
The impact of the health crisis on the functioning of Parliaments in Europe

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Introductory remarks

Emmanuel Cartier, Basile Ridard, Gilles Toulemonde

Faced with the first epidemic wave sweeping Europe in March 2020, its parliaments were forced to respond quickly. With the sudden and widespread economic and social downturn, most of them wanted to maintain at least some semblance of activity in their parliaments. What some parliaments went through in the first months of the health crisis, however, was more akin to Lamartine's famous line – “O time, suspend thy flight” - although, unlike the poet, the suspension of their work did not target “the transient delight -That fills our fairest day”¹. Parliaments were temporarily placed in an artificial coma, either no longer meeting, as in Hungary for a long time and in the United Kingdom for a while or delegating most of their normative power to the executive authorities, as in Spain or Poland, or abandoning all claims to control over government action.².

The relationship with time that parliaments have developed during this health crisis is complex. The present contributions aim both to report on the impact of the current health crisis on the first democratic institution in our countries - parliament - and to launch the second stage of a project initiated in 2016 in Lille on “Parliament and time”, which culminated in a conference organised in Paris in November 2016 in partnership with the Senate and the National Assembly and a book published in 2017.³ While the first stage of the project covered five European States (Belgium, Germany, Italy, France and the United Kingdom), the second aims to extend the analysis to all EU Member States by adopting the same methodological framework and the same issues.

Its ambition is to rely on a European network of research teams which, for the moment, remains informal but which, in the long term, could adopt a more structured form thanks to a European university network based on local teams that can work in a concerted manner on specific issues in the field of constitutional and European law. This network covers twelve European states: Belgium, Bulgaria, France, Germany, Greece, Latvia, Poland, Portugal, Romania, Spain, Sweden, the United Kingdom and the European Parliament. Despite Brexit, the United Kingdom remains a reference model for a study devoted to the Parliament in the European framework.

¹ « Ô temps ! Suspend ton vol, et vous, heures propices ! Suspendez votre cours : Laissez-nous savourer les rapides délices Des plus beaux de nos jours ! ». Alphonse de Lamartine, « Le Lac », *Méditations poétiques*, 1820.

² In France, the law of 23 March 2020 establishing the state of health emergency did not lead to a referral to the Constitutional Council by members of parliament.

³ Emmanuel Cartier and Gilles Toulemonde (Dir.), *Le Parlement et le temps. Approche comparée*, Paris, LGDJ, 2017, 370 p.

The first phase of this international project involved a webinar held on 9 July 2020 to compare the different ways in which national parliaments had responded to the pressing health crisis in the exercise of their usual functions. To do this, each national team had to organise its reflection around two axes. On the one hand, a brief presentation of the context of the battle against the pandemic and the constitutional system, specifying in particular the type of regime and the form of state, whether federal, unitary or regional. On the other hand, a brief analysis of the impact of the health crisis on the functioning of parliaments, focusing on two points: parliamentary procedure and parliamentary scrutiny of the government during the crisis. The following contributions are the result of these summer exchanges. Grouped in pairs, they were published weekly by the Robert Schuman Foundation throughout October and November 2020. This general report, which integrates all of these national studies and along with the one on the European Parliament, provides a broad overview of parliamentary activity in Europe during the pandemic and attempts to answer the questions raised by the crisis.

The exceptional health conditions have indeed legitimately raised many questions about the place of Parliament in our democracies, some of which remain unresolved. Beyond the practical justifications relating to the contagious nature of the coronavirus and the potential seriousness of Covid-19, are the legal or constitutional bases that have allowed Parliament to be side-lined in many European States sufficiently solid? What was the nature of the standards mobilised to adapt the functioning of parliaments to the health crisis? Which parliaments have set up remote voting procedures and according to what technical modalities? What was, beyond appearances, the reality of parliamentary powers during the pandemic? Did distance working distort the deliberative process in favour of a less politicised, more technical approach and, finally, did it not contribute to increasing the importance of parliamentary administration? In all events, has this period accentuated a shift in the political system towards one that is more supportive of the executive, or has it disrupted the functioning of the institutions creating a rift? While the contributions all shed important light on these varied issues, we will limit ourselves here to highlighting some of the aspects that have received particular attention.

The first difficulty encountered by the parliamentary assemblies was the impossibility for their members to meet all together at any one time because of the constraints imposed by the virus. However, the abrupt stoppage that these democratic fora experienced could not be total. The exceptional and sudden nature of the health situation demanded swift action with a view to taking urgent decisions, which was difficult in the very context of the deliberations that parliament necessarily involves.

At the same time, this period of pandemic could, like other periods of crisis throughout our history, lead to the prevalence of the instant, or even the snapshot. Thus, parliaments have sometimes had to urgently vote on extremely general texts granting broad powers to the executive, thereby ruling out any long-term reflection. In the United Kingdom, the Coronavirus Act 2020 was passed by both Houses of Parliament and then passed into law in just six days, without giving MPs any time to

examine this wide-ranging piece of legislation in detail.⁴ The Romanian Parliament was even faster, adopting in a record time of two days a draft law on measures to limit the spread of the pandemic. For its part, the Greek parliament adopted a text on 25 February providing for preventive measures against the epidemic, before approving a text on 11 March that aimed to contain the economic impact of the health crisis; on 14 March it voted on a text that would limit the spread of the virus. In Bulgaria, the National Assembly passed a law in just a few days allowing the health minister alone to order the compulsory isolation of infected people and "contact cases". Similarly, on 2 March the Polish Parliament adopted a law laying down the broad outlines of a legal framework for combating the pandemic, which was then shaped on the basis of subsequent decrees issued directly by the Minister of Health.

In France, Parliament adopted the law dated 23 March 2020 on the state of health emergency in just five days. As for the organic law dated 30 March, it was passed in four days, thereby violating a procedural constitutional requirement. Article 46 paragraph 2 of the Constitution provides for an incompressible period of fifteen days between the tabling of a draft organic law on the bureau of an assembly and the moment when it can be examined in public session. This minimum temporal reserve, which is supposed to give parliamentarians a certain amount of time to reflect on a delicate and important subject, was not respected in any way by the Assemblies, and this without the Constitutional Council finding any reason to oppose it, "given the particular circumstances."⁵

Compliance with constitutional deadlines has also been very relative in Spain, where the Congress of Deputies was only asked to extend the *state of alert* after the maximum period of fifteen days, which is clearly laid down in Article 116 of the Constitution. Unhappy about being consulted so late in the day, the Spanish deputies approved this extension without difficulty however, without even subjecting it to certain conditions, thus temporarily relinquishing part of their parliamentary sovereignty. The pressure to act quickly, dictated by the situation, even led to the end of an *a priori* inextricable political situation in Belgium. While negotiations for the formation of a government coalition had ground to a halt and a caretaker government had been conducting routine business since December 2018, a parliamentary majority finally granted confidence to a government vested with special powers to manage the health crisis directly in March 2020. The government resulting from the elections of 25 May 2019 was finally formed ...on 1 October 2020....

As if they were suffering from the coronavirus, the assemblies ran short of breath and were unable to continue their activities with the same intensity as before. In Spain, the Congress of Deputies mainly limited itself to meeting every fortnight to renew the extension of the state of alert and validate the numerous royal decree-laws, thus leaving many powers in the hands of the executive. For its part, the Spanish Senate did not meet once in plenary session during the first month of the state of alert. The Bulgarian National Assembly, meanwhile, decided that as long as the state of

⁴ This particularly long legal text - 329 pages - is to be compared with the 12 pages of the French Act on the state of health emergency. The very swift adoption of the text was made possible by the vote on 23 March 2020 of a resolution to suspend the internal rules of the House of Lords, initially proposed by the minister responsible for relations with Parliament. A. Fourmont and B. Ridard, "Parliamentary oversight in the health crisis", European Issue, Robert Schuman Foundation, No. 558, 2020, p. 6.

⁵ Decision n° 2020-799 DC, 26 March 2020, *Loi organique d'urgence pour faire face à l'épidémie de Covid-19*, JORF, 31 March 2020.

emergency lasted, it would only hold plenary sessions devoted to the examination of legislation directly related to the epidemic. In the Greek Vouli, no less than 19 parliamentary committees suspended their work.

However, this weakening of parliament, as a result of its artificial coma or its submission to the tyranny of the moment, is not the only conclusion that can be drawn regarding the effect of the pandemic on its work.

It is remarkable that parliaments have been able to find ways of maintaining a minimum level of activity during this period. In the same way as academics have been forced to lecture or pursue research activities by videoconference, parliaments in many European states have organised a hybrid approach to their functioning, by allowing a limited number of parliamentarians to participate physically in the activities of their assembly or by developing videoconference meetings. In this way it has been possible to maintain some life in the assemblies, even if some assemblies have nevertheless found themselves short of breath.

The issue of adapting the parliamentary work to the health situation was taken very seriously in Latvia, so much so that for the first time in its history a joint meeting of the Head of State, the Head of Government, the President of the Parliament, the President of the Constitutional Court and the President of the Supreme Court took place. Common working principles for the institutions in a health crisis situation were determined so that the legislative process could continue. The Bureau of the Saeima, for its part, decided temporarily to organize its plenary sessions by maintaining physical separation between the different parliamentary groups, each of which convenes its members in different rooms, that are linked by a videoconference system. This temporary system was eventually replaced by the e-Saeima platform, which made the Latvian Parliament one of the first in the world to work entirely at a distance.

In Spain, the use of videoconferencing has been restricted to meetings of the Conference of Presidents of the Congress of Deputies. In the Swedish Riksdag, the parliamentary committees were able to continue their work in hybrid mode, allowing some MEPs to participate remotely, provided that the digital equipment is sufficiently secure to guarantee the confidentiality of the meetings.⁶ In the German Parliament, on the other hand, the number of remote debates has increased, especially since this technique was not a total novelty. Unlike most other assemblies, the Bundestag had already used videoconferencing regularly for meetings of its parliamentary groups only, even before the health crisis made this communication system widespread. In Greece, the number of parliamentarians allowed to participate physically in plenary debates has been reduced to sixty. The limitation made by the British House of Commons was proportionally more drastic, as it limited the number of participants physically attending the meetings to 50 MPs with up to 120 more elected representatives on the Zoom platform. The Portuguese Assembly has only allowed one fifth of the MPs to take part in debates in the hemicycle, respecting the numerical proportion of parliamentary groups. On the other hand, it has limited the development of videoconferencing as much as possible, only allowing

⁶ As a general rule, meetings of the *Riksdag's* parliamentary committees are restricted to the members who sit on them, although they may sometimes decide to hold public hearings.

it to go ahead on Skype and only for a few elected representatives. In Bulgaria, where the physical presence of a quarter of the MEPs is allowed during debates, a computerised voting process has been introduced, with MEPs divided into two groups who have a minimum of half an hour to vote in a staggered manner. The most successful form of remote voting is probably the one adopted by the European Parliament, which has set up a very secure and precisely organised process.

The dematerialisation of parliamentary deliberation may have led to a form of devaluation of the assemblies' activities. While parliamentary work was trying to survive in the face of events, some members of the assemblies may have contributed to weakening it, due to the instantaneous nature of videoconferencing. This was the case in the French Parliament where a member of parliament took part in a committee meeting directly from his car, or a senator, who was only able to begin her intervention after several unsuccessful attempts to connect, not without having let slip a few inappropriate words that she thought were inaudible.

Moreover, in a second phase, some more satisfying conclusions could be drawn for Parliament, even if they are still hypothetical for the time being. The present time of the pandemic, a dark one for parliaments and which it is hoped will soon be over, is giving way to a future time that is more favourable to them, provided it does not remain a conditional one. Over the long term, which is more befitting for parliamentary assemblies, the latter already have a dual role to play: both to confirm, sometimes validate or ratify, the measures taken by the government during this period, but also to monitor and take stock of the action taken by governments at the end of the pandemic. On the first point, the decree-laws passed by governments during the crisis have already had to be ratified by certain parliaments. Regarding parliamentary control, special Covid-19 committees or committees of enquiry have been set up, some of whose work has already been completed⁷.

Rabelais wrote that "*time matures all things; through time all things come to light; time is the father of truth*". It is up to parliaments to take full advantage of a long period of time that must now be recovered, to exercise genuine parliamentary scrutiny so as to regain their full strength. Let us express the hope that the health crisis we are experiencing will help parliaments, if not to rise from their ashes, at least to emerge from the weakened situation in which they have found themselves in this crisis. It is now a matter of urgency for the assemblies which, while the first vaccinations give hope of a gradual restoration of freedoms, are the only ones in a position to revive European parliamentary democracy.

⁷ A first assessment of the crisis has already been made by several parliaments in Europe. In France, the Senate's Commission of Inquiry for the evaluation of public policies regarding major pandemics in the light of the Covid-19 health crisis and its management, issued a very detailed report on 8 December 2020, revealing shortcomings in the executive's management of the crisis. A few days earlier, the National Assembly's fact-finding mission also issued a rather critical report on government action during the pandemic. In Belgium, the work of the Covid-19 Special Commission, set up in July 2020, is continuing. In Bulgaria, a special parliamentary committee has been set up to oversee the expenditure of public funds related to the fight against the spread of the Covid-19 pandemic.

Chronology of the health crisis in Europe

8 December 2019: Doctors in China's Wuhan province report that an unknown virus is circulating in their area. The first infections date back to November and appear to have originated from a wildlife market in Wuhan.

January 2020: First cases are reported in Europe, first in Italy, and the first measures are taken.

28 January 2020: The Croatian Presidency of the Council of the Union activates the Integrated European Crisis Response Mechanism (IPCR) in "information sharing" mode.

2 March 2020: Due to the changing situation and the different sectors affected (health, consular protection, civil protection, economy), the Croatian Presidency switches the IPCR to "full activation" mode.

8 March 2020: An initial quarantine is decided in the north of Italy, before the measure is extended to the entire territory by decree the following day.

11 March 2020: The World Health Organisation (WHO) qualifies the situation caused by Covid-19 as a "pandemic".

12 March 2020: Several EU Member States begin to close their borders and confine their populations by adopting measures to reduce human contact. Many states also re-establish control measures on their borders.

13 March 2020: WHO declares Europe the epicentre of the pandemic.

18 March 2020: The European Central Bank launches the pandemic emergency purchase programme (PEPP), a €750 billion asset buyback programme.

20 March 2020: The European Commission suspends the application of budgetary rules for States (debt at 60% of GDP and deficit below 3%), before this decision is validated by Finance Ministers on 23 March.

March - April 2020: After Italy, Spain, France and Belgium take drastic measures on the basis of constitutional or legislative mechanisms, restricting certain fundamental individual and collective rights and freedoms, and concentrating power in the hands of governments, in the name of preserving public health and human life. Against the tide, Sweden has adopted the least restrictive policy in Europe, with its government advocating the strategy of herd immunity. Nevertheless, most parliaments are subject to the same public health and social distancing measures as all other meeting places, despite the democratic importance of bringing together national representatives in a crisis of such magnitude.

15 April 2020: G20 countries agree on a moratorium on the debt of the poorest countries, temporarily suspending interest payments on debt to help fragile countries cope with the

pandemic. Of the 73 eligible poor countries, 46 had already resorted to it by the end of October.

24 April 2020: At an event co-hosted by the WHO Director-General, the French President, the President of the European Commission, and the Bill & Melinda Gates Foundation, the Access to Covid-19 Tools (ACT) is officially announced. This international programme aims to facilitate the sharing of tools and data. The COVAX facility is part of COVAX, the "vaccines" pillar of the Access to Covid-19 Tools Accelerator (ACT accelerator) co-led by CEPI, Gavi and WHO. It supports the strengthening of manufacturing capacity and the purchase of advance supply so that 2 billion doses can be distributed equitably by the end of 2021.

end April 2020: Given the stabilisation or decline of the epidemic in most European states, governments begin a gradual process of ending the lockdown of their societies and economies. Thus, as of 9 April, the Czech Republic allowed certain companies to resume their activities.

May - June 2020: The momentum picks up as many Member States, including Spain, Italy, Greece and Portugal, lift some of the exceptional measures they had introduced. Each is preparing for the "second wave" and is trying to revive national economies, accompanied in an unprecedented way by the European Union.

13 May 2020: The European Commission presents its "tourism and transport" package, which aims to coordinate the reopening of European borders and give visibility to tourists. The Commission's recommendations provide for the gradual lifting of restrictions by 30 June, starting with the end of border controls on 15 June. It also recommends the reopening of external borders for certain countries from 1 July.

4 June 2020: The ECB announces that it is increasing the amount allocated to the pandemic emergency purchase programme (PEPP) by €600 billion to a total of €1,350 billion.

15 June 2020: Launch of the "Re-open EU" platform by the European Commission, which collects and provides information in 24 languages on health measures and restrictions in force in all Member States.

30 June 2020: Member States agree to open the external borders to nationals from 15 third countries. The list is to be updated every 15 days taking into account the development of the pandemic in third countries.

1 July 2020: Germany, which assumed the Presidency of the Council of the Union following Croatia, decides to maintain the IPCR system in "full activation" mode.

27 August 2020: The European Commission signs a first contract with AstraZeneca for 300 million doses of vaccine (and more than 100 million more if needed).

1 September 2020: Hungary unilaterally closes its borders to foreign nationals regardless of their origin, with the exception of its neighbors in the Visegrad Group (Poland, Slovakia, Czech Republic).

18 September 2020: The European Commission signs a contract with the French laboratory Sanofi, thereby pre-ordering 300 million doses of vaccine.

28 September 2020: The symbolic milestone of one million Covid-19 deaths worldwide is passed.

8 October 2020: The European Commission signs a contract with Janssen Pharmaceutica, the Belgian subsidiary of Johnson & Johnson, to reserve 200 million doses of its potential

vaccine and a possible second delivery of a further 200 million doses.

End of October / beginning of November 2020: On 19 October, Ireland and Wales announce a new lockdown. Gradually, the EU Member States are locking down again: France announces the lockdown of the population on 28 October, followed by Austria, Belgium and the United Kingdom over the All-Saints' Day/Halloween weekend. At the beginning of November, Slovakia tests two thirds of its population with antigen tests, a world first.

3 November 2020: According to the WHO, 202 candidate vaccines against COVID-19 are being developed worldwide, 47 of which are in clinical trials.

9 November 2020: Pfizer (American) and BioNTec (German) announce that their Covid-19 vaccine is 90% effective.

11 November 2020: The European Commission signs agreements with three laboratories (BioNTech-Pfizer, CureVac, Moderna), adding to the agreements already signed with AstraZeneca, Sanofi and Janssen Pharmaceutica. A total of 1.8 billion doses of vaccines will be distributed in all Member States once the marketing approvals have been granted by the European Medicines Agency.

End of November 2020: Some EU countries decide to ease restrictions in the run-up to Christmas: reopening of non-essential shops in Belgium, France, Ireland, Poland and the Czech Republic, reopening of bars and restaurants in Catalonia, parts of Italy and Ireland, easing of restrictions on movement in France and Ireland, reopening of museums and cinemas in Ireland, the Netherlands and the Czech Republic, and reopening of places of worship in Belgium, France, Ireland, Lithuania and the Czech Republic.

15 and 16 December 2020: Germany, Italy and the Netherlands announce a new lockdown in an attempt to curb the exponential growth of infections.

21 December 2020: Meeting of the European Medicines Agency.

End of December: The first vaccines against Covid-19 are likely to be placed on the market in all Member States.

Belgium

The impact of the health crisis on parliamentary assemblies

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From a legal point of view, the crisis triggered by the COVID-19 pandemic has raised several questions in Belgium, some of which are very different in nature¹. We limit ourselves here to a few observations on the impact of the crisis on parliamentary assemblies and their members.

I. The constitutional prohibition of the suspension of fundamental rights by members of parliament

In Belgium, restrictions to fundamental rights, provided that they can be objectively and reasonably justified, can only be decreed by legislative norms, voted by one or more parliamentary assemblies. It is irrelevant whether these restrictions are dictated by a crisis situation or not. However, these same legislative assemblies are not authorised to suspend, in whole or in part, these fundamental rights, even in the event of an acute crisis². It should be noted that the Belgian Constitution was not designed to deal with crisis situations, which, on the contrary, were somehow neglected by the constituent assembly. Adopted in 1831, Article 187 of the Constitution states that "*the Constitution may not be suspended in whole or in part*". It thus unambiguously prohibits the Constitution from

¹ De l'auteur du présent rapport, cf. également M. Verdussen, « [La Constitution belge face à la pandémie de Covid-19](#) », *Confluence des droits*, 26 juillet 2020 ; M. Verdussen, « La crise du coronavirus et la menace sur les droits fondamentaux en Belgique », in Institut des droits de l'homme du barreau de Paris (IDHBP) et Institut des droits de l'homme des avocat(e)s européen(e)s (IDHAE), *Confinement forcé sur tout le territoire national et modalités d'application : des mesures disproportionnées dans une société démocratique ?*, Paris, 2020 ; M. Verdussen, « [Droits humains et crise sanitaire : l'État mis au défi](#) », *La Libre Belgique*, 18-19 juillet 2020, pp. 42-43 ; M. Verdussen (avec C. Romainville), « L'état d'exception, nouveau régime de droit commun des droits et libertés ? Du terrorisme à l'urgence sanitaire. Belgique », *Annuaire international de justice constitutionnelle*, 2020, vol. XXXVI (à paraître en 2021). Le présent rapport s'inspire de ces publications antérieures. Sur les aspects constitutionnels de cette crise en Belgique, cf. également N. Bernard, « Les pouvoirs du Gouvernement fédéral en période de crise : le Gouvernement Wilmès face à l'épidémie de Covid-19 », *Journal des tribunaux*, 2020, pp. 372-375 ; F. Bouhon, A. Jousten, X. MINY et E. Slautsky, « L'Etat belge face à la pandémie de Covid-19 : esquisse d'un régime d'exception », *Courrier hebdomadaire du Crisp*, 2020, n° 2446 ; J. Clarenne et C. Romainville, « [Le droit constitutionnel belge à l'épreuve du Covid-19](#) », *Jus Politicum*, 23 avril-4 mai 2020 ; S. Ganty, « [COVID 19 and States of Emergency. Belgium and COVID-19 : When a Health Crisis Replaces a Political Crisis](#) », *Verfassungsblog*, 21 avril 2020 ; T. Moonen et J. Riemsdagh, « [Fighting Covid-19 – Legal Powers and Risks : Belgium](#) », *Verfassungsblog*, 25 mai 2020. *Adde* : « [Carnets de crise](#) », Centre de droit public de l'Université de Bruxelles.

² To suspend the application of these rights as an immediate reaction to a highly exceptional situation, derogations - often part of a "state of emergency" or "state of exception" - should not be confused with the limitation of fundamental rights. Limiting fundamental rights means allowing *particular* restrictions to be placed on them and setting the conditions for them. Thus, the system of suspensions applies in exceptional periods, whereas that of limitations is part of the ordinary law of ordinary times.

being suspended in whole or in part. Consequently, in Belgium, the introduction of a "state of emergency" or a "state of exception" is not provided for in the Constitution and is even formally prohibited.³

It seems that by adopting Article 187, the National Congress in 1831 wanted to obviate the risk of authoritarian and arbitrary suspensions that would exceed the legislature or the executive's powers. The author of the amendment that led to the adoption of Article 187, Mr. Van Snick, also quoted the decrees of Charles X suspending constitutional liberties⁴. No doubt the delegates also remembered certain unconstitutional acts carried out by King William of the Netherlands when the Belgian provinces were part of the Netherlands (1815-1830). More broadly, one might think that they considered that to offer constituted authorities the possibility of freeing themselves of their obligation to comply with the Constitution would lead to the temptation of invoking this extra-constitutionality clause at all times.

What situations are covered by Article 187 of the Constitution? It concerns exceptional situations. One thinks of the need to counter terrorism, but also to deal with a nuclear disaster, a deadly heat wave, devastating weather, an epidemic or a pandemic. For a State faced with such threats, it may be tempting for the legislative branch or even the executive branch to adopt exceptional measures suspending the application of constitutional provisions and especially fundamental rights. The response of the Belgian constituent assembly is categorical: whatever the seriousness and intensity of the events or threat, institutions must function at all costs, citizens must be able to exercise their fundamental rights without hindrance and the legal regime of these rights cannot be changed in the circumstances. All public authorities are responsible for applying all of the provisions laid down in the Constitution.

The objection could be raised that Belgium has subscribed to international conventions which provide for a "state of emergency", which occurs "in the event of war or other public danger threatening the life of the nation", under the terms of Article 15 of the European Convention on Human Rights - several European States have already notified the General Secretariat of the Council of Europe of their wish to invoke Article 15 of the Convention because of the Covid-19 pandemic -, or a "public emergency" threatening the existence of the nation, according to Article 4 of the International Covenant on Civil and Political Rights⁵. However, the exceptional regimes provided for in these international instruments fall short of the protection that the Constitution intends to establish.⁶ They apply only to fundamental rights not recognised by the Constitution.

The intransigence of the Belgian constituent assembly is a challenge. Ignoring the possibility

³ It would be futile to invoke here the decree law of 11 October 1916 relating to the state of war and the state of siege. (*Moniteur belge*, 15 October 1916), still in force, since both the state of war and the state of siege only apply in times of war.

