

A DEMOCRATIC AUDIT FOR EUROPE IN TIMES OF EMERGENCY

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Culminating more than a decade of crisis in Europe, the Covid-19 pandemic has opened an important window of opportunity for institutional and policy change, not only at the “reactive” level of emergency responses, but also to tackle more broadly the many socio-political challenges caused or exacerbated by Covid-19. Building on this premise, the Horizon Europe project REGROUP (*Rebuilding governance and resilience out of the pandemic*) aims to: 1) provide the European Union with a body of actionable advice on how to rebuild post-pandemic governance and public policies in an effective and democratic way; anchored to 2) a map of the socio-political dynamics and consequences of Covid-19; and 3) an empirically-informed normative evaluation of the pandemic.



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Abstract

The purpose of this paper is to sketch the outline of a Democratic Audit of the pandemic with explicit focus on the European Union. We take as our point of departure that the corona pandemic was understood as a time of emergency, and this understanding was widely shared. Hence, in order to understand the democratic and constitutional implications of the pandemic we need to focus on the nature and conditions of politics in times of emergency. Emergencies can make it hard to deliver democratic politics to normal standards: to hold elections in normal ways; to pass laws by normal democratic procedures without legislatures ceding their powers to executive discretion if not decree; to gather representatives together in parliaments to scrutinise and debate responses to emergencies; to maintain full rights of free speech and assembly at the core of democratic politics. Yet crises, and even emergencies, are likely to be recurring features of our world of fragile, interdependent systems that displace problems with and between themselves. Democracies, therefore, need to define what standards and procedures should apply in an emergency. They will need to think counterfactually and not just historically: to anticipate possible emergencies and not just draw lessons from those experienced. Much recent literature has turned away from the idea of emergency powers as a state of exception outside the normal politics and procedures of the democratic constitutional state. Rather, it asks how the powers and politics of emergency can themselves be embedded in democratic institutions and constitutional procedures.

The paper starts by clarifying what is meant by democratic audit. It thereafter proceeds to discuss how to adapt the democratic audit framework to the special conditions surrounding emergency politics, and thereafter outlines three different positions in the international literature on emergency governance that it holds up against the democratic audit framework. The next part provides an overview of emergency politics criteria as defined by the Council of Europe. These criteria have been devised for the assessment of constitutional democracies understood as states, and therefore need modification to apply to the complex multilevel EU setting. The paper does that by first highlighting some of the distinctive traits of the EU that need to be taken into consideration, and thereafter pulls these elements together to present the outline of a Democratic Audit of the pandemic for the multilevel EU. The final part concludes.

Keywords: democratic audit; European Union; emergency governance; executive dominance; Covid-19 pandemic

Introduction

The purpose of this paper is to sketch the outline of a Democratic Audit of the pandemic with explicit focus on the European Union. We take as our point of departure that the corona pandemic was understood as a time of emergency, and this understanding was widely shared. Hence, in order to understand the democratic and constitutional implications of the pandemic we need to focus on the nature and conditions of politics in times of emergency.

Emergencies can make it hard to deliver democratic politics to normal standards: to hold elections in normal ways; to pass laws by normal democratic procedures without legislatures ceding their powers to executive discretion if not decree; to gather representatives together in parliaments to scrutinise and debate responses to emergencies; to maintain full rights of free speech and assembly at the core of democratic politics. Yet crises, and even emergencies, are likely to be recurring features of our world of fragile, interdependent systems that displace problems with and between themselves. It took only a weekend for the failure of a US bank to become a crisis of global financial systems. It took only a few weeks for the pandemic to spread across the world; and only around 48 hours for it to spread between Europe's closely interconnected economies and societies.

Democracies, therefore, need to define what standards and procedures should apply in an emergency. They will need to think counterfactually and not just historically: to anticipate possible emergencies and not just draw lessons from those experienced. Much recent literature has turned away from the idea of emergency powers as a state of exception outside the normal politics and procedures of the democratic constitutional state (Ginsburg & Versteeg 2020) Rather, it asks how the powers and politics of emergency can themselves be embedded in democratic institutions and constitutional procedures.

Assume it is an ideal of democracy that citizens should be able to use their political systems to accord one another rights and obligations, and control their own laws, as equals. What would it take for citizens to control as equals those rights and laws that apply in emergencies? Or for any coercion needed to deal with emergencies to count as self-coercion by democratic citizens who control their own laws? What, in other words, distinguishes emergency powers that are justified by democratic principles from those that are arbitrary, abusive or dominating? What are the non-democratic and dominating variants of emergency politics that need to be avoided?

One danger is of 'emergency technocracy', perhaps benign, but still a lapse into a false belief that public policies and laws can be based on facts and data alone without values and rights that are only decidable by citizens or elected representatives as

equals. Of course that is an everyday problem. But emergencies are not just an absence of everyday politics. They often also have a technocratic bias precisely because they occur at the boundaries of our understanding of complex interdependent systems: our understanding, for example, of medicines and climate, to mention not just ghosts of emergencies past, but a ghost of emergencies to come.

Another danger is more abusive. Emergency powers can be unnecessary or disproportionate. They may not be fully 'returned' by those who (ab)use them. They may be ²¹used to consolidate the powers of the powerful or to curtail freedoms and preconditions for democracy such as impartiality of the media or the work of an independent judiciary in ensuring all government is within a rule of law.

So mechanisms of 'normalisation' are crucial. Democracies should return to 'normal' as soon as possible; and, while it is essential that they learn from emergencies, any permanent changes should only be endorsed once democratic politics and process have returned to normal (Council of Europe 2020). Public control will also need to be ex ante or ex post where it is difficult during emergencies themselves.

All that is fine as far as it goes. But any form of ex ante or ex post control already assumes concepts and standards of what it is for a democratic public to exercise control; and, therefore, of what it is to account or justify to a public. There are also different ways of institutionalising ex ante or ex post control of emergencies. So, ideally, citizens should be able to author and control through representatives the standards and institutions of emergency powers. That is how the exceptional should be defined by the normal in democratic politics.

Then there is the further difficulty that we no longer live in a world of single democracies. How democracies respond to modern emergencies is no longer just their own affair. It cannot be enough for closely interconnected democracies, such as those of the EU, to ensure their own responses to emergencies develop within a framework of constitutionality, democracy and rule of law. Those democracies will also need means of solving collective action problems between themselves. As Christian Joerges (2006; 2022) remarks, it is a constitutional defect of the democratic state that it does not represent the externally affected in its decisions (Also see Lord 2021).

