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## Just trust us: a short history of emergency powers and constitutional change

Marc de Wilde\*

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This article focuses on the relationship between governmental emergency power (ie, the power to derogate from the laws in emergencies) and constitutional change. It seeks to explain how, in the past, uses of emergency power contributed to constitutional transformations. Three historical examples are analysed and compared: the fall of the Roman Republic in the first century BC, the emergence of a more centralized government towards the end of the Middle Ages and the decline of the Weimar Republic in the 1920–30s. The comparison shows that these constitutional transformations can be explained by the normalization of emergency powers, ie, their use as regular means of governance. Moreover, the notion of public trust appears to have played a key role in these constitutional transformations, either by constraining emergency powers in the absence of other legal restrictions or by legitimizing extra-legal uses of these powers that undermined existing constitutions.

**Keywords:** state of exception; emergency powers; necessity; constitutional change; *fides publica*

### I. Introduction

In recent years, a succession of crises has forced governments across the globe to take refuge in their emergency powers. Examples include the use of emergency powers in the context of the so-called ‘war on terror’ as well as the emergency measures taken in response to the recent financial crisis. Emergency powers have, for instance, been used to justify the indefinite detention and ‘enhanced interrogation’ of suspects of terrorism. In the context of the financial crisis, these powers have been deployed to financially support and nationalize banks, sometimes without express legislative authorization. As these examples suggest, the use of emergency powers may have a major impact on democracy and the rule of law. In emergencies, when quick and decisive action is required, governments are temporarily exempted from the normal restrictions on their power. They are allowed to act without prior authorization and sometimes even against the law,

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so that they become capable of responding to the emergency quickly and effectively. As governments are temporarily released from these restrictions, there is the risk that they abuse their emergency powers. They may thus invoke the emergency as a pretext for violating rights or taking controversial measures that lack democratic legitimacy. Here we encounter a dilemma characteristic of emergency powers: the very emergency powers that were established to protect the legal order may be turned against that order, as they are no longer effectively constrained.

The danger of emergency powers being abused remains limited if crises are of short duration and the use of these powers remains temporary. However, if these crises continue over an extended period of time, the use of these powers and the suspension of law threaten to become permanent. Emergency powers may thus be transformed into regular means of governance. This may ultimately lead to constitutional changes by which the position of the executive is permanently strengthened at the expense of the legislative and judicial branches of government.<sup>1</sup> These changes do not require express legislation, but merely different constitutional practices, in which the relation between the various branches of government is gradually transformed. It is these gradual and largely implicit shifts in constitutional practice that deserve our special attention.

In this article, I will address the question of emergency powers and constitutional change from a historical perspective. More particularly, I will analyse and compare three historical examples: the fall of the Roman Republic in the first century BC, the emergence of a more centralized government towards the end of the Middle Ages and the decline of the Weimar Republic in the 1920–30s. By analysing and comparing these historical examples, I intend to explain how uses of emergency powers contributed to constitutional transformations and, more particularly, to transitions towards more authoritarian forms of government. The reason that I focus on these examples is because of their immense impact on European constitutional history. For instance, I could also have

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<sup>1</sup>As early as 1948, the political theorist Clinton Rossiter concluded on the basis of a comparative study of crisis government in Germany, France, England and the United States in the Interbellum years that uses of emergency powers had led to ‘permanent and often unfavourable alterations’ in the governmental schemes of these countries. He referred to the fact that after each crisis the executive had gained more extensive competences at the expense of the legislative and judicial branches of government: Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press, 1948, rept Harcourt, 1963) 13. More recently, Eric Posner and Adrian Vermeule have argued that, in the past decade, executive responses to crises have made the principle of separation of powers largely obsolete. They point out that ‘[t]he complexity of policy problems, especially in the economic domains, the need for secrecy in many matters of security and foreign affairs, and the sheer speed of policy response necessary in crises combine to make meaningful legislative and judicial oversight of delegated authority difficult in the best of circumstances. In emergencies, the difficulties become insuperable’: Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2013) 9.

discussed the way in which the Medici rulers used their emergency powers to undermine the corporate structure of the Florentine republic and impose their oligarchical regime,<sup>2</sup> or, to mention yet another example, the way in which Napoleon III deployed his emergency powers to facilitate the transition towards an empire based on his personal rule.<sup>3</sup> However, notwithstanding the historical importance of these other examples, they do not seem to have affected European constitutional history in the same way as the examples mentioned above, and they appear to be of a somewhat different order of magnitude.

Of course, by comparing these historical examples, I do not intend to suggest that uses of emergency powers always or necessarily led to constitutional transformations. Nor do I want to imply that there is any direct, causal connection between historical events so diverse and distant in time – even though the Roman example, in particular, would continue to haunt the imagination of subsequent generations (for instance, as late as the 1920s, German lawyers can still be found to refer to the Roman example as an authoritative model for understanding contemporary emergency powers).<sup>4</sup> Instead, my aim is more modest: I want to understand how in these particular historical contexts, the use of emergency powers contributed to constitutional transformations and, more particularly, how the normalization of these powers supported the transition towards more authoritarian regimes. In doing so, I believe it is important to keep in mind the historical diversity and specificity of these cases, for instance, the fact that emergency powers were used in different social and political contexts and prompted by different kinds of crises (the social struggle between plebeians and patricians in Rome, the crisis of feudal government at the end of the Middle Ages and the prolonged financial and political crisis of the Weimar Republic).

In view of this historical diversity, it may also seem a bit grand to speak indifferently of the constitution of the Roman Republic, the medieval constitution(s), and the constitution of the Weimar Republic. Indeed, the very term ‘constitution’ as denoting the whole legal framework of the state was rarely used at all before the seventeenth century.<sup>5</sup> Instead, Roman lawyers preferred the term *res publica*, a

<sup>2</sup>Moritz Isenmann, ‘From Rule of Law to Emergency Rule in Renaissance Florence’ in Lawrin Armstrong and Julius Kirshner (eds), *The Politics of Law in Late Medieval and Renaissance Italy: Essays in Honour of Lauro Martines* (University of Toronto Press, 2011) 55–76.

<sup>3</sup>See Rossiter (n 1) 81–82.

<sup>4</sup>For instance, in his influential plea for the so-called ‘theory of inviolability’, according to which presidential emergency powers were strictly limited by the constitution, Richard Grau frequently refers to the Roman dictatorship as an authoritative example: ‘[d]ictatorship is thus part of the German imperial constitution just like it was part of the Roman constitutional order’. Richard Grau, ‘Diktaturgewalt und Reichsverfassung’ in Erich Genzmer (ed), *Gedächtnisschrift für Emil Seckel* (Springer Verlag, 1927) 430.