⁴ E. Huyttens, *Discussions du Congrès national de Belgique 1830-1831*, Bruxelles, A. Wahlen et Cie, 1844, vol. II, pp. 464 et s.

⁵ See the Syracuse Principles on the Provisions of the International Covenant on Civil and Political Rights Allowing for Restrictions or Derogations, adopted on 28 September 1984.

⁶ J. Velu, « Le droit pour les États de déroger à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales en cas de guerre ou d'autre danger public menaçant la vie de la nation », in *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruxelles/Louvain-la-Neuve, Bruylant/Cabay, 1982, pp. 71-147 ; R. Ergé, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles*, Bruxelles, Bruylant, 1987.

that crisis situations may emerge which call for the suspension of certain fundamental rights means that the State might possibly take refuge, outside any guidelines, behind notions as vague and insecure as the state of necessity and self-defence. Is it not tempting for a State faced with a pressing emergency, and therefore in *tempore suspecto*, to break down a tightly closed door, which prohibits any suspension under any circumstances, and jump in, without any restrictions? Is it not preferable to open this door, in *tempore non suspecto*, by placing material and procedural limits - including the intervention of the legislative assemblies - on the implementation of a dispensatory regime? The debate is open. In any case, it should be noted that Article 187 of the Constitution "*has not stood the test of time*", since wartime "*engendered a state of necessity which led to the implementation of a regime of exception suspending certain constitutional freedoms despite the Constitution...*".⁷

Executive dispossession of MPs

On 23 March 2020, the Minister of the Interior relied on rather imprecise legislative provisions - taken from the law of 31 December 1963 with regard to civil protection, the law of 5 August 1992 with regard to the police function and the law of 15 May 2007 with regard to civil security - to adopt a ministerial order which has proved to be the legal basis for substantial emergency measures to limit the spread of COVID-19⁸: closures of the main shops; restrictions on access to supermarkets; closure of markets; obligation for "non-essential businesses" to work from home; prohibition in principle of "gatherings", "activities of a private or public nature, of a cultural, social, festive, folkloric, sporting and recreational nature", "school excursions", "activities within the framework of youth movements", or "activities of religious ceremonies"; suspension of lessons and activities in nursery, primary and secondary education; distance learning in colleges and universities; prohibition of "non-essential travel" from Belgium; regulation of residential confinement. The measures adopted restrict many fundamental rights (freedom to come and go, freedom of assembly, right to respect for private and family life, right to education, freedom of religion, right to cultural development).

It is surprising that such drastic interference in terms of citizens' fundamental rights has been decided by the Minister of the Interior alone. Admittedly, the laws invoked in support of these decisions enabled this. Admittedly, the Council of Ministers was consulted. Admittedly, the Minister of the Interior enjoys extensive administrative police powers (albeit subsidiary to those of the municipal authorities). It is also true that the ministerial order in question was adopted on 23 March 2020, i.e. four days before the adoption on 27 March 2020 of the Special Powers Act (discussed below). The urgent nature of the situation certainly justified it. However, while the ministerial order provided that the measures adopted were only applicable until 5 April, it was amended several times to extend this deadline. Whatever the arguments put forward, the fact remains that, in a State governed by the rule of law and concerned about respecting fundamental rights, it is not normal to leave the

⁷ R. Ergec et S. Watthée, « Les dérogations aux droits constitutionnels », in M. Verdussen et N. Bonbled (dir.), *Les droits constitutionnels en Belgique – Les enseignements jurisprudentiels de la Cour constitutionnelle, du Conseil d'État et de la Cour de cassation*, Bruxelles, Bruylant, 2011, vol. 1, p. 396.

⁸ *Moniteur belge*, 23 March 2020, 2nd éd. Il s'agit, en réalité, du troisième arrêté ministériel adopté à cette fin par le ministre de l'Intérieur, deux précédents arrêtés ayant été adoptés le 13 mars 2020 (*Moniteur belge*, 13 mars 2020, 2^e éd.) et le 18 mars 2020 (*Moniteur belge*, 18 mars 2020, 3^e éd.). D'autres arrêtés ministériels ont également été adoptés, qui portent des mesures urgentes plus spécifiques.

Minister of the Interior alone with responsibility for interference of such magnitude.

This is all the more regrettable since the *a posteriori* scrutiny by the Administrative Jurisdiction Division of the Council of State has proved to be largely ineffective here, for reasons linked to the temporal nature of the proceedings. Does the procedure of extreme urgency allow the circumvention of the complexities of the ordinary annulment and suspension procedures? It must be noted that, in the context of the health crisis, the appeals lodged in extreme urgency against the measures adopted by ministerial order (but also by the municipal authorities) were all rejected. The Council of State considered that the conditions of extreme urgency had not been met, because the appeals had become moot following the modification or annulment of the contested standards, or because the grounds for dismissal were not serious⁹.

II. Self-exclusion by MPs

The COVID-19 crisis is challenging the relationship between legislative assemblies and governments, particularly in that the so-called "special powers" procedure allows the legislature to temporarily forego legislating on certain matters that it entrusts to the executive. The parliamentary system specific to the Belgian constitutional system has been more or less destabilised as a result. So, what does this mean?

Special Powers Acts are laws by which, if certain conditions are met¹⁰, the federal legislator temporarily empowers the King - i.e. the Federal Government - to regulate a certain number of matters which are normally regulated by the federal legislator, and this by royal decrees of special powers¹¹. In practice, rather than acting jointly with the federal assemblies (the House of Representatives and the Senate), the federal government acts collectively but alone, which allows it, in a crisis context requiring prompt action, to intervene "*faster and more effectively than the normal functioning of the legislative assemblies permits*"¹². Based on a bold interpretation of article 105 of the Constitution, the use of special powers is all the more acutely justified when these same legislative assemblies are unable to meet physically in the buildings of Parliament.

Royal decrees of special powers have regulatory value, unless they are subsequently confirmed by the legislator, in which case they acquire legislative value (force of law). Constitutionally, this confirmation is required when the Royal Decree of Special Powers regulates matters reserved by the

⁹ See Council of State., decree n° 247.674, 28 May 2020; judgment no. 247.714, 4 June 2020; judgment no. 247.939, 26 June 2020; judgment no. 248.108, 3 August 2020; judgment no. 248.132, 10 August 2020; judgment no. 248.145, 13 August 2020.

¹⁰ In an [opinion given on 31 May 1996](#), the Legislation Division of the Council of State has indicated that, in order to be compatible with Article 105 of the Constitution, special powers must meet the following conditions: (1) special powers must be justified by certain factual circumstances, generally described as exceptional circumstances or circumstances of crisis; (2) special powers may only be granted for a limited period, determined according to the circumstances that justify them ; (3) the special powers must be precisely defined, with regard to both the objectives to be achieved and the matters in which measures may be taken and their scope; (4) on the distribution of powers between the federal and federated entities.

¹¹ The legal literature on special powers is extensive. See M. Leroy, « Les pouvoirs spéciaux en Belgique », *Administration publique*, 2014, pp. 483-504 ; T. Moonen, « Bijzondere machten als oplossing voor een crisis : of zelf in een midlifecrisis ? », in E. Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijke recht*, Bruges, die Keure, 2019, pp. 177-213.

¹² M. Uyttendaele, *Trente leçons de droit constitutionnel*, Bruxelles/Limal, Bruylant/Anthemis, 2014, p. 520. On the time constraints on parliamentarians in the exercise of their duties, see. M. Borres, M. Solbreux et M. Verdussen, « Les Parlements belges et le temps », in G. Toulemonde et E. Cartier (dir.), *Le Parlement et le temps – Approche comparée*, Paris, Institut Universitaire Varenne, 2017, pp. 227-255, spéc. pp. 232-253.

Constitution to the federal legislator (criminal offences, criminal procedure, taxes, etc.). In practice, however, the laws of special powers generally require confirmation by the federal legislature of all royal decrees of special powers, even in matters not reserved to the legislature. As Professor Yves Lejeune rightly points out, "*initially designed as a legal correction of the powers granted to the King in matters constitutionally reserved to the law, the confirmation laws (...) have thus become a new means of political supervision over the exercise of the special powers granted in all matters*"¹³. It should be noted that the legislative confirmation of decrees confers on them the value of legislative standards retroactively, i.e. to the date on which the decree comes into force. Since Belgium is a federal state, the federated authorities - the regions and communities - can logically also make use of special powers, on the basis of Article 78 of the special law on institutional reforms of 8 August 1980. Essentially, the principles governing special powers apply, *mutatis mutandis*, at federal level.

The crisis triggered by the Covid-19 pandemic prompted the federal legislature to make use of special powers. On 27 March 2020, two special powers laws were passed empowering the King to take measures to combat the spread of the virus¹⁴. It provides that the special powers will expire three months after the entry into force of the law. They therefore expired on 30 June. The adoption of a new law on special powers was possible, but this did not occur. Furthermore, it is required that the decrees adopted be confirmed by law within one year of their entry into force, it being specified that, if they are not confirmed within this period, they are deemed never to have had effect.

Since Belgium is a federal state, the federated authorities - the regions and communities - can logically also make use of special powers, which most of them have done. The nature and extent of the special powers granted by the legislators of these federated entities are quite variable when compared to each other but also when compared to federal laws of special powers, some special powers resembling full powers.

To deal with the second wave of the pandemic, the federal legislature did not use any special powers. But the regional governments did do this however: on 14 November the Parliament of the Wallonia-Brussels federation granted special powers to the regional government for three months, renewable once. Flanders, for its part, did not ask for special powers but triggered a "civil state of emergency" which enabled the construction of medical infrastructures without the need to obtain the normally required permits.

III. The challenge of federalism to MPs

The crisis triggered by the Covid-19 pandemic has tested the balance between the different levels of power, especially in a federal State marked by strong divisions between those levels. Previous crises already raised this type of question, but the health crisis of 2020 has exacerbated the tensions inherent in the Belgian federal system.

There has been an increase in the number of measures taken to fight the COVID-19 pandemic, which is justified by the fact that the areas involved are fragmented between the different levels of

¹³ Y. Lejeune, *Droit constitutionnel belge – Fondements et institutions*, 3^e éd., Bruxelles, Larcier, 2017, p. 666.

¹⁴ *Moniteur belge*, 30 mars 2020, 2^e éd.

power. In an opinion given on 13 May 2013, the Legislation Division of the Council of State emphasised that "*it is not because measures relate to the fight against a crisis affecting public health that the federal authority can be deemed competent. On the contrary, each authority is responsible for combating a crisis affecting public health within the limits of its own material competences, which does not exclude, however, that a cooperation agreement may be concluded in this regard*"¹⁵. The situation in Belgium is particularly complex in this respect. While some matters are (almost) exclusively the responsibility of one level of government - such as education which is the competence of the communities, and justice, which comes under federal jurisdiction - other matters are shared between different levels of government, such as health policy and economic policy.

This overlapping of competences not only undermines the need for a coherent and effective policy in response to the crisis, but may also lead, again, to the parliamentary assemblies being sidelined. An example of this is given with regard to tracing. Belgium is indeed a State in which citizens can download an application on their smartphone that records their movements and the people with whom they have come into contact. The aim is to be able to identify and isolate people who may be infected. In particular a tool like this affects the protection of privacy and the role of the legislator in regulating what constitutes interference with this fundamental right. In an effort to initiate a democratic debate on the subject, several members of the Belgian House of Representatives tabled a motion for a resolution that sought to establish a set of essential guarantees to govern this kind of digital tool (minimisation of recorded data, transparency through publication of the application's source code, etc.)¹⁶. A parliamentary committee suggested the inclusion of this resolution in a legislative proposal, which has been done¹⁷. However, following objections raised by the Legislation Division of the Council of State, a draft cooperation agreement between the competent levels of power was prepared. While its entry into force was delayed, a Royal Decree of Special Powers was adopted¹⁸. When the cooperation agreement is concluded by the governments involved, the subsequent assent of the parliaments will be purely formal. However, this is a problem that calls for in-depth parliamentary debate. The main question raised is that of the need for such a measure¹⁹. Some governments tend to consider this to be a political issue falling within their sovereign appreciation, whereas the issue is a legal one. The European Court of Human Rights further recalled, on 3 March last, that any interference with the right to privacy must be "necessary in a democratic society" in the sense of Article 8 § 2 of the Convention, which implies that "*the reasons adduced by the national authorities to justify it are relevant and sufficient*"²⁰. Is the process under consideration sufficiently effective to justify such an intrusion into privacy? To date, there has been no evidence for this. Moreover, it seems disproportionate, for reasons beyond the scope of this contribution.

¹⁵ [Avis n° 53.018/AG du 13 mai 2013](#) sur un projet d'arrêt royal relatif au contrôle sanitaire du trafic international.

¹⁶ Proposition de résolution relative au développement potentiel d'une application mobile pour lutter contre le coronavirus (Covid-19) et à la nécessité de respecter les droits humains, en particulier le droit au respect de la vie privée (*Doc. parl.*, Ch. repr., 2019-2020, n° 55-1182/1).

¹⁷ Proposition de loi relative à l'utilisation d'applications numériques de traçage de contacts par mesure de prévention contre la propagation du coronavirus Covid-19 parmi la population (*Doc. parl.*, Ch. repr., 2019-2020, n° 55-1251/1).

¹⁸ Royal Decree No. 44 of 26 June 2020, published in the Belgian Official Journal (*Moniteur belge*), 29 June 2020 (2nd ed.). On special powers, see above.

¹⁹ See E. Degrave, « [Le suivi numérique des citoyens : un pacte avec le diable ?](#) », *La Libre Belgique*, 24 April 2020.

²⁰ ECHR, *Conventito and others vs. Romania*, 3 March 2020, § 48.

IV. The vagaries of parliamentary scrutiny

Two periods should be distinguished: the period of special powers and the subsequent period. During the period of special powers, the parliamentary assemblies retain their full powers. Parliamentarians may resort to the usual techniques of government oversight and, in particular, the questioning procedure. They may reappropriate, by tabling bills, matters entrusted to the government under special powers and, of course, retain legislative control over matters not covered by the special powers.²¹ They may initiate the adoption of resolutions intended to address recommendations to the government and its members²². Now that the period of special powers has expired, political oversight will be exercised in three main ways: the right of parliamentary questioning; the power of the assembly to set up special committees²³, or even parliamentary commissions of enquiry; the vote of the assembly on whether or not to confirm special powers orders. On this last point, let us not delude ourselves: the parliamentary debate - if there is one - on the measures adopted under the cover of the special powers "*will take place only after they have all been definitively stripped of their effects*" and "*it is highly unlikely that they will not all be validated*"²⁴.

That said, the exercise by the assemblies of their powers during a period of lockdown and social distancing makes logistical adaptation measures aimed at guaranteeing the continuity of parliamentary work indispensable. Assemblies have generally decided to make use of the digital technique of videoconference (remote discussions and voting), whether this is combined with the physical participation of a limited number of elected representatives or not. However, the outright adjournment of the assembly seems to us to be difficult to reconcile with the imperatives of a parliamentary system. The role of parliamentary assemblies is central, since they are empowered to adopt regulations within the framework of their organic autonomy. New provisions have been adopted which are applicable in the event of a health crisis dangerous to human health. They include the possibility of adjourning Parliament and the possibility of bypassing the committee stage in the event of an urgent legislative proposal. These measures help to restrict parliamentary control over the government and limit the democratic debate. They are all the more problematic in that, in Belgium, the rules of procedure of assemblies are, in principle, not subject to any jurisdictional control and thus enjoy almost full impunity²⁵.

²¹ For example, the Belgian Official Journal (*Moniteur belge*) of 29 May 2020 published an Act of 20 May 2020 containing various provisions on justice in the context of the fight against the spread of the coronavirus Covid-19 and an Act of 27 May 2020 relating to the Act of 20 May 2020. As another example, the Belgian Official Journal of 11 June 2020 publishes a law on various urgent fiscal measures due to the Covid-19 pandemic.

²² See motion for a resolution on the potential development of a mobile application to combat the coronavirus (Covid-19) and the need to respect human rights, in particular the right to privacy, cited above, which gave rise to lengthy debates and expert hearings in the Committee on Economic Affairs, Consumer Protection and the Digital Agenda.

²³ Thus, the House of Representatives adopted on 25 June 2020 a text calling for the establishment of a special committee to examine Belgium's management of the Covid-19 epidemic and set it up on 2 July 2020.

²⁴ See A. Schaus and V. Lettelier, « [Les droits et libertés à l'épreuve de la crise sanitaire \(Covid-19\)](#) », *Carnets de crise* #15, 17 April 2020.

²⁵ M. Verdussen, *Justice constitutionnelle*, Bruxelles, Larcier, 2012, p. 115.

Bulgaria

In Bulgaria, a self-restricting control of power

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I. The Constitutional Status of the State of War, State of Siege and State of Emergency in the 1991 Constitution of the Republic of Bulgaria

The Bulgarian constitution provides for a very concise, succinct and laconic formulation of the constitutional regime of the state of war, the state of siege and the state of emergency¹. They are provided as three independent regimes without any clear differentiation between them in terms of their substance. The 1991 Constitution focuses much more on the procedure than on the substance of these three regimes of constitutional emergency.

According to article 84, point 12 of the 1991 Constitution the National Assembly declares the state of siege or state of emergency. It acts on the proposal of the President of the Republic or the Council of Ministers. The involvement of several institutions in this process is supposed to serve as a safeguard against misuse of power. The state of siege or state of emergency can be declared across the whole territory of the state or part of it. According to article 100, paragraph 5 of the Constitution the President of the Republic shall proclaim a state of war in the case of an armed attack against Bulgaria or whenever urgent actions are required by virtue of an international commitment. The President of the Republic shall proclaim a state of siege or state of emergency whenever the National Assembly is not in session and cannot be immediately convened. The National Assembly shall then be convened forthwith to endorse the decision.

According to article 57, paragraph 3 of the Constitution in the case of the proclamation of war, state of siege or state of emergency the exercise of constitutional rights may be temporarily suspended or restricted by an act of the Parliament with the exception of the rights provided in articles 28, 29, 31 paragraph 1, 2 and 3, 32 paragraphs 1, and 37 of the Constitution. Hence, several constitutional rights enjoy higher levels of constitutional protection and must remain unrestricted even in the event of war, state of siege or state of emergency. These are the right to life and the prohibition of torture,

¹ See E. Tanchev et M. Belov, « The Governmental System of the Republic of Bulgaria » *in* N. Chronovski, T. Takacs, et T. Drinoczi (Éds.) *Governmental Systems of Central and Eastern European States*, Varsovie, Kluwer Polska, 2011, p. 95.

the safeguards of the right to personal liberty, namely the right to be brought before the judiciary within a legally prescribed period, the prohibition of conviction on the basis of confession, the presumption of innocence, privacy and freedom of conscience, thought, and religion.

The Bulgarian Constitution does not provide for the possibility of delegated legislation, including during a state of emergency². Thus, the Parliament in Bulgaria must retain a monopoly over the adoption of the most important norms which frame social relations with high and durable importance even in the event of war, state of siege or state of emergency.

II. The State of Emergency and the Emergency Epidemic Situation in Bulgaria caused by the COVID-19 Pandemic

On 13 March 2020 the National Assembly of the Republic of Bulgaria adopted a decision³ which, for a first time in the modern Bulgarian history, introduced a state of emergency. According to this decision, that was established in article 84, paragraph 12 of the Constitution, the Parliament:

1. Declares the state of emergency across the entire territory of the Republic of Bulgaria;
2. Empowers the Council of Ministers to take all necessary measures to control the emergency situation related to the COVID-19 pandemic.

The initial period of the state of emergency extended from 13 March 2020 to 13 April 2020. Few weeks later, on 2 April 2020 the National Assembly adopted a new decision⁴ by virtue of which it extended the state of emergency until 13 May 2020. On 24 March 2020 the National Assembly adopted the Measures and Actions during the State of Emergency Act (MADSEA)⁵. This act of Parliament regulates the range of anti-pandemic measures and activities imposed and accomplished during the state of emergency on the territory of the Republic of Bulgaria (Article 1). The MADSEA Act introduces several legislative amendments in numerous acts of Parliament. Special attention should be paid to the amendments that were introduced in the Health Act. They allow the Minister of Health to order mandatory isolation of patients, contaminants, contact persons and persons who have entered the country from other countries, when there is a threat to the health of the citizens due to diseases (§ 22 of MADSEA Act). This provision was valid until 13 May 2020, when the state of emergency was brought to an end and was replaced by the “emergency epidemic situation” introduced via ordinary legislation namely through amendments to the Health Act.

A legal definition of the term “emergency epidemic situation” has now been given. Pertaining to §1, point 45 of the Health Act the “emergency epidemic situation” is present in the case of a “disaster caused by a contagious disease, which leads to an epidemic with immediate danger to the life and health of citizens, the prevention and overcoming of which requires more than usual activities to protect and preserve the life and health of citizens”. The emergency epidemic situation shall be declared for a certain limited period of time by virtue of a decision of the Council of Ministers adopted on the proposal of the Minister of Health and on the basis of an assessment of the existing epidemic

² For the prohibition of emergency legislation see Belov, M. Constitutional Law in Bulgaria, Kluwer, 2019, p. 248.

³ State Gazette n° 22, 13 March 2020

⁴ State Gazette n° 33, 7 April 2020

⁵ State Gazette n° 28, 24 March 2020

risk by the Chief State Health Inspector in the case of imminent danger to the life and health of the citizens from the epidemic spread of a contagious disease in order to protect and preserve the life and health of the citizens for a certain period of time. The "epidemic emergency" can be extended. It has been extended several times by virtue of decisions of the Council of Ministers⁶. It is currently in force until 31 January 2021.

The President of the Republic approached the Constitutional Court with a demand to declare the unconstitutionality of the "emergency epidemic situation". The President claimed that the legislator – the National Assembly – inadmissibly delegated to the executive power its exclusive constitutional powers provided by article 57, paragraph 3 of the Constitution. It should be indeed recalled that delegated legislation is not allowed by the current Bulgarian constitutional model⁷.

In its Decision n° 10 of 23 July 2020 the Constitutional Court explicitly – but wrongly – identified the state of emergency with the idea of "constitutional dictatorship". According to the Constitutional Court the state of emergency is "a temporary and reversible transformation of the constitutional order and its peculiar readiness to overcome a life-threatening threat to society. The state of emergency is an 'emergency' mode of functioning of the constitutional system. The main consequence of switching to such a regime is the redistribution of power and authority (for example, granting functions to the country's defense bodies inherent to the bodies of the Ministry of Interior) and restricting the exercise of certain rights and freedoms in order to neutralize and overcome serious external or internal threats to the existence of the state and society."⁸

The Constitutional Court believes that the "emergency epidemic situation" differs from the "state of emergency". According to its reasoning the "emergency epidemic situation" does not lead to the redistribution and relocation of government functions. Its aim is not to deviate from the established order of government, but instead to introduce a special protection regime allowing for the introduction of urgent measures to protect and safeguard the lives and health of citizens. The Constitutional Court believes that the difference is in the degree and the scale of the threat. Hence, the resulting divergence in the scope and intensity of possible infringements of constitutional rights. According to the Court the declaration of an "emergency epidemic situation" does not presuppose an intensive violation of the rights of the citizens comparable to the one provided for in article 57, paragraph 3 of the Constitution, which allows for the declaration of war, state of siege or state of emergency. The Court considers that there are two essential differences between an "emergency epidemic situation" and a "military state of emergency". The first one is the intensity of the measures undertaken to overcome the threat. The second one concerns the authorities which are competent to declare them.

The Constitutional Court bases its argumentation on rather disputable considerations which have no substantial basis in both the text and the spirit of the Constitution. It would be much more reasonable – especially in view of the Bulgarian constitutional model – to accept, as Constitutional

⁶ See e. g. Decision n° 325, 14 May 2020; Decision n° 378, 12 June 2020; Decision n° 418, 25 June 2020; Decision n° 482, 15 July 2020; Decision n° 525, 30 July 2020.

⁷ See M. Belov, *op.cit.*, p. 56-58.

⁸ Decision n° 10/2020, 23 July 2020 (State Gazette n° 70, 7 August 2020).

Court Judge Georgi Angelov noted in his dissenting opinion, that “the emergency epidemic situation is a special case of the state of emergency”. Judge Angelov considers that the 1991 Constitution allows only the relative strengthening of the intensity and expansion of the scope of the executive power by relocating and/or creating new functions or bodies, but only in its own spheres of competence. No constitutional norm allows the transfer of competences between the various separated branches of state power. Thus, no transfer of powers is permitted between the legislative power (the National Assembly) and the executive power (the Council of Ministers and the ministers). The President of the Republic enjoys an increase of power in the event of a state of siege or state of emergency, only within the executive power to which he predominantly belongs. Therefore, Judge Angelov concludes that any “relocation of the functions and powers of the highest state bodies - the Council of Ministers, the President and the National Assembly” is constitutionally, and therefore legally inadmissible. And the “transformation of the constitutional order” in the event of an “emergency epidemic situation” is permitted even less.