So, citizens will need to author and control as equals the standards and institutions by which emergencies and emergency powers are governed; and they will need to do that within and beyond the democratic state. This paper makes a modest suggestion that is within the bounds of the possible. We do have methods of assessing or auditing institutions against democratic standards. Those methods can be used by democracies to reflect on themselves: to diagnose shortcomings: to specify priorities, choices, minima, and trade-offs between standards; and to debate what kind of a democracy they want

to be. Methods of evaluating democracies can then help to generate public debate over standards and procedures, including those that should govern the public control of powers needed to manage emergencies within and between democracies.

The paper is structured in the following manner. The first part clarifies what is meant by democratic audit. The second part starts by discussing how to adapt the democratic audit framework to the special conditions surrounding emergency politics, and thereafter outlines three different positions in the international literature on emergency governance that it holds up against the democratic audit framework. The third chapter provides an overview of emergency politics criteria as defined by the Council of Europe. These criteria have been devised for the assessment of constitutional democracies understood as states, and therefore may need modification in order to apply to the complex multilevel EU setting. The fourth part addresses that by first highlighting some of the distinctive traits of the EU that need to be taken into consideration, and thereafter pulls these elements together to present the outline of a Democratic Audit of the pandemic for the multilevel EU. The final part concludes.

The democratic audit framework

What is the purpose and design of the democratic audit?

There are different ways of doing democracy and of valuing it. So, self-rule can presumably only be self-rule if publics can make choices between forms of democracy. James Bohman endorsed that view when he argued that 'democracy is that set of institutions by which individuals are empowered as free and equal citizens to form and change the terms of their collective life together, *including democracy itself*' (2007:2). Richard Bellamy likewise argues that 'for democracy to mean 'people rule', the *demos* should be free to redefine the nature of their democracy whenever they want and not be tied to any fixed definition' (2007: 90).

Some, though, might question how far publics ever get to 'choose' their political systems (Dunn 2000), including democratic ones. Perhaps it is more realistic to expect democracies to be like ships that need to be continuously (re)built at sea without safe 'harbours' from 'storms'. (Oakeshott 1962). Yet, even those who doubt that we can shape our democracies through much more than a *bricolage* of continuous incremental adjustment would presumably agree that publics should, as Philip Pettit puts it, be able to 'invigilate' democratic systems (2008: 53).

Since Robert Dahl (1971) many attempts have been made to design methods of 'invigilating' how well democracies meet democratic standards. Within the academic literature, at least the following have had the courage to propose indicators of different

democratic standards and means of assessing those indicators against qualitative and quantitative data: Democratic Auditing (Beetham et al 2008); the Democratic Barometer; and the Varieties of Democracy (VDem) project.

Of those methods, we use Democratic Auditing to make some suggestions for evaluating public control of emergency responses to COVID. The idea of democratic auditing was developed by the political philosopher and political scientist David Beetham. In various collaborations, he sought to

develop a method and a framework which can be used by citizens of any country to audit their own democracy. The point of such an Audit is to identify the most significant strengths and weaknesses as a contribution to reforming and strengthening the democratic process (Beetham 2005: 161).

The 'go to' publication for understanding the idea and methods of Democratic Auditing is *Assessing the Quality of Democracy: A Practical Guide* (Beetham et al 2008). The Guide justifies the Democratic Audit as a framework and method of democracy assessment. It 'compares the audit framework with other methods of assessing democracy'. It discusses the strengths and weaknesses of different data sources in evaluating different aspects of democracy. It draws lessons from Democratic Audits in at least 24 states in all corners of the world. Democratic Audit indicators have also been used to contribute to the debate on democracy and the European Union (Lord 2004).

As explained in the next parts, we will adapt only a selection of the Democratic Audit indicators to frame our own tests of the democratic control of emergency responses to COVID. However, our main interest in the Audit is as a method of improving theoretical understanding of what we know and believe about democracy, as well as practical understanding of what we should do about it in a particular context such as emergency politics. The following paragraphs explain.

As with so much else that is involved in defining, justifying or realising democracy, attempts to use indicators to assess the democratic quality of political systems have provoked much disagreement: on what indicators should be used; on how each indicator should be assessed; and on how, if at all, assessments given to individual indicators should be combined into overall evaluations of how democratic is a political system (Coppedge and Gerring 2012).

One response is simply to welcome the contestedness of any one method of evaluating democracy. Democracy would, arguably, not be democracy if there were not limits to how far it can be evaluated by any one set of indicators. If peoples are to be free to choose their own form of democracy for reasons and standards of their own, there would seem to be limits to how far democracy can be measured by standards that can be universalised or even compared across systems.

But the difficulty with that argument is that democracy is a 'boundedly contested concept', not an 'essentially contested' one (Lord 2004: 12-3). Disagreements about indicators are to be expected but only within the bounds of needing *some* standard of public control, *some* standard of political equality; *some* standard of rights; *some* rights to a justification. We might even argue things the other way round: precisely because there are multiple possible conceptions of democracy, any evaluation of how democratic anything is can be improved in at least the following ways by specifying indicators.

1. Reasoned standards. Beetham started by defending public control with political equality as a core definition of democracy. He then went on to identify practices and further values that 'mediate' the delivery of public control with political equality: participation, authorisation, representation, accountability, transparency, responsiveness and solidarity (Beetham et al 2008: 22) From there, he framed up to 90 'indicators' or 'guiding questions' (ibid) that ask how well a political system delivers public control with political equality through their mediating values. For sure, not everyone would come up with exactly the same indicators specified in exactly the same way. But the Democratic Audit indicators are indicative not stipulative. They assume those who live in any one political system may well choose their own indicators, and certainly weight them differently or consider some more relevant to themselves than others. More than an invitation to follow a specific set of indicators the Audit is an invitation to follow a method in which each indicator is justified singly and in relation to all the others.

2. Explicit and accountable standards. By making indicators fully explicit, the Audit also provides a more accountable method of assessing the democratic quality of political systems. Justifying one set of indicators rather than another, or one way rather than another of framing one particular indicator, establishes an 'Audit trail'. Every step in any evaluation - from the choice of each standard to the application of each standard to any assessment of how democratic is any one political system - has to be laid out in a way that is open to being 'tested in adverse controversy' (Mill 1972 [1861]: 239) by anyone who would have reached a different evaluation.

3. Coherent standards. As Beetham put it (2008: 25), 'our aim is to construct the assessment framework around a coherent understanding of democracy, rather than a random set of elements put together without explanation'. We can easily miss the importance of this. As Ronald Dworkin (2011: 117) puts in *Justice for Hedgehogs*, precisely because there are no facts in the world that make them true, normative principles are justified by nothing more than their coherence with one another.