<sup>5</sup>The term *constitutio* was already known in Roman law, but it had a much more limited meaning: it referred to laws that were issued by the emperor. In the Middle Ages, the term often referred to particular administrative enactments, and was used interchangeably

rather vague notion that was sometimes used to refer to the state and its governmental institutions. In the Middle Ages, we find terms such as *status reipublicae* or *status regni*, which have strong pluralist and feudal connotations. With regard to these contexts, I will use the modern concept of a ‘constitution’ analytically to make patent certain historical developments that affected the nature of government (for instance, the centralization of governmental power at the end of the Middle Ages) without confusing this modern concept with those of the past itself. In particular, it is important not to confuse our own conception of a constitution as an (often) written, systematic and fundamental law with the (mostly) unwritten, unsystematic and customary ‘constitutions’ which we find in previous periods. Of course, these older conceptions of constitutions corresponded to very different understandings of the state, as well as of the functions and responsibilities of governmental institutions.

Finally, it seems important to emphasize that what we now, from hindsight, tend to identify as ‘constitutional change’ was not always recognized as such by contemporaries. To give an example: the constitutional transformations that took place at the end of the Roman Republic were – to quote John Kelly – ‘consummated in a spirit of painful anxiety to suggest that nothing essential was changed’.<sup>6</sup> Thus, Augustus presented his new, essentially monarchical regime as a continuation of the republican system of government, and suggested that it had left the Republic’s ancient institutions intact. Indeed, it is perhaps characteristic of all three historical examples I discuss in this article – the downfall of the Roman Republic, the centralization of governmental power at the end of the Middle Ages and the transition towards authoritarian government in the Weimar Republic – that, at least initially, those in power were at pains to avoid the impression that the constitution had changed at all. However, this should not prevent us from using present-day concepts such as ‘constitutional change’ to make clear and to analyse the new, and often more authoritarian, governmental practices which had in fact been introduced. Thus, for instance, in spite of Augustus’s ideology of republican continuity, ‘a silent, hardly visible transformation, even transubstantiation, had in fact taken place, because every part of the constitution now contained a new, tacit term, namely acquiescence in the will of an individual’.<sup>7</sup>

In this article, I intend to show how emergency powers contributed to these silent and hardly visible transformations. More particularly, my hypothesis is that the notion of *fides publica* or ‘public trust’ played a key role in these constitutional transformations, either by constraining executive power in the absence of

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with other words such as *lex* or *edictum*. More particularly, it was used to distinguish such particular enactments from *consuetudo* or customary law: Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press, 1966) 24.

<sup>6</sup>John Maurice Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 2007) 43.

<sup>7</sup>*Ibid.*, 44.

other legal restrictions or by legitimizing extra-legal uses of emergency powers that undermined existing constitutions. In the literature on emergency powers, the notion of ‘public trust’ has been largely ignored: although some scholars have noticed the general importance of fiduciary relations, they have not related it to the historical tradition of ‘public trust’.<sup>8</sup> However, as I will show in this article, throughout history, lawyers have invoked ‘public trust’ to articulate the legal limitations to emergency powers. As formal restrictions were temporarily suspended, these lawyers took refuge in the informal norm of ‘public trust’ to prevent abuses of emergency powers. Hence, as I will try to demonstrate below, in each of these periods the notion of ‘public trust’ reappears in different guises – whether it be as an appeal to the ruler’s ‘good faith’ or ‘constitutional fidelity’ – and played a decisive role in legitimizing and constraining emergency powers. I will end this article with some reflections on contemporary practices of crisis government, and suggest that, in view of the extensive uses of emergency powers we witness today, the notion of ‘public trust’ may once again become relevant.

## II. The dictatorship and the fall of the Roman Republic

Emergency powers were first used on a large scale in the Roman Republic.<sup>9</sup> Whenever the Republic was threatened by war or civil strife, a special governmental official, the so-called dictator, was appointed.<sup>10</sup> The dictator was invested with

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<sup>8</sup>For instance, Evan Criddle and Evan Fox-Decent emphasize the importance of fiduciary relationships between governments and their subjects for constraining emergency powers. In their view, governments bear a fiduciary duty to guarantee their subjects’ ‘secure and equal freedom’. However, in their interpretation of fiduciary duties, Criddle and Fox-Decent do not refer to the history of public trust, of *fides publica* and the specific constraints on emergency power this concept implies: Evan Criddle and Evan Fox-Decent, ‘Human Rights, Emergencies, and the Rule of Law’ (2012) 34 *Human Rights Quarterly* 39. In the historical literature on emergency powers, we find occasional references to concepts such as trust or fidelity, but no systematic analysis of the relation between emergency powers and ‘public trust’. For instance, Rossiter, (n 1) 24, mentions almost in passing the ‘sacred trust’ of the Roman dictator to maintain the existing constitutional order, but he does not explain what this trust consisted of, nor does he relate it to the concept of *fides publica*.

<sup>9</sup>The analysis presented in this section is largely based on Marc de Wilde, ‘The Dictator’s Trust: Regulating and Constraining Emergency Powers in the Roman Republic’ (2012) 33 (4) *History of Political Thought* 555.

<sup>10</sup>Initially, there were two types of dictatorships, the *dictatura rei gerundae causa*, which served to protect the Republic against external enemies (as in cases of foreign invasion) and the *dictatura seditionis sedandae causa*, which was deployed against internal enemies (as in cases of civil strife or conspiracy). From 363 BC onwards, the dictatorship would also be used outside military emergencies: thus, dictators were appointed to conduct religious ceremonies (eg, to appease the gods in case of a plague) or to replace regular magistrates who had passed away or were otherwise absent in vital tasks (eg, to organize

extensive emergency powers: he was authorized to take all the measures he deemed necessary to protect the Republic. He was thus allowed to issue emergency decrees, to levy troops, to undertake military campaigns and even to prosecute and sentence to death Roman citizens. Moreover, unlike the Republic's other governmental officials, the dictator did not have a colleague of similar rank and his decisions could not be vetoed.<sup>11</sup> Indeed, initially, it was not even possible to appeal against the dictator's emergency measures to the popular assemblies.<sup>12</sup> In times of dire emergency, such constitutional checks and balances were temporarily suspended, such that the dictator could respond to the emergency quickly and decisively.

However, the dictator's power, though far-reaching, was not unlimited. Instead, there were significant legal restrictions on his power. The most important was the limited term of the office. Dictators were thus expected to lay down their powers at once after completing their task. To prevent the impression that they were seeking unconstitutional power, they considered it their duty to give up their powers as soon as possible, in days or weeks rather than months.<sup>13</sup> Moreover, dictators were appointed for a maximum term of six months, after which they were required to abdicate.<sup>14</sup> Another constraint on the dictator's power was that he remained financially dependent on the senate, which had to approve every withdrawal from the public treasury. Moreover, he was not allowed to start offensive wars, as it remained the popular assemblies' prerogative to decide about war and peace.<sup>15</sup> Finally, it appears that the dictator's emergency decisions were brought under the tribunes' veto by 363 BC, and subjected to the *provocatio ad populum*, the appeal from serious sentences to the popular assemblies, by 300 BC.<sup>16</sup>

Apart from these legal limitations, there were other, informal constraints on the dictator's power. They can be illustrated by the famous story of Cincinnatus, a retired Roman general who spent his old age in the countryside just outside of Rome.<sup>17</sup> According to Livy, Cincinnatus was given dictatorial powers in 458 BC

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elections). The most extensive catalogue of Roman dictatorships can be found in Marianne Hartfield, *The Roman Dictatorship: Its Character and Evolution* (Berkeley, 1982) 309–518.