It is important to note that the exercise of the government’s power to declare an “emergency epidemic situation” and the anti-epidemic measures that have been undertaken by the minister of health are subject to control. According to the Constitutional Court’s Decision n°10 of 23 July 2020 during the declared epidemic, Parliament retains all of its powers including its competence to control the acts and activities adopted and performed by the institutions of the executive power. Pursuant to article 83, paragraph 2 of the Constitution the National Assembly and the parliamentary committees may oblige the ministers to appear at their sittings and to give answers to the questions raised by the MPs. Consequently, the declaration of the “emergency epidemic situation” does not change or limit the controlling competence of the National Assembly in general and the MPs in particular. Nevertheless, such changes concerning both the parliamentary procedure in general and the parliamentary oversight over the government in particular were identified during the state of emergency.

III. The Impact of the COVID-19 Pandemic on the Parliamentary Procedure

Important debates emerged in several countries regarding the permissibility of remote sittings of the Parliaments and the subsequent distance deliberation and voting via digital technologies. Such discussion was present also in the Bulgarian case. The issue of whether the National Assembly is constitutionally permitted to hold its sittings and to vote remotely by virtue of electronic means is not explicitly regulated in the Bulgarian Constitution. Article 81, paragraph 3 of the Constitution provides that voting is personal and public, except when the Constitution provides, or the National Assembly decides to make recourse to secret voting. The constitutional text does not contain any indications regarding secret voting. The Constitutional Court in its Decision n° 8 of 5 June 2003 decided that:

“The requirement of article 81, paragraph 3 of the Constitution that ‘voting is personal’ is a fundamental constitutional principle related to the work of the National Assembly. Regardless of the type and specifically chosen manner of voting, the right of each MP to participate is a personal constitutional right, the exercise of which by someone other than the entitled MP is inadmissible. The content of this right is that voting on the adoption of the acts of the National Assembly is one of

personal discretion, in which the MP expresses immediately, freely and independently his or her personal will in accordance with his or her conscience and convictions.”

It can be assumed that if the opportunity for “immediate, free and independent” expression of the personal will of each MP is safeguarded then there is no constitutional impediment for the sittings and voting in the National Assembly to take place remotely by virtue of electronic means. However, the National Assembly decided not take advantage of this opportunity. On 26 March 2020 the Parliament adopted a decision⁹ for the organization of the rules of Procedure of the National Assembly during the state of emergency. According to this decision:

1. During the state of emergency declared by virtue of its decision of 13 March 2020 the National Assembly shall hold plenary sittings only on draft acts of Parliament and draft decisions of Parliament which are related to the declared state of emergency. Parliamentary control during this period is carried out only by written questions and answers.
2. During the state of emergency extraordinary plenary sessions can be held in accordance with the provisions of article 78 of the Constitution of the Republic of Bulgaria and article 46 of the Rules of Procedure of the National Assembly.

According to article 78 of the Constitution the National Assembly shall be summoned to hold its sittings by the Chairman of the National Assembly. The Chairman of the National Assembly can summon the Parliament either on his or her own initiative or on the basis of the proposal of 1/5 of the MP, the President of the Republic or the Council of Ministers. Article 46 of the Rules of Procedure of the National Assembly provides that in the circumstances described in article 78, points 2, 3 and 4 of the Constitution, the Chairman of the National Assembly is obliged to schedule a sitting not later than 7 days after the receipt of the summons regardless of whether the National Assembly is during its holiday period or not. The initiator of the summons must also propose the effective agenda of the sitting.

On 7 April 2020 the National Assembly adopted a new decision related to its functioning during times of pandemic. Its task was to further develop the regulative framework of Bulgarian parliamentarism during the COVID-19 restrictions. Parliament adopted several special rules for the functioning of the National Assembly during the state of emergency. They can be summarized as follows. The Chairman of the National Assembly shall distribute the draft acts of Parliament only to the leading committees and are considered as adopted only in one reading in the parliamentary committee phase. Furthermore, article 45, paragraph 2 of the Rules of Procedure of the National Assembly has been suspended. This is the provision that regulates the periods of the parliamentary holidays when the National Assembly is not in session.

The certification of the quorum which is done at the beginning of the plenary sitting shall be carried out through a computerized voting system. The registration of the MPs shall begin one hour

⁹ Decision amending the Decision on the work of the National Assembly during the State of emergency, announced by a Decision of the National Assembly (State Gazette n° 22, 2020) and promulgated (State Gazette n°26, 2020).

before the announced starting time of the sitting. Only 1/4 of all MPs is allowed to be present during the parliamentary debates. The Chairman of the National Assembly sets the time when the voting must commence after the closure of debate. The voting is carried out through a computerized voting system according to a schedule determined by the Chairman of the National Assembly. The MPs shall be divided into two groups that vote consecutively in the plenary hall of the Parliament. After the voting is finished the results shall be established and summarized by secretaries of the National Assembly and shall be handed over to the Chairman of the National Assembly, who shall announce them during the same sitting. Written proposals of the Members of Parliament for amendment of draft acts of Parliament adopted on the first reading shall be launched within 24 hours before the voting on second reading. The voting on the second reading of draft acts of Parliament should be accomplished after the end of the presentation of the reports of the leading commission in front of the plenary of the National Assembly and the debates on them; the Chairman of the National Assembly schedules the time for the vote on the bills, which cannot be earlier than 30 minutes after the end of the last debate on the draft act of Parliament. Voting is carried out by virtue of the computerized voting system according to the schedule determined by the Chairman of the National Assembly. MPs have to be divided into two groups, which vote consecutively in the plenary hall of the Parliament. The vote of each group shall be accomplished chapter by chapter, section by section or text by text until the contents of the relevant report for the second vote and of the proposals made during the debate have been exhausted. After the end of the voting, the results shall be established and summarized by secretaries of the National Assembly and shall be submitted to the Chairman of the National Assembly, who shall announce them during the same sitting.

IV. The Impact of the COVID-19 Pandemic on Parliamentary Control on the Government

Despite the declared state of emergency and the central role of the executive branch in managing the crisis, the National Assembly did not adopt special rules to organize more frequent exercise of its controlling function. On the contrary, by virtue of the above-mentioned decision, adopted on 26 March 2020, the National Assembly established an unconstitutional restriction of the use of many of the means of parliamentary control. Parliament accepted that during the state of emergency parliamentary scrutiny can be exercised only through written answers to written questions and inquiries. Thus, the National Assembly temporarily abolished all other forms of parliamentary control in sharp contrast to the requirements set by the 1991 Constitution and the Rules of Procedure of the National Assembly. More precisely, the National Assembly has banned the recourse for the duration of the state of emergency to oral questions and interpellations as well as the vote of no confidence provided by articles 89 and 90 of the Constitution and Chapter IX of the Rules of Procedure of the National Assembly¹⁰.

¹⁰ For the different forms of parliamentary control in Bulgaria see M. Belov, *op.cit.*, p. 127.

One day after the end of the state of emergency, on 14 May 2020, the National Assembly adopted a Decision on the establishment of a Temporary Parliamentary Committee for Control of the Expenditures of Public Funds Related to Overcoming the Consequences of the Spread of COVID-19¹¹. According to the initiators of this decision, this Committee has “to fulfill its constitutional power to control the executive branch” to ensure necessary transparency and to check the compliance of the accomplished expenditures with a range of criteria subsequently analyzing their effectiveness. The activities of the commission should cover “all funds collected, received, stored, distributed and spent by public sector organizations” according to § 1, point 1 of the Financial Management and Control of the Public Sector Act.

The Temporary Committee comprises 10 members. Thus, each parliamentary group in the National Assembly has appointed 2 members of the Committee. The Committee is entrusted with the following tasks. First, it demands and publishes information on all expenditures of public funds, including funding provided by the European Union funds or other financial instruments related to overcoming the consequences of the spread of Covid-19. Second, it checks the compliance of the individual costs with the conditions and criteria established for the individual anti-crisis measures. Third, the committee prepares a report with summary data on the costs incurred and analysis of their effectiveness.

The committee has been established for the duration of the health emergency. During the period 20 May 2020 - 31 July 2020 the committee held [three meetings](#). It requested information about expenditures of public funds related to overcoming the consequences of the spread of COVID-19 from the Prime Minister of the Republic of Bulgaria, the Minister of Finance, the Minister of Employment and Social Policy, the Minister for the Economy, the Minister of Health and the Deputy Prime Minister of the Republic of Bulgaria Mr. Tomislav Donchev. The Deputy Prime Minister and his team have been invited to committee hearings related to the spending EU funds and their restructuring to deal with the crisis. The Minister for the Economy Mr. Lachezar Borisov and the Managing Authority of the Operational Program “Innovation and Competitiveness”, Ms. Iliana Ilieva, have also been auditioned before the committee.

Parliamentarism has rather fragile foundations in Bulgaria. The first Bulgarian Tarnovo Constitution established a constitutional monarchy with elements of parliamentarism. Nevertheless, the history of Bulgarian parliamentarism from 1879-1947 experienced difficulties, between prevailing authoritarian regimes established by both the monarchs and the Prime Ministers. Parliamentarism was abolished during the communist regime (1947-1989) and the 1947 and 1971 Soviet type Constitutions. It was reestablished with the current 1991 Constitution.

The last 30 years have allowed the painful establishment of a fragile democratic order. The period of transition from communism to democracy has been marked by attempts to set up a liberal democracy following the best European models of parliamentarism and democracy. These efforts have been partially successful.

¹¹ State Gazette n° 46, 19 May 2020

The Covid-19 pandemic has placed an immense pressure on the Bulgarian constitutional order. The measures adopted by the government, the minister of health and expert bodies have largely infringed the rule of law. They have also had a very negative impact on parliamentarism in terms of both its formal, procedural and substantial aspects. It remains to be seen whether the distortions of parliamentarism can be removed swiftly after the end of the Covid-19 pandemic.

France

The Parliament on Life Support

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The French Parliament is bicameral. It is composed of the National Assembly, whose 577 deputies are elected by direct universal suffrage, and the Senate, whose 348 members are elected by indirect suffrage by local and national elected representatives, among whom the delegates of the municipal councils are the greatest in number². While the National Assembly is renewed in its entirety every five years, half of the Senate is renewed every three years. This bicameralism, while not totally egalitarian, is no longer as unequal as it was under the Fourth Republic. In principle, the law must be adopted according to the same terms by both assemblies but, after two readings in each assembly³, the Prime Minister or the Presidents of the Assemblies may call a meeting of a mixed joint committee (CMP) responsible for finding a compromise on the provisions still under discussion. In the absence of agreement, a new reading takes place in each of the chambers and, if there is still disagreement, the Government may ask the National Assembly to rule alone on the text, in a final reading⁴. In terms of oversight of government action, the inequality between the two chambers lies mainly in the fact that only the National Assembly can challenge the government's responsibility, either by rejecting a vote of confidence put forward by the Prime Minister or by adopting a motion of censure⁵.

As far as the health situation is concerned, it seems that the first cases of Covid-19 appeared in France at the end of January 2020 and the first death on 14 February. On 12 March, the President of the Republic announced the closure of schools. On 14 March, the Prime Minister announced the closure of establishments open to the public (bars, restaurants, museums, etc.) from midnight on, while maintaining the first round of municipal elections the following day. On 16 March, the President of the Republic announced lockdown from 12 noon on 17 March and the postponement of

¹ The authors would like to thank Lucile Gonot and Olivia Richard for their help in this research.

² They represent about 95% of the senatorial electoral college. This is important to note as the municipal elections took place during the pandemic and the second round had to be postponed due to the lockdown, cf. *infra*.

³ Or only one in the event that the Government has initiated the accelerated procedure for voting on the law, which it does almost systematically with regard to the bills it initiates.

⁴ Article 45 of the Constitution.

⁵ Article 49 of the Constitution.

the second round of elections, which was initially scheduled for 22 March. Extended twice, the lockdown lasted until 11 May. Although the first measures to combat the pandemic were based on the Public Health Code, it was soon necessary to establish the legislative powers of the executive branch. The French regulatory arsenal provided for three crisis situations: Article 16 of the Constitution, which confers exceptional powers on the President of the Republic in the event of an interruption in the regular functioning of the public authorities and a serious and immediate threat; the state of siege (Article 36 of the Constitution), which results in the transfer of police powers from the civil authorities to the military authorities in the event of imminent danger resulting from a foreign war or armed insurrection; and the state of emergency (law of 3 April 1955) which allows the policing powers of prefects and the Minister of the Interior to be widely extended in the event of imminent danger resulting from serious breaches of public order or in the event of a public calamity. Since none of these instruments was deemed relevant to deal with the situation, **Parliament had to pass a special law to deal with the Covid-19 pandemic: this was the purpose of the Act of 23 March 2020 instituting a state of health emergency⁶.**

A paradox appears here: whereas France was under lockdown, the Parliament had to meet to vote on the law instituting the state of health emergency. This paradox was all the greater because, traditionally, Parliament takes a recess during the week preceding the municipal elections and the week between the two rounds. However, the first round took place on 15 March. The assemblies therefore ceased their work on 9 March and planned to resume this after the second round, scheduled for 22 March. The situation no longer allowed them to adhere to this schedule, especially as a law was needed to postpone the second round, since the development of the epidemic made voting untenable on 22 March. It was therefore necessary to recall the members of parliament and modify the provisional calendar for the session to cope with Covid-19. The paradoxical situation was further reinforced by the fact that the National Assembly had itself become an epidemic cluster: on 5 March, 2 cases were recorded among staff and deputies; on 9 March, 7 cases; on 12 March, 16 cases; and on 16 March, 26 cases⁷.

But whilst actors in parliament, parliamentarians and assembly officials, were affected physically by the coronavirus, the parliamentary institution was also affected: as in other parliamentary democracies or in certain situations of war in the past, the following consequences occurred⁸, and there was a relative dormancy of assemblies, as well as the prevalence of government decisions to deal with the urgency of the situation. In a way, one wonders whether Covid-19 has not exacerbated a deep-rooted tendency of the Fifth Republic by accentuating its features that are least favourable to Parliament.

Although the assemblies managed to avoid a deep coma, they only managed to maintain a light state of breathing and after making considerable sacrifices. Moreover, this breathless murmur seems to have been quite artificial if we focus our attention on parliamentary oversight.

⁶ Law n°2020-290 23 March 2020 emergency response to the Covid epidemic-19 (22 articles).

⁷ See the press releases from the Presidency of the National Assembly of 5, 9, 12 and 16 March.

⁸ See the first part of B. Daugeron, « [Le contrôle parlementaire de la guerre](#) », *Jus Politicum*, n°15.

I. Maintaining a breath of life

Although the French Parliament was able to maintain a modest amount of legislative activity during the first months of the Covid-19 pandemic, this was so weak and so strictly framed by new constraints that, under such conditions, one can legitimately question the reality of parliamentary power.

1.1. A barely audible murmur

It cannot be said that legislative activity of the French Parliament during the pandemic was inexistent. First of all, it was necessary to vote in the law instituting the state of health emergency⁹ then renew its application in view of the duration of the pandemic¹⁰. But it was also necessary to implement, economic and social measures to support companies and employees during the lockdown and then do the same in view of ending lockdown. Two Amending Finance Acts¹¹ and a law supplementing the mechanism¹² provide for this. Finally, it was necessary to adapt the deadlines regarding certain jurisdictional or electoral procedures; for the former, this was the purpose of the organic law of 30 March.¹³ and for the latter of the law dated June 22¹⁴ bearing in mind that the postponement of the second round of the municipal elections was covered by the law of 23 March and by the decree of 17 March¹⁵. The entire legislative process concerning these laws, from tabling to adoption, was conducted during the Covid-19 pandemic.

However, if we look at the legislative output of the French Parliament during the period from 15 March to 30 June 2020, we see that it has also concluded that¹⁶ the procedure concerning three other laws whose object was totally distinct from the pandemic: a law on support for families who have experienced the tragedy of the death of a child¹⁷, another regarding information on agricultural and food products¹⁸ and finally a law targeting hate content on the internet¹⁹.

With this, the French Parliament seems to have maintained normal legislative activity both qualitatively, since the subject matter of the laws passed did not only concern Covid-19, but also quantitatively, since from 15 March to 30 June 2020 there were ten laws passed by Parliament. Over

⁹ Law n°2020-290.

¹⁰ Law n°2020-546 11 May 2020 extending the state of health emergency and supplementing its provisions (13 articles).

¹¹ Law n°2020-289 23 March 2020 of amending finance acts for 2020 (7 articles) and L. n° 2020-473 25 April 2020 of amending finance acts for 2020 (27 articles).

¹² Law n°2020-734, 17 June 2020 regarding various measures linked to the health crisis, to other urgent measures as well as the UK's withdrawal from the EU (61 articles).

¹³ Organic Law n°2020-365 30 March 2020 emergency response to the Covid-19 epidemic (1 article).

¹⁴ Law n°2020-760 22 June 2020 to secure the organisation of the second round of municipal and community elections in June 2020 and to postpone the consular elections (19 articles).

¹⁵ Decree n°2020-267 17 March 2020.

¹⁶ Other bills or proposals for legislation were also discussed in the assemblies during this period, but they did not result in a standard.

¹⁷ Law n°2020-692 8 June 2020 aimed at improving workers' rights and support for families after the death of a child (9 articles).

¹⁸ Law n°2020-699 10 June 2020 on transparency of information on agricultural and food products (12 articles).

¹⁹ Law n°2020-766 24 June 2020 on the fight to counter hate content on the internet (19 articles).

the same period, in 2019, Parliament passed fifteen laws (but six of them enabled the ratification of treaties) and seventeen laws in 2018 (seven of which enabled the ratification of treaties).

An interesting peculiarity of the legislative procedures adopted during the Covid-19 pandemic was the easy agreement reached between the two chambers even though they had different majorities. To fight the pandemic, national unity was called for and a consensus was formed despite political differences. This consensus was observed at two levels. Firstly, at the adoption stage: the laws whose procedure was fully followed during the pandemic were adopted either on first reading, or on second reading (two laws²⁰), either after agreement in a mixed joint committee (five laws²¹) ; none gave rise to a vote on final reading²². Moreover, this consensus can be seen in the pattern of votes cast: of the ten laws adopted during this period, seven were the subject of such a consensus (37 votes against at most); only the laws extending the health emergency (167 votes against in the National Assembly), completing the mechanism related to the health crisis (174 votes against in the National Assembly) and combating hate content on the Internet (150 votes against in the National Assembly) were challenged. In the Senate, the only law that was the subject of a public ballot showing opposition was the law extending the health emergency, with 87 votes against (252 in favour) in reading after the CMP.

In addition, these laws were passed by adapting the voting procedure to respect the very strict limit on the number of members of parliament allowed in the hemicycles. In fact, on 17 March, the National Assembly decided to restrict the presence of deputies to three deputies per group (including the president) and it was not until 27 April that 75 deputies, chosen according to the proportionality of the groups, were admitted to the hemicycle, then 150 from 11 May, 151 from 27 May and it was only from 22 June that all the deputies, wearing masks, were able to attend in person²³. In the Senate it was decided to limit the presence in the Chamber to 18 senators (three for the largest groups, two for the others) as of 24 March, before opening, as of 20 April, to 48 senators, chosen according to the proportional representation of the groups, plus their chairmen and the chairman of the sitting, then to 77 senators plus the chairmen of the groups as of 2 June, and finally to raise the level to half of the Chamber, i.e. 189, as of 22 June. However, the Constitution requires voting in person and allows only one delegation per member of parliament (Art. 27). It was thus agreed that each group chairman would carry the votes of his or her group, of which he or she would be able to express the nuances (all members would therefore not have to vote in the same way). Moreover, each member of parliament could transmit to the services the exact meaning of his vote, even after it had taken place²⁴.

²⁰ Law n°2020-289 and the Organic Law n°2020-365.

²¹ Laws n°2020-290, 2020-473, 2020-546, 2020-734 and 2020-760.

²² Only the Law on Hate Content on the Internet (2020-766) was adopted on final reading but its procedure was not fully conducted during the pandemic. The other two Laws in this case were adopted in reading after the CMP. (n° 2020-692 et 2020-699).

²³ This limitation on the number of members of parliament who may participate physically in the work of the assemblies was decided by the Conferences of Speakers of the Assemblies, see the Conclusions of 17 March, 27 April, 5 and 26 May and 16 June. However, its applicability to members of parliament was essentially a matter of political consensus. Indeed, the Constitutional Council maintained that the freedom of members of parliament in the exercise of their mandate should enable them to participate in the work of the assemblies to which they belonged, suggesting that if members of parliament had been genuinely prevented from carrying out their duties by this restriction on the number of participants, the legislative procedure would have been flawed (Constitutional Council, 2020-800 DC, 11 May 2020, § 6).

²⁴ See the Summary of the Conclusions of the Conference of Presidents of the National Assembly of 18 March 2020.

It is therefore by interpreting the possibilities for delegating the vote²⁵ that the fiction of a Parliament at work during the pandemic was maintained despite the lockdown and control over the number of members of parliament. But the reality is more complex.

1.2. An almost inanimate Parliament

Whatever the importance of the texts voted during this period, they are fairly short laws. In total, the ten laws voted during this period comprise 190 articles. Admittedly, during the same period, the ten laws voted in 2018 (excluding laws authorising the ratification of treaties) only contain 173 articles; but in 2019, the nine laws voted contain 372 articles.

Moreover, these laws organise the temporary dispossession of Parliament, through the quasi-systematic delegation of the legislative power they operate. Between 15 March and 30 June 2020, 62 [decrees](#) were signed by the President of the Republic²⁶. The law of 23 March alone, to deal with the Covid-19 epidemic, empowers the government to act by means of decree under article 38 of the Constitution.

Although the condition of the emergency justifying the use of decrees has evidently been met²⁷, this constitutes almost generalised empowerment in all areas of administrative activity. Admittedly, the jurisprudence of the Constitutional Council only requires the Government to indicate precisely to Parliament the purpose of the measures envisaged and authorises empowerment only for a limited period of time²⁸, with all conditions fulfilled here. However, generalised empowerment such as this in a number of matters falling within the competence of the legislator raises questions as to the very usefulness of Parliament. To paraphrase André Chandernagor, “what is the point of having a parliament if it delegates its entire legislative power to the government²⁹?”

Moreover, in cases where it has retained its legislative power, the procedures have been speeded up to the extreme. With regard to the seven laws for which the entire procedure took place during the pandemic period, discussion and voting was particularly rapid. On average, it took only 12 days to pass a law after it had been considered by both chambers, when on average 149 days are needed to pass a law³⁰. This average is also misleading since the last two laws adopted were so after a much longer period of time (twenty-two days for law n°2020-760; thirty-five days for law n°2020-734). The first five laws voted on during this pandemic period were thus adopted in less than 6 days, on average. The rectifying finance bill n°2758 was tabled on 18 March in the National Assembly; it was discussed and voted on 19 March and the Senate discussed and voted on 20 March. Even the organic law did not withstand this dictatorship of urgency. The Constitution does, however, provide for a fifteen-day time reserve between the tabling of a draft organic law and its examination in public session in the first assembly to which it is referred, thus allowing members of parliament to reflect

²⁵ What the Constitutional Council had already admitted, 2010-624 DC, 20 January 2011, § 9.

²⁶ Ce chiffre ne tient compte que des ordonnances liées à la gestion de l'épidémie ; sur la période, on compte 11 autres ordonnances signées par le Président.

²⁷ Constitutional Council, 99-421 DC, 16 December 1999, § 13.

²⁸ Constitutional Council, 86-207 DC, 26 June 1986, § 13.

²⁹ A. Chandernagor, *Un Parlement pour quoi faire ?*, Gallimard, coll. Idées, 1967.

³⁰ C. Bartolone and M. Winock, *Refaire la démocratie*, National Assembly Report n°3100, 2012, p. 90.

on a sensitive subject. Despite this, the organic law of 30 March 2020 was adopted in only four days. The Constitutional Council, obligatorily notified of such a law, considered that "*in view of the particular circumstances of the case, there is no reason to judge that this organic law was adopted in violation of the rules of procedure provided for in Article 46 of the Constitution.*"³¹

Although the situation obviously required the urgent adoption of laws, in the end it led to the parliamentary debate being reduced to almost nothing, both in terms of its duration and the number of deputies who could take part in it³². Parliament was therefore virtually at a standstill from the point of view of its legislative function. But the procedural conditions imposed on Parliament were not the only cause: the broad consensus among members of parliament to give the Government the means to act quickly to combat the invisible enemy represented by the virus also contributed to this. That is why the parliament's oversight function of government action was hardly more valiant than that of the government.

II. Parliamentary oversight on life support

Since parliamentary oversight does not necessarily require the physical presence of members of parliament, as evidenced by the written question procedure, one might have thought that Covid-19 would have little impact on this essential mission of parliament. The reality was quite different. The means of oversight were adapted, but the way in which they ultimately functioned revealed the artificiality that they proved to be, whether in terms of questions or monitoring missions.

2.1. Parliamentary questions in artificial survival mode

In France, the combined logic of rationalised parliamentarianism, majority rule and the "monarchical leanings", which lead to any criticism from within the presidential majority being considered a crime of lèse-majesty, have not allowed parliamentary oversight to develop to the extent that it has in other parliamentary democracies. Oversight mechanisms, which are constantly being renewed in an attempt to improve their effectiveness, often fail because of the behaviour of the members of parliament themselves. As MP Paul Lambin wrote as early as 1939: "[Parliament] *can do much, it can do everything. But it must be willing to do so.*"³³ This feature, typical of the Fifth Republic, has been compounded tenfold during the Covid-19 pandemic, as seen in the case of questions to the Government, but less so in the case of written questions, for which the statistics show no decrease, which is quite logical.