4. Comprehensive standards. Beetham also aimed at a 'comprehensive and systematic assessment of a country's political life against core principles of public control with political equality'. The challenge is one of how to avoid a kind of 'blind persons and elephants problem' where someone touches the trunk, the hoof or the ear, yet no one

understands democracy overall as a form of government and a form of society; as an idea and as a practice. How to make sure that everything that is important to democracy is included in any assessment? How to identify trade-offs and predicaments? How to distinguish problems for one standard of democracy that arise in the delivery of some other 'imperative of democracy' (Beetham 2005: 42) from instances of 'pure loss'? All those questions require forms of democracy assessment that at least aim at completeness in their specification of standards.

5. Ideal and attainable standards. Another difficulty is that 'democracy is not an all or nothing affair, but rather a shifting continuum' (Beetham et al 2008: 17) of what is possible under 'attainable' states of the world' (Sen 2006). Democracy assessment, therefore, requires standards of what is good enough and not just ideal. But, perhaps even more so than ideals that can be defined in the abstract, only those who live under a form of government can define what is 'good enough' for them. Yet, the prize is an important one. Publics that can form opinions on minimum thresholds can better protect itself from domination by non-democratic systems that pretend to be democratic ones. Even those systems that really can be justified by their own public's conception of democracy, mostly lie somewhere in between the minimally acceptable and the ideal. Those democracies will need to follow a law of non-regression: infeasibility cannot be an argument against standards they have themselves shown to be feasible (Applbaum 2019: 143). So any method of democracy assessment needs to be complete, coherent and diagnostic enough to identify where things are getting better or worse; and where a system is failing even to attain the attainable as defined by its own standards, its own past and comparisons it itself makes with others.

6. Measurement? Terms such as 'Audit' or 'Indicators' might suggest measurement. Some measures plainly can tell us some things about some elements of democracy. Voter participation, support, satisfaction, and trust in democracy are examples. It would also help to locate those aspects of democracy that often are measured within a framework - such as a Democratic Audit - for assessing how democratic is a political system over all. In some ways, it is also trivially true that everything can be measured. So, for example, even the most qualitative evaluations can be turned into numbers by asking people to give scores out of ten. Yet also obvious are limits to attempts to measure, aggregate or rank democracy. Even the design of measures involves much judgement and many normative assumptions. Still more question-begging are attempts to aggregate this or that aspect of a country's political life into a single score of how democratic it is overall. How, can different elements of democracy be aggregated into an overall score where different conceptions of democracy, and different reasons for valuing it, put different weight on those elements?

7. Social Construction. Rather than a measure, Democratic Auditing was conceived as a help to citizens in reflecting and deciding on their own democracies: on what they value in them; on their form; and on their strengths and weaknesses. Democracy is a performative concept; or, in other words, a concept which people form and to which they commit themselves in everyday public debate and in coping with the world. It is also a 'social concept' (Searle 2010) that depends on others also interpreting (Dworkin 2011) the concept if not agreeing it. All that has important implications for why democracies need methods of assessing themselves. Assessing democracy helps constitute democracy. Standards cannot just precede assessments. Rather, they need to be recursively defined. By reflecting together on their democracies - and by assessing them in every day debate - publics elaborate standards ever more closely. They fill standards out with assessments of means, applications, priorities and trade-offs. They continuously recreate their democracies by assessing them. Each assessor 'performs an act' of reaffirming her own commitment to each standard she uses in any assessment and in any attempt to convince others of that assessment.

8. A responsibility of democracy. But above all, democracy is a form of collective decision, shared law, and shared coercion. Democracies regulate 'aspects of lives in common' (Habermas 1996). That, arguably, entails a responsibility on democracies - based in democratic principles of self-rule and non-domination - for assessing how well collective and coercive decisions can be justified as forms of self-coercion. All the more so if any one way of doing democracy pre-empts other ways of organising democracy. That a democracy should have the means of assessing itself is a part of its obligations to its citizens, and the responsibilities of citizens to one another that follow from any use they make of procedures of public control with political equality to author laws and policies that will apply to all co-citizens.

These are key considerations pertaining to the democratic audit: what it is, what it is intended to achieve, and how we may go about conducting audits. These considerations are configured for democratic audits in ordinary political situations; no attempt has been made to adapt or modify them to emergency contexts. The next part starts that process which we address in several steps in the remaining parts of the paper.

How to adapt the democratic audit framework to emergency governance?

This section takes the first step towards clarifying how we should conduct a democratic audit under conditions of emergency politics and governance. Emergencies represent special circumstances (and no two emergencies are identical) that often require rapid

responses. Emergency circumstances will generally entail sidestepping ordinary procedures and/or suspending rights or derogating from rights. Given that, it is necessary to be clear on what those circumstances entail for the nature, form, and timing of the democratic audit.

One issue is the timing of the democratic audit. When and under what circumstances should the democratic audit be conducted? One approach would be to conduct the audit after the emergency has receded, since emergency powers are generally 'to be employed to deal with temporary situations and are aimed at restoring the conditions to a state in which the ordinary constitutional system of rights and procedures can resume operation.' (Ferejohn and Pasquino 2004: 212) The problem with that is two-fold. For one, we do not know when an emergency happens how long it will last. Further, we do not know whether the emergency has led to changes so that there is no easy return to status quo ante. To address these problems, one could consider undertaking an audit before the emergency and a further after the emergency. The downside of that is of course to establish when to conduct an audit before something unpredictable such as a crisis or emergency will happen. The moment the emergency occurs is too late. The only fail-safe way to properly address this problem would be to have regular audits. If not, there could be a long period of time between an audit and the onslaught of the emergency. Hence a problem of comparing before and after.

Another approach could be to adapt the audit to make it amenable for the special circumstances of the emergency. The advantage of this approach would be to make us able to see clearly the specific changes effected during the emergency. The problem would be that we would not have a good benchmark for telling how much these deviated from the period prior to or after the emergency.

From these observations it appears that the safest approach would be to conduct three audits: the first would be of the situation as it was before the emergency, the second would capture the situation during the emergency, and the third and last would capture the situation after the emergency has ended. Given the problem referred to above of predicting when an emergency will take place, the first audit would have to be historically reconstructive, in the sense of going back in time to the period before the emergency. The challenge would be to establish as clearly as is possible for a reconstructive analysis what the situation was before the emergency struck.¹ The second audit conducted during the emergency or reconstructing what happened during the emergency would have to be such designed as to capture the changes wrought by the emergency.

A further issue to that of timing of audits pertains to the kind of audit standards and criteria that an approach with three audits would require. Can we rely on one set of

1. There will always be a problem of 'pollution' in that it would be difficult to demarcate with certainty how the situation was before the emergency struck. There is a further problem of retrospective analysis which is about projecting the present onto the past. That is an endemic problem for historical analysis.

democratic audit criteria that are operational throughout the process? If so, the focus would be on establishing how much the emergency deviated from the before and the after and how much the after deviated from the before the emergency. Such an approach would however only measure how much the context of the emergency deviated from the normal situation; it would not be very helpful for establishing the inner logic of the emergency, or whether it is possible to think of emergencies as special cases of democratic governance. This, as we shall see, is theoretically important and hinges on how we understand emergency.