<sup>11</sup>Wolfgang Kunkel, *Staatsordnung und Staatspraxis der römischen Republik: Die Magistratur*, edited by Roland Wittmann (CH Beck, 1995) 667–668. Lintott observes that a number of sources maintain that the dictator was not subject to the *provocatio ad populum*. However, he also notes that the sources suggest that the appointment of the dictator did not abolish the *provocatio* law: Andrew Lintott, *The Constitution of the Roman Republic* (Oxford University Press, 2009) 111.

<sup>12</sup>Kunkel (n 11) 672–73.

<sup>13</sup>Examples of quick abdication can be found in Livy, *Ab urbe condita* 3.29.7 (16 days), 4.34.5 (16 days), 4.47.6 (8 days), 6.29.10 (20 days), 9.34.13 (20 days), and 23.23.7 (1 day).

<sup>14</sup>The six-month term is mentioned in several sources, for instance: Cicero, *De legibus* 3.9; Livy *Ab urbe condita* 3.29.7, 23.22.2–11 and 23.2; Appian, *Bellum civile* 1.3.9.

<sup>15</sup>Kunkel (n 11) 681.

<sup>16</sup>Cf Livy, *Ab urbe condita* 7.3.9.

<sup>17</sup>On the example of Cincinnatus's dictatorship compare De Wilde (n 9) 563.

to protect Rome against an invasion of the Sabines. He succeeded in defeating the enemy in a mere 16 days, after which he laid down his powers and returned to his plough.<sup>18</sup> The story of Cincinnatus's commitment to the Republic and his willingness to give up his powers at once after completing his task was intended to illustrate the moral qualities that were required of a dictator: he was thus expected to be virtuous and trustworthy, committed to the safety of Rome and the preservation of its constitution. This implied, among other things, that he did not seek personal advantage and that he was prepared to make his own private interests secondary to the public good. It also implied that he had to show lenity to the enemy and restraint in the exercise of his powers. Cincinnatus is thus said to have spared the lives of his captives, who were but embarrassed by being sent under the yoke, after which they were released unharmed.<sup>19</sup>

As I have argued elsewhere,<sup>20</sup> the virtues Cincinnatus displayed as a dictator – the fidelity to the republican constitution, the commitment to the public good, and the willingness to protect those dependent on his power – were part of the so-called *fides publica*. This requirement of *fides publica* or 'public trust' was considered a general standard of behaviour for public officials and all those invested with state power.<sup>21</sup> As Cicero argued, state power was not to be considered a private privilege, but was committed to the official as a trust. It incorporated the 'sacred trust' of the Roman people, which the official was not allowed to violate.<sup>22</sup> This applied especially to the dictator, whose power was not limited by the normal legal restrictions. Thus, the dictator remained bound by his trust even when legal restrictions on his power were temporarily suspended because of an emergency. Interestingly, until the second century BC, more than 90

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<sup>18</sup>Livy, *Ab urbe condita* 3.26–28.

<sup>19</sup>*Ibid.*, 3.28.10–11.

<sup>20</sup>Cf De Wilde (n 9) 563–64.

<sup>21</sup>The term *fides publica* had different connotations depending on the context in which it was used. It could thus refer to trust, reliability, loyalty, fidelity and the keeping of one's word. *Fides* was essentially an open norm, a general standard of behaviour. Its content was determined by historical *exempla*, promises made in the past, justified expectations and the particular circumstances of the case: Dieter Nörr, *Die Fides im römischen Völkerrecht* (CF Müller Juristischer Verlag, 1991) 21. In addition, the concept of *fides publica* had moral connotations, referring to virtues such as honesty, independence and benevolence. A public official was thus expected to do the right thing by his own violation and not to deviate from his duties because of external pressure or moral weakness. Moreover, he was expected to make his own private interests subservient to the public good, which required him, among other things, to accept certain risks for the sake of others: John Barry, 'Fides in Julius Caesar's *Bellum civile*: A Study in Roman Political Ideology at the Close of the Republican Era' (PhD thesis, University of Maryland, 2005) 5, 22–23. For an extensive discussion of the various interpretations of *fides publica* in Republican Rome, compare Marc de Wilde, 'Fides publica in Ancient Rome and its Reception by Grotius and Locke' (2011) 79(3–4) *Legal History Review* 458.

<sup>22</sup>Cicero, *De Officiis* 1.124.

dictatorships have been recorded, and not one of these dictators is known to have abused his emergency powers. I believe this can only be explained by the great importance the Romans attached to the *fides publica*, which required the dictator, among other things, to respect the limited republican nature of his power.<sup>23</sup>

However, in the first century BC, two dictators would violate the requirements of *fides publica*. First, there was Sulla, who, in 82 BC, had himself appointed dictator with the authority ‘to write the laws and to restore a constitution to the state [*legibus scribendis et rei publicae constituendae causa*]’, an authority that was unprecedented in the history of the Republic. Although Sulla was granted these powers for an indefinite term, he abdicated voluntarily after a year, thereby emphasizing his fidelity to the republican constitution. However, the harm was already done: Sulla had shown how a more authoritarian government could be established from within the constraints of the republican constitution by using the dictatorship’s emergency powers.<sup>24</sup> In 48 BC, Caesar had himself named dictator for a one-year term, thus violating the traditional six months’ restriction and imitating Sulla’s example. Two years later, Caesar acquired yet another dictatorship, this time for an unprecedented 10 years. And, in 44 BC, weeks before he was stabbed to death, he accepted the ‘dictatorship for life’, the *dictatura perpetua*. Caesar had thereby succeeded in gradually transforming the temporary emergency powers of the dictatorship into a permanent authority, which was no longer compatible with the republican constitution.<sup>25</sup>

It would be wrong to conclude that the dictatorship and the frequent use of emergency powers caused the fall of the Roman Republic. Instead, only a

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<sup>23</sup>Elsewhere I analyse in detail several examples of how *fides publica* served as an effective constraint on dictatorial powers: cf De Wilde (n 9) 565–70. Here I also explain how the requirement of *fides* caused other, formal restrictions on dictatorial power to become more effective. For instance by abdicating voluntarily before their six months’ tenure expired, dictators demonstrated their public trust and their fidelity to the republican constitution: *Ibid* 570–75.

