptional and severe measures that have been taken to save the common currency and the future of debtor states were not meant as a temporary remedy restoring the disturbed order, but as a transformative step that then President of the Commission José Manuel Barroso himself disclosed as no less than “a silent revolution.”¹⁰³

What Böckenförde and many others always aspired for, namely seeing a monetary union accompanied by a common economic policy on the European level, seems to have now been taking form in recent years. The crisis has thus triggered a deeper integration of the EU in this respect, the content and fashion of which, however, bear the marks of the emergency situation: There are many observers who see this development as a form of “authoritarian constitutionalism.”¹⁰⁴ Rescue packages and stability mechanisms paralleled several decrees that were ultimately condensed into a comprehensive economic and fiscal policy imposed on the Eurozone states and other EU member states. The “European semesters”; the “six pack,” composed of five regulations and one directive;¹⁰⁵ the “Fiscal Compact” that requires ratification as a condition for receiving funds from the ESM;¹⁰⁶ and further measures¹⁰⁷ have installed the centralized monitoring of the drafting of national budgetary plans, the supposed prevention and correction of macroeconomic disequilibria, a “debt brake,” and many other instruments that interfere with countries’ sovereignty on fiscal and budgetary

¹⁰² BÖCKENFÖRDE, *supra* note 72, at 351 (emphasis in the original).

¹⁰³ José Manuel Barroso, Speech at the European University Institute (June 18, 2010) (cited in Oberndorfer, *supra* note 7, at 187).

¹⁰⁴ See Oberndorfer, *supra* note 7; Hans-Jürgen Bieling, *Volkssouveränität und europäische Integration: Zur Transformation eines ehemals komplementären Spannungsverhältnisses*, in SUPRANATIONALITÄT UND DEMOKRATIE: DIE EUROPÄISCHE UNION IN ZEITEN DER KRISE 63, 77–80 (Nabila Abbas, Annette Förster & Emanuel Richter eds., 2015); Ralph Guth, *EU-Krisenpolitik als Verrechtlichung der Demokratie: Autoritärer Europäischer Konstitutionalismus und die Negation der Volkssouveränität*, 2 MOMENTUM QUARTERLY 33 (2013).

¹⁰⁵ Regulations (EU) No. 1173/2011, 1174/2011, 1175/2011, 1176/2011, and 1177/2011, and Directive 2011/85/EU, 2011 OJ (L 306/1, 8, 12, 25, 33, 41).

¹⁰⁶ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union [Fiscal Compact], available at http://europa.eu/rapid/press-release_DOC-12-2_de.htm.

¹⁰⁷ See Bieling, *supra* note 104, at 78–79; FALK ILLING, DIE EUROKRISE. ANALYSE DER EUROPÄISCHEN STRUKTURKRISE 53–177 (2017); Caroline de la Porte & Elke Heins, *Game Change in EU Social Policy: Towards More European Integration*, in THE EUROZONE CRISIS AND THE TRANSFORMATION OF EU GOVERNANCE: INTERNAL AND EXTERNAL IMPLICATIONS 157, 163–70 (Maria João Rodrigues & Eleni Xiarchogiannopoulou, eds., 2014).

policy.¹⁰⁸ Thus, they touch the “sanctum” of national parliaments and enable access to a variety of policy areas that have so far been reserved for national politics, including tax, labor, and social policy.¹⁰⁹

This economic constitutionalization can be interpreted as authoritarian because it, unlike previous steps on the way to a European economic constitution, largely avoided the challenging “ordinary legislative procedure” provided in Article 48 of the Lisbon Treaty, and implemented a central supervisory power of EU institutions, especially the Commission and the ECB, thus exhibiting distinct technocratic-authoritarian traits.¹¹⁰ What has sometimes been regarded as “an illegal injection [*Einpressung*] of new economic policy into the European constitution”¹¹¹ has especially provoked criticism with regard to the treatment of countries in need of immediate financial support. While no one can seriously put the necessity of the conditionality of loans into question, the concrete fashion in which the Memoranda of Understanding were set is equivalent to the incapacitation of the debtor state with all antidemocratic consequences, and, moreover, was seen by many legal experts as an infringement of basic social rights. For example, those rights are anchored in the Charter of Fundamental Rights of the European Union (CFR)¹¹²—which is binding under Article 6 of the Treaty on European Union—and in the European Convention on Human Rights (ECHR).¹¹³

Only few courts, however, dared to judge some of the measures as unlawful, which has been discussed above. When they did, such a decision was not seen as legitimate, but as dysfunctional by economic constitutionalists. When, for example, the Portuguese Constitutional Court annulled several budget measures targeted at the reduction of public spending,¹¹⁴ the EU Commission commented in a statement that this verdict “raised further doubts about the government’s capacity to push through the necessary reforms. As a consequence, investors demanded higher premiums to reflect increased sovereign risk and Portuguese bond yields decoupled from other European sovereigns.” Furthermore, the

¹⁰⁸ See Oberndorfer, *supra* note 7, at 187–94.

¹⁰⁹ Rödl, *supra* note 31, at 5, 7.

¹¹⁰ See Bieling, *supra* note 104, at 79.

¹¹¹ Oberndorfer, *supra* note 7, at 188 (my trans.).

¹¹² Charter of Fundamental Rights of the European Union, 2000 OJ (C 364/1).

¹¹³ See, e.g., FISCHER-LESCANO, *supra* note 41; Margot E. Salomon, *Of Austerity, Human Rights and International Institutions*, in LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS 2 (2015).