If the emergency represents a wholesale suspension of legal rule, then it makes sense to apply the same criteria throughout the process, because that will tell us how serious the suspension was and whether the status quo ante was restored after the emergency.

If, however, emergency represents a derogation from legal and constitutional arrangements and rights rather than a clear break then it makes more sense to establish a distinct set of criteria for the context of the emergency because the emergency is not a phenomenon that is allowed to unfold outside the law but rather within it. Then we should devise two sets of criteria, one set that captures the pre and the post of emergency and one set that is adapted to the context of the emergency itself.

The choice between these two options cannot be settled without knowing more about what an emergency is and the strategies available to states and non-state entities such as the European Union to grapple with emergencies. There are different positions on what an emergency is in the broader international literature and these positions differ on whether an emergency can be handled within the framework of law and the legal constitutional order. Outlining and discussing these positions against the issues of the timing of the audit and the criteria for tapping into democracy in the audit is theoretically important: it helps us to establish whether there is a need for theoretical innovation. Such innovation would come about through devising a distinct set of criteria for democratic audit under emergency conditions.

In the following we outline several theoretical approaches on how to understand emergencies and what that entails for the nature and timing of the democratic audit. It must be noted that most of these theoretical approaches are designed for constitutional states. Special provisions therefore need to be made for capturing the distinctive traits of the European Union. That suggests a further need for innovation.

Different theoretical positions on emergency politics and governance

Three issues appear to stand out in the broader literature on emergency politics and governance. The first is whether an emergency represents an exception that requires

the suspension of law. This is, as we shall see, the position adopted by Carl Schmitt. Second and related to that is who should be entitled to call an emergency. If emergency triggers a period of exception that suspends law the question of who is entitled to define when there is an emergency and what that more specifically consists in takes on great significance. Third is that there are currently at least three different models for grappling with emergencies, which David Dyzenhaus (2012) has termed the executive model, the legislative model, and the judicial model. We will refer to these models in the brief overview of the literature below.

In addition to the three issues outlined in the previous paragraph, issues germane to the broader international literature on emergencies, a fourth issue props up when analyzing emergency politics and governance in the European Union context. How should we analyze emergency politics in the multilevel European Union context, given that the EU is neither a state nor a fully-fledged constitutional order imbued with sovereignty (the issue of *Kompetenz-Kompetenz* remains unresolved)?

a) Emergency politics as politics without law

The first position is typically propounded by the German jurist Carl Schmitt (and those inspired by his work) who associates rule of law with normality and claims that legal norms cannot govern extreme cases of emergency or states of exception. A state of exception is therefore effectively the suspension of legal rule. This is in line with his famous sovereignty dictum to the effect that the sovereign is the one that decides on the state of exception (Schmitt [1922] 2005). Schmitt's position is decisionist in the sense that what matters is that there is someone in place to decide on an exception, and that someone is the executive. The implication is that the executive is equipped both with the power to decide when a state of exception exists and once that is done there are no real controls on the executive. Schmitt's notion of sovereignty is therefore pre-legal. Schmitt's analysis is profoundly steeped in the friend-enemy distinction, which helps ensure social mobilization and the drumming up of support behind the executive.

In effect, Schmitt's position is the ultimate rationale for executive dominance. It is therefore no surprise that many analysts have taken issue with Schmitt's position. Nevertheless, for our purposes and as was pointed out in the above it matters for the democratic audit design how centrally Schmitt's analysis should figure. Dyzenhaus who is a staunch critic of Schmitt notes that 'Schmitt is and has to be taken seriously because the claim that the executive is the real agent in responding to emergencies seems to have considerable support in legal and political experience.' (Dyzenhaus 2012:445)

Adopting a Schmittian approach to the democratic audit of the emergency context would entail operating with one single set of democratic criteria and simply consider how much these changed during the emergency and after law's suspension had ended

(if it ever did). There would be no need for adapting the democratic audit for the context of the emergency because it would only be a matter of clarifying how democratically destructive the emergency was.

We do not adhere to Schmitt's position because we see sovereignty as legally embedded and constrained; there is no normative, theoretical or empirical need to equate emergency with a politics of exception that entails law's suspension; and by implication democracy does not vanish with the onslaught of an emergency. This position draws on making a clear distinction between state of exception and crisis (Séville 2021). Séville notes that

Schmitt's work is arguably not especially helpful for understanding today's 'emergency politics' in consolidated, liberal democracies and in the transnational arrangements they participate in... Nothing in the Western hemisphere in recent times resembles Schmitt's idea of a state of exception; nothing has been radically exceptional and unforeseeable - and nothing has suspended all existing legal norms and revealed a genuine political sovereign beyond legality. (Séville 2021:1964)

These observations were made in a journal symposium issue that explicitly addressed the corona pandemic (Heupel et al. 2021).

The debate on the relevance of Schmitt's idea of a state of exception may be particularly important in the context of the EU given that European integration has been driven by executives and experts, and there are grounds for thinking that especially executives will play a particularly prominent role in the handling of emergencies in the EU context (see for instance Lord et al. 2023; White 2020). For our purposes, then, devising a democratic audit for the multilevel EU's handling of the corona pandemic, it is important to underline the uncertain and contested constitutional status of the European Union and the scope for executive dominance that exists in this multilevel context. We assume with Jonathan White (2020) that this is more so the case in the EU than it would be in a fully-fledged constitutional democracy.

b) Emergency politics as constitutionally regulated and constrained

The second position on emergency in the international literature espouses the need for explicit constitutional provisions for regulating emergencies.² This is then typically a model that underlines the central role of courts as constitutional guardians. Ferejohn and Pasquino (2004) trace this back to the ancient Roman Constitution. They note the continuity with the present and term that the neo-Roman model:

2. Council of Europe (2020) provides an overview of the European countries that have constitutional provisions for regulating emergencies. For a brief selection of academic analyses, see Ackerman 2004; Ferejohn and Aquino 2004; Gross and Ni Aolain 2006; Kreuder-Sonnen 2021.