<sup>24</sup>François Hurlet characterizes Sulla’s dictatorship as a ‘legal *coup d’état*’, referring to the fact that the constitution was subverted with constitutional means: François Hurlet, *Sulla: Monarchie ou magistrature républicaine? Essai d’histoire constitutionnelle* (Institut Historique Belge de Rome, 1993) 176. Following Theodor Mommsen, Claude Nicolet interprets the Sullan dictatorship as a ‘constituent power’, ie, a power by which the constitution is altered: Claude Nicolet, ‘Dictatorship in Rome’ in Peter Baehr and Melvin Richter (eds), *Dictatorship in History and Theory: Bonapartism, Caesarism, and Totalitarianism* (Cambridge University Press, 2004) 270.

<sup>25</sup>Initially, Caesar maintained the traditional formalities of the dictatorship to legitimize his ever-expanding emergency powers. He had himself named dictator with traditional titles such as *rei gerundae causa* and *comitiorum habendorum causa* and observed the duty to abdicate after fulfilling his task. However, he later ignored the duty to abdicate by having himself named *dictator perpetuus*. Thereby the dictatorship lost its limited, republican character. For a more extensive analysis of the dictatorships of Sulla and Caesar, compare Marc de Wilde, ‘The Dictatorship and the Fall of the Roman Republic’ (2013) 130 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 1.

variety of political, social and economic causes may explain the ultimate collapse of the Republic.<sup>26</sup> However, what can be concluded is that the dictatorship and the normalization of emergency powers contributed to the gradual erosion of republican institutions and the establishment of a more authoritarian form of government. That formal restrictions on the dictatorship, such as the six-month term of office, were no longer observed was not decisive, for these restrictions had always been applied with a certain flexibility.<sup>27</sup> More important, I believe, was that the *fides publica*, the requirement of public trust, was no longer respected. Thus, Caesar, in particular, used the dictatorship, not to protect the existing constitution, but rather to overcome its legal and temporal restrictions. It was this breach of trust that explains how the dictatorship could be turned against the very constitution it was established to protect.

### III. Emergency powers and the emergence of centralized government in the late Middle Ages

It was mainly because of the rediscovery of Roman law around 1100 AD that medieval lawyers began to engage, once again, with the question of emergency powers.<sup>28</sup> The first to do so were the church lawyers, the so-called decretists and canonists. They argued that the laws of the church did not apply in ‘cases of supreme necessity’. As Gratian observed, in supreme necessities, the laws of the church temporarily lost their binding force, since ‘necessity ha[d] no law [*necessitas non habet legem*]’.<sup>29</sup> Gratian’s principle was soon applied outside the context of canon law. It was thus argued that ‘princes’ – be they emperors or kings or even the governing authorities of city republics<sup>30</sup> – were temporarily allowed to derogate from the laws if a supreme necessity required it. However, this did not mean that they were authorized to go

<sup>26</sup>Peter Brunt, *The Fall of the Roman Republic* (Clarendon Press, 1988) 92. Compare also John Crook, Andrew Lintott and Elisabeth Rawson, ‘Epilogue: The Fall of The Roman Republic’ in John Crook, Andrew Lintott and Elisabeth Rawson (eds), *The Cambridge Ancient History* (Cambridge University Press, 1992) 769–76.

<sup>27</sup>There are several examples of dictators who were allowed to remain in office after their six-month term of office expired. See, for instance, Livy, *Ab urbe condita* 9.22.1 and 24.1. This suggests that the dictator’s term was primarily dependent on the task for which he had been appointed. If the crisis for which he had been appointed continued, he was sometimes allowed to remain in office for longer than six months. On the other hand, if the crisis was shorter, the dictator was expected to lay down his powers before his six-month term expired.

<sup>28</sup>For a more extensive analysis of the medieval conceptions of emergency powers discussed in this section compare Marc de Wilde, ‘Emergency Powers and Constitutional Change in the Late Middle Ages’, (2015) 83 *Legal History Review* 1–34 (forthcoming).

<sup>29</sup>Gratian, ‘Decretum Gratiani’ in Emil Friedberg (ed), *Corpus iuris canonici* (Akademische Druck- u. Verlagsanstalt, 1959) pars 3, dist 1, c 11.

<sup>30</sup>Compare Kenneth Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (University of California Press, 1993) 38.

outside the law and act arbitrarily. Instead, those invested with emergency powers, though temporarily released from the laws of man, remained bound by the laws of nature. More specifically, the canonists held that the use of emergency powers could only be legal if it was necessary to protect the public safety and preserve the community. If, on the other hand, it merely served to promote the private aims of those in power, it was illegal, an act of tyranny that should not be obeyed.<sup>31</sup>

From the twelfth century onwards, secular lawyers and writers of political treatises followed the canonists' example by arguing that a king or emperor whose realm was threatened by war or foreign invasion was temporarily exempted from his normal legal obligations. Thus, in his influential *Policraticus*, John of Salisbury argued that a 'prince' could subject those he suspected of having conspired against him to torture, since the laws prohibiting torture did not apply to cases of supreme necessity.<sup>32</sup> In their turn, French lawyers, such as Philippe de Beaumanoir and Pierre Dubois, argued that the king was allowed to impose extraordinary emergency taxes on his subjects for the 'necessary defense of the realm [*in casu necessitatis defensionis regni*]'.<sup>33</sup> He could levy these taxes even on the clergy without prior papal approval, though such approval was normally prescribed by canon law. For in cases of supreme necessity, when the realm was imperilled, the king was temporarily released from the regular constraints on his power. He was authorized to derogate from the laws to protect the public safety and preserve the realm.

However, medieval lawyers also attempted to articulate the legal limitations to the use of emergency powers.<sup>34</sup> They did so by specifying the legal grounds justifying the use of these powers. On their view, the use of emergency powers could only be legal if it was based on a *causa necessitatis*, a lawful 'ground of necessity'. First, to qualify as legal *causa*, the necessity had to be public; it had to involve a threat to the *public* safety. Hence, the necessity had to be 'more than a sanction of self-protection',<sup>35</sup> and any uses of emergency powers for private purposes were considered to be illegal. Second, the necessity had to be 'urgent' or 'imminent'. The king was thus not allowed to use his emergency powers to protect his kingdom from future threats which had not yet started to materialize. Instead, a conspiracy had to be already unfolding, a foreign invasion at hand, for the use of emergency powers to be justified. Thirdly, the necessity had to be 'evident'; only if the necessity was generally recognized and beyond dispute could it justify the use of emergency powers.<sup>36</sup> This implied, for instance, that

<sup>31</sup>Cf Thomas Aquinas, *Summa theologiae* 1a, 2ae, q 96, art 6.

<sup>32</sup>John of Salisbury, *Policraticus* 6.25.

<sup>33</sup>Philippe de Beaumanoir, *Coutumes de Beauvaisis* ch 49 para 1510; Pierre Dubois, *De recuperatione terre sancte* ch 123 para (77).