The former are undoubtedly the highlight of the parliamentary week, although it is often more of a spectacle than a substantive review. Imposed by the Constitution to take place once a week

³¹ Constitutional Council, 2020-799 DC, 26 March 2020, § 3. On this decision, cf. J.-P. Derosier, "Identification d'un mouvement jurisprudentiel de crise sanitaire. Chronique de droits fondamentaux et libertés publiques (janvier 2020 à June 2020)", Title VII [online], to be published in October 2020, No. 5.

³² Elina Lemaire sees this as a negation of parliamentary deliberation: « [Une assemblée parlementaire peut-elle fonctionner en comité restreint ?](#) », *Jus Politicum Blog*, 2 avril 2020.

³³ Wording contained in Motion for Resolution No. 5948 of 23 June 1939 tabled in the Chamber of Deputies. Wording taken up by him in 1972, this time in relation to the Parliament of the Fifth Republic. Quoted by Lambin P., *Pour une réforme profonde du Parlement et une démocratie réelle*, La pensée universelle, 1972, p. 96.

(Article 48, paragraph 5), it is one of the rare moments in parliamentary activity that attracts the media's attention. But they require the presence of the members of parliament to ask questions and the presence of ministers to answer them. As of 17 March, the National Assembly decided to limit the number of questions, which in turn would enable the limitation of the number of ministers present to provide answers. Communicated the evening before, the questions were quantitatively limited to two questions per group and one for the non-attached members. Thus, at the sitting of 19 March, seventeen questions were asked, compared with the usual 30, and only eight ministers were present. From 20 March onwards, this arrangement was changed in favour of four questions for the two largest groups and two for each of the other eight groups. On this date, the Senate also undertook to reduce the time allocated for topical questions to the Government: 40 minutes per week (two questions for the three largest groups, one for each of the other groups).

The initial adjustments should have ensured the upkeep of the essential role of these question sessions. However, the National Assembly then decided that as of 31 March, only one deputy per group would be present ask questions on behalf of the members of the group of the few ministers present who were concerned by the subject matter of the questions in hand³⁴. This solution was a parody of parliamentary control. However, this situation lasted for almost a month, since it was not until 20 April that the authors of the questions to the Government were able to return to the Assembly to ask their questions themselves. The deserted hemicycle shows the extent to which questions to the Government were on artificial life support; they were no longer the high point of French parliamentary democracy; they were no longer the moment of connection between members of parliament and citizens.

2.2. Lifeless fact-finding missions

The assemblies quickly decided to review the management and consequences of the Covid-19 crisis by means other than questions. As early as 17 March, the Conference of Presidents of the National Assembly decided to set up a fact-finding mission, giving priority to a general and cross-cutting mandate in which the various parliamentary groups and committees would be represented. The President of the Assembly, Richard Ferrand, was appointed chairman and general rapporteur. The Prime Minister and the Minister of Health were heard on 1 April, and then, in the following weeks, other members of the Government or, for example, the Director General of Health or the Chairman of the Scientific Council.

Praiseworthy in principle, the modalities of this oversight show their shortcomings and demonstrate that it had no other objective than to prevent the Government and the majority from getting into difficulties, as was the case in 2018 in the Benalla affair.³⁵ On the one hand, entrusting the President of the National Assembly, an eminent member of the majority, with the task of reporting

³⁴ Moreover, it is not certain that this arrangement could have been adopted in the rules of procedure of the National Assembly, since the Constitutional Council has repeatedly pointed out that the principle of governmental solidarity did not allow the presence of ministers to be limited to those whose portfolios were concerned with the issues (Constitutional Council, 2014-705 DC, 11 December 2014, § 13)

³⁵ The Committee of Inquiry in the National Assembly was unable to conclude its work due to a deep disagreement between the majority and the opposition.

on the work of this mission does not guarantee precise and uncompromising oversight of the Government's action. On the other hand, the National Assembly fell far short of what it had implemented when the state of emergency was declared following the terrorist attacks of 2015. Indeed, at the time, the Assembly's Laws Committee had given itself the powers of a committee of enquiry³⁶, which provided it with much greater investigative capacity. However, it was not until 3 June that the fact-finding team was given these powers and that, at the same time, the duties of rapporteur were entrusted to Eric Ciotti, an opposition MP.

Finally, the hearings were, initially at least, organised by videoconference: the person auditioned was physically present alongside the Chairman and the mission's rapporteur, but the other members participated only by means of screens, having to cut off the microphone and camera after they had spoken. Once again, this was only a mockery of oversight because being heard by 30 or 40 members of parliament who were physically present, and “encasing” the person being heard produced a form of “pressure” on the latter and made his or her audition less comfortable for him or her. Moreover, it is easier for members of parliament to respond to what is said, as it is well known that speaking in a videoconference is much more problematic. In short, the conditions of these hearings could not provide the interaction necessary for rigorous scrutiny³⁷.

The Senate adopted a different organisation to oversee the measures taken to combat the epidemic. The various standing committees have set up monitoring missions and held the necessary hearings. Consequently, if the modalities of the hearings are similar to those of the National Assembly, this sectorised control by committee made it more in-depth, more specialised, and therefore slightly more effective, especially since the Senate is in opposition to the Government. Then, on 30 June, the Senate decided to set up a committee of enquiry to assess France's state of preparedness on the eve of the outbreak of the epidemic, the management of the health crisis by political and administrative leaders and the choices made by France compared to those of other European States.

The French Parliament's state of health during the health crisis has therefore been quite alarming. It was especially so because the rules adapted to operate had fragile legal bases (decisions of the President or the Conference of Presidents). One might even wonder whether the condition for the interruption of the regular functioning of the public authorities, necessary for the activation of Article 16 of the Constitution, was not met, which could have provided other, perhaps better, guarantees, such as the systematic consultation of the Constitutional Council. It was because members of parliament were unanimous that the assemblies were able to function in this way. As Sylvain Waserman, Chairman of the National Assembly's working group responsible for anticipating how parliamentary work would function in times of (future) crises, points out: [“It is important to ask ourselves what would have happened in the absence of unanimity”](#). Consideration is therefore being given to anticipating new crisis situations and how to respond to them, which should undoubtedly

³⁶ Meeting of the Laws Committee of the National Assembly, 2 December 2015.

³⁷ On 23 April, Eric Coquerel questioned Jérôme Salomon, director general of health, from his car while driving. The Huffington Post then wrote: [“Will the parliamentarians debate from their camper vans in July?”](#) ».

lead to a more satisfactory functioning of the Parliament than has been the case to date.

However, from now on the French assemblies could "compensate" for this apathy by breathing new life into parliamentary work. To do so, they would have to examine and vote in a serious manner on the bills for the ratification of the decrees taken concerning its empowerment during the crisis; it would also be necessary for the Senate's committee of enquiry and the Assembly's information mission to carry out a review, albeit in reverse, but precise control of the action of the Government and the administrative authorities before and during this crisis.

To cope with the resurgence of the epidemic, a state of health emergency throughout the country was declared by decree as of midnight on 17 October 2020. The law of 14 November 2020 extends the state of health emergency until 16 February 2021. The rules of procedure of both chambers require the physical presence of members to vote, and no provisions have been made for remote voting. In the National Assembly, the wearing of masks is mandatory, half capacity in the hemicycle and in committee meetings without voting switched to videoconferencing, employees working from home.

At a time when fears regarding the long-term effects of the epidemic on our societies are growing, the very survival of the French Parliament is at stake. Therefore, democracy³⁸.

³⁸ The English version of this essay has not been reviewed by the authors.

Germany

The pulsing heart of "combative democracy"

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Throughout the first wave of the coronavirus epidemic, Germany was often presented as a model of health crisis management compared to its European neighbours. Many foreign observers praised the Chancellor's pragmatic, efficient attitude and, more broadly, that of the entire German government¹. Fewer are those who have taken the pain to see whether the German Parliament also responded in a manner commensurate with the stakes of this exceptional situation. The Bundestag is often referred to as a "working parliament" (*Arbeitsparlament*) which is opposed to a "debating parliament" (*Redeparlament*)² like the British parliament. Has the German Parliament been able to fully exercise its control and legislative functions, in particular within its committees, where most of the parliamentary work in Germany is carried out?

Before answering this question precisely, we should recall the main characteristics of the German parliamentary system. The Parliament is bicameral. The Bundestag currently consists of 709 deputies elected for four years, while the Bundesrat is composed of 69 representatives of the governments of the federal states (Länder), who are renewed in stages for a five-year term³. While in the Bundesrat each member is obliged to vote according to the instructions of the regional executive to which he or she belongs, this complete lack of freedom of mandate does not prevent the chamber from fully participating in the decision-making process. Bicameralism is, however, unequal. The Bundestag, responsible for electing the head of government on the proposal of the Federal President⁴, is also considered as the "intrinsic legislator", whilst the Bundesrat is simply said to participate in legislative output⁵. However, the Bundesrat is fully involved in the examination of the "assenting acts" (*Zustimmungsgesetze*) since its vote is just as important as that of the Bundestag in this context⁶, over which it can exercise an absolute veto. On the other hand, parliamentary scrutiny is mainly

¹ However, the idealisation of the German response to the health crisis must be nuanced, as Alexis Fourmont, Benjamin Morel and Benoît Vaillot point out in « Pourquoi la décentralisation n'est pas un remède miracle contre le Covid-19 », *The Conversation*, 28 April 2020.

² This distinction, originally made by Max Weber, is frequently used to qualify the Bundestag. N. Achterberg, „Das Parlament im modernen Staat“, *Deutsches Verwaltungsblatt*, 1974, p. 705.

³ The renewal of the regional parliaments (Landtag) is held every five years, staggered over different years depending on the Länder, and their results indirectly determine the composition of the Bundesrat. Only Bremen's regional parliament, the *Bürgerschaft*, is renewed every four years.

⁴ Article 62 of the Basic Law.

⁵ A. Haratsch, in H. Sodan, *Grundgesetz – Kommentar*, Munich, Beck, 2^e Éd., 2011, p. 458.

⁶ The approving laws correspond to the texts that directly affect the interests of the Länder and represent an important proposal of all the laws adopted each year.

carried out by the Bundestag, which, in particular, is the only body that can hold the government accountable, either by rejecting a motion of confidence or by means of a constructive motion of censure⁷.

Unlike other European States the state of emergency was not invoked in Germany. The *domestic emergency* (*innere Notstand*), provided for by article 91 of the Basic Law (*Grundgesetz*) which aims to “remove a danger threatening the existence or the liberal and democratic constitutional order”, and “the state of tension” (*Spannungsfalle*) featured in article 80a, and also the “state of defence” (*Verteidigungsfalle*) in article 115 were not adapted to the situation. Finally, although Article 35 on mutual assistance between the Bund (Federation) and the Länder in the event of a “natural disaster” or “particularly serious disaster” was analogous to the situation of a health crisis, it was not implemented either. This arsenal of crisis measures under the Basic Law, known as the “emergency constitution” (*Notstandsverfassung*), was not triggered by the Bundestag, not only because of a historical reluctance to go beyond the ordinary framework of the Basic Law, but also because these measures were ill-suited to the health crisis.

Indeed, the German Parliament seems to have been much less constrained in its action by the legal framework and political context of the health crisis than some national parliaments in Europe, which faced a very restrictive state of emergency. The Bundestag did not remain impotent facing the crisis, whereas in France, for example, the executive became the only real master in dealing with the epidemic wave, leaving Parliament almost impotent⁸. However, has the German Parliament been able to bring its full weight to bear in the political debate and effectively monitor the government's handling of the crisis?

While periods of crisis are often conducive to increasing the powers of the executive to the detriment of legislative assemblies and fundamental freedoms, the German Parliament has been keen to ensure the continuity of German parliamentary democracy, both in its role as legislator and in its function of overseeing the executive. From this point of view, the Bundestag has succeeded in maintaining a lively debate by maintaining its activities at a reasonable level, even if, inevitably, concrete adjustments had to be made to adapt to the health situation. The German Parliament's determination to pursue its action has been in line with the logic described by the Federal Constitutional Court (*Bundesverfassungsgericht*) as “combative democracy” (*streitbare Demokratie*), in the sense that its “ability to function” (*Handlungsfähigkeit*) is a “constitutional imperative” (*Verfassungsgebot*)⁹.

⁷ These two measures are provided for respectively in Articles 67 and 68 of the Basic Law.

⁸ Cf. J.-P. Derosier et G. Toulemonde, “The French Parliament in the time of coronavirus. A parliament on life support”, *Parliament in the time of coronavirus*, Robert Schuman Foundation, 2020.

⁹ The Constitutional Court has been able to reiterate this requirement in the context of inter-organ litigation, for example in its decision of 16 July 1991. (BVerfGE 84, 304).

I. The continuation of numerous legislative activities

The German Parliament, established by the Constitutional Court as a 'forum for address and reply' (*Rede und Gegenrede*) in the legislative debate, recognises the right to speak for each of its elected representatives, as well as for members of the federal government. In this respect, the Bundestag sought to continue the discussions already under way on certain bills, although priority was given to the political response to the health crisis. In the first weeks of the lockdown, it passed numerous legislative texts to deal with the consequences of the pandemic. The Bundestag passed laws to increase the financial resources of hospitals and to adapt certain civil and criminal procedures to the health situation. Similarly, a financial rescue plan to deal with the shutdown of many sectors of activity was adopted in just three days, a record time for the German Parliament¹⁰.

The members of parliament (*Mitglied des Bundestages, MdB*) grasped the challenge of adapting quickly to the new health situation. A crucial and urgent question to be addressed was how and through which legal channel to give the competent authorities the ability to act in the fight against the pandemic. Recourse to the provisions of the "emergency constitution" was not desired, finally they opted for the simple modification of the law governing the protection against infections, the so-called ISG (*Infektionsschutzgesetz*). Adopted by the Federal Parliament on 27 March 2020, even though lockdown had already been decreed in the Länder of Bavaria and Saarland six days earlier, the new wording of § 28 of this law has raised questions. This provision states that in the event of the discovery or suspicion of infection, the 'competent authorities' (i.e. the executive authorities of the Länder) are empowered to take proportionate and provisional 'protective measures' which may run counter to certain fundamental rights such as personal liberty, freedom of demonstration or the inviolability of the home. This law was modified on 18th November 2020.

Consequently, the Bundestag and the Bundesrat have given the regional governments considerable room for manoeuvre with a view to combating the pandemic, without providing for external intervention, even though fundamental freedoms have been at stake. While the refusal to resort to a state of emergency was justified in so far as the decisions taken were less detrimental to fundamental freedoms than in most of the neighbouring countries¹¹, the integration of the protection against infections into an ordinary law and the power given to the executives of the Länder are particularly questionable.

The divestment of Parliament, although strictly limited, has also been seen with respect to the federal government¹². § 5 (2) of the ISG Act significantly has increased the powers of the Federal Ministry of Health by allowing it to adopt "*derogations from the provisions of this Act by decree*

¹⁰ The procedural arrangements of a provisional nature provided for in Rule 126a of the Rules of Procedure of the Bundestag have enabled the Bundestag to act more quickly than usual in legislative matters. See below "III - The way parliamentary work was adapted to the new health situation".

¹¹ The measures include a ban on gatherings of more than two people, the closure of businesses deemed non-essential and the closure of schools, without strict lockdown of the population.

¹² C. D. Classen et A. Gaillet, « Covid : perspective allemande », *Blog Jus Politicum*, 8 April 2020 ; P. Cossalter, « Le droit public allemand et le Coronavirus », *Revue générale du droit*, n° 51830, 2020.

without the approval of the Bundesrat". The scope of the Act is rather broad, since it covers most of the laws relating to the development, manufacture and distribution of medicines, as well as laws relating to the operation of the health system and the supply of medicines to the population. The Bundesrat's opinion has been dispensed with, which is surprising in a federal system of this kind.

However, the fact that a federal ministry could not only implement, but also derogate from legislative provisions for a fixed period of time¹³ goes far beyond the bounds of the field within which it is normally authorised to make orders. This new ministerial prerogative does not seem compatible with Article 80-1 of the Basic Law in terms of the power to issue regulations.¹⁴ This "privileged area" of the parliament (*Parlamentsvorbehalt*) is essential.

Autonomous regulations are in principle excluded, while legislative delegations are viewed with suspicion. Criticism of the constitutionality of the system was particularly strong because, as Professor Christoph Möllers points out, it is precisely in times of crisis that the question of political negotiation venues arises, which is crucial in view of the general ban on meetings.¹⁵ It is therefore doubtful whether Parliament took the right decision in withdrawing from the production of regulations at this point, even if one accepts that the system complies with the Basic Law, especially since the promulgation of regulatory texts is not necessarily faster than that of legislation¹⁶.

Finally, the federal government itself has been affected by this new organisation of power. As a result of the emergency situation, the core competencies are indeed likely to be exercised by the Federal Ministry of Health in agreement with other ministries, depending on the matters under consideration. This strategic retreat of the decision-making process within ministerial spheres alone could gradually lead to a certain "depoliticisation of far-reaching decisions at the highest level"¹⁷ in the health policy.

II. Maintaining traditional parliamentary scrutiny without any specific mechanism

Despite the exceptional nature of the health situation and the particularly severe restrictions on fundamental freedoms that were created by the measures to combat the pandemic, no specific control mechanism has been set up in the Bundestag. The time spent on monitoring the government's actions has not been significantly greater than usual. Nevertheless, the lack of any specific mechanism for monitoring the government's management of the health crisis raises questions, given the potential infringements on certain individual freedoms that could result from the crisis situation. However, there is also nothing to suggest that the ad hoc committees set up to monitor the government's management of the epidemic in some states allow for increased vigilance in terms of the traditional

¹³ Until the health crisis is resolved and at the latest by 31 March 2021 pursuant to § 5 (4)-1 of the ISG Act.

¹⁴ Art. 80(1): "The federal government, a federal minister or the governments of the Länder can be authorised by law to issue regulations. This law must determine the content, purpose and scope of the authorisation granted. The regulation must state its legal basis. If a law provides that an authorisation can be subdelegated, a regulation is required for the delegation of the authorisation".

¹⁵ C. Möllers, « Parlamentarische Selbstentmächtigung im Zeichen des Virus », *Verfassungsblog*, 26 March 2020.

¹⁶ B. Ridard, *L'encadrement du temps parlementaire dans la procédure législative. Étude comparée : Allemagne, Espagne, France, Royaume-Uni*, Bayonne, Institut Universitaire Varenne, 2018, p. 531 et s.

¹⁷ C. Möllers, „Parlamentarische Selbstentmächtigung im Zeichen des Virus“, *Verfassungsblog*, 26 March 2020.

instruments of parliamentary control.

The lack of tighter parliamentary control during the health crisis can be explained in particular by the current political configuration of the Bundestag. Indeed, the governing "grand coalition", formed by the Christian Democratic parties (CDU-CSU) and the Social Democratic Party (SPD), is supported by a large majority of MPs, while the parliamentary opposition is fairly small. The first opposition group, comprising elected members of the far-right Alternative für Deutschland (AfD) party, has only 12% of the seats in the Bundestag, while each of the other 3 opposition groups (Die Linke, FDP and Grünen) has only 10% of the seats. The structure of the parliamentary opposition, which is dispersed among four rather modestly sized groups, is a hindrance to the coherence of its action in terms of control of the executive.

Although parliamentary scrutiny has not increased much despite the severity of the crisis, the members of the Bundestag have not remained silent. Weekly, they have submitted oral and written questions to the government on the management of the crisis by the public services. As early as March, several "small questions" (*Kleine Anfrage*) were asked by opposition members. The liberal group (FDP) thus questioned the federal government to see whether a representative of the Italian government had made a request to activate the European Stability Mechanism (ESM) at the beginning of the epidemic. In April, the AfD group asked the government to demonstrate that the health system had sufficient capacity to cope with a significant increase in the number of infected people in the event of a second wave of the epidemic.

The Bundestag also continued its oversight activity during meetings of parliamentary groups, particularly those of the opposition, but also and above all in the context of parliamentary committees. Overnight, these committees drastically had to change their agendas, especially those responsible for economic and financial matters and for health care. The latter devoted a great deal of time to discussing the consequences of the health crisis from both short-term and long-term economic and social perspectives.

Although the work of these committees has continued in terms of both legislation and control, it has been at the cost of adapting the way they operate. In the parliamentary committees, the number of participants was in fact limited to the physical presence of ten members, while all of the other members could participate in the meetings by videoconference. The change in working methods was not restricted to the committees alone but was only one of the many to which the Bundestag very quickly agreed when the health crisis began.

III. The way parliamentary work was adapted to the new health situation

The German Parliament, where the legislative decision-making process is often long and complex¹⁸, continued its work by making concrete adaptations, marked by pragmatism, to the way it functions. With a view to preserving the Bundestag's "capacity for action", its President, Wolfgang

¹⁸ W. Reutter, « Struktur und Dauer der Gesetzgebungsverfahren des Bundes », *Zeitschrift für Parlamentsfragen*, 2007, p. 299.

Schäuble, first proposed a constitutional revision to allow the lower chamber to meet in a reduced format, thus requiring only a limited number of deputies to be physically present¹⁹. In the end, the amendment of the Basic Law was considered too cumbersome and unsuitable, which is why the Members of the Bundestag simply decided to temporarily modify the internal regulations, the “*Geschäftsordnung des Bundestages*”. Initially applicable until 30 September 2020, these temporary provisions were finally extended until the end of the year.

The Members of the Bundestag therefore introduced a new paragraph 126-a in the Rules of Procedure to enable meetings in restricted formation. While the increase in the number of select committee meetings seems questionable, and even detrimental, to the expression of the diversity of views within Parliament, it is important to point out that, in most cases, the other Members of the Bundestag could participate at distance. The requirement for physical distance in the new health situation was very quickly taken on board by the parliamentary groups, which agreed on new measures which aimed, among other things, to limit the number of people present in the hemicycle at the same time.

Consequently, each parliamentary group has allowed its members to be physically present only for a specific period of time during plenary sessions. Similarly, for personal votes, for which § 51 of the Rules of Procedure stipulates that each Member must pass through the hemicycle to record his or her vote, it is no longer provided for them to take place in just a few minutes but in over almost an hour, so as to give Members time to cast their vote in one of the ballot boxes located in different parts of the Bundestag. Where a personal vote is not required, the amendment to the Rules of Procedure has provided that these may also cast in written form, as an exception to the requirement of physical presence laid down in § 48 of the Rules of Procedure.

The inclusion of the new paragraph 126a in the Rules of Procedure has mainly allowed Members of the Bundestag to meet physically in smaller numbers. This new paragraph introduced an exception to the quorum rule in plenary and committee meetings, which is laid down in paragraphs 45 and 67 of the Rules of Procedure respectively. Whereas these require the presence of “more than half of its members in number”, § 126a (1) and (2) require the presence of only one quarter of the members. In reality, this amendment is only an additional safeguard, since the quorum of those present required for the ballot is not checked automatically but only at the request of one of the Members of the Bundestag. In practice, Members of the Bundestag also use the technique known as ‘*pairing*’, which allow an equal number of Members from the majority and the opposition to agree to be absent at the same time without affecting the outcome of the vote. Moreover, the meeting periods were more concentrated in time both in plenary sessions and in committees, some of them, whose spring programme was not very busy, even decided to postpone their scheduled meetings. In this sense, the health crisis has contributed to speeding up procedures and reducing the time available for discussion.

Similarly, it was agreed that the three stages of discussion provided for all legislative texts examined in the Bundestag, whose first two being normally at least one day apart, could be held

¹⁹ R. Roßmann and G. Mascolo, « Ein Rettungspaket für den Bundestag », *Süddeutsche Zeitung*, 3 April 2020.

consecutively on the same day²⁰. This reduction in time is not essential, however, since in the Bundestag the bulk of the work on the text is done prior to its examination in plenary session, especially in the parliamentary committees and between the political groups, which can thus take the time to negotiate among themselves.

This slight procedural acceleration went together with an increased development of remote exchanges and videoconferencing facilities, which had already been used in practice before the crisis for meetings within the framework of parliamentary groups only²¹. Unlike in many foreign parliaments, where it was completely new, the Bundestag had only to extend this system to all its meetings and sittings. The hybrid format became the norm for most meetings. For plenary sessions, the parliamentary groups have determined the speakers present, while their other members participate in the debate online. Finally, for plenary meetings and public hearings of parliamentary committees, § 126a of the Rules of Procedure provides that the public may only attend at distance, via the Internet.

All in all, it has to be said that the German Parliament, like many national parliaments in Europe, has granted significant powers to the executive. However, it has only considered this in a precisely defined field and has not divested itself of its legislative powers in favour of the executive. On the contrary, the Bundestag has continued to exercise its legislative and supervisory powers, while adapting its practices to the requirements of the epidemic situation. In this respect, the German system is proof - unlike neighbouring States which have given in to the temptation of momentary concentration of powers in the hands of the executive - that exceptional situations do not necessarily call for an exceptional response, but rather for the maintenance of democratic procedures in strict compliance with the rule of law²².

²⁰ § 81(1) of the Rules of Procedure of the Bundestag.

²¹ P. Amthor, « Bundestag et parlementarisme allemand en temps d'exception », *JP Blog*, 9 September 2020.