Emergency powers in modern constitutions are to be employed to deal with temporary situations and are aimed at restoring the conditions to a state in which the ordinary constitutional system of rights and procedures can resume operation. Typically, the holder of emergency powers is not permitted to make law but is restricted to issuing temporary decrees. And of course, the constitution itself is not to be changed in such periods.’ (Ferejohn and Pasquino 2004:212)

This approach to emergency powers is typically conservative and underlines the need to restore the situation to the period before the emergency as soon as possible. The neo-Roman model is based on the notion of ‘heteroinvestiture’, which means that there is a clear separation between the body that declares the emergency and the one that exercises the authority. The authors note that this constitutional model has not been frequently used. In the extension of that they claim that modern democracies have developed a new model, which the authors term the legislative model. That model underlines the role of the legislature in ‘enacting ordinary statutes that delegate special and temporary powers to the executive.’ (Ferejohn and Pasquino 2004:217)

It is important to underline that both the neo-Roman and the legislative model underline that there is a rule of law continuity between the period before during and after the emergency. There is no suspension of law during the period of the emergency, and whereas the executive is granted special powers these are conditioned and constrained. Further, the executive is not in a position to define what constitutes an emergency and when there is an emergency. Nevertheless, the apparent shift from constitutionally entrenched provisions to legislative provisions reflects a shift in the balance of power between courts and legislatures and the institution of less rigid procedures for handling emergencies.

An important issue is whether the legislative model is meant to replace the constitutional model or whether there might be a division of labour between the two, so that it would be possible to single out circumstances of emergency politics requiring the activation of constitutional provisions versus circumstances of emergency politics that can be handled through legislative means. Our presumption at least is that for there to be a distinct position on emergency politics as constitutionally regulated and constrained there has to be some constitutional provision to be drawn upon if and when an emergency strikes.

Having said that it is important to underline that all legislative models must be attentive to the rule of law. In the extension of that, the notion that the softer more legislature-focused position does not need to entail the abrogation or serious weakening of the rule of law has been underlined by David Dyzenhaus (2006, 2012) in what we here present as a distinct elaboration of the position described here under b).

c) Emergency politics as rule of law through 'regulative assumption'

David Dyzenhaus (2006, 2012) seeks to understand the handling of emergencies through underlining the need for a productive relationship between politics and law. Dimitrios Kyritsis (2008:96) summarizes Dyzenhaus' position in the following manner:

The rule of law is a set of principles of good governance to which the legal order as a whole aspires, and in the light of which we ought to interpret the acts and decisions of every state institution. As much follows from the proper understanding of what it takes for someone to be an authority. Hence, state institutions, including the legislature and the executive, must be seen as engaging in the 'rule-of-law project', the project of governing in accordance with rule-of-law values. In this picture the rule of law assumes the role of a 'regulative assumption' that governs our understanding of the decisions of all institutional actors; it marks 'the constitutive or constitutional conditions of being an authority'. When a court is called upon to implement a legislative decision, says Dyzenhaus, it ought to assume that the legislature intends to carry on with the rule-of-law project and uphold it rather than opt out of it. Of course, the court will not always be able to override legislative decisions that flout legality. But even in these cases it can expose such decisions for what they are and thus raise the stakes for a government that at least wants to pay legality lip service. It will then rest content to play the role of the 'weatherman', 'alerting the commonwealth to the storm clouds on the horizon when the rule of law which secures the fabric of civil society is put under strain'.

Dyzenhaus is critical of what he refers to as 'constitutional positivism', which is a doctrine about the legitimacy of judicial supervision of the legislature. The problem is legal-constitutional overstretch. Dyzenhaus therefore advocates for a more politics - law interactionist approach to the preservation of the rule of law as a core principle.

If we look at the positions presented above, we see that positions b) and c) overlap. They share a fundamental assumption, namely that the rule of law is institutionally embedded in the constitutional state, and that the circumstances of an emergency do not - and should not - abrogate the rule of law. The question of what to prioritize: constitutional or legislative provisions is therefore an institutional choice within a relatively fixed and familiar (normatively identifiable) legal-constitutional framework. That there is experimenting with what institutions to prioritize within such fixed settings is a matter of *experimentation within relatively fixed bounds*. Precisely because there is no wholesale suspension of the rule of law during emergencies, it makes sense to adapt the democratic audit to emergency circumstances. Such an approach is more likely to give impetus to learning and reflection and improve our understanding of what has been

referred to in the above as 'attainable standards'.

Positions b) and c) refer to relatively fixed bounds, which means focusing on the politics surrounding the measures taken to address the emergency, and where the assumption is that these measures are not intended to alter the polity or the political system and its constitutional arrangements. The EU system, its officials and analyses of its operation are far more focused on the EU as a 'system in motion'. That entails as will be spelled out in the below that the analysis must focus on both politics and *polity*. That is due to the fact that the European Union is a political-constitutional experiment in supranational and/or transnational governance. The broader implication is that in such unsettled legal-constitutional settings the choice of model - judicial, executive, or legislative - is far more consequential because the choice can have systemic effects, as Jonathan White (2020) underlines in his work on emergency politics in the EU context. Our approach is not that we need to develop entirely new and EU-distinctive criteria but rather that we need to be explicit on how we adapt existing criteria from state-based contexts to the EU. The EU is no doubt a new type of political system, but it is built from well-known building materials and the development of a system of governing at the EU-level has not meant radically transforming the member states to the extent that they no longer function as states.

The next section presents a set of criteria that we subsequently adapt to the multilevel EU context.

What criteria to draw from?

In the following we start the adaptation of the democratic audit to the EU context. We first outline the standards for the use of emergency powers to which all EU/EEA countries are committed through their membership of the Council of Europe and the UN. These criteria are standardized for constitutional democratic states. There is no special allowance made for the distinct traits of the EU. We therefore specify in the next and final section what particular adaptations are needed for undertaking a democratic audit of the multilevel EU under conditions of emergency.

1. Rule-of-law. 'In an emergency, the rule of law shall continue to prevail'...'everyone shall be subject only to such limitations as are determined by law'. Or, as the Council of Europe (2020b) puts it, 'a state of emergency is itself a legal institution subject to legal regulation'.

2. Authorisation. All emergency powers should be legally promulgated, whether by using a provision in the Constitution that permits emergency powers or by ordinary statute. Unless the emergency makes it impossible, any emergency powers should be authorised by parliament. The authorisation should specify reasons for the emergency

powers, their content, their duration, and arrangements for the parliamentary and judicial control of those powers:

3. Notification. 'a state taking emergency measures that derogate' from its obligations under Council of Europe or United Nations to protect rights 'shall immediately notify' those bodies and 'other states that are members of them. Notification must include 'an explanation of the reasons for the derogation'.

4. Necessity. Emergency powers should only be those 'strictly required by the exigencies of the situation'. Emergency powers are not necessary where ordinary powers/normal legislation would be sufficient to deal with a problem (Council of Europe 2020a). Nor should emergency powers be used for anything else than dealing with the emergency itself.