<sup>34</sup>These legal limitations of emergency powers are discussed in more detail in De Wilde (n 28).

<sup>35</sup>Frederick M Powicke, 'Reflections on the Medieval State' (1936) 4(1) *Transactions of the Royal Historical Society* 7.

<sup>36</sup>François Saint-Bonnet, *L'État d'exception* (Presses Universitaires de France, 2001) 140–41.

the king was only allowed to levy emergency taxes from his subjects if the 'evident necessity of defending the realm' required it. If, on the other hand, such taxes were imposed to finance offensive wars abroad, they were generally rejected.<sup>37</sup>

Crucially, these legal limitations to emergency powers were not applied in an all-or-nothing manner. Instead, they were developed into elaborate criteria of proportionality which served to assess the legality of specific emergency measures. As Elisabeth Brown has pointed out, this was done by adopting a principle from Aristotelian physics to law: 'the cause ceasing, ceases the effect [*cessante causa, cessat effectus*].'<sup>38</sup> It was thus argued that as soon as the necessity had ceased, its effect, the emergency powers, had to cease as well. This implied, for instance, that a king who had levied emergency taxes on his subjects for the 'necessary defense of the realm' was required to abolish these taxes as soon as the necessity had ceased and the enemy had been defeated. Moreover, applying the principle *cessante causa, cessat effectus* to emergency taxation, lawyers argued that the king had to pay back any taxes he had collected in excess of the needs of defense. Thus, the French lawyer Pierre Dubois suggested that a king who needed 100,000 marks to defend the kingdom and took 200,000 marks acted illegally and should not be obeyed; the communities affected could refuse to pay such taxes.<sup>39</sup>

However, if the king violated these legal limitations to his emergency powers, there were no remedies. Although the king was under the laws, he was under no man, and he could not be subjected to a judicial process.<sup>40</sup> Hence, his emergency measures could not be contested in a court of law. Instead, the only way to influence the king's emergency decisions was through extra-judicial procedures of petitioning and consultation.<sup>41</sup> Even in emergencies, the king was required to seek the advice of his counsellors and the consent of those affected. However, the authority to decide lay with the king, and if he judged that there was an 'evident' necessity, he could overrule the pleas of his subjects. The advantage lay with the royal prerogative, and the king could uphold his emergency measures even against the express wishes of his subjects. Absent legal remedies, lawyers invoked the

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<sup>37</sup>Gaines Post mentions several examples of royal demands for emergency subsidies that were refused. For instance, in 1242, when Henry III attempted to levy extra-ordinary taxes to finance his military campaign against Louis IX, the magnates refused their consent, arguing that the king was wrong about the alleged necessity since a military campaign overseas (in France) could not be justified by the 'evident necessity of defense': Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100–1322* (Princeton University Press, 1964) 321.

<sup>38</sup>Elisabeth Brown, 'Cessante causa and the Taxes of the Last Capetians' in Joseph Strayer and Donald Queller (eds), *Post Scripta: Essays on Medieval Law and the Emergence of the European State in Honor of Gaines Post* (Studia Gratiana, 1972) 565–587.

<sup>39</sup>Dubois (n 33) ch 124 para 77.

<sup>40</sup>Post (n 37) 272.

<sup>41</sup>*Ibid*, 273.

king's faith, his *fides*, to prevent him from abusing his emergency powers. They emphasized the king's duty to be just and observe the legal limitations to his power by his own volition.<sup>42</sup> If he failed to do so, and violated his trust (for instance, by imposing emergency taxes on his subjects while knowing that they exceeded the needs of defence), he was accused of 'sinning the sin of injustice', which was considered a legitimate cause for resisting his emergency measures.<sup>43</sup>

However, towards the end of the Middle Ages, European rulers such as the German emperor and the kings of France and England would deploy their emergency powers on an ever larger scale. This enabled them to gradually expand their own prerogatives at the expense of local authorities and the church.<sup>44</sup> Their use of emergency powers contributed to disrupting the existing feudal relations, which were based on reciprocity and consent, and served to redefine the position of the king as the highest governing authority. While the king remained a feudal lord in times of peace, he became a sovereign ruler in times of war, who called upon others 'not as his vassals, but as his subjects'.<sup>45</sup> Moreover, by invoking the 'necessary defense of the realm', these rulers could impose new taxes on their subjects while ignoring their traditional rights and privileges. If the realm itself was imperilled, no-one, not even the clergy, could claim immunity from taxation; instead, everyone was expected to contribute their share in meeting the necessity.<sup>46</sup> Hence, the appeal to necessity enabled these rulers to claim new fiscal competences, thereby strengthening their position vis-à-vis local authorities and the church.

The notion of *fides* or trust seems to have contributed to these developments. As long as medieval rulers used their emergency powers to defend the realm and protect the public safety, there was no cause for resistance, even if their use of these powers violated traditional rights and privileges. In this context, the appeal to the king's *fides* could even contribute to legitimizing the suspension of traditional limitations to royal power. Thus, medieval rulers were allowed to impose new taxes in violation of traditional rights and privileges as long as they acted in good faith, that is, as long as they believed it was necessary to protect the public safety. By contrast, if they violated their trust, for instance, by demanding more taxes than the needs of public defence required, then derogation from the

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<sup>42</sup>*Ibid*, 273. Compare also Brian Tierney, "'The Prince is not Bound by the Laws': Accursus and the Origins of the Modern State' (1963) 5 *Comparative Studies in Society and History* 392.

<sup>43</sup>For instance, Pierre d'Auvergne, *Quodlibet* 3, q 14, Bibliothèque Nationale, MS Latin 14562, fos 44–45. A transcription of the text can be found in Brown (n 31) 585–587. Cf also Dubois (n 33) ch 124, para (77).

<sup>44</sup>For a more extensive discussion of the relationship between emergency powers and the gradual expansion of royal power at the end of the Middle Ages see De Wilde (n 28).

<sup>45</sup>Pierre Jacobi, *Practica aurea libellorum* ch 63, para 38, 277.

<sup>46</sup>Post (n 37) 18.

laws was not accepted and demands for emergency taxation were rejected. Hence, the appeal to the king's *fides* served a double function: on the one hand, it served as a constraint on the king's emergency powers, requiring that he acted in good faith and observed the legal restrictions on his powers by his own volition, and, on the other, it contributed to legitimizing the gradual expansion of royal competences beyond their traditional limitations, thereby contributing to the emergence of a more centralized government.