¹¹⁴ Portuguese Constitutional Court, April 5, 2013, Case No. 187/2013, <http://www.tribunalconstitucional.pt/tc/acordaos/20130187.html>.

Commission lamented the government's "shrinking room for manoeuvre."¹¹⁵ This statement exceeded the usual rivalries between the fields of law and politics that cannot be witnessed only in times of crisis, by expressing a more fundamental ignorance:

The Commission . . . held the Constitutional Court responsible for the risk of destabilising the economic resistance of the system and above all for discrediting the government in front of the investors, with possible consequences on the interest rates on public debt. All of this without any regard for the fundamental principles of a liberal democratic State [sic!] or for the separation of powers and the independence of judges.¹¹⁶

In sum, the European austerity policy is a step towards more supranational integration of the EU. Its authoritarian form and imprudent content, however, runs the risk of amplifying the disintegrative tendencies within the EU by augmenting social inequalities, neglecting national economic traditions, betraying a technocratic, almost colonialist spirit—which lacks legitimacy by trying to shun agonistic democratic debate and evokes all kinds of political resignation or resistance¹¹⁷—and by demonstrating a managerial depreciation of the rule of law at least in some regards. This latter development is profoundly at odds with the project of the EU as a legal community and proves to be an even more serious strategic mistake at times in which national governments, such as the Polish, start to challenge and damage the idea of the rule of law and the institution of an independent judiciary for their benefit.

E. Conclusion

Ernst-Wolfgang Böckenförde has not publicly commented on the European management of the financial crisis since his piece in 2010. It is very unlikely, however, that he would approve of the recent developments. Having demanded for a long time that the monetary union be accompanied by a common European economic policy, the form of this endeavor certainly does not correspond to the political union he has in mind. In his NZZ article, he made it utterly clear that the

¹¹⁵ European Commission, *The Economic Adjustment Programme for Portugal. Eighth and Ninth Review*, Occasional Papers 164 (Nov. 2013), para. 88, 30, http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp164_en.pdf. Also see the comment on the Commission's reaction in, Luca de Lucia, *The Rationale of Economics and Law in the Aftermath of the Crisis: A Lesson from Michel Foucault*, 12 EUCONST 445, 470 (2016).

¹¹⁶ De Lucia, *supra* note 115, at 470.

¹¹⁷ Bieling, *supra* note 104, at 79.

European Union must take the character of a federation, a political federation of the European peoples No longer must it appear as a technical-pragmatic construct of governmental dominance; on the contrary, it must embody an idea of political order that establishes a relation to the peoples of Europe and is open to their participation.¹¹⁸

This ideal has been foiled by a management of crises and re-shaping of the EU that bears technocratic and sometimes even authoritarian traits, as discussed above.

Böckenförde's attitude towards the often-claimed state of emergency has not been without ambivalence. While he has been—though sometimes overlooked—very critical of the early political reactions to the financial crisis, even explicitly alerting the public to politicians' tendencies to degrade the European treaties to mere soft law utilizable at will, his public intervention could still be interpreted as having left the possibility of a legitimate recourse to the unlawful state of exception—given the lamentable absence of a legal embedding of emergency politics—open. Nevertheless, he has always been frank about the political dangerousness of this constellation. As Paul Kirchhof pointed out even more clearly, a partial suspension or circumvention of legal order usually does not leave the “law of normal affairs” untouched, but changes its content and validity. The empirical validity of laws depends largely on social expectations about the prospects of their application in the future; the open breach of law in the name of necessity or other overriding causes will likely alter those expectations decisively, just as audacious reinterpretations of existing laws—such as the “no bail-out” provision—will do.

Admittedly, the major protagonists were willing to present the political paths and measures chosen during the Eurozone crisis as at least formally legal, which was supported by several courts. But even more important than the legal evaluation of this instance of crisis politics—which is far from unanimous among legal experts—are the political consequences. In this regard, the handling of the financial crisis is not best described with the term “state of emergency,” but rather shows the antidemocratic and sometimes law-depreciating effects of a managerial style of emergency politics being publicly justified by exceptionality and necessity. Moreover, what has been declared “exceptional measures” has been condensed into a new form—an authoritarian economic regime politically unconceivable before the outbreak of the crisis. Thus, the preservation of the Euro did not restore the *status quo ante* but entailed revolutionary effects in a procedural and politico-economical respect.

In sum, Agamben's premonition has been affirmed in this case: Emergency politics takes a paradigmatic form and tends to yield permanent effects, most often to the detriment of

¹¹⁸ Böckenförde, *supra* note 33 (my trans.).

specific basic rights and democratic values, which has sparked severe societal contestation. Irrespective of the economic efficiency of the emergency measures—which would demand a discussion in its own right—the managerial mode of politics tends to undermine the legitimacy of the supranational edifice. This *modus operandi* and the effects of European governance have, according to Fritz Scharpf, “put an end to the permissive consensus and benign neglect that long characterized citizen’s attitude toward the EU.”¹¹⁹ While Böckenförde’s reflections and those by other observers on the possible illiberal, antisocial, and antidemocratic consequences of the handling of emergency situations are still pertinent today, the governmental style of exceptionality will continue to deserve further reflection in the future.

¹¹⁹ Fritz W. Scharpf, *Political Legitimacy in a Non-Optimal Currency Area 2* (Max Planck Institut für Gesellschaftsforschung [MPIfG], Discussion Paper No. 13/15, 2013).