5. Proportionality. Emergency powers should include 'no more restrictive means than are required to achieve the purpose of the limitation'. Restrictions on rights should be the minimum necessary to achieve objectives of emergency powers (in this case containing a pandemic)

6. Time limitation. 'The Venice Commission (Council of Europe) recommends that declarations or measures that have no specific time limit should not be considered as lawful' (Council Europe 2020b). Normal time limits seem to be between about 10 and 90 days. If more time is needed, executives should be required to seek fresh parliamentary approval to renew or prolong emergency powers. Note also States of Emergency should not be used to make permanent changes policy and law (Council of Europe 2020a). Permanent changes will often be needed after an emergency. But they should be introduced later under normal conditions and through the normal political process.

7. Non-discrimination. Emergency powers should not be framed or applied in ways that discriminate on grounds of ethnicity, gender, etc

8. Legal certainty/clarity. Legal rules limiting rights shall be clear and accessible to everyone

9. Challenge and legal remedy. 'every emergency limitation shall be subject to legal challenge and remedy against its abusive application'....'both parliamentary and judicial control should be possible' (Council Europe 2020b). Emergency measures should be open to judicial review

10. Non-derogable rights. Some rights should be non-derogable even in an emergency. 'States should define right that cannot be limited even in an emergency'. In the case of COVID those might perhaps be freedom from medical or scientific experimentation without free consent...freedom of thought or religion...no application of laws with retroactive effect.

11. Oversight. Where possible all emergency powers should be approved and frequently renewed by the legislature (see above). Even if it is not possible for parliament to authorise a state of emergency the latter should lapse after a short time if it is not approved by parliament. Parliament 'should have power to discontinue the emergency' (Council of Europe 2020a). 'The constitution and laws governing states of emergency should also provide for prompt and periodic independent review by the legislature'. Throughout all those who exercise emergency powers should know that parliament will later undertake or authorise a thorough ex-post review or enquiry: 'parliament should signal its intention to subject all pandemic measures to deep scrutiny after the crisis has come to an end' (Council of Europe 2020a). The Council of Europe (ibid) also points out that parliamentary oversight is 'especially important where legislative power has been transferred to the executive' as part of any package of emergency powers. In those cases, there 'should be rules setting out limits on delegations of legislative powers'.

12. Deliberation and debate. An interesting departure was the emphasis 'the Venice Commission of the Council of Europe (ibid) put on the need for deliberation and debate of emergency powers by parliament and civil society, and not just more formal and legal constraints. As it put it, 'for a deliberative democracy legitimacy lies in the deliberative process itself'.

The next part addresses how these indicators might be applied to the democratic audit of emergency governance in the EU. As we will show that assessment cannot be confined to these indicators but must pay attention to the EU as a political system. That amounts to a double adaptation of audit indicators: a) from a normal to an emergency situation; and b) to apply to the distinctive traits of the multilevel EU as a non-state polity. This section covered a); the next part covers b).

Towards a democratic audit of emergency governance in the EU

The EU has a democratic vocation and has democratic entrance conditions for members. Article TEU 1a states that

(t)he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

At the same time the EU is a distinct political entity with a mixture of supranational and intergovernmental traits. Constitutionally speaking it is in many ways an unsettled political order. The EU has a material constitution but not a formal and normative or democratic constitution (Fossum and Ménendez 2011). Throughout the EU's history crises have been considered to be quite conducive to further integration (Monnet 1978). We could therefore say that crisis-driven constitutional change has long been part of the EU's development. This fact situates the EU in a distinct position in relation to the crisis and emergency literature where it is emphasized (as noted above) that crises and emergency politics should not bring about constitutional change. This dynamic and the fact that the EU is neither a state nor an international organization but rather an experiment in supranational governance implies that we need to adopt specific democratic audit criteria that are tailor-made to the EU, in other words that relate issues of rule of law and basic constitutional principles to the nature of the multilevel EU as a political system. Such a democratic audit must cater not only to the politics of crisis and emergency rule but also to the polity or political system dimension. The upshot is that the democratic audit has to be doubly adapted: a) to emergency politics, and b) to the distinct political system of the EU.

This issue has become more pronounced as the EU has integrated further and has become more pressing in the context of the crises of the last decade and a half because these have been more severe - more existential - for the EU. There is far less assurance than before that the crises responses necessarily take the EU in a democratizing direction.³ This development gives added credence to the notion that '(w)hen emergency politics moves beyond the state, it takes on forms different from those familiar at the domestic level.' (Kreuder-Sonnen and White 2022:955; see also Kreuder-Sonnen 2018, 2019).

One obvious distinguishing feature is that since the EU is not a state it lacks the monopoly of force that we associate with the state. Nevertheless, it is also clear that member states have lent some of their stateness to the arrangements at the EU-level through an increased EU coordination of so-called core state powers (Genschel and Jachtenfuchs 2014). This is not a transfer of state functions from the member states to the EU but rather a matter of EU coordinating state functions and responses.

A further distinguishing feature of the EU, especially from the mutations it has undergone in the last decade and a half is that there is more scope for informality. As White has noted, '(i)nformal features become more pronounced in the transnational setting, given its weak constitutionalization, the use of constructive ambiguity in treaty-making, and the ever-present possibility of stepping outside existing arrangements and reverting to international relations.' (White 2020:32) Within this setting there is greater

3. In saying that we refer explicitly to the EU-level, even if the European Union is a multilevel system of governing, composed of the EU-level's own political, legal and institutional order and those of its member states.

scope for the executive but not operating as a unified structure or located in the person of the leader as in the Schmittian version but rather as a more dispersed network of actors across institutions at the EU-level and in the member states.

Towards a democratic audit of emergency governance in the EU

Summing up from previous sections, we need a double adaptation of audit indicators: first, to the specific problems of emergency governance; second to the assessment of the European Union’s own distinctive system of multi-level emergency governance. The latter we have argued in a previous paper (Lord et al. 2023), is broadly a system in which member states ‘do the coercion’ needed to deal with the immediate exigencies of crisis while the Union ‘does the coordination’ needed to prevent negative externalities and provide positive externalities without which single member states democracies would struggle to manage emergencies on their own.

We start the double adaptation of audit indicators by showing how the criteria from the previous chapter (Council of Europe) would figure under different polity configurations. We spell them out in relation to two polity conceptions: intergovernmental union and federal union. The overview in Table 1 provides a sense of who does what and which level is responsible for what among the 12 emergency politics indicators. It is important to underline who has prime responsibility and who has merely subsidiary responsibility within a multilevel context.