#### IV. The normalization of emergency powers and the end of the Weimar Republic

The question of emergency powers and the danger of their normalization would again play an important role in the so-called Weimar Republic in the 1920–30s. The Weimar Republic was a constitutional democracy in many respects comparable to our own. It consisted of a parliamentary system with important guarantees relating to the rule of law, including fundamental rights and an independent judiciary. However, from the outset, the Republic faced a succession of grave political crises. This led the government to take refuge in its emergency powers on an almost daily basis. In the first five years of the Republic, a state of emergency was proclaimed on no less than 135 occasions.<sup>47</sup> Especially in 1919 and 1920, emergency powers were almost continuously deployed to suppress a series of communist uprisings. They were used to introduce, among other things, the censorship of newspapers, prohibition of certain political parties and summary arrests and detentions of citizens who were suspected of armed resistance against the state.

However, the practice of emergency government did not remain limited to the classic cases of war and civil strife. Instead, the government also used its emergency powers to respond to a series of financial and economic crises. In 1923, the Republic was faced with a grave financial crisis, which led to hyperinflation, a quick devaluation of money causing the savings of many German citizens to become worthless overnight. Attempting to bring the crisis to a halt, the government began issuing a series of emergency decrees, prohibiting speculating on foreign currencies, regulating the market for scarce goods and introducing severe punishments for tax fraud.<sup>48</sup> This extension of emergency powers to the financial and economic domain proved to be momentous: it was the first step

<sup>47</sup>F Poetz-Heffner, 'Vom Staatsleben unter der Weimarer Verfassung: Erster Bericht, vom 1 Januar bis zum 31 Dezember 1924' (1925) 13 *Jahrbuch des öffentlichen Rechts* 141.

<sup>48</sup>Peter Blomeyer, *Der Notstand in der letzten Jahren von Weimar: Die Bedeutung von Recht, Lehre und Praxis der Notstandsgewalt für den Untergang der Weimarer Republik und die Machtübernahme durch die Nationalsozialisten* (Duncker und Humblot, 1999) 81–84. These emergency decrees were based in part on so-called 'enabling acts [*Ermächtigungsgesetze*]' by which the Reichstag expressly granted the President the authority to issue emergency decrees in response to the financial crisis. Cf Rossiter (n 1) 44–49.

towards a general system of emergency government which would govern through emergency decrees in other domains as well.

The danger of general emergency government became a reality when, in 1929, the Republic was confronted with a second financial crisis. In the spring of 1930, a majority coalition of Social Democrats, Catholics and Conservatives broke up over the issue of unemployment insurance. Thereupon, the President of the Republic, Paul von Hindenburg, appointed a minority cabinet under the Catholic politician Heinrich Brüning. It soon became clear that Brüning lacked the necessary political support in the Reichstag. This led Hindenburg to take a decision with far-reaching consequences: instead of dismissing Brüning and his cabinet, he proclaimed a state of emergency and dissolved the Reichstag.<sup>49</sup> In the following elections, anti-democratic parties won a great victory. The National Socialists, in particular, surged ahead. Together with other anti-democratic parties, such as the Communists and *Völkischer* Nationalists, they obtained almost half of the seats of the Reichstag. A return to parliamentary democracy seemed to have become impossible.

In the next two and a half years, the President's emergency powers gradually became a regular means of governance as the Reichstag was paralysed by political polarization and no longer able to agree on anything substantial. Although Brüning kept consulting the Reichstag, he took refuge in emergency decrees whenever he failed to obtain its support. He thus issued one decree after another reducing the number of civil servants and introducing large cutbacks in unemployment and other social benefits.<sup>50</sup> In doing so, he relied on the President's authority under Article 48 of the Constitution to proclaim and periodically renew the state of emergency. This normalization of emergency powers transformed governmental practice and contributed to the gradual erosion of Weimar's parliamentary system. The Republic remained a parliamentary democracy in name only and essentially became a Presidential dictatorship. Hence, from the perspective of governmental practice, the Republic had been overthrown long before Adolf Hitler came to power.<sup>51</sup>

In May 1932, Hindenburg replaced Brüning with the Conservative Franz von Papen, who used his emergency powers to suspend parliamentary government in Prussia, which had been the last bastion of Social Democratic power. At the following elections, the Nazis received 37.3% of the vote, becoming the largest party in the Reichstag. Hindenburg was forced to dismiss Papen, and replaced him with his close aide Kurt von Schleicher. But it soon became clear that the political gridlock could only be broken if the Nazis were involved in government. On

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<sup>49</sup>Heinrich August Winkler, *Weimar, 1918–1933: Die Geschichte der ersten deutschen Demokratie* (CH Beck, 1993) 379–80.

<sup>50</sup>Eric Weitz, *Weimar Germany: Promise and Tragedy* (Princeton University Press, 2007) 352.

<sup>51</sup>*Ibid*, 351.

30 January 1933, Hindenburg appointed Adolf Hitler as Chancellor of the Republic. Barely a month later, the new Chancellor used the Reichstag Fire as a pretext for issuing an emergency decree that indefinitely suspended the constitutional rights of citizens, including political rights such as the freedom of speech and assembly.<sup>52</sup> Prominent Social Democrats and Communists were arrested. Another month later, in an atmosphere of threat and intimidation, the Reichstag passed the so-called Enabling Act, authorizing the new government to enact legislation, including laws deviating from the Constitution, without parliamentary consent.<sup>53</sup>

Legal historians have attempted to explain the collapse of the Weimar Republic by the structural flaws of its Constitution.<sup>54</sup> Thus, Article 48 of the Constitution invested the President with exceptionally wide emergency powers. If the public safety and order were seriously disturbed or endangered, the President could take all the measures he deemed necessary and even deploy the military.<sup>55</sup> In addition, he could suspend a number of important constitutional rights, including the inviolability of person, property and domicile and the freedom of speech and assembly.<sup>56</sup> Although in theory the Reichstag could revoke these presidential emergency measures at any time, in practice this provision failed to be effective. For in addition to his extensive emergency powers, the President had the authority to dissolve the Reichstag. He could thus force the Reichstag to accept his emergency measures by threatening to dissolve it. Hence, it was the combination of exceptionally wide emergency powers with the authority to dissolve the Reichstag which gave the President a power that was virtually uncontrolled. This contributed to undermining Weimar's parliamentary democracy and ultimately led to the Republic's downfall.

Still, it can be doubted whether these structural flaws of the Constitution suffice to explain the Republic's collapse. I believe more important is that, in the end, those invested with emergency powers failed to act in the spirit of the republican constitution. Liberal jurists who protested against the President's frequent use of emergency powers were aware of this. They invoked the age-old legal requirement of public trust. More specifically, they referred to *Verfassung-*

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<sup>52</sup>Verordnung des Reichspräsidenten zum Schutz von Volk und Staat, 28 February 1933, Art 1.

<sup>53</sup>Gesetz zur Behebung der Not von Volk und Reich, 24 March 1933. Art 2 stipulated that executive legislation of the government could deviate from the Constitution as long as it did not affect the institutions of the Reichstag, the Reichsrat and the President of the Reich. However, this provision merely protected the existence of these institutions, not their constitutional rights.