²² S. Jürgensen and F. Orlowski, « Critique and Crisis: The German Struggle with Pandemic Control Measures and the State of Emergency », *Verfassungsblog*, 19 April 2020.

Greece

Tackling the novel pandemic effectively

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According to the Constitution, Greece is a presidential parliamentary democracy (or republic¹) (art. 1.1).² The President, elected by Parliament every five years (art. 32.1 Const.), is the head of State.³ The Prime Minister is the leader of the majority party in Parliament and serves to unite the Government. The Prime Minister, together with his ministers and deputy ministers, make up the Ministerial Council, which is the top decision-making institution in the country. The Prime Minister is selected by the President and is the leader of the Government.⁴

I. The Parliament

1.1. The institution

The Parliament is the supreme democratic institution; it represents the citizens through an elected body of Members of Parliament (MPs). In the Hellenic Constitution, there is a presumption of competence in favour of the Parliament (art. 50 Const.). The Hellenic Parliament is made up of 300 parliamentarians elected every four years by Greek citizens⁵.

1.2. How the Parliament works: Plenum of Parliament and Recess Session

The Plenum consists of all the MPs elected in the same general election. General elections are normally held every four years, unless Parliament is dissolved earlier. The interval between two elections is a ‘parliamentary term’, in which the Parliament holds regular sessions, while the Constitution of Greece provides for extraordinary and special sessions as well. The Plenum is mainly responsible for the legislative and parliamentary control functions. When Parliament is in recess between two Sessions, part of the legislative and parliamentary control business is exercised by the

¹ The [Greek](#) word “δημοκρατία” can be translated both ways.

² The Constitution of Greece, as revised by the parliamentary resolution of 25 November 2019 of the IXth Revisionary Parliament, available in English [here](#).

³ The incumbent President is Katerina Sakellaropoulou, who took office on 22 January 2020. On 17 October 2018 she was appointed President of the Council of State and remained in that position until 11 February 2020. On 22 January 2020, she was elected the first female President of the Hellenic Republic by Parliament, securing 261 votes out of a total of 300. She took the oath before Parliament on 13 March 2020 and assumed office the following day.

⁴ The incumbent prime minister is Kyriakos Mitsotakis, who took office on 8 July 2019.

⁵ The electorate elects MPs at a general election by direct, universal, secret ballot (article 51.3 Const.). The Constitution does not determine the total number of parliamentarians (article 51.1 Const.) but does stipulate that there shall be no fewer than two hundred (200) or more than three hundred (300). Since 1952, the overall number of Hellenic Parliament MPs has been 300. Members of Parliament receive their title and privileges on the day they are elected. Part of those 300 MPs, no more than 1/20, may be elected not in a specified constituency but rather throughout the country at large. These are the State Deputies, whose exact number depends on the total electoral strength of each party (article 54.3 Const.).

compositions of the Vacation / Recess Section (art. 71 of the Constitution). There are three consecutive compositions of the Recess Section each year during the summer recess, each consisting of a third of the total number of MPs. In the Recess Section, one third of the total number of MPs participate.

1.3. The Parliament decides

The Plenum decides by a majority of the MPs who are present. The majority has to be at least $\frac{1}{4}$ of the total number of MPs (300) in the Plenum. The Greek Constitution and Parliament's Standing Orders provide for the cases that require special or qualified majority voting.

1.4. The Parliament legislates

Legislative work, namely voting on Bills and law proposals and exercising parliamentary control over the Government, are the core activities of Parliament. The legislative initiative belongs to the Government, through one or more of its ministers, and to the MPs individually or as a group. Ministers introduce Bills (draft laws), amendments and additions while MPs introduce law proposals, amendments and additions under the conditions laid down by the Constitution.

1.5. Submission of Bills and Law Proposals to Parliament

An explanatory report accompanies every Bill and law proposal to elaborate on its purpose and objectives. If a Bill or a law proposal incurs additional expenses for the State Budget, it must be accompanied by a General Accounting Office report specifying the amount of expenditure involved.

If a Bill results in expenditure or a reduction in revenues, a special report regarding the coverage of the expense is attached and signed by both the Minister for Finance and the competent Minister. Bills must also be accompanied by an impact assessment report and by a report on the results of the public consultation that took place prior to the submission of the Bill. The Scientific Agency of the Parliament also submits a review on the proposed provisions. The Bills and law proposals are then announced to the Assembly; they are subsequently referred either for elaboration and examination or for debate and voting by the competent Standing Committee of the Parliament.

The elaboration and examination of a Bill or law proposal includes two stages that must be at least seven (7) days apart. At the first stage, a debate in principle and on the articles is conducted; at the second stage, a second reading takes place followed by a debate and vote by article. During the legislative drafting of every Bill or law proposal by the competent Standing Committee and until the second reading of the relevant articles, every special permanent committee can express its opinion on any specific issue that falls within its competence.

1.6. Parliament debates and votes on Bills and law proposals

Once the appropriate Standing Committee has completed the drafting and examination or the debate and voting on Bills and Law Proposals, the latter are entered in the Order of the Day to be debated and voted in the Plenum. Bills and law proposals debated and voted on by the appropriate Standing Committee are voted on at once in principle, by article and as a whole, by the Plenum (art. 76.1 Const). The Recess Section may debate and vote only those Bills and Law Proposals that do not

fall exclusively within the competence of the Plenum, according to the Constitution. The President of the Republic promulgates and publishes all the Bills and law proposals passed by the Parliament within one month of the vote.

However, according to the Constitution (art. 76.4–5): “4. *A Bill or law proposal designated by the Government as very urgent shall be introduced for voting after a limited debate in one sitting, by the Plenum or by the Section of article 71, as provided by the Standing Orders of Parliament.* 5. *The Government may request that a Bill or law proposal of an urgent nature be debated in a specific number of sittings, as specified by the Standing Orders of Parliament.*”

1.7. Means of Parliamentary Control

Means of parliamentary control include, in addition to a censure motion⁶, petitions, questions, current questions, applications to submit documents, interpellations, current interpellations and investigation committees.

1.8. Judicial review of the constitutionality of laws

All Greek courts, especially the Council of State (the Hellenic Supreme Administrative Court) and the Special Highest Court (art. 100 Const.), often address constitutional rights protection issues (art. 93.4 and art. 100.5 Const.) when exercising judicial review of the constitutionality of laws. The absence of a constitutional court sometimes works against a unified, coherent jurisprudence.⁷

II. Legal framework to face the pandemic

2.1. The relevant constitutional provisions

According to article 44 [“Acts of Legislative Content” (ALC)] of the Constitution: “In extraordinary circumstances of most urgent and unforeseen need, the President of the Republic may, on the suggestion of the Cabinet, issue Acts of Legislative Content. These acts shall be brought before Parliament for approval, in accordance with the provisions of article 72.1, within forty days from the day of issuance or within forty days from the commencement of a Parliamentary session. If the said acts are not submitted to Parliament within the said time limits, or if they are not approved by Parliament within three months from each submission, they shall become invalid for the future.”

The ALCs are considered as acts of a *sui generis* legislative organ formed by the President and the Council of ministers. Article 44.1 introduces an exception to the rule of article 26.1 Const. that: “1. The legislative powers shall be exercised by the Parliament and the President of the Republic.” The issuance of the ALCs takes place at least temporarily in the absence of the Parliament.⁸ The ALCs are not regulatory (administrative acts). This means that any petition of annulment against them

⁶ According to article 142 of the Standing Orders, “by a resolution and following a submission of a motion of censure, the Parliament may withdraw its confidence towards the Government or towards one of its members. The motion of censure must be signed by at least one sixth of the MPs and include the specific matters that are to be discussed.”

⁷ Nonetheless, a large part of Greek constitutional jurisprudence deals with the delineation of the protective scope of rights and the permissibility of restrictions.

⁸ See Spyropoulos (Ph.), *Constitutional Law*, Sakkoulas ed., 2nd edn. 2020, p.110.

before the Counsel of State is rejected as unacceptable.⁹ According to article 43. 2, of the Constitution: “*the issuance of general regulatory decrees, by virtue of special delegation granted by statute and within the limits of such delegation, shall be permitted on the proposal of the competent Minister. Delegation for the purpose of issuing regulatory acts by other administrative organs shall be permitted in cases concerning the regulation of more specific matters or matters of local interest or of a technical and detailed nature*”. So, the issuance of regulatory acts is permitted by virtue of special delegation granted by an ALC.¹⁰

2.2. Measures taken by government/public authorities

2.2.1. General measures

The Greek Government adopted general measures in response to the Coronavirus Covid-19 outbreak in the form of ALCs. Joint Ministerial Decisions [art. 43.2 Const.] and circulars are issued to implement or specify the provisions in the Acts of Legislative Content. The core measures adopted from the beginning of the pandemic in February until June have been incorporated in more Acts of Legislative Content, which multiple ministerial decisions and circulars continue to specify. To contain the second wave of the pandemic, Prime Minister Kyriakos Mitsotakis announced on 5 November 2020 a second three-week lockdown starting on 7 November. It has been extended twice and will now last until 7 January 2021.

2.2.2. The first Act of Legislative Content (ALC)

This first act of legislative content was adopted on 25 February 2020.¹¹ It focuses on preventive measures such as medical checks, pharmaceutical treatments, confinement and vaccination, the closure of public spaces and the suspension of artistic and sports events. Following the issuance of this act, the Ministry of Education and Religious Affairs imposed the closure of all educational institutions in Greece until 24 March 2020 with its decision of 10 March 2020.¹²

Pursuant to this ALC of 25 February 2020, three Joint Ministerial Decisions¹³ and circular No 5/2020/18–3–2020¹⁴ of the Ministry of Development and Investments were issued mandating the effective horizontal closure of all retail businesses, restaurants, cafe bars, cinemas, theatres, fitness centres, museums, catering and tourist businesses until 31 March 2020. The same measure was imposed regarding tourist lodging businesses until 30 April 2020. Catering and retail businesses were allowed to maintain delivery and take-away services.

⁹ CoS Ass 2291/2015, 1250/2003, 3636/1989, 2289/1987.

¹⁰ CoS Ass. 1305, 1421/2019.

¹¹ Act of legislative content “On emergency measures of prevention and limitation of the contagion of the coronavirus” (OG A’ 42/25-2-2020).

¹² Ministries of Development and Investments, Citizen Protection, Education and Religious Affairs, Labor and Social Affairs, Health, Culture and Sports, Interior, Joint Ministerial Decision “on the imposition of temporary closure of [...] educational institutions [from] 11.3.2020 until 24.3.2020.”), No D1a/GP.oik 16838, OG B’ 783/10-3-2020.

¹³ See O.G B’ 855/13-3-2020, O.G B’ 857/14-3-2020, O.G B’ 915/17-3-2020.

¹⁴ The Ministry of Development and Investments, Circular No 5/2020/18-3-2020, [available in Greek](#).

2.2.3. First set of emergency measures

On 11 March 2020, a new set of emergency measures was adopted through the second ALC; these focused on the negative financial impact of the Coronavirus COVID-19 outbreak.¹⁵ The ALC of 11 March 2020 provides for measures suspending debt repayment obligations, extending the deadlines for repayments by taxpayers and enterprises, allowing flexible arrangements in work schedules, providing for special-purpose leave for workers, suspending upcoming parades, and obliging radio and TV stations to transmit information messages.

As far as the implementation of the above measures is concerned, specific instructions to workers and employers were issued by the Ministry of Labour and Social Affairs on 12 March 2020 by way of a circular specifying the measures of special purpose leave for working parents, of remote work and insurance payments.¹⁶ The *special purpose leave* for working parents with children attending compulsory education units¹⁷ or special schools¹⁸ was mandated to last as long as the closure of these schools. The possibility of distance working was addressed in the same circular, to be decided upon by individual employers.

2.2.4. Additional emergency measures

The next ALC was published on 14 March 2020 and contained additional emergency measures in response to the need to limit the transmission of Coronavirus COVID-19.¹⁹ This ALC of 14 March 2020 included measures extending the schedules of catering services and obliges supermarkets and pharmacies to inform public authorities on their available stock of sanitation products and antiseptics. In addition, article 13.1 of this ALC of 14 March 2020 provided for a supportive mechanism for workers. Concrete relief measures in favour of self-employed individuals, employees and the unemployed were announced by the Ministry of Labour and Social Affairs in a press release on 18 March 2020.²⁰ These measures constituted the aforementioned supportive mechanism and include a special purpose compensation of €800 to be paid in April to employees working in enterprises which suspended their operations, postponement of the payment of insurance and tax obligations for self-employed individuals and businesses, and the extension of unemployment benefit for a two-month period for those who would have normally stopped receiving it on 31 March 2020.

For the purposes of the effective implementation of the new support mechanism, the Ministry of Labour and Social Affairs issued a Joint Ministerial Decision²¹ providing details on the procedure, including the setting up of an online platform to collect applications. The above Joint Ministerial Decision also provided for a special reduction of rent for employees working in businesses which

¹⁵ Act of legislative content “on emergency measures to counteract the negative impact of the coronavirus COVID-19 emergence and the need to limit its contagion” (OG A’ 55/11-3-2020).

¹⁶ The Ministry of Labor and Social affairs, Circular No 12339/404/12-3-2020, [available in Greek](#).

¹⁷ Kindergarten, Nursery, Primary and Junior High School.

¹⁸ Education units for persons with disabilities regardless of age.

¹⁹ OG A’ 64/14-3-2020.

²⁰ Ministry of Labor and Social affairs, Declaration of Giannis Vrotsis on the second set of one-off support measures for workers, freelancers, the self-employed, the unemployed and businesses with a non-redundancy clause, Press Release, 18 March 2020, available in Greek at <https://www.ypakp.gr/uploads/docs/12319.pdf>

²¹ Ministry of Labor and Social Affairs, Joint Ministerial Decision No 12997/231 O.G B’ 993/23-3-2020 on “Mechanism of application of support measures of employees in response to the negative impact of coronavirus Covid-19”, [available in Greek](#).

were obliged to suspend operations. It must be underscored that employees who continued to work remotely, or employees who were already on another form of leave such as maternity or educational leave, were exempted from the support mechanism, since their financial and insurance status were not impacted by the suspension of operation of the businesses they were employed by.

2.2.5. Other emergency measures

Moreover, by dint of the ALC of 20 March 2020, more urgent measures were taken to address the consequences of the risk of the spread of COVID-19, to support society and entrepreneurship, and to ensure the smooth running of the market and public administration (OG A' 68). On 30 March 2020, a new ALC provided for more measures for the treatment of coronary heart disease COVID-19 (OG A' 75). Furthermore, on 13 April 2020, by dint of another ALC (OG A' 84), more measures were adopted to address the ongoing consequences of the COVID-19 pandemic. Finally, since it concerned the period of lockdown, the ALC of 1 May 2020 (OG A' 90) included further measures to address the continuing effects of the COVID-19 coronary pandemic and the return to social and economic normality.

2.3. Impact of the health crisis on the functioning of Parliament

2.3.1. Impact on parliamentary procedure

Because of the health crisis, the Parliament suspended most of its work between 17 March and 25 May. It continued some of its activities remotely. Some sessions took place, but only a few parliamentarians were permitted to participate in these sessions. Thus, during the health crisis period, from 18 March until 25 May, 19 parliamentary committees (Standing Committees, Special Standing Committees, Special Permanent Committees, and Committees on Parliament's Internal Affairs) suspended their work. The permanent Committees convened normally during this period to ratify the already published ALC. The Special Permanent Committee on Parliamentary Ethics was convened twice, on 10 April and 27 May. All Committees were convened normally once more in the last week of May.

2.2.1. ALCs and the role of Parliament

The Greek Government made use of the enabling provision in art. 44 Const. to issue ALCs, the most important of which was issued on 20 March. The Government used this mechanism to provide for the initial measures tackling the containment of the spread of coronavirus, but also wisely delegated to ministers the power to take additional measures, if the situation deteriorated further. Indicative of the political acceptance of the constitutionality and effectiveness of the measures is the fact that, when the relevant ALCs were submitted to Parliament for ratification, they were ratified by a majority larger than that of the Government MPs, being voted down only by the Greek Communist Party. Nevertheless, according to Professor Spyros Vlachopoulos²², the danger of Mithridatism²³ lurks behind these practices employed by the Government.²⁴

²² Vlachopoulos (s.), *Constitutional Mithridatism. Individual Freedoms in pandemic eras* (in Greek), Eurasia, 2020.

²³ Mithridatism is the practice of protecting oneself against a poison by gradually self-administering non-lethal amounts. The word is derived from Mithridates VI, the King of Pontus, who so feared being poisoned that he regularly ingested small doses, aiming to develop immunity.

²⁴ Professor Vlachopoulos (*op. cit.*) raises the question of whether the suspension of fundamental rights to deal with the coronavirus

2.2.2. *How did the Parliament react?*

The Government brought all the published ALCs before the Parliament quickly, even during the pandemic, and the Parliament ratified the ALCs within the constitutional time limits. Some examples are relevant:

2.3.3.1. Law no 4682/2020²⁵

20 March 2020 was the Deposit Date of the relevant Bill of the Ministry of Health along with the relevant explanatory report, the General Accounting Office report, and the Impact assessment report. It was then examined on 31 March 2020 by the relevant Standing Committee on Social Affairs. 2 April 2020 was the date of the vote and 3 April the date on which it was published in the OG.²⁶

2.3.3.2. Law no 4683/2020²⁷

3 April 2020 was the Deposit Date of the relevant Bill of the Ministry of Health along with the relevant explanatory report, the General Accounting Office report, and the Impact assessment report. It was then examined on 7 April 2020 by the relevant Standing Committee on Social Affairs. 9 April 2020 was the date of the vote and 10 April the date on which it was published in the OG.²⁸

2.3.3.3. Law 4684/2020²⁹

14 April 2020 was the Deposit Date of the relevant Bill of the Ministry of Health along with the relevant explanatory report, the General Accounting Office report, and the Impact assessment report. It was then examined on 22 April 2020 by the relevant Standing Committee on Social Affairs. 24 April 2020 was the date of the vote and 25 April the date on which it was published in the OG.³⁰

2.3.3.4. Law 4690/2020³¹

pandemic could threaten the "health" of the Republic. In his opinion, "constitutional mithridatism" refers to the risk of continuing to tolerate restrictions placed on our rights after the end of the emergency in the light of which the restrictions were introduced. Because even after the end of the emergency there is a risk that restrictions on individual freedoms, such as privacy, will continue or intensify with the use of new state-of-the-art technological applications. The question is how we defend our legal culture. Suspension of freedoms is a "treatment" so toxic that it must be strictly temporary. Furthermore, the author also answers the question of whether power, equipped with the "pins" of technology, can penetrate the cell of our individual freedom just as the virus with its own pins attacks biological cells. He concludes that constitutional law is called upon to answer these questions without succumbing to either "constitutional populism" or "constitutional mithridatism".

²⁵ Law no 4682/2020 (OG A '76 / 03.04.2020) Ratification: a) of ALC of 25 February 2020 "Urgent measures to avoid and limit the spread of coronavirus" (OG A' 42), b) ALC of 11 March 2020 "Urgent measures to address the negative consequences of the occurrence of COVID-19 on coronary artery disease and the need to limit its dissemination" (OG A' 55), and c) ALC of 14 March 2020 "Urgent measures to address the need to reduce the spread of COVID-19 corona" (OG A' 64) and other provisions.

²⁶ Only two Speakers: One for the Government (Evangelos Liakos) and one for the Opposition (Nikolaos Pappas).

²⁷ Law no 4683/2020 (OG A' 83/10.04.2020) Ratification of the ALC of 20 March 2020 "Urgent measures to address the consequences of the risk of the spread of COVID-19 corona, to support society and entrepreneurship and to ensure the smooth running of the market and public administration" (OG A' 68) and other provisions.

²⁸ Only two Speakers: One for the Government (Miltiadis Chrysomallis) and one for the Opposition (Georges Tsipras).

²⁹ Law 4684/2020 (OG A' 86/25.04.2020) Ratification of ALC of 30 March 2020 ALC "Measures for the treatment of coronary heart disease COVID-19 and other urgent provisions" (OG A' 75) and other provisions.

³⁰ Only two Speakers: One for the Government (Dimitrios Markopoulos) and one for the Opposition (Konstantinos Zachariadis).

³¹ Law no 4690/2020 (OG A' 104/30.05.2020), Ratification of A) ALC of 13 April 2020 "Measures to address the ongoing consequences of the COVID-19 corona pandemic and other urgent provisions" B) ALC of 1 May 2020 "Further measures to address the continuing effects of the COVID-19 coronary pandemic and return to social and economic normality."

20 May 2020 was the Deposit Date of the relevant Bill of the Ministry of Health along with the relevant explanatory report, the General Accounting Office report, and the Impact assessment report. It was then examined on 27 May 2020 by the relevant Standing Committee on Social Affairs. 29 May 2020 was the date of the vote and 30 May the date on which it was published in the Official Gazette.³²

III. How Parliament worked during the pandemic

3.1. Restricted meetings

Since one of the core principles of the coronavirus period has been to gather fewer people together in one place, the Hellenic Parliament also adapted to this principle. Parliament has maintained its core functions—passing laws, ratifying ALCs, overseeing the Government—in this difficult period. Both committees and plenary sessions have focused on measures needed for the Government to respond to the crisis.

The Covid-19 pandemic has forced Parliament to limit physical meetings and function remotely, but MEPs have still been able to approve urgent EU measures to fight the pandemic. For example, the Plenary Session operates with a maximum of sixty (60) deputies present. As there are 25 parliamentary committees, 19 of which are made up of fewer than 25 deputies, these committees now meet in the large Trophy Hall, on the first floor. The other committees meet in the Senate Hall and in the Plenary Hall. Moreover, due to the pandemic, the doors of Parliament's Plenary Hall have remained open for the first time in its history. During the lockdown, many parliamentarians attended the standing committees' meetings whose work exceptionally continued online. Online hearings were then possible.³³

After lockdown, Parliament introduced a procedure allowing deputies to vote remotely for the first time. Voting previously required physical presence. The infrastructure is now also in place to allow deputies to participate in the sessions from their homes.

3.2. Impact on parliamentary oversight of the Government

The Constitution states that the Government is subject to Parliamentary control in accordance with the procedure set out in Parliament's Standing Orders. During the crisis, 16 sessions of Parliament took place for the exercise of Parliamentary control.³⁴ Also, individuals or groups of citizens have been able to address complaints or requests to the Parliament. In all, Parliament responded to 1800 petitions and questions during the first quarantine period, but the relevant civil servants were working remotely.

As David Sassoli, President of the European Parliament, underlined: “Democracy should not be stopped by a virus. We need the democratic process to help us overcome this emergency”. The Greek Government has made extensive use of the powers afforded to it, as well as of the special

³² Only two Speakers: One for the Government (Spyridon Pnevmatikos) and one for the Opposition (Athanasios Papachristipoulos).

³³ The Special Permanent Committee on Parliamentary Ethics was convened twice, on 10 April and 27 May.

³⁴ In an article entitled “Parliament against coronavirus”, the Speaker of the Parliament, Costas Tassoulas, explains how the test posed by the pandemic was passed; see “[Parliament against coronavirus](#)” in the *Kathimerini* newspaper of 16 June 2020.

procedures provided for by the Greek Constitution. As a result of both wise constitutional design and effective government and parliamentary action, Greece has performed impressively, successfully flattening the virus curve by the end of the first phase of the pandemic in June 2020.³⁵ At this stage it is still too early for an assessment of the second wave of the pandemic. Thus, according to Professor *Panagiotis Doudonis*³⁶, the former black sheep of the Eurozone is now a European paradigm for dealing with the novel pandemic effectively without deviating from the constitutional order and the protection of fundamental rights.

³⁵ See Papatolias (A.), 'The "next day" of national and European constitutionalism. Interpretive reflections in the wake of the pandemic', Papazisis ed., 2020. Professor Akritas Kaidatzis in an article in the *Argi* newspaper on 1 October 2020 entitled "[Antisocial rights in a time of pandemic](#)" argues that the health crisis resulting from the Covid-19 pandemic meets the definition of "extraordinary circumstances of an urgent and unforeseeable need" as laid down in article 44 of the Constitution, which regulates the issuance of Legislative Acts, but makes it clear that the exercise of some of our rights may become antisocial. The exercise of the right of free movement or assembly is considered antisocial, since it poses risks to public health, so we have to tolerate their extreme restriction. The guarantee of employment rights is also considered antisocial, in light of the economic impact of the pandemic, which is why we should tolerate their partial suspension, too. Ironically, sociability itself is perceived as antisocial. Social rights must be reduced as far as possible - that is the message of the measures."

³⁶ Doudonis (P.), "Greece is no longer [Europe's black sheep: coronavirus, Greek government's response and the Constitution](#)", *U.K. Const. L. Blog*, (8th April 2020).

Latvia

E-Saeima, one of the first parliaments in the world ready to work in fully remote mode

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The spring of 2020 upset the lives of many countries. The pandemic caused by virus Covid-19 influenced the daily life of states, the society, and each person. Latvia was no exception. When the emergency situation was declared¹, numerous restrictions were introduced aimed at decreasing the spread of the virus and protecting public health and safety. Covid-19 directly affected also the work of the Latvian parliament – the *Saeima*: Members of the *Saeima* had to both self-isolate and solve the issue of how to ensure that the functions that the parliament had been entrusted with were fulfilled in these special circumstances.