Table 1: Emergency politics criteria applied to different polity configurations

Indicator	Intergovernmental union	Federal union
Rule of law	Main responsibility lies with the member states (according to the delegation of power doctrine)	All governments are co-responsible for upholding the rule of law
Authorisation	Member states authorise emergency powers	Federal government authorises any emergency powers within its own competence
Notification	Member states notify	Federal government notifies
Necessity	The decision is taken at the member state level (variation is possible)	The decision is taken at the federal government level
Proportionality	The decision is taken at the member state level (variation is possible)	The decision is taken at the federal government level
Time limitation	Time limits set by member states	Time limits set by the federal government
Non-discrimination	Member states make and uphold these	The federal government makes and upholds these
Legal certainty/clarity	This is set by the member states	This is set at the federal government level

Indicator	Intergovernmental union	Federal union
Challenge and Legal remedy	Controls set at the member state level	Controls at both federal and member state levels
Non-derogable rights	Decided by each member state	Decided at the federal level but could also involve member states
Oversight	Each member state's legislature undertakes this	All legislatures undertake this
Deliberation and Debate	All-encompassing	All-encompassing

Table 1 illustrates that who does what and who is responsible for what under conditions of emergency politics vary considerably with polity configuration. This stylised rendition of two conventional polity models shows that the first - the intergovernmental union model - is one where the member states are responsible, whereas the second - the federal union model - is one where the federal level is the level responsible for handling the emergency. The table is useful as far as it goes but it does not capture the EU well because the EU is clearly more than an intergovernmental union and less than a federal union. The EU in effect falls somewhere in-between the two polity models outlined in Table 1. Consider the following: the intergovernmental model in Table 1 locates point 8 in the democratic audit (A responsibility of democracy) of which democratic input (from citizens/voters, elected bodies, civil society and public opinion) is an important component at the national only, there is no allowance in the intergovernmental model as outlined in Table 1 for an EU-level democratic input. The federal model on the other hand prioritises the federal level's role in handling the emergency.⁴ It does not exclude the sub-unit (which in the EU context would be the member state) level, but the federal level is attributed with significant sanctioning and coercion measures. If we look at the EU, we find that even if the EU has federal-type features, such sanctioning and coercion measures are not available at the EU-level, even if the EU has democratic input mechanisms that are more reminiscent of a federation than an intergovernmental organisation, but these are not well developed in relation to the EU's key emergency handling bodies, with the intergovernmental European Council as a key body. The implication is that the point of departure for Table 1, namely the nature of the polity configuration is what is at stake in the EU context. It is precisely the question of who should be responsible for what in the EU that is unsettled and is affected by emergency politics. We therefore need to unpack several of the categories in Table 1 further in order to capture the current democratic division of labour in the EU. Such unpacking requires paying attention to the configuration of input, throughput and output factors.⁵ A democratic form of European Union emergency governance needs to produce as its outcomes the public

4. We could say that the more sanctioning and coercion measures are concentrated at a given level of governing the stronger the onus on proper democratic input measures tailored to that level.

5. An instructive application of these legitimacy dimensions to the EU's emergency politics is Schmidt (2022).

goods that are needed to manage emergencies well and from whose benefits citizens and whole member democracies cannot be excluded. But what constitutes that happy outcome - what counts as 'well-managed' emergencies, as public goods, or as benefits from which citizens and democracies cannot be excluded - needs inputs from citizens as equals. And how everything is done - not least by procedures that translate inputs into outputs - needs to be publicly controlled by citizens as equals. All that, in turn, means that the outputs, inputs and throughputs of Europe's multi-level emergency governance all need to be based in what the Audit identifies as democracy's intermediating practices and values: accountability, representation, transparency, rights, rule-of-law, public debate and civil society. So as a highly summary and baseline set of indicators of how the EU's multi-level system of emergency governance handled the COVID crisis we suggest that many of the entries in Table 1 will need to be tailored to a prior assessment of the democratic division of labour between the EU-level and the member-state level. In other words, what is required is a prior assessment of how the following indicators are configured at the EU-level versus at the member state level:

Table 2: Input, throughput and output indicators

<p>Input indicators</p> <p>How accessible were responses to Covid-19 to the inputs or 'voices' of: i) citizens/ voters ii) elected bodies; iii) civil society; and iv) public opinion formed through media debate?</p>
<p>Throughput indicators</p> <p>How far was the emergency governance of COVID based on procedures that were v) transparent; vi) based on public justification, and vii) accountable to voters or their representatives? How well were emergency procedures viii) themselves governed by a rule-of-law and ix) by arrangements for the earliest possible return to normal democratic politics?</p>
<p>Output indicators</p> <p>How far were outcomes of decisions in the emergency governance of COVID consistent with: x) democratic rights; xi) equal treatment of citizens; xii) citizens' trust and solidarity; xiii) the provision of public goods in the control of a pandemic?</p>

With regard to the input indicators, the audit needs to clarify whose voices should be and actually were present in responses to Covid-19. Were these voices of i) citizens/ voters ii) elected bodies; iii) civil society fragmented national voices or were they also heard and synchronised at the EU-level? Similarly, with throughput indicators, we need to process-trace decisions in order to establish the relative salience of the EU-level versus the member state level. Norms such as those developed by the Council of Europe can then be considered as resources that can help with the specification of the input,

throughout and output indicators. Those norms have themselves been deliberated and based on agreement and observation of good practice. We may take it as common to all understandings of the European Union polity that it involves some element of member democracies deciding together and deciding apart. But we also need to be clear in suggesting how we should undertake a Democratic Audit of how the EU's system of multi-level governance responded to COVID that different normative and conceptual 'models' of the European Union polity - from intergovernmentalism to a form of Federal Union - would imply different ways in which the foregoing indicators can and should be satisfied.

Conclusion

The purpose of this paper was to sketch the outline of a Democratic Audit of the pandemic that would be properly tailored to the multilevel European Union. We took as our point of departure the democratic audit framework derived from David Beetham, which does not only specify a set of indicators but also a method and mind-frame for conducting the democratic audit in the first place. The democratic audit is not simply a mechanical assessment of a polity by means of a set of indicators each of which obtains a specific score. A democratic audit is in a sense 'an exercise in democracy' in the sense that it requires citizens' participation and engagement in the exercise. The audit then enables citizens to identify the strengths and weaknesses of a given democratic polity, and this process in turn gives impetus to a further process to reform and strengthen democracy. The democratic audit framework has thus far been tailored to normal circumstances; no significant effort has thus far been expended to convert it to circumstances of emergency politics. For such a conversion to be undertaken we needed to know if the audit could be based on the presumption of the rule of law not being suspended as Schmitt's approach posits. We found ample support for that in the current emergency literature, which paved the way for adapting the democratic audit framework to emergency situations. We found that for the EU what we have termed a double adaptation of audit indicators was necessary. The first step was to adapt the general democratic audit indicators to emergency politics through drawing on the indicators that the Council of Europe had introduced. The second step was to adapt these in turn to the distinctive traits of the multilevel EU as a non-state polity. The second step was unpacked through organizing the indicators in terms of input, throughput and output.