<sup>54</sup>Cf, eg, Karl Dietrich Bracher, *Die Auflösung der Weimarer Republik: Eine Studie zum Problem des Machtverfalls in der Demokratie* (Droste, 1984) 47–57 and Blomeyer (n 48) 14.

<sup>55</sup>Verfassung des deutschen Reiches, 11 August 1919, Art 48: 1–2.

<sup>56</sup>*Ibid*, Art 48: 2.

*streue* or ‘constitutional trust’.<sup>57</sup> They argued that if the President was forced by necessity to derogate from the laws, he was required to remain faithful to the spirit of the Constitution. Indeed, he was allowed to deviate from the laws only if acted in good faith, that is, if he believed it was necessary to protect the *existing* Constitution. By contrast, President Hindenburg and the Chancellors acting on his authority had become convinced of the failure of Weimar’s parliamentary system and used their emergency powers to overthrow the Republic’s constitution and create a more authoritarian form of government.<sup>58</sup> Hence, it was primarily a breach of trust, not of law, which caused these layers to protest against the practice of presidential emergency government.<sup>59</sup>

## V. The contemporary practice of emergency powers: ‘war on terror’ and financial crisis

The history of the Weimar Republic is not without relevance to the present. In the past decade or so, our democracies have been facing a succession of crises which made the question of emergency powers and their normalization once again relevant, even vital. In the aftermath of the 9/11 terrorist attacks, many governments turned to emergency powers to respond to the threat of terrorism. Then the worldwide financial crisis forced these same governments to use their emergency powers once again to prevent banks and even entire countries from going bankrupt. These crises have not been short-lived: for instance, more than a decade has passed since the 9/11 attacks, and yet the threat of terrorism continues to be invoked to justify derogations from important constitutional rights. As these crises continue, there is an increasing risk that emergency powers become a regular means of governance. For instance, President Barack Obama now claims the right to kill suspects of terrorism even if

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<sup>57</sup>For instance, in later editions of his influential commentary on the Constitution of the Weimar Republic, Gerhard Anschütz expressly referred to the requirement of constitutional trust as a constraint on presidential emergency powers: Gerhard Anschütz, *Die Verfassung des deutschen Reiches* (Stilkes Rechtsbibliothek, 1933) 281.

<sup>58</sup>Weitz (n 50) 351.

<sup>59</sup>The work of Carl Schmitt suggests that constitutional trust could also have a different function. Thus, in his *Verfassungslehre* (1928), Schmitt argued that Art 48 of the Weimar Constitution authorized the President to derogate from the ‘rule of law provisions’ of the Constitution if necessary to protect its ‘political substance’. He thereby suggested that the requirement of constitutional trust could also serve to justify an extensive interpretation of presidential emergency powers: the President was thus allowed to derogate from the rule of law restrictions on his power as long as he remained faithful to the Constitution’s political substance: Carl Schmitt, *Verfassungslehre* (1928 rept Duncker und Humblot, 1993) 22–27. Schmitt’s position in the constitutional debate about emergency powers is analysed in Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Duke University Press, 2004) and Marc de Wilde, ‘The State of Exception in the Weimar Republic: Legal Disputes over Art 48 of the Weimar Constitution’ (2010) 78(1–2) *Legal History Review* 135.

they are not actually engaged in or planning any particular attack at the time they are killed.<sup>60</sup>

The risk of presidential emergency powers becoming a regular means of governance is problematic, as it undermines democracy and the rule of law. As judicial and democratic controls of emergency powers are limited, there is the risk that the government abuses its powers. An example are the excesses of Guantánamo Bay, where some 150 men continue to be held, many for more than a decade, without access to an independent judge.<sup>61</sup> However, the use of emergency powers may also unintendedly contribute to the erosion of the legal order, for instance, if anti-terrorism laws are deployed outside the context of emergencies. Recent examples include the massive interceptions of phone and email communications in the United States and the United Kingdom,<sup>62</sup> as well

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<sup>60</sup>In a speech held at the National Defense University in Washington DC on 23 May 2013, and a Presidential Policy Guidance he signed on the previous day, President Obama stated that he would authorize non-battlefield drone strikes of suspects of terrorism on the condition that '(1) they are necessary to respond to individuals who pose a "continuing and immediate threat to the American people;" (2) capture is not feasible; (3) the host country is unwilling or unable to countermand the threat; and (4) there is a near certainty that no civilians will be killed or injured'. However, in practice, the first of these conditions is interpreted extensively: thus, a White Paper of the Justice Department suggests that individuals may pose a 'continuing and immediate threat' even if they are 'not engaged in or planning any particular attack at the time they are killed': David Cole, 'The End of the War on Terror?' (2013) 60(17) *The New York Review of Books* 60.

<sup>61</sup>Spencer Ackerman, 'Guantánamo Bay Detainees' Release Upon End of Afghanistan War "Unlikely"', *The Guardian*, 19 April 2014.

<sup>62</sup>On 7 June 2013, *The Guardian* and *The Washington Post* published documents from Edward Snowden which revealed that the American and British intelligence agencies NSA and GCHQ had systematically intercepted phone, email and video communications. These revelations included the existence of the so-called PRISM programme through which the NSA had gained direct access to servers of Google, Facebook, Microsoft, YouTube, Skype and Yahoo. This enabled the NSA, among other things, to intercept emails, chats, pictures and videos. It was also revealed that telecom providers had been forced to deliver each day large quantities of so-called metadata about phone calls, including information about their length as well as the locations and identities of the callers. That same month it was revealed that the NSA and GCHQ had also gained direct access to undersea cables which enabled them to intercept the content of intercontinental phone and Internet communications: Barton Gellman and Laura Poitras, 'US and British Intelligence Mining Data From Nine US Internet Companies in Broad Secret Program' *The Washington Post* (Washington, 7 June 2013) [http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497\\_story.html](http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html) (accessed 22 May 2015); Glenn Greenwald and Ewan MacAskill, 'NSA PRISM Program Taps into User Data of Apple, Google, and Others' *The Guardian* (London, 7 June 2013) <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data> (accessed 22 May 2015); Ewan MacAskill, Julian Borger, Nick Hopkins, Nick Davies and James Ball, 'GCHQ Taps Fibre Optic Cables for Secret Access to World's Communications' *The Guardian* (London, 21 June 2013) <http://www>.

as the use of surveillance drones by the regular police.<sup>63</sup> Such practices have already led to significant violations of rights, the right to privacy in particular, thereby undermining the rule of law.