The Preamble to the Constitution (*Satversme*) of the Republic of Latvia comprises the idea that everyone takes care of themselves, their relatives and the common good of society, treating responsibly others, the future generations². The practical implementation of this idea was decisive in curbing the spread of the virus. In this respect, conduct and actions appropriate for the situation were expected from the parliament.

I. Latvia as a parliamentary republic

The Latvian constitutional regulation, basically, is included in the Constitution of the Republic of Latvia, adopted by the Latvian Constituent Assembly on 15 February 1922, which is validly recognised as one of the oldest constitutions that are still in force in the world. Pursuant to the will of the creators of the Constitution of the Republic of Latvia – the Latvian Constituent Assembly – and also following from the content and structure of the constitution itself, Latvia is a typical parliamentary republic. Parliamentarism could be called the form of democracy that traditionally has been characteristic of Latvia.³ In view of the fact that, according to Article 6 of the Constitution⁴,

¹ [Cabinet Order of 12 March 2020 No. 103](#) Regarding Declaration of the Emergency Situation. (accessed 5 October 2020).

² Preamble of the [Constitution of the Republic of Latvia](#), (accessed 6 October 2020).

³ Par Valsts prezidenta funkcijām Latvijas parlamentārās demokrātijas sistēmas ietvaros [On the functions of the President within the framework of the Latvian parliamentary democracy] in *Valsts prezidenta Konstitucionālo tiesību komisija. Viedokļi 2008-2011*, Rīga, 2011, p. 106.

⁴ It provides that the 6th Convocation of the *Saeima* shall be elected in general, equal and direct elections, and by secret ballot based on proportional representation. [The Constitution of the Republic of Latvia](#), (accessed 6 October 2020).

Latvian citizens elect only one institution, i.e. the parliament (, the *Saeima* is “directly democratically legitimised”.⁵ This means that the *Saeima*, in accordance with the Constitution, may act, in exercising the State’s power, in the name of the people of Latvia.

On this basis, the Constitution grants large competences to the *Saeima*. Similarly to the parliaments of many other States, the *Saeima* carries out the legislative function as well as other typical parliamentary functions arising from the Constitution, abiding by the so-called “*theory of essentiality*” developed by the Constitutional Court of the Republic of Latvia. According to this theory, the Cabinet may be entrusted with deciding on a matter; however, it is the obligation of the *Saeima* to decide itself in the legislative process on all most important matters in the life of the State and society.⁶

At the same time, it should be underscored that the *Saeima*’s rights, in exercising its competence, are not unlimited. The *Saeima* must abide by the principle of separation of powers and respect the competence granted to the other bodies of the State power. As explained in judicature: “The *Saeima* is free to express its will only insofar it is not restricted by the Constitution.”⁷

II. The emergency situation: regulation and reality in 2020

It is known in the theory of constitutions that usually two ways for exercising the State’s power are included in the basic law: the ordinary or normal and special legal order.⁸ The Constitution of the Republic of Latvia includes the special legal regulation with respect to proclaiming the state of emergency. The state of emergency is defined in its article 62, which states that if the State is threatened by an external enemy, or if an internal insurrection which endangers the existing political system arises or threatens to arise in the State or in any part of the State. This exclusive right – to declare the state of emergency – has been granted to the Cabinet, who must inform the Presidium of the *Saeima* within twenty-four hours and the Presidium must, without delay, present such decision of the Cabinet to the *Saeima*.

The Constitution does not regulate other exceptional situations, as for example pandemic crises. Another legal regime – emergency situation – is regulated by a law On Emergency Situation and State of Exception, which Section 4 explains that emergency situation in the entire State, a part of the State or a part of its administrative territory may be declared in the case of a threat to the State, which is related to a disaster, danger thereof or threats to the critical infrastructure, if safety of the State, society, environment, economic activity and the health and life of human beings are significantly endangered.⁹ The Cabinet has the right to proclaim an emergency situation for a term not exceeding three months, with the possibility to extend this term. Upon declaring an emergency situation, the

⁵ Judgement of the Constitutional Court of the Republic of Latvia on 2 March 2016 in case No. 2015-11-03, para 21.2. [Latvijas Vēstnesis](#), No. 45, 2016.

⁶ Judgement of the Constitutional Court of the Republic of Latvia on 21 December 2009 in case No. 2009-43-01, para 31.1. [Latvijas Vēstnesis](#), No. 201, 2009.

⁷ Judgement of the Constitutional Court of the Republic of Latvia on 22 February 2002 in case No. 2001-06-03, para5. [Latvijas Vēstnesis](#), No. 31, 2002.

⁸ PLEPS (J.), “Satversmes 62. Panta komentārs” [Comment on Article 62 of the Constitution], in BALODIS (R.), (Dir.) *Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets*. Rīga, 2017, p.616.

⁹ [Law On Emergency Situation and State of Exception](#), (accessed 5 October 2020).

Cabinet has very extensive rights to establish various restrictions: both with respect to the movements of persons and economic activities, circulation of goods as well as to define appropriate measures for preventing or overcoming the threat. It could be said that the legal regulation grants to the Cabinet sufficiently extensive rights to respond to the situation in the State and take the necessary measures for limiting, preventing the threat.

In reaction to the Communication by the World Health Organisation of 11 March 2020¹⁰ that the number of Covid-19 cases had reached the scope of pandemics, on 12 March 2020 the Cabinet proclaimed emergency situation in the entire territory of the State to establish epidemiological safety and other measures aimed at curbing the spread of Covid-19. Initially, the emergency situation was proclaimed until 14 April 2020, later this term was extended. The Cabinet decided on significant restrictions on the work of persons and institutions.¹¹ The Cabinet's decision was drawn up as an order, which, in view of the actual situation, was later reviewed and amended several times: both the term of the emergency situation was extended and the rules of personal and public life were changed. Therefore, on 15 March 2020, Latvia submitted to the Secretary General of the Council of Europe a declaration on derogating from ensuring some aspects in some of the rights and freedoms, guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms, for instance, inviolability of private life, freedoms of assembly and movement for the period when the emergency situation was proclaimed in Latvia. On 16 March 2020, Latvia submitted a similar declaration also to the Secretary General of UN.¹² The submission of these declarations was not only a mechanism for fostering transparency with respect to restrictions established to protect public health but also confirmed the extraordinary nature of that situation and proved that Latvia complied with the principles repeatedly emphasised in the case law of the European Court of Human Rights.¹³

The emergency situation in Latvia was in force until 9 June 2020.¹⁴ To cope with a resurgence of the epidemic, on 6 November the government declared a state of emergency from 9 November to 6 December. This was extended again on 1 December until 11 January 2021.

III. The parliament and the emergency situation

Neither in the emergency situation nor in the state of exception, the Constitution of the Republic of Latvia envisages delegating the legislative function to the executive power or another constitutional body. Article 81 of the Constitution, which provided that in cases of urgent necessity between sessions of the Saeima, the Cabinet has the right to issue regulations which have the force

¹⁰ World Health Organization's [Situation Report](#) on Coronavirus disease 2019 (COVID-19). Available: (accessed 8 October 2020).

¹¹ [Cabinet Order of 12 March 2020 No. 103](#) Regarding Declaration of the Emergency Situation, (accessed 5 October 2020).

¹² LĪCE (K.), VĪTOLA (E.) "Deklarācija starptautiskajām cilvēktiesību organizācijām par ārkārtējo situāciju Latvijā" [Declaration to international human rights organizations on the state of emergency in Latvia]. *Jurista Vārdi*, No. 115, 2020, p. 13.

¹³ *Ibid.*, p. 14.

¹⁴ Ministru kabineta 2020. gada 7. maija rīkojums Nr. 254 Grozījumi Ministru kabineta 2020. gada 12. marta rīkojumā Nr. 103 "[Par ārkārtējās situācijas izsludināšanu](#)" [Order No. 254 of the Cabinet of Ministers of 7 May 2020 Amendments to the Cabinet of Ministers Order No. 103 of 12 March 2020 "On the declaration of a state of emergency"]. *Latvijas Vēstnesis*, No. 88A, 2020.

of Law, has become void since 2007.¹⁵ Therefore, the Presidium of the *Saeima* had the obligation to find a solution for the continuity of the *Saeima*'s, the legislator's work, and also to take care of the epidemiological safety in its work. In view of the fact that the fundamental constitutional principles, the system of constitutional bodies and a person's fundamental rights must be equally effective and applicable both in routine and emergency situations,¹⁶ also the functioning of the parliament as one of the constitutional bodies is indispensable in all circumstances and it is important that the parliament continues the legislative process as effectively as possible.

Following proclamation of the emergency situation, being aware of the actual situation, on 23 March 2020, the first joint meeting in Latvia's history of several constitutional institutions – the President, the Speaker of the *Saeima*, the Prime Minister, the President of the Constitutional Court and the Chief Justice of the Supreme Court – defined the basic principles of work for the constitutional institutions in an emergency situation.¹⁷ The President has acknowledged that the main objective of these principles is to facilitate the dialogue of the constitutional bodies and form a shared position on matters of national importance.¹⁸ It was recognised that all public institutions and officials had to intensify coordination of their activities and had to collaborate, abandoning legal formalism and departmental thinking, which “obstruct implementation of the Constitution's aims, particularly so, in an emergency situation.”¹⁹ Likewise, it was recognised that “management of the emergency situation is the Cabinet's task. The other national constitutional bodies, within the framework of the system of checks and balances, established by our democratic state, and safeguarding the basic principles of the Constitution, shall exercise their competence and procedures so as to ensure management of the emergency situation.”²⁰ At the same time, also in an emergency situation, all constitutional institutions agreed that the *Saeima* had to continue its work, fulfilling not only the legislative function but also exercising the parliamentary supervision over the Cabinet's work, if necessary, using the available possibilities for organising the *Saeima*'s work remotely. One might say that this served as a signal for all – employees of public institutions and society in general – that the national constitutional bodies, all public institutions and officials coordinated their activities also during the emergency situation, continued fulfilling their functions and were doing that as effectively as possible.

During the period of emergency situation, the main decisions made by the legislator were related to the adoption of the Cabinet's order on proclaiming emergency situation and of amendments to it, adopting new legal regulation for organising the daily work of the State and local government institutions in the new circumstances, ensuring social and other assistance to inhabitants, businesses and the economy in general. Thus, in the initial stage of the emergency situation, on 20 March 2020,

¹⁵ [Grozījumi Latvijas Republikas Satversmē](#) [Amendments to the Constitution of the Republic of Latvia] Passed on 3.05.2007. (accessed 5 October 2020)

¹⁶ LEVITS (E.) “Satversme ārkārtas apstākļos” [The Constitution in extraordinary situation], *Jurista Vārds*, No. 18, 2020, p. 6.-10.

¹⁷ [President Notification No. 8 "Basic Principles of Activity of State Constitutional Bodies in an Emergency Situation"](#). (accessed 5 October 2020)

¹⁸ LEVITS (E.), “Satversme ārkārtas apstākļos” [Constitution in extraordinary situation], *Jurista Vārds*, No. 18, 2020, p. 7.

¹⁹ [President Notification No. 8 "Basic Principles of Activity of State Constitutional Bodies in an Emergency Situation"](#). Para 3. (accessed 5 October 2020)

²⁰ [President's Notification No. 8 "Basic Principles of Activity of State Constitutional Bodies in an Emergency Situation"](#). Para 6. (accessed 5 October 2020)

[the law "On Measures for the Prevention and Suppression of Threat to the State and Its Consequences Due to the Spread of COVID-19"](#)²¹ was adopted. On 3 April 2020, in turn, the law "On the Operation of State Authorities During the Emergency Situation Related to the Spread of COVID-19"²².

Unlike the Cabinet, which held fully remote sitting on an internet platform already since 24 March 2020²³, ensuring fully remote work regime for the *Saeima* initially was more complicated, in view of the parliament's numerical composition (100 Members of the *Saeima*). When the emergency situation was proclaimed in the State, the *Saeima* switched to working in an emergency regime. Initially, only extraordinary sittings of the *Saeima* were convened to resolve the most urgent matters and issues related to the emergency situation, and the *Saeima* continued to work in its Plenary Chamber because an agreement had to be reached and a solution found for holding the *Saeima*'s sitting in another format, suitable for the emergency situation. The sittings of the *Saeima*'s committees, if needed for preparing a draft law, were held remotely since 31 March of the current year.²⁴

On 20 March 2020, the joint meeting of the *Saeima*'s Presidium and the Council of Factions was held²⁵, where the representatives of the factions discussed the possible solutions for organising the *Saeima*'s work in the future. In order to ensure a safe distance between the Members of the *Saeima* at the Plenary Chamber, the Council of Factions discussed also the possibility of decreasing the number of Members present at the sitting, complying with the proportional representation of factions; however, this solution of proportional representation was not supported.²⁶ After the period of self-isolation,²⁷ during which the *Saeima*'s sittings were not convened, the Presidium of the *Saeima* found a temporary solution for holding the sittings, where each faction of the *Saeima* was in a separate room, the places for the deputies during the sitting were ensured in epidemiologically safe distance, and these premises were connected in a video conference format, thus, ensuring both the epidemiological safety for the Members of the parliament and restrictions of direct contacts, as well as compliance with the provisions on the procedure for extraordinary sittings of the *Saeima*, established in the Rules of Procedure of the *Saeima*, retaining, as much as possible, involvement of all deputies in the decision making and the parliamentary debates. At the same time, the Presidium

²¹ [Law "On Measures for the Prevention and Suppression of Threat to the State and Its Consequences Due to the Spread of Covid-19"](#). 313373 (accessed 7 October 2020)

Law was developed to respond promptly to the economic consequences of the Covid-19 crisis and to provide support to industries, companies and their employees.

²² [Law "On the Operation of State Authorities During the Emergency Situation Related to the Spread of Covid-19"](#) (accessed 7 October 2020). This law strengthened in one place the basic principles of operation of state institutions and certain rights and obligations of state institutions and individuals for the prevention and overcoming of the state threat and its consequences. The law has now expired but was replaced on 5 June 2020 by Law on the Suppression of Consequences of the Spread of Covid-19 Infection. See: [Law on the Suppression of Consequences of the Spread of Covid-19 Infection](#). (accessed 7 October 2020)

²³ [Events calendar](#), (accessed 8 October 2020)

²⁴ [Parlaments gatavošanas Saeimas sēžu attālinātai norisei](#) [Parliament is preparing for the distance holding of Saeima sittings] (accessed 7 October 2020)

²⁵ [Latvijas Republikas 13. Saeimas Prezidija un Frakciju padomes 2020. gada 20. marta sēdes protokols](#) Nr. 16. [Minutes of the sitting of the Presidium of the 13th Saeima of the Republic of Latvia and the Council of Factions on March 20, 2020 No.16.] (accessed 8 October 2020)

²⁶ *Ibid.*

²⁷ Taking into account that one of the Saeima deputies was confirmed to have Covid-19 illness, almost all Saeima deputies were in self-isolation as the contact persons of a Covid-19 infected person from 21.03.2020. until 30.03.2020.

of the *Saeima* set the work to organise *e-Saeima* platform, which is more extensively examined in the following section.

However, in view of the restrictions that were introduced and the procedure, in which the committees' sittings were held, it must be noted that the quality of legislation was not significantly influenced during the emergency situation. Work in the committees and the *Saeima*'s sittings did not stop for a moment. Comparison of the statistics related to the *Saeima*'s work – during the autumn session of 2019, before the pandemic, 160 legislative initiatives were examined, whereas during the spring session, during Covid-19 pandemic – 115.²⁸ This proves that, during the period of emergency situation, the number of issues examined did not significantly decrease and that the *Saeima* continued effective legislative process.

Likewise, during the emergency situation opinions were voiced in society regarding possible amendments to the Constitution, which would have been necessary if the *Saeima*, for instance, continued to work in a reduced composition.²⁹ However, at least for now, these discussions have calmed down because, looking at what was achieved during the period of pandemic, it can be concluded that the State is able to function effectively enough within the existing legal system and institutional framework if it is reasonably interpreted and applied to the circumstances of an emergency situation. To ensure the existence of the State, protect the democratic order and people, the fundamental principles of the Constitution allow some non-standard solutions so that public institutions could continue operating and do it effectively, *inter alia*, the solution of holding remote sittings of the Constitution, etc. Juris Jansons, the Ombudsman of the Republic of Latvia, has acknowledged the *Saeima*'s ability to function effectively, underscoring that the measures taken, and the decisions made by the *Saeima* and the Government thus far, aimed at overcoming Covid-19 crisis, had been necessary and justified.³⁰

Additionally, it should be noted that one of the means for controlling the work of the parliament and the executive power, i.e., legal acts, is the Constitutional Court. Cases have been initiated at the Constitutional Court, in which the Court will have to provide the assessment of the compatibility with the Constitution of a law, adopted during the emergency situation, which established significant restrictions on business activities, prohibiting from engaging in particular business activity – gambling.³¹ The Constitutional Court also will provide its assessment of the *Saeima*'s remote work, examining the case, initiated with respect to the compliance of the Law on Administrative Territories and Populated Areas, adopted during the emergency situation, with the legal norms of higher legal force.³²

IV. E-Saeima

²⁸ [Legislative statistics](#), (accessed 8 October 2020).

²⁹ See Levits (E.) “Satversme ārkārtas apstākļos” [Constitution in extraordinary situation]. *Jurista Vārdi*, No. 18, 2020, p. 6.-10.

³⁰ Jansons J. “[Tiktāl, ciktāl? jeb vai ārkārtējā situācija var būt pamats cilvēktiesību ierobežošanai?](#)” [“To what extent” or can an emergency justify human rights restrictions?], (accessed 8 October 2020).

³¹ [Decision of the 4th Chamber of the Constitutional Court of 29 September 2020 to initiate a case](#), (accessed 5 October 2020).

³² [Decision of the 2nd Chamber of the Constitutional Court of 3 August 2020 to initiate a case](#), (accessed 5 October 2020).

As explained above, in the situation where almost all Members of the *Saeima* as contact persons of a Covid-19 infected person had to self-isolate, solutions were actively sought to ensure that the legislator continued its work in full and for organising the *Saeima's* further work in the conditions of emergency situation. Already on 26 May 2020, the temporary solution for holding the *Saeima's* sittings, when each faction of the *Saeima* was in a separate room and all rooms were connected in a video conference regime, was replaced by the newly created e-*Saeima* platform.³³ Thus, the *Saeima* of the Republic of Latvia became one of the first parliaments in the world ready to work in fully remote mode during the crisis brought on by Covid-19.

The new tool – internet platform “e-*Saeima*” – is a modern technological solution, appropriate for the 21st century, custom-made for the *Saeima's* work and specific procedures, providing the possibility to hold totally remote sittings of the *Saeima*, its Members being outside the parliament's premises. Members of the *Saeima* may log into e-*Saeima* environment at a special internet site, using secure means of authentication – e-signature. All Members of the *Saeima*, upon assuming the duties of a Member of the *Saeima*, give the solemn promise to fulfil their duties honestly and conscientiously³⁴, thus, all deputies are responsible for the use of the laptop at their disposal and also must use with great care the personal identification tools. The agenda of the sitting and the list of speakers for all relevant items can be seen in e-*Saeima* environment. Members of the parliament may ask to speak both about the matter that is being reviewed and also about successive issues on the agenda.³⁵ Voting in the electronic environment is ensured by three "buttons" – "for", "against" and "abstain". 30 seconds have been allocated for choosing in the voting regime, and during these seconds the deputies may change their decision. Following the vote, the results appear on the screen, in accordance with the seating of the Members in the Plenary Chamber.³⁶ Thus, the functionality, convenient and easy-to-understand use of the e-*Saeima* platform can be mentioned as one of its positive aspects, allowing to dedicate more time to qualitative debates rather than to highly technical voting procedure, lasting for several minutes, as it was in the temporary solution.³⁷

Considering the discussions relating to the legality of e-*Saeima*, an opinion about this new platform was provided both by the *Saeima* Legal Bureau and experts in constitutional law. It is noted in the opinion by the *Saeima* Legal Bureau on the procedure of remote *Saeima* sittings that the purpose of Article 15 of the Constitution (“The *Saeima* shall hold its sitting in Rīga, and only in extraordinary circumstances may it convene elsewhere”) is mainly to ensure stable and predictable organisation of the work of the *Saeima* as well as other public institutions. Likewise, this norm is aimed at ensuring continuity in the decision-making capacity of the *Saeima* since it envisages the possibility to hold sittings of the *Saeima* also in extraordinary circumstances, albeit in another, unusual place.³⁸ The

³³ LĪBIŅA – EGNĒRE (I.) Par e-Saeimas jauno platformu un tās priekšrocībām [About the new e-Saeima platform and its advantages]. *Jurista Vārds*, No 23, 2020. p. 5.-6.

³⁴ [The Constitution of the Republic of Latvia](#). Section 18, (accessed 6 October 2020)

³⁵ Parlaments sēdes tagad var noturēt attālināti: izstrādāts e-Saeimas digitālais rīks [Parliament can now hold sittings in a distance: an e-Saeima digital tool has been developed. *Jurista Vārds*, No. 23, 2020, p. 5.

³⁶ *Ibid.*

³⁷ LĪBIŅA – EGNĒRE (I.) Par e-Saeimas jauno platformu un tās priekšrocībām [About the new e-Saeima platform and its advantages]. *Jurista Vārds*, No 23, 2020. p. 5.-6.

³⁸ Saeimas Juridiskā biroja 2020. gada 26. maija vēstule Nr. 622.13/1-14-13/30 [Letter of the Legal Bureau of the Saeima of May 26, 2020 No. 622.13 / 1-14-13 / 30]. Unpublished

Legal Bureau has noted that, at the time when this legal norm was drafted, the words “convene elsewhere” could be understood only as physical convening of the deputies in another place; however, the norms, included in the Constitution, should be interpreted in compliance with the purpose thereof, the spirit of the time and technological possibilities. Modern technologies have created the possibility to hold the sittings in form, where the Members of the *Saeima* are not present in one room but can see and hear one another, and voting can be ensured. The Legal Bureau holds that there are no doubts whatsoever that Article 15 of the Constitution allows convening remote sittings of the *Saeima*, using digital software for moderating the sitting.

Dr.iur. Jānis Pleps, an expert of the constitutional law, stated that Article 15 of the Constitution did not link "extraordinary circumstances" to special regimes, envisaged in the Constitution, – warfare and state of exception, as well as emergency situation, envisaged in the law "On Emergency Situation and State of Exception". Thus, also in ordinary circumstances, extraordinary circumstances may arise, requiring that the sitting of the *Saeima* is held elsewhere.³⁹

Also President Dr.iur.h.c. Egils Levits has underscored that the fundamental principles of the Constitution allow, if necessary, to continue the *Saeima*'s work remotely because of the emergency situation and an absolute need – the *Saeima* must continue its work. The President has explained that such a [emergency] situation, of course, was not envisaged in 1922, when the Constitution was adopted; however, the contemporary understanding of the Constitution allows implementing its aim – protection of the existence of the State, democratic order and people – also in such circumstances that are new un unprecedented. I.e., the Constitution is understood in a way that allows the State to continue being, acting and protecting its residents.⁴⁰

Thus, it can be concluded that *e-Saeima* is a safe and reliable technological solution that complies with the Constitution of the Republic of Latvia,⁴¹ ensuring that the *Saeima* fulfils its main functions, abiding by the basic principles for organising the *Saeima*'s work, and that the legislator's work does not become paralysed in extraordinary circumstances.⁴² The *Saeima* held its sitting on *e-Saeima* platform also after the emergency situation had ended, i.e., from 10 June 2020 to 1 September 2020. When the epidemiological situation improved, the sitting of 3 September 2020 and the successive sittings of the *Saeima* were held onsite. During this period, some sittings of the committees were organised semi-remotely, i.e., the Members of the *Saeima*, serving on the committees, were in the premises of the committees, whereas the invited participants took part via a video conference. The sittings of the *Saeima* Presidium were held both remotely and onsite, abiding by the epidemiological safety measures introduced during the emergency situation. However, when the epidemiological situation worsened again, with the aim of protecting the health of deputies and staff

³⁹ Pleps (J.) Par Satversmes 15. pantu un e-Saeimu [On Article 15 of the Satversme and e-Saeima]. *Jurista Vārds*, No. 24/25, 2020, p. 5.-7.

⁴⁰ [Levits: Saeima ir rīcībspējīga un var turpināt darbu attālināti](#) [Levits: The Saeima has the capacity to act and can continue working in a distance]. (accessed 8 october 2020)

⁴¹ Pleps (J.) *op. cit.*, 2020, p. 5.-7.

⁴² Lībiņa – Egnere (I.) Par e-Saeimas jauno platformu un tās priekšrocībām [About the new e-Saeima platform and its advantages]. *Jurista Vārds*, No 23, 2020. p. 5-6.

as well as to ensure the continuity in the parliament's work,⁴³ it was decided at the sitting of 28 September 2020 of the Presidium, to hold the continuation of the extraordinary sitting of the *Saeima* of 24 September 2020 and the extraordinary sitting of the *Saeima* of 1 October 2020 remotely, on e-*Saeima* platform.⁴⁴ Currently work continues on e-*Saeima* platform.

V. Control over the Government in an emergency situation: the general principle and realization in Covid times

Pursuant to Article 59 of the Constitution, in Latvia, as a parliamentary republic, the Government is accountable to the *Saeima*.⁴⁵ The Government gains its legitimisation indirectly – via the instrument of the parliament's confidence because, pursuant to Article 59 of the Constitution, “in order to fulfil their duties, the Prime Minister and other Ministers must have the confidence of the *Saeima* and they shall be accountable to the *Saeima* for their actions.”⁴⁶ This, in turn, means that the Government may fulfil its functions only as long as it enjoys the confidence of the *Saeima*. To put it differently, “the confidence of the *Saeima* is the only constitutional foundation for the Cabinet's activities.”⁴⁷

Although the Government is not subordinated to the parliament, throughout the period of the Government's operations, the parliament fulfils the function of control over the Government. Traditionally, several means of parliamentary control have been known in Latvia, for example, the procedure of questions and requests, the possibility to establish parliamentary investigatory committees, approval of the budget. The functions of parliamentary control over the executive power did not decrease during the emergency situation. They were fulfilled, starting with the very introduction of the special legal status. Pursuant to Section 10 of the law “On Emergency Situation and State of Exception”, the *Saeima* retains control over proclamation of the emergency situation. I.e., although the decision on the emergency situation is adopted by the Cabinet, it must immediately inform the *Saeima* about it. The *Saeima* has been granted the right of control, verifying the validity and legality of the adopted decision. Implementation of control over the adopted decision is the priority task for the *Saeima* during this period because the Presidium of the *Saeima* must include immediately on the agenda of the *Saeima*'s sitting the Cabinet's decision on the emergency situation or for such amendments to the decision on the emergency situation that establish additional territorial or rights restrictions or on extending the proclaimed emergency situation. It is important to underscore that the fulfilled control function is not merely formal. It has certain effects. If the *Saeima* dismisses the Cabinet's decision then the respective decision becomes void and the measures, introduced in

⁴³ [Latvijas Republikas 13. Saeimas rudens sesijas ceturtās \(ārkārtas\) sēdes turpinājuma \(attālināti\) 2020. gada 1. oktobrī stenogramma](#) [Transcript of the continuation of the fourth (extraordinary) sitting of the 13th Saeima of the Republic of Latvia (remotely) on October 1, 2020] (accessed 8 October 2020).

⁴⁴ [Saeimas Prezidija 2020.gada 28. septembra sēdes darba kārtība](#) [Agenda of the sitting of the Presidium of the Saeima on September 28, 2020], (accessed 8 October 2020)

⁴⁵ Judgement of the Constitutional Court of the Republic of Latvia on 1 October 1999 in case No 03-05(99). para 1. [Latvijas Vēstnesis](#), No. 325/327, 1999.

⁴⁶ [The Constitution of the Republic of Latvia](#), (accessed 6 October 2020). See also [Konstitucionālās tiesību komisijas Viedokli par Saeimas apstiprinājuma nepieciešamību liela apjoma aizņēmumu saņemšanai](#) [Opinion of the Constitutional Law Commission on the Necessity of the Saeima Approval for Receiving Large - Scale Loans], (accessed 5 October 2020)

⁴⁷ Judgement of the Constitutional Court of the Republic of Latvia on 13 July 1999 in case No 03-04(98). para 2. [Latvijas Vēstnesis](#), No. 208/210, 1998.

accordance with it, are immediately revoked. In view of this legal regulation, on 13 March 2020, the following day, an extraordinary sitting of the *Saeima* was convened, during which, following debates, the *Saeima*, in great unanimity, with all present Members of the *Saeima* voting “for”, decided to support the Cabinet’s decision to proclaim the emergency situation from 12 March 2020 until 14 April 2020, in compliance with the provisions set out in the Cabinet’s Order of 12 March 2020 No. 103 on proclaiming the emergency situation.⁴⁸

In assessing the work of the parliament, it is important to note that, after the emergency situation was proclaimed, the *Saeima*, apart from the customary measures of parliamentary control – requests and questions, which Members of the *Saeima* continued to use also during the emergency situation, was involved and responded swiftly to any changes of the situation in the State. The *Saeima* re-approved, in total, of twenty-two amendments to the Cabinet’s order on proclaiming the emergency situation⁴⁹; however, it needs to be underscored, that none of the *Saeima*’s decisions was made without parliamentary debates.

The active parliamentary work, in providing proposals to the draft laws advanced by the Cabinet and in adopting significant amendments to the laws relating to curbing the spread of Covid-19 and eliminating the consequences caused by, can be deemed to be an important aspect in the parliamentary control. It needs to be noted that all draft laws related to the situation caused by Covid-19 were adopted in urgent procedure in two readings, thus, responding swiftly to the situation in the State. One of the most significant draft laws was the one submitted by the Cabinet on 1 April, “On the Operation of State Authorities During the Emergency Situation Related to the Spread of Covid-19”, which already on the following day was submitted to Defence, Internal Affairs and Corruption Prevention Committee and adopted in the first reading on the same day. For the second reading of the draft law, the Members of the *Saeima*, the *Saeima* Legal Bureau and the committee in charge had submitted 53 proposals. Through debates and assessments, the majority of proposals were supported at the *Saeima*’s sitting, later amendments were introduced into the law. The second most important law “On Measures for the Prevention and Suppression of Threat to the State and Its Consequences Due to the Spread of Covid-19”⁵⁰ was amended, in total, five times. During the emergency situation, the *Saeima* convened for 43 sittings and adopted approximately 100 laws. Thus, it can be asserted that the *Saeima*’s work in the area of parliamentary control had been significant throughout the period of the emergency situation and is continuing.

It has been recognised that this crisis could be a good “teacher”, leading to the reassessment of one’s values in life. It seems that, indeed, in these times society could appreciate things that were so customary that never caused any emotions, but the prohibitions or significant restrictions applied to

⁴⁸ [Latvijas Republikas 13. Saeimas ziemas sesijas vienpadsmitā \(ārkārtas\) sēde 2020. gada 13. Martā](#) [The eleventh (extraordinary) sitting of the 13th Saeima of the Republic of Latvia on March 13, 2020.] (accessed 6 October 2020); see also [Par ārkārtējās situācijas izsludināšanu](#) [On the declaration of a state of emergency]. Decision of the Saeima on March 13, 2020. *Latvijas Vēstnesis*, No. 52A, 2020.

⁴⁹ See, for example, [Latvijas Republikas 13. Saeimas pavasara sesijas trīspadsmitā \(ārkārtas\) sēde 2020. gada 14. Maijā](#) [Thirteenth (extraordinary) sitting of the 13th Saeima Spring Session of the Republic of Latvia on May 14, 2020], (accessed 6 October 2020)

⁵⁰ This law provided for special support mechanisms, as well as expenditures directly related to limiting the spread of Covid-19.

them upset the daily routine. Undeniably, the emergency situation also provided incentives for development into e-direction.

At the same time, this crisis has caused big concern, whether and in what quality the constitutional institutions have worked and whether the established restrictions on human rights have been proportional. As noted above, the Constitutional Court will rule on it. It is essential that the parliament, even during the emergency situation, had been capable or work, fulfilling the functions characteristic of it.

Poland

Instrumentalizing the pandemic so as to strengthen the ruling party's grasp on power

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The Covid-19 pandemic has caused unpredictable turbulence across the world. Governments have had to adapt to an unexpected and completely new threat. The Chinese reaction to the disease, including all out lockdown and disregard for human rights was consistent with the country's political system, but hardly applicable in democratic States. The severity and swift spread of the disease forced governments worldwide to introduce radical and often irrational decisions based on fear and concern for the unpredictable consequences of the disease.

However, the Covid-19 appeared not only to be a threat for public health, but also an unexpected and tempting opportunity to exploit its uniqueness to resolve certain political questions and to turn the public opinion's attention away from burning social, economic and political problems. This commentary will deliberate the Polish case and its experience in the early days of the pandemic with a particular focus on the problem of presidential elections.

I. Poland's state of emergency regulations

Following a pattern present in other European fundamental laws, Poland's constitution contains extensive regulations related to exceptional situations, as provided in Chapter XI "Extraordinary Measures". Apart from the separate provisions on the state of war, the Polish constitution recognizes three possible measures: martial law, state of emergency and state of natural disaster. The constitution provides for a martial law when external threats, armed aggression, or a treaty obligation of common defence is present. Hence, martial law is of little relevance for our deliberations.

The constitutional provisions concerning the state of natural disaster draw a rather narrow competence for the State authorities, since art. 232 explicitly refers to "preventing or removing the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster".¹ However the law on natural disasters defines natural disaster as "consequences that threaten the life and health of many people." The Covid-19 pandemic seems to fit also art. 230 acknowledging that among others, in the case of threats to the security of the citizens and the public order, the introduction of a state of emergency. Importantly, in this case the Council of Ministers

¹ [Art. 232 Constitution of the Republic of Poland](#) from April 2, 1997.

must request from the President the introduction of the said state of emergency. The introduction of this kind of extraordinary measure is limited in time. President's declared state of emergency can last up to 90 days and can be extended only once for additional 60 days with the consent of the Parliament.²

The Polish Constitution is very precise when it comes to the question of limiting human rights in the case of martial law or state of emergency. Art. 233 explicitly forbids the limitation of the following freedoms and rights: Article 30 (the dignity of the person), Article 34 and Article 36 (citizenship), Article 38 (protection of life), Article 39, Article 40 and Article 41, para.4 (humane treatment), Article 42 (ascription of criminal responsibility), Article 45 (access to a court), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions), as well as Article 48 and Article 72 (family and children). This article also explicitly forbids any discrimination based on race, gender, language, faith or lack of it, social origin, ancestry or property in the extraordinary circumstances. That leaves the authorities with a rather limited arsenal of restrictions concerning Article 22 (freedom of economic activity), Article 41, paras. 1, 3 and 5 (personal freedom), Article 50 (inviolability of the home), Article 52, para. 1 (freedom of movement and sojourn on the territory of the Republic of Poland), Article 59, para. 3 (the right to strike), Article 64 (the right of ownership), Article 65, para. 1 (freedom to work), Article 66, para. 1 (the right to safe and hygienic conditions of work) as well as Article 66, para. 2 (the right to rest).

The law on the state of emergency³ stipulates that the government can request that the president introduce a state of emergency “in the case of a particular threat to the constitutional system of the state, citizens’ security and public order, including activities of a terrorist character or within cyberspace, that cannot be overcome by the use of ordinary constitutional measures”⁴. Importantly, the provisions of Chapter XI are explicitly limited by the principles of exceptionality, legality, proportionality, advisability, protection of the legal system and the representative bodies enlisted in art. 228⁵. Each one of these principles constitutes a safeguard for the prompt reestablishment of the “normal” functioning of the political system. The safeguards protect the established political system against the temptations for the centralization of power and possible authoritarian turns by the incumbent political elites. With regard for the limited space in this analysis, only a handful of aspects of the vast literature on the role of the safeguarding principles in the state of emergency will be discussed.

1.1. The principle of proportionality

The principle of proportionality frames the limits of state interference that are required to address the threat beyond the means available in ordinary circumstances.⁶ These principles limit the state authorities in their ideas of what means, when and how should be applied to resolve the urgent

² [Art. 230 Constitution of the Republic of Poland](#) from April 2, 1997.

³ Law on the state of emergency. [Ustawa z dnia 21 czerwca 2002 r. o stanie wyjątkowym](#), Dz.U. 2002Nr 117poz. 985.

⁴ Art. 2, p.1 of the Law on the state of emergency.

⁵ L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2002, pp. 424--426., Krzysztof Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* Temida2, Białystok 2005, pp.17-18

⁶ Ordinary circumstances refers to the daily functioning of the state when no state of emergency, natural disaster, martial law or state of war is declared.

problem. The adequacy of the government's response to extraordinary situations can be a matter for the State Tribunal, equipped to rule over the questions of political responsibility. Hence, the authorities are limited in their actions, not only by the specificity of the extraordinary situation, but also by the nature of their actions subject to political and legal responsibility. Importantly, the principle of proportionality concerns not only the introduction of the state of emergency but applies to the whole period of enforcement.

The limited scope of government's response to such situations is framed by the freezing of any procedures with the potential to change the nature of the democratic political system. Local, parliamentary and presidential elections and referendums cannot be held. At the same time, the terms of all elected bodies are automatically prolonged. The only exception concerns the possibility to hold local elections, but only in areas where extraordinary measures are not introduced.⁷

1.2. The principle of advisability

The principle of advisability frames the purpose of the authorities, which can be summarised by the obligation that their actions "*shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State.*"⁸ A noticeable weakness of this principle lies in the absence of any explicit reference to the restoration of the full respect for human rights and political freedoms.⁹ The temporal pressure imposed by this provision sets an additional challenge for the government in the pursuit of solutions to resolving the extraordinary situation.

Last, but not least, particularly important in our context are the provisions of art. 228 p.6 explicitly forbidding the introduction of any changes to "the Constitution, the Acts on Elections to the Sejm, the Senate and organs of local government, the Act on Elections to the Presidency, as well as statutes on extraordinary measures." The aim of this provision is more than obvious – to avoid any changes in the fundamental law and principles of the democratic order and to secure its re-emergence once the extraordinary circumstances are over.

1.3. The measures

On March 4, the first case of confirmed Covid-19 case was hospitalized. 10 days later the government announced the introduction of the "state of pandemic threat" and after another week a "state of pandemic". The government decided to ground its approach towards the pandemic in the Law on the prevention and combating of infections and contagious diseases.¹⁰ Interestingly, the administrative unit used in the law is *voivodships* (provinces) and from its wording it becomes apparent that the primary actors are the *Voivods* (governors) which can introduce a state of epidemic threat or state of pandemic on parts or the whole territory of the voivodship. In event of the pandemic

⁷ Art. 228 p. 7.

⁸ Art. 228 p. 5

⁹ K. Prokop, *op. cit.*, p. 33, T. Jasudowicz, *Granice korzystania z praw człowieka - rozwiązania Konstytucji RP na tle standardów europejskich*, Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej, red. C. Mik, Toruń 1999, p. 6.

¹⁰ [Law on the prevention and combating of infections and contagious diseases](#), Dz. U. 2008 Nr 234 poz. 1570 Ustawa z dnia 5 grudnia 2008r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi.

spreading, the Minister of health becomes the person responsible for the management of the crisis. However, unlike the constitutionally enlisted extraordinary situations, the state of pandemic threat and the state of pandemic does not require the freezing of political terms and postponement of decisions.

On March 13, the Minister of Health issued the first decree enlisting Covid-19 related restrictions that concerned the freedom of movement, trading with a list of medical supplies, restrictions on the functioning of institutions and workplaces and a ban on the organization of mass activities¹¹. A week later the decree on the state of pandemic threat was revoked and a new one, on the state of pandemic was introduced.¹² The new decree expanded the existing provisions and introduced new requirements related to the acquisition of properties and land in accordance with the pandemic plans. Four days later, further restrictions were introduced limiting the freedom of movement to the workplace, participation in voluntary activities and indispensable for daily existence. A complete ban on public gatherings was introduced (with the exception of family reunions), public transportation restrictions and imposing limits to religious ceremonies and gatherings.¹³ Additionally, the parliament adopted a special Law on the special solutions regarding the prevention, counteracting and combatting Covid-19, other contaminating diseases and crisis situations.¹⁴ Thus, the legal framework to combat Covid-19 was shaped, based on the subsequent decrees of the Minister of health.

II. The political context

The challenge to Poland's constitutionalism that was triggered by the Covid-19 pandemic cannot be understood without a brief summary of the current nature of its internal political situation. Since 2015 the country has been ruled by the Law and Justice party, allied with two additional junior coalition partners "Solidary Poland" and "Poland Together". In the 2015 parliamentary elections, Law and Justice won, for the first time in Poland's post-communist history, a landslide victory in the elections, obtaining more than 50% of the seats in both chambers of the Polish parliament.¹⁵ In May 2015 the Law and Justice candidate also won the Presidential race, thus securing complete control over the two institutions of the Polish executive.

The landslide victory came with a promise of revolutionary changes against the uneven redistribution of wealth during the quarter of a century of post-communist democracy. The former ruling coalition's political sins were taken as an excuse for an all-out seizure of state control. This process, epitomized by the clash over the Constitutional Tribunal that led to a conflict over the rule

¹¹ [Rozporządzenie Ministra Zdrowia z dnia 13 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego](#), Warszawa, dnia 13 marca 2020r. Poz. 433.

¹² [Rozporządzenie Ministra Zdrowia z dnia 20 marca 2020r. w sprawie odwołania na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego](#), Dz.U. Warszawa, 20.03.2020, Poz.490.

¹³ [Rozporządzenie Ministra Zdrowia z dnia 20 marca 2020r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii](#), Warszawa, dnia 20 marca 2020r. Poz. 491.

¹⁴ [Rozporządzenie Ministra Zdrowia z dnia 24 marca 2020](#) zmieniające rozporządzenie w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii, Dziennik Ustaw 2020 r. poz. 522.

¹⁵ [Law on the special solutions related to the prevention, counteracting and combatting Covid-19, other contaminating diseases and the conjured crisis situations](#). Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych.

¹⁵ The lower chamber – Sejm (460 seats) and the higher chamber – Senate (100 seats).

of law in Poland with the EU, become the most tangible aspect of the Law and Justice revolution. Being pushed to the margins of political decision-making, the opposition declared itself “total”.¹⁶ In the meantime, the Law and Justice led coalition, kicked off a process to intercept all possible positions in the state structures, regardless of the logic of cadencies and professionalization of the state apparatus. This deep political polarization substantially increased the importance of political participation in the 2019 parliamentary elections and the 2020 presidential elections that rose to being among the highest turnouts in Poland’s recent history¹⁷

As long as the 2019 parliamentary elections confirmed the attractiveness of the Law and Justice political platform and methods of its implementation, the close race between the presidential candidates appeared to be of particular importance for two reasons. Firstly, a potential loss of control over the Presidents’ office by Law and Justice would have significantly undermined its efforts for furthering political reforms. A cohabitation framework for Law and Justice would have made it much more difficult to continue introducing its reforms at the same pace. Secondly, it would be not only a first defeat of the Law and Justice since 2015, it but would have undermined the logic of deep systemic changes that its mastermind Jarosław Kaczyński promotes. Hence, the presidential elections appeared to be of particular significance for the political status quo in the country.

III. Covid-19 and the Presidential elections

In accordance with the constitutional provisions, in early February the Speaker of the Sejm announced that the elections will be held on May 10, thus officially starting the election campaign. With the formal registration of the candidates it became apparent that the Civic Platform candidate Małgorzata Kidawa-Błońska, claiming to be the most serious competitor, performed poorly, thus increasing the chances of other candidates, but also significantly dividing the opposition’s votes.

The Covid-19 pandemic and its media coverage had a direct impact on the presidential election campaign. Many of the candidates, hurried to mitigate the potential negative consequences of public gatherings and suspended their campaigns. However, the perspective of postponing the elections was against Law and Justice’s interests, since election polls indicated an easy win for Andrzej Duda against his main competitors. The Law and Justice rush for elections was understandable since any postponement brought the risk of increased disappointment with the government’s actions during the pandemic. The positive exit polls and the weak performance of the main competitor Kidawa-Błońska were all favourable conditions for the party in power.

Moreover, the fast growing restrictions, had an immediate impact on people’s daily lives. The mounting restrictions made it increasingly difficult to organize and conduct elections. By the end of March, the Ombudsman wrote letters to the Prime Minister and the National Election Commission, insisting on postponing elections and the introduction of a “state of natural disaster”. The

¹⁶ Polska Times, Grzegorz Schetyna: [Bedziemy opozycja totalna. Bedziemy przeszkadzac w niszczeniu panstwa](#). 26.2.2016.

¹⁷ During the 2019 parliamentary elections the turnout was 61,74% and during the 2020 presidential elections 64,51% during the first round and 68,18% during the second round. The second highest turnout in parliamentary elections in Poland were the first semi-free elections in 1989 with 62,70% voted in the first round. Presidential elections are much more contested and the 1995 second round was the most contested ever in Poland’s post-communist history with 68,23%.

Ombudsman argued that the “human rights limitations introduced by the decrees and the relevant adopted acts, go way beyond the legal boundaries of these acts and have no legal basis. For this reason, a state of emergency is indispensable”¹⁸

The government’s determination to hold the election, became visible in the arguments put forward by Jarosław Kaczyński, the head of Law and Justice and the true power holder in Polish politics. While claiming that there were no conditions that justify the introduction of a state of emergency, he suggested that the opposition were forcing him to violate the constitution.¹⁹

Against the widely shared opinion that the elections should be postponed²⁰, the government continued preparations for the May 10 elections to the point that the voting slips were printed. The pandemic related legislation was further expanded by the Anti-Crisis Shields – laws aiming to assist the government in handling the consequences of the crisis. Law and Justice smuggled into this law the provision to expand distant voting for people over the age of 60. Notwithstanding that this age group are among the core electorate of Law and Justice, it became apparent that the ultimate purpose of the government was to hold the elections at any price. The government’s solution was the organization of “envelop” elections for all citizens. This idea led to a fracture between Law and Justice and its junior partner “Poland Together” that led ultimately to the resignation of Jarosław Gowin from his post as deputy-prime minister. Under pressure from the coalition partner, the National Election Commission and a procedural obstruction in the Senate, which has been controlled by the opposition according to a narrow margin since 2019, the government agreed to postpone the elections that were finally held on June 28 and July 12.

The government’s failure to organise the elections in legally binding terms, provided the opposition with the unexpected opportunity to replace its poorly performing candidate with the mayor of Warsaw Rafał Trzaskowski. This change, of great concern for the Law and Justice party, provided for a much more dynamic and contested campaign. Although the incumbent president Andrzej Duda clinched his second term by a narrow margin winning 51,03% it confirmed Law and Justice’s concerns that any further extension of the election campaign would have negatively impacted its presidential election outcome negatively. The 2020 elections raised new issues about the elections’ legality.

Since 2015 Poland’s political system is exposed to “total war” between the ruling and opposition parties. The victims of this clash have been the Constitutional Tribunal, the Supreme Court, the National Judicial Council, public media, public servants, and state-owned companies. Even if the Covid-19 pandemic came as a surprise to Poland, its consequences could have been milder and more predictable in a census based political regime. Instead, the specificities of the new reality were promptly incorporated to the daily political struggle. It is the government that makes the ultimate decisions including the legal framework, the means and consequences of dealing with the pandemic.

¹⁸ RPO: [Już dawno powinien zostać wprowadzony stan klęski żywiołowej](#), Gazeta Prawna, 29.3.2020.

¹⁹ [Kacper Rogacin, Dlaczego rząd nie wprowadza stanu nadzwyczajnego? Są podstawy? "Stan klęski żywiołowej zmienilby termin wyborów prezydenckich"](#); Monika Platek, [Liczy się treść, nie nazwa. Rząd ogłosił i wprowadził nadzwyczajny stan klęski żywiołowej](#), Gazeta Wyborcza, 23.3.2020.

²⁰ Tomasz Dereszyński, [Wybory prezydenckie 2020: Koronawirus szaleje i trzeba wprowadzić stan wyjątkowy. Głosowanie musi być przesunięte. Kiedy wybory?](#), 26.3.2020, Polska Times.

The Polish constitution is explicit as to the fact that in times of extraordinary circumstances the power is concentrated in the hands of the executive with the Parliament playing a secondary role. However, notwithstanding the fact that the government did not introduce any of the extraordinary situations provided for in the constitution, it has become even more apparent that when the political system is completely controlled by one political option, the Parliament turns into a rubber-stamping body of the government's will.

It is too early to determine the practical consequences of the 2020 presidential election experience for Poland's legal tradition and political culture, but it seems obvious that the attempt to conduct elections at any price and with disregard for the existing extraordinary circumstances added another precedence in Poland's most recent legal experience. The instrumentalization of the legal provisions and the adjustment of the legal framework to the needs of the party in power, are practices that are more on a par with authoritarian, rather than democratic forms of government.

The paradox of Polish politics is that while having a well-developed legal framework capable of handling the extraordinary circumstances caused by the pandemic, the government refused to apply them for the sake of short-term political benefits. Whether the Covid-19 pandemic would have been better handled, if a state of emergency had been introduced is not obvious, but there is little doubt that the pandemic was treated instrumentally in order to further strengthen the ruling party's hold on power. While the country is facing a particularly violent second wave of coronavirus, the state of emergency has still not been declared by the Polish executive.

Portugal

During the Covid-19 pandemic the Parliament did not 'revolutionize' its functioning

João Carlos Loureiro

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I. Portugal: a short presentation

Portugal has been a Republic since 1910. In 1926, a military intervention ended the First Portuguese Republic, strongly affected by serious political instability. In 1933, approved via a plebiscite, the Constitution of 1933 emerged as the framework of a corporative State that repressed fundamental liberties under the leadership of Oliveira Salazar², a Professor of Coimbra University (Faculty of Law). The regime survived only a few years after the end of his political career (due to a domestic accident) in 1968 (death: 1970). After the Carnation Revolution (25 April 1974), a new Constitution (*Constituição da República Portuguesa*) was approved in 1976.

Portugal is a unitary State, although it has two autonomous regions with legislative powers:

Art 6 of the Constitution

1. *The State is unitary and the way in which it is organised and functions shall respect the autonomous island system of self-government and the principles of subsidiarity, the autonomy of local authorities and the democratic decentralisation of the Public Administration.*
2. *The Azores and Madeira archipelagos are autonomous regions with their own political and administrative statutes and self-government institutions³.*

Despite the legislative pre-eminence of the Parliament (*Assembleia da República*), the government has a normal legislative competence, to a rather uncommon extent, from a comparative point of view. In fact, article 198 states that

¹ Institute for Legal Research. Many thanks are due to Dr. João Nuno Amaral, who is the Director of the Communication Cabinet of the *Assembleia da República* (Diretor do Gabinete de Comunicação da Assembleia da República). All URLs were last accessed on 5 October 2020.

² See MENESES (F.), *Salazar: a political biography*, Enigma Books, 2010.

³ See [Constitution of the Portuguese Republic](#).

1. *In the exercise of its legislative functions the Government has the competences to:*

- a) *Make executive laws on matters that do not fall within the exclusive competence of the Assembly of the Republic;*
- b) *Subject to authorisation by the Assembly of the Republic, make executive laws on matters that fall within the latter's partially exclusive competence;*
- c) *Make executive laws that develop the principles, or the general bases of the legal regimes contained in laws that limit themselves to those principles or general bases.*

1. *The Government has the exclusive competence to legislate on matters that concern its own organisation and modus operandi.*

Concerning the type of regime, it is a *mixed parliamentary-presidential one*. Although a significant number of scholars present it as a semi-presidential regime⁴, I integrate the group of those who believe that such a qualification is, to say the least, controversial, since the major component is the parliamentary one and the powers of the President are limited, especially if compared with the French President⁵.

II. An analysis of the impact of the health crisis on the functioning of the Parliament

2.1. A brief introduction

Before analyzing the impact of the health crisis on the functioning of the Parliament, allow me to make a short presentation of the normative instruments used to deal with pandemics⁶. Article 19 of the Portuguese Constitution lays down that the state of exception (*estado de exceção*) – state of siege (*estado de sitio*) or a state of emergency (*estado de emergência*) – *may only be declared in part or all of Portuguese territory in cases of actual or imminent aggression by foreign forces, a serious threat to or disturbance of democratic constitutional order, or public disaster.*

In spring 2020, Portugal experienced a state of exception for just 45 days. On 9 November, to cope with the second wave, the Prime Minister declared a state of emergency for at least two weeks. On 20 November, the state of emergency was extended until 9 December and then until 18 December.

⁴ French academics influenced their Portuguese on this issue. Jorge Miranda, a reputable Professor of Constitutional Law and one of the “Founding Fathers” of the Constitution of 1976, considered the Portuguese system of government to be of a “semi-presidential” nature. Miranda (J.), *Curso de direito constitucional*, vol. 2, Universidade Católica Portuguesa, 2016, p. 130-133]. See also Novais (J.), *Semipresidencialismo*, Almedina, 2018.

⁵ See Canotilho (J.) and Moreira (V.), *Fundamentos da Constituição*, Coimbra Editora, 1991, 207-208. In the last edition of their annotation to the Portuguese constitution, they now prefer to speak of a “parliamentary system of government” [Canotilho (J.); Moreira (V.), *Constituição da República Portuguesa anotada*, vol. 2, 4th edition, Wolters Kluwer/Coimbra Editora, 2010, p. 19].

⁶ The scope of the text is limited to the impact of Covid-19 on the functioning of parliaments. Regarding issues in view of its juridical impact, see Gomes (C.) and Pedro (R.) (Coord.), *Direito administrativo de necessidade e de exceção*, AAFDL Editora, 2020; *e-Pública – Revista Eletrónica de Direito Público*, Vol. 7, n. 1, 2020. For a general analysis to the Portuguese situation in English, see Violante (T.); Lanceiro (R.), “[Coping with Covid-19 in Portugal: from constitutional normality to the state of emergency](#)”, *Verfassungsblog on matters constitutional*, April 2020 ; Lomba (P.), “[The constitutionalized state of emergency](#)”, *Verfassungsblog on matters constitutional*, April 2020. The Portuguese legislation on Covid-19 is available on the *Diário de República electrónico* (in [Portuguese](#) and [English](#)).

The authorities plan to extend it again until 7 January 2021. The other tool introduced whereby different instruments laid down in the legal framework and the major form used to deal with the pandemic was, and still is, the resolution (*resolução*)⁷. This figure, although usually designed for use mainly as a political instrument, can also be normative.

2.2. The constitutional state of exception (state of emergency)

There is a constitutional framework for the state of exception. Article 19 (Suspension of the exercise of rights) lays down that

1. *Entities that exercise sovereignty may not jointly or separately suspend the exercise of the rights, freedoms and guarantees, save in the case of a state of siege or a state of emergency declared in the form provided for in the Constitution.*
2. *A state of siege or a state of emergency may only be declared in part or all of the Portuguese territory in cases of actual or imminent aggression by foreign forces, a serious threat to or disturbance of democratic constitutional order, or public disaster.*
3. *A state of emergency is declared when the preconditions referred to in the previous paragraph are less serious and may only cause the suspension of the some of the rights, freedoms and guarantees that are capable of being suspended.*
4. *Both the choice between a state of siege and a state of emergency and the declaration and implementation thereof must respect the principle of proportionality and limit themselves, particularly as regards their extent and duration and the means employed, to that which is strictly necessary for the prompt restoration of constitutional normality.*
5. *Declarations of a state of siege or a state of emergency shall set out adequate grounds therefore and specify the rights, freedoms and guarantees whose exercise is to be suspended. Without prejudice to the possibility of renewals subject to the same limits, neither state may last for more than fifteen days, or, when it results from a declaration of war, for more than the duration laid down by law.*
6. *In no case may a declaration of a state of siege or a state of emergency affect the rights to life, personal integrity, personal identity, civil capacity and citizenship, the non-retroactivity of the criminal law, accused persons' right to a defense, or the freedom of conscience and religion.*
7. *Declarations of a state of siege or a state of emergency may only alter constitutional normality in accordance with the provisions of the Constitution and the law. In particular, they may not affect the application of the constitutional rules concerning the competences and modus operandi of the entities that exercise sovereignty or of the self-government organs of the autonomous regions, or the rights and immunities of the respective officeholders.*
8. *Declarations of a state of siege or a state of emergency grant the public authorities the competence to take the steps that are necessary and appropriate for the prompt restoration*

⁷ See Articles 19 and 21 of the Framework Law of Civil Protection (*Lei de Bases da Proteção Civil*) which refers to the situation of calamity.

of constitutional normality.

There is also a statute that confirms the legal framework for the state of exception – Law nr. 44/86, September 30 –, regulating the regime of the state of siege and the state of emergency.

For 45 days, between March and the beginning of May, Portugal experienced a state of emergency, the less serious type of state of exception. The Decree⁸ (*Decreto*) of the President of the Republic nr. 14-A/2020, March 18, imposing the state of emergency (there were two renewals or prorogations⁹) was not without controversy, especially in terms of what the obligation of confinement means, since the right to freedom and security (Article 27 CRP) was not mentioned in the cited Decree¹⁰. Instead, mandatory confinement was presented as a compression of the right to travel to any part of the national territory (*liberdade de circulação*¹¹).

2.3. The situation of calamity (the use of the legislative framework instead of maintaining the state of exception)

The first juridical response to the pandemic was not given via the use of the constitutional resource of the state of emergency, but via appealing to the ordinary means established in health and civil protection statutes¹². The first intervention penned by the Government¹³ – the Declaration of the (legal) situation of alert (*situação de alerta*)¹⁴ – is part of a simple and ordinary necessity law (*einfaches Notstandsrecht*)¹⁵, based on the Framework Law of Civil Protection (*Lei de Bases da Proteção Civil*)¹⁶, the Framework Health Law (*Lei de Bases da Saúde*)¹⁷ and the Law on Public Vigilance of Health Risks (*Lei do Sistema de Vigilância em Saúde Pública*)¹⁸. This path was and still is very controversial. Since restrictions of rights were at stake, critics point to a violation of the reserve of parliament concerning rights, freedoms and guarantees. The constitutional state of emergency ended and, since the 3rd of May, under a situation of calamity (declared by the Government without

⁸ During the state of emergency, the Government took Decrees in order to regulate the Decrees of the President of the Republic: Decree nr. 2-A/2020, March 20; Decree nr. 2-B/2020, April 2; Decree nr. 2-C/2020, April 17.

⁹ Decree of the President of the Republic (*Decreto do Presidente da República*) nr. 17-A/2020, April 2; Decree of the President of the Republic (*Decreto do Presidente da República*) nr. 20-A/2020, April 17.

¹⁰ Regarding this discussion, see NOVAIS (J.), “[Estado de Emergência: quatro notas jurídico-constitucionais sobre o decreto presidencial](#)”, *Observatório Almedina*; Idem, “Direitos fundamentais e inconstitucionalidade em situação de crise – a propósito da epidemia de Covid-19/ Fundamental rights and unconstitutionality in a situation of crisis – regarding Covid-19 epidemic”, *e-Pública – Revista Eletrónica de Direito Público*. In support of the solution adopted in the Presidential Decree, see Brito (M.), “Pensar no estado da exceção na sua exigência”, *Observatório Almedina*. Alexandrino (J.), “Devia o direito à liberdade ser suspenso? Resposta a Jorge Reis Novais”, *Observatório Almedina*. Ramião (R.), “[O direito à liberdade e o estado de emergência numa releitura de Alf Ross](#) (2.ª resposta a Jorge Reis Novais), ICJP/CIDP, 2020.

¹¹ Article 44/1 CRP.

¹² See Gonçalves (P.), “[Nova fase de gestão da epidemia: a questão da \(in\)suficiência jurídica da declaração administrativa de calamidade](#)”, *Observador*, 2 May 2020. For another perspective, see Lomba (P.), “[A questão da suficiência jurídica do «estado de emergência administrativo»](#)”, *Observador*, 5 May 2020.

¹³ See also an important piece of legislation published on the same day: Decree-Law nr. 10-A/2020, March 13.

¹⁴ Order (*Despacho*) nr. 3298-B/2020, March 13.

¹⁵ Canotilho (J.), *Direito constitucional e teoria da constituição*, Coimbra, Almedina, 2003, p. 1103-1104, following the track of German scholarship.

¹⁶ Law nr. 27/2006, July 3 (last amendment: Law nr. 80/2015, August 3).

¹⁷ Law nr. 95/2019, September 4.

¹⁸ Law nr. 81/2009, August 21. This statute was not expressly mentioned in Order (*Despacho*) nr. 3298-B/2020, March 13.

the need of an authorization of the Parliament)¹⁹, Portugal started the process of ending lock down.

According to Resolution of the Council of Ministers 51-A/2020, 26 June, a differentiated geometry was applied to the territory. Actually, depending on the areas, in Portugal, during a certain period of time, the situations of calamity, contingency, and alert coexisted²⁰.

One interesting problem was raised by an intervention of the Azores Government that used a resolution²¹ to impose a mandatory lockdown for passengers arriving on the archipelago. After a first judicial decision²², the Constitutional Court²³ considered some of its norms unconstitutional. According to the Court, the right to freedom (Article 27 CRP) was at stake, but even those who consider that the fundamental position affected was the right to travel (Article 44/1 CRP), agree that this still pertained to rights, freedoms and guarantees. The Constitution lays down that this field is subject to reserve of statute (Article 165/1/b). Therefore, the Court stressed the incompetency of the Regional Government of Azores to set restrictions.

III. Pandemic and the functioning of Parliament

Turning to the core of the research, I will consider the following points: a) national Parliament (*Assembleia da República*) and the impact of the pandemic on legislative procedure; b) a brief reference to regional Parliaments (*Assembleias Parlamentares das Regiões Autónomas*), especially the case of Azores; c) parliamentary oversight over the Government (the executive), during the crisis and after.

3.1. National parliament: the impact of pandemic on procedures

In order to discuss this topic – parliamentary procedure –, allow me a short presentation of models if the reader is looking for comparisons²⁴. The following modes are distinguishable: suspension of the activities – the closure model – adopted by some parliaments, at least during some periods²⁵ (with or without a standing committee); reduction of meetings, with or without implementing or deepening virtual gatherings; no changes (business as usual).

Before going into the detail, we should look at an article of the CRP concerning collegial organs.

¹⁹ Resolution of the Council of Ministers (*Resolução do Conselho de Ministros*) nr. 33-C, April 30; Resolution of the Council of Ministers nr. 38/2020, May 17; Resolution of the Council of Ministers nr. 40-A/2020, May 29; Resolution of the Council of Ministers nr. 43-B/2020, June 12.

²⁰ Resolution of the Council of Ministers nr. 51-A/2020, June 26. After that intervention, vd. Resolution of the Council of Ministers nr. 53-A/2020, 14 July; coexistence of the situation of contingency and alert: Resolution of the Council of Ministers nr. 55-A/2020, July 31; Resolution of the Council of Ministers nr. 63-A/2020, August 14; situation of contingency: Resolution of the Council of Ministers nr. 70-A/2020, September 11; Resolution of the Council of Ministers nr. 81/2020, September 29.

²¹ Articles 1,2, 3, 4 and 7 of the Resolution of the Council of Government nr. 77/2020, and 3/ e) and 11 of the Resolution of the Council of Government nr. 123/2020.

²² Judicial Court of the District of Azores (*Tribunal Judicial da Comarca dos Açores*), [Press Release](#), 16 maio 2020. See also FREITAS (T.), “A execução do estado de emergência e da situação de calamidade nas Regiões Autónomas – o caso da pandemia Covid-19”, *e-Pública*, n. 7, 2020, p. 44-77. On the Portuguese organisation of the courts, see *Justice transformation in Portugal: building on successes and challenges*, Paris, OECD, 2020, Annex A, p. 102-103.

²³ [Ruling \(Acórdão\) nr. 424/2020](#).

²⁴ Interesting information about these issues can be found [on the website of the Inter-Parliamentary Union](#).

²⁵ For comparative information concerning other Parliaments, see the information compiled [by the Inter-Parliamentary Union](#).

Article 116/2 lays down that *Collegial entities and organs shall take their decisions in the presence of a majority of the number of members they are prescribed to have by law.*

Despite the fact that the constitutional requirement was intended to be the physical presence of the members of collegial organs, it seems that it is possible to reinterpret the norm in a way that allows virtual presence as well. Both the national and regional Parliaments did not suspend their activities. Focusing on *Assembleia da República*, the limits regarding presence of MPs in the case of personal meetings, the limits concerning the number of sessions and the limits regarding the subjects being discussed will be considered.

3.1.1. *Face-to-Face meetings*

3.1.2. *Limits concerning presence*

On the issue of being present in the Parliament, a distinction between members of the Parliament (*Deputados*) and the public shall be made.

a) **Members of the Parliament**

A relevant number of parliaments reduced the number of deputies taking part in the different meetings both in plenary sessions and in committees. Portugal followed the track of reduction: concerning the plenary meetings, only 1/5 of the deputies could take part, respecting the proportion of the Parliamentary Groups²⁶; regarding deliberations, the quorum (116 out of 230 deputies) had to be guaranteed. Some objections were raised against the proposal of replacing the full session of the Parliament by a Standing Committee²⁷; 1. This would have meant the suspension of the activities of Parliament in a context marked by ongoing legislative procedures; 2. The Standing Committee does not have the competence to pass vital bills²⁸. Looking at the Constitution regarding the possibility of suspensions, Article 174/2 CRP stipulates that: “*without prejudice to suspensions decided by a two-thirds majority of all the Members of the Assembly of the Republic who are present, the Assembly of the Republic's normal parliamentary term is from 15 September to 15 June*”.

There were proposals to replace the normal function of *Assembleia da República* by the Standing Committee. Article 179 of the Portuguese Constitution reads:

1. *Outside periods in which the Assembly of the Republic is in full session, during periods in which it is dissolved, and in the remaining cases provided for in the Constitution, the Assembly of the Republic's Standing Committee shall be in session.*
2. *The Standing Committee is chaired by the President of the Assembly of the Republic and is also composed of the Vice-Presidents and of Members of the Assembly of the Republic nominated by each of the parties, each in proportion to the number of seats it holds in the Assembly.*

²⁶ According to the internal rules of procedure of the Assembly (*Regimento*), this was the minimal quorum.

²⁷ According to a counterproposal – not approved –, the Standing Committee would summon the Parliament. *Leaders' Conference Meeting (Reunião da Comissão de Líderes)*, nr. 14, 16 March 2020.

²⁸ *Leaders' Conference Meeting* nr. 13, 13 March 2020.

3. *The Standing Committee has the competences to:*
 - a. *Scrutinise compliance with the Constitution and the laws and monitor the activities of the Government and the Administration;*
 - b. *Exercise the Assembly's powers in relation to the mandate of Members of the Assembly of the Republic;*
 - c. *Take steps to ensure that the Assembly is called whenever necessary;*
 - d. *Prepare the opening of the legislative session;*
 - e. *Consent to the President of the Republic's absence from Portuguese territory;*
 - f. *Authorise the President of the Republic to declare a state of siege or a state of emergency, declare war or make peace.*

4. *In the case provided for in subparagraph (f) of the previous paragraph, the Standing Committee shall take steps to ensure that the Assembly is called as soon as possible.*

b) Public

Initially the public, including those who are the first subscribers to a petition were excluded; then, the *Leaders Conference (Conferência de Líderes*²⁹) moved towards accepting five people in the public galleries.

3.1.2.1. Limits regarding the number of sessions

A lot of parliaments reduced the number of meetings both in plenary and commissions. The Portuguese Parliament did this: the Plenary met only once a week; Commissions meetings were held only if needed and in a reduced model (*Bureau and Coordinators/ Mesa e Coordenadores*).

3.1.2.2. Limits regarding the subjects/issues

Some parliaments reduced the agenda to urgent subjects, especially the approval of legislation concerning the coronavirus. Nevertheless, in Portugal, there were no formal limits concerning the subjects of the decisions taken by Parliament during the lockdown. Question times (Parliamentary questions) were maintained, despite the circumstances. However, in March, there was a proposal to limit the agenda of Plenary meetings to the approval of the measures related to coronavirus only (the major role would be played by the Standing Committee).

3.1.1.4. Limits concerning the protection

Beyond the aforementioned reduction in the number of the deputies, one should also consider the requirement of wearing protective equipment. The President of the Parliament, despite initially resisting and criticizing the use of masks, changed his position afterwards in accordance with the recommendations of National Health Authorities³⁰.

²⁹ *Leaders' Conference Meeting* nr. 23, 27 May 2020.

³⁰ See Order (*Despacho*) nr. 43/ XIV/ PAR (Presidente da Assembleia da República).

3.1.2. Virtual meetings (remote sittings)

Some parliaments allowed committees to hold meetings remotely. During the pandemic, some assemblies (e.g., Belgium) amended the rules of procedure so as to allow participation in both plenary or committee meetings using electronic media and also to open the way [to remote voting](#).

The *Regimento of the Assembleia da República (Rules of Procedure of the Assembly of the Republic)*³¹ has no norms regarding the issue of remote meetings and remote voting. However, without changes being made to the *Regimento*, at least *prima facie*, the last option seems to be prohibited. Thus, all the Plenary sessions were and are face-to-face meetings. But despite that, through hermeneutical means, the MPs representing Autonomous Regions (Azores and Madeira) and those who represent emigrants were allowed to take part via videoconference³². Following a recommendation made by the Information Technologies Department (*Direção de Tecnologias de Informação*) the software used was Skype.

And a mixed solution was adopted (face-to-face sitting and videoconference) for committees. There were discussions via virtual media; and there was remote voting: in some countries, remote voting was allowed; in others, this procedure remained prohibited.

3.1.3. A controversial celebration

To celebrate the 46th anniversary of the April Revolution (Carnation Revolution) that ended the dictatorship, there was a ceremony with about 100 persons in attendance at the plenary of *Assembleia da República*. Since there were strict lockdown measures, many citizens were very critical of the meeting, speaking of privileges and irresponsibility, given the risks of contagion.

3.2. The Legislative Assemblies of the autonomous regions: the case of Azores

Despite the fact that there are two regions³³, I will focus on the case of Azores that challenges the traditional parliamentary mode of functioning. The Azores is an Archipelago comprising 9 islands in the middle of the Atlantic Ocean. Due to a combination of the risks set by person-to-person meetings in the traditional manner and the tough restrictions made to air travel, the Legislative Assembly (with 57 Deputies) decided to totally revolutionise the way it functioned. The outcome was a digital Parliament³⁴, using technological possibilities to run virtual sessions. Without changing the

³¹ An English translation is available, but it is not completely up to date: see the Rules of the Procedure of the Assembly of the Republic (last amendment available in English: Rules of the Procedure of the Assembly of the Republic nr. 1/2017, April 21).

³² Cf. "[Parliamentary Committees decide to meet when necessary with some meetings by videoconference, using Skype](#)".

³³ For information on [the Legislative Assembly](#) of the Autonomous Region of Madeira. Parliamentary work was launched early, after the Summer recess: [September 15 instead October 1](#). Due to reasons of space, it is impossible to analyse the case of Madeira. However, it should be noted that the Rules of Procedure were amended: see Resolution of the *Legislative Assembly* of the Autonomous Region of Madeira (*Resolução da Assembleia Legislativa da Região Autónoma da Madeira*) nr. 16-A/2020/M, April 30. The quorum needed to run the Plenary meetings is now, at least, 1/3 of the deputies in full exercise of their office (Article 63/1), replacing the former rule (the majority of the members); the conditions of voting were changed (Article 104/2/3); the sittings of the Commissions can be held electronically, using the adequate technological means (Article 119/3).

³⁴ See Gouveia (J.), *O primeiro parlamento digital português*, Lisboa: AAFDL Editora, 2020.

*Rules of Procedure (Regimento)*³⁵, the traditional face-to-face sessions based on physical presence under the same roof were replaced by virtual meetings, allowing the parliamentary assembly to continue to sit. Drawing on the opinion of a Portuguese Professor of Constitutional Law, Jorge Bacelar Gouveia, the way out of the problem was to consider that there was a loophole in the *Regimento*³⁶, since this instrument does not establish a regime for the use of telematics. A “loophole of exception”, i.e., a loophole based on an extraordinary circumstance and the need to ensure the continuity of parliamentary activities³⁷. In normal times, the traditional rule is face-to-face sittings³⁸.

Now, after the return to the traditional meetings of the regional parliament, some safety norms have been implemented to prevent the risk of contagion³⁹.

3.3. On parliamentary oversight of the Government, during the crisis and after

After the end of constitutional state of emergency, the Parliament was criticized for not disciplining some issues⁴⁰. Although the possibility of using the (legal) state of calamity to implement measures that curbed some rights, imposing limitations (e.g., the use of masks) was accepted, some voices considered that, given the existence of a parliamentary reserve concerning rights, freedoms and guarantees, *Assembleia da República* should have legislated on the issue⁴¹.

It was decided not to change the *Regimento da Assembleia da República* during this period.

Concerning the parliamentary oversight of the Government⁴² during the crisis, it is worth mentioning that, beyond the normal instruments of control (such as interpellations and demands), three mandatory reports⁴³ on the application of the state of emergency were submitted by Government to the Parliament. To know the extent and how effective this control was and still is, during the pandemic, further research is needed, analyzing the use of parliamentary questions. In the post-pandemic, it would be advisable to gain a complete picture of the roles played by the main political players. For instance, Ferro Rodrigues, President of the *Assembleia da República*, stressed how

³⁵ Rules of Procedure of the *Legislative Assembly* of the Autonomous Region of the Azores (*Regimento da Assembleia Legislativa da Região Autónoma dos Açores* – Resolution/ Resolução ALRAA nr. 15/2003/A, November 26, as amended by Resolution/ Resolução Alraa nr. 3/2009/A, January 14).

³⁶ See Gouveia (J.), *O primeiro parlamento digital português*, 84.

³⁷ Gouveia (J.), *O primeiro parlamento digital português*, 84.

³⁸ Gouveia (J.), *O primeiro parlamento digital português*, 84.

³⁹ See the site of the *ALRAA – Assembleia Legislativa da Região Autónoma dos Açores*.

⁴⁰ Gonçalves (P.), “[Abdicação parlamentar na emergência e continuação da abdicação na calamidade](#)”, Observatório Almedina, 21 May 2020.

⁴¹ For this discussion and further references, see Loureiro (J.), “Bens, males e e(E)stados (in)constitucionais: notas sobre uma pandemia”, *Revista de Estudos Internacionais*, Vol. 11, n. 2, 2020.

⁴² The Government amended the Rules of its Organization and Operation (*regime da organização e funcionamento do XXII Governo Constitucional*: see Decree-Law nr. 19-B/2020, April 30) in order to “ensure better coordination and articulation between central, regional or district administration services, namely in situations of alert, contingency, calamity, state of siege or emergency” ([Summary in plain English](#)).

⁴³ The reports are mandatory according Article 28/1 of Law nr. 44/86, September 30. See also Estrutura de Monitorização do Estado de Emergência, *Relatório sobre a aplicação da declaração do estado de emergência* 19 de março de 2020 a 2 de abril de 2020, Ministério da Administração Interna, 13 de abril de 2020; Estrutura