References

- Ackerman, B. (2004) 'The Emergency Constitution', *The Yale Law Journal*, 113(5): 1029-1091.
- Applbaum, A. (2019) *Legitimacy. The Right to Rule in a Wanton World*, Cambridge MASS, Harvard University Press.
- Beetham, D. (2005) *Democracy, A Beginner's Guide*, Oxford: One World.
- Beetham, D., Cavalho, E., Landman, T and Weir, S. (2008) *Assessing the Quality of Democracy. A Practical Guide*, Stockholm: International Idea.
- Bellamy, R. (2007) *Political Constitutionalism, A Republican Defence of the Constitutionality of Democracy*, Cambridge: Cambridge University Press.
- Bohman, J. (2007) *Democracy across Borders from Demos to Demoi*, Cambridge MA: MIT Press.
- Coppedge, M and Gerring J. et al (2011) 'Conceptualising and Measuring Democracy: A New Approach', *Perspectives on Politics*, 9(2): 247-267.
- Council of Europe (2020a) 'Respect for Democracy, Human Rights and Rule of Law During states of Emergency', Strasbourg: Council of Europe, June 2020.
- Council of Europe (2020b) Interim Report on the Measures Taken in the EU Member States as a Result of the COVID-19 Crisis and their Impact on Democracy, Rule of Law and Human Rights', Strasbourg: Council of Europe.
- Dahl, R. (1971) *Polyarchy, Participation and Opposition*, New Haven CT, Yale University Press.
- Democracy Barometer. See www://democracybarometer.org/concept-en.html, last accessed 29 March 2015.
- Dunn, J. (2000) *The Cunning of Unreason. Making Sense of Politics*, London: Harper Collins.
- Dworkin, R. (2011) *Justice for Hedgehogs*, Harvard Mass: Belknap Press of Harvard University Press.
- Dyzenhaus, D. (2006) *The constitution of law: Legality in a time of emergency*. Cambridge: Cambridge University Press.
- Dyzenhaus, D. (2012) 'States of Emergency', in Rosenfeld, M. and Sajó, A. (eds) *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, pp. 442-463.
- Ferejohn, J. and Pasquino, P. (2004) 'The law of the exception: A typology of emergency powers', *International Journal of Constitutional Law*, 2:210-239.

- Fossum, J.E. and A.J. Menéndez (2011) *The Constitution's Gift: A Constitutional Theory for the European Union*. Lanham, MD: Rowman and Littlefield.
- Genschel, P. and Jachtenfuchs, M. (2014) (eds) (2014) *Beyond the Regulatory Polity? The European Integration of Core State Powers*. Oxford: Oxford University Press.
- Ginsburg, T. and Versteeg, M. (2020) 'The Bound Executive. Emergency Powers During the Pandemic', Virginia Public Law and Legal Theory Research Paper, No 52, 2020.
- Gross, O., and Ní Aoláin, F. (2006) *Law in Times of Crisis: Emergency Powers in Theory and Practice*. Cambridge: Cambridge University Press.
- Habermas, J. (1996) *Between Facts and Norms*, Cambridge: Polity.
- Heupel, M., Koenig-Archibugi, M., Kreuder-Sonnen, C., Patberg, M., Seville, A., Steffek, J., and White, J. (2021) 'Emergency Politics After Globalization', *International Studies Review*, 23:1959-1987.
- Joerges, C. (2006) 'Deliberative Political Processes Revisited: What have we learnt about the Legitimacy of Supranational Decision-Making?', *Journal of Common Market Studies* 44 (4): 779-802.
- Joerges, C. (2022) *Conflict and Transformation: Essays on European Law and Policy*. London: Bloomsbury.
- Kreuder-Sonnen, C. (2018) 'An authoritarian turn in Europe and European Studies?', *Journal of European Public Policy*, 25(3): 452-464.
- Kreuder-Sonnen, C. (2019) *Emergency Powers of International Organizations: Between Normalization and Containment*. Oxford: Oxford University Press.
- Kreuder-Sonnen, C. (2021) 'Does Europe Need an Emergency Constitution?' *Political Studies*, doi:10.1177/003232172111005336.
- Kreuder-Sonnen, C. and White, J. (2022) 'Europe and the transnational politics of emergency', *Journal of European Public Policy*, 29(6): 953-965.
- Kyritsis, D. (2008) 'Review of David Dyzenhaus, The Constitution of Law: Legality in a Time of Emergency', *Criminal Law and Philosophy*, 2:95-98.
- Lord, C. (2004) *A Democratic Audit of the European Union*, Basingstoke: Palgrave Macmillan.
- Lord, C. (2021) 'Democracy at the European Level? Folly or Necessity? More work for a Directly Elected European Parliament', *European Law Journal*, published on line doi.org/10.1111/eulj.12402.
- Lord, C., Fossum, J.E. and Väisänen, A. (2023) 'Report on the institutional consequences of emergency powers at the national and European levels' REGROUP Research Paper n° 2. Available at: <https://regroup-horizon.eu/publications/emergency/>

- Mill, J. S. (1972 [1861]) *Utilitarianism, On Liberty and Considerations on Representative Government*, London: Dent.
- Monnet, J. (1978) *Memoirs*. Doubleday & Co.
- Oakeshott, M. (1962) *Rationalism in Politics and other Essays*, New York: Basic Books.
- Pettit, P. (2008) 'Three Conceptions of Democratic Control', *Constellations* 15 (1): 46-55.
- Schmidt, V. A. (2022) 'European emergency politics and the question of legitimacy', *Journal of European Public Policy*, 29(6): 979-993.
- Schmitt, C. ([1922]2005) *Political Theology. Four Chapters on the Concept of Sovereignty* (1922), trans. by G. Schwab, Chicago: University of Chicago Press.
- Searle, J. (2010) *The Making of the Social World, The Structure of Human Civilization*, Oxford: Oxford University Press.
- Sen, A. (2006) 'What do we want from a theory of justice?' *Journal of Philosophy* 103: 215-38.
- Séville, A. (2021) 'Why Emergency? Reflections on the Practice and Rhetoric of Exceptionalism', in Heupel, M., Koenig-Archibugi, M., Kreuder-Sonnen, C., Patberg, M., Seville, A., Steffek, J., and White, J. (2021) 'Emergency Politics After Globalization', *International Studies Review*, 23:1963-1967.
- Varieties of Democracy. See <https://v-dem.net>.
- White, J. (2020) *Politics of Last Resort. Governing by emergency in the European Union*. Oxford: Oxford University Press.
- Treaty on European Union. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016M/TXT>