In this context, legal theorists such as David Dyzenhaus and Adrian Vermeule have pointed out that, in recent years, many ‘black holes’ and ‘grey holes’ have seeped into our law.<sup>64</sup> In case of ‘legal black holes’, the executive is expressly exempted from substantive or procedural constraints on its power.<sup>65</sup> Examples include the notion of ‘non-state combatants’, a notion that was introduced after 9/11 to emphasize that suspects of terrorism do not have the same rights as suspects under the normal criminal law or prisoners of war. By contrast, the notion of ‘legal grey holes’ refers to the situation in which legal norms apply to the executive, yet these norms are so vague and insubstantial that they do not effectively constrain executive power.<sup>66</sup> Examples include the financial emergency laws that were introduced in several European countries during the recent financial crisis. These laws authorize governments to financially support or even nationalize banks if their failure would constitute a serious and immediate threat to the stability of the financial system. In practice, such laws offer little legal certainty to those affected, since the decision to nationalize a bank cannot be subject to prior parliamentary consent (the reason being that the mere suggestion that a particular bank might be nationalized would have immense repercussions on the financial markets), and can be reviewed only marginally *ex post facto* (as the decision largely depends on assessments of fact, for instance, the assessment that a particular bank is too big to fail).<sup>67</sup>

These developments have caused legal theorists to doubt whether it is possible at all to legally regulate emergency powers. Thus, Oren Gross, in a series of influential articles, claims it would be better if governments would openly admit that emergencies sometimes force them to go outside the law.<sup>68</sup> As crises tend to be

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[theguardian.com/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa](http://theguardian.com/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa) (accessed 22 May 2015).

<sup>63</sup>Ed Pilkington, “‘We See Ourselves as the Vanguard’”: The Police Force Using Drones to Fight Crime’ *The Guardian* (London, 1 October 2014) <http://www.theguardian.com/world/2014/oct/01/drones-police-force-crime-uavs-north-dakota> (accessed 22 May 2015).

<sup>64</sup>Adrian Vermeule, ‘Our Schmittian Administrative Law’ (2009) 122 *Harvard Law Review* 1095; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006).

<sup>65</sup>Dyzenhaus (n 64) 2.

<sup>66</sup>*Ibid.*, 3.

<sup>67</sup>For a critical analysis of the lack of effective legal protections in Dutch financial emergency legislation compare Samantha Daniels, ‘De staatsrechtelijke hiaten in de Interventiewet’ (2012) 26 *Nederlands Juristenblad* 1778.

<sup>68</sup>Compare, in particular, Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?’ (2003) 112(5) *Yale Law Journal* 1011; Oren Gross and Fionuala Ní Aoláin, *Law in Times of Crisis* (Cambridge University Press, 2006) 110–69; Oren Gross, ‘Extra-Legality and the Ethic of Political Responsibility’ in Victor Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 60–93.

unpredictable, the legislator cannot determine in advance which measures will be needed to respond to a crisis. The legislator is thus incapable of formulating clear and effective restrictions on executive emergency powers. Hence, in practice, these powers will be formulated in wide and vague terms, which makes their judicial control virtually impossible. Indeed, Gross believes that legally regulating executive emergency powers may turn out to be counter-productive, as it threatens to infect the legal order with competences that cannot be effectively controlled. Gross therefore concludes ‘that going outside the law in appropriate cases may preserve, rather than undermine, the rule of law in ways that constantly bending the law to accommodate emergencies and crises will not’.<sup>69</sup>

Contrary to Gross, I believe that governments are not forced to act extra-legally in emergencies. Instead, even in emergencies, they remain bound by the fundamental norm of trust that underlies our legal order. Indeed, on my view, one of the main lessons to be drawn from the history of emergency powers is that the requirement of public trust, the *fides publica*, is crucial to prevent abuses of emergency powers. Today, governments are faced once again with a succession of crises, yet they should be inspired by the example of Cincinnatus: while they may temporarily derogate from the formal restrictions on their power, they should continue to observe the requirements of public trust. This means that they should remain faithful to the spirit of the constitution, that they should remain committed to the public good and be prepared to exercise their powers with restraint. The latter criterion includes the requirement that present-day governments, like Cincinnatus, should be willing to protect those dependent on their power.

There is little doubt that in recent years, these fundamental requirements of trust have often been violated. Examples include the already mentioned policy of indefinite detention of suspects of terrorism. The problem is not, at least not primarily, that in Guantánamo Bay and elsewhere the formal requirements of law were violated. For it is uncertain whether, and to what extent, these requirements applied at all once a state of emergency had been proclaimed. Instead, I believe it is more important that the US government violated a fundamental norm of trust by failing to protect those entrusted to its power. This requirement of trust remained applicable even in emergencies, when formal legal requirements were temporarily suspended. Moreover, I would claim that the public protests against excessive uses of emergency powers, which gained momentum after the abuses of Abu Ghraib were revealed, were not primarily directed against the breach of law but against the breach of trust. As the US government had frequently invoked its trust as an argument to obtain ever increasing emergency powers, there was much public outrage, when it turned out that it had abused its powers and violated its trust.<sup>70</sup>

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<sup>69</sup>Gross, ‘Extra Legality’ (n 68) 62.

<sup>70</sup>Cf Paul Krugman, ‘Just Trust Us’ *The New York Times* (11 May 2004) <http://www.nytimes.com/2004/05/11/opinion/11KRUG.html> (accessed 22 May 2015).

## VI. Conclusion

As we have seen, the use of emergency powers, though sometimes necessary, is never without risks. Governments may thus invoke the emergency as a pretext to violate the rights of citizens and gradually circumvent parliament. However, uses of emergency powers may also inadvertently contribute to an erosion of democracy and the rule of law. That is the case if these powers are deployed outside emergencies. In those cases, there is a risk that emergency powers, which were designed to respond to extreme dangers, permeate our regular law and infect the legal order. Ultimately, this may cause ‘black holes’ and ‘grey holes’ to seep into our law, exempting the executive from effective legislative and judicial oversight. I consider this normalization of emergency powers one of the major threats to democracy and the rule of law today.

The historical examples I have discussed show how the normalization of emergency powers may ultimately lead to permanent transformations of the constitution. The history of the Weimar Republic is the most disturbing example: here the frequent use of emergency powers gradually undermined the parliamentary system and contributed to the transition towards an authoritarian regime. Of course, our present-day context differs in important respects from that of the Weimar Republic, if only because today only a very small minority contests the legitimacy of parliamentary democracy itself. Yet, the broad support for democracy and the rule of law may not turn us blind to the risks of emergency powers being used as a regular means of governance. The greatest danger is that effective legal and democratic constraints on the executive become permanently suspended.

What I find most disturbing is that today there seems to be a general scepticism about the effectiveness of law in emergencies. Many seem to believe that law is a luxury we cannot afford in times of crisis. This scepticism threatens to become a self-fulfilling prophecy if it serves as an argument to advocate extra-legal approaches to emergencies. Instead, I have tried to show that governments can be effectively constrained even in emergencies. This requires that we acknowledge the fundamental norm of trust underlying our law. My principal claim has thus been that the requirement of public trust, the *fides publica*, should be considered an important guarantee against abuses of emergency powers. It requires governments to remain faithful to the existing constitution even in emergencies, and to use their authority to protect those entrusted to their power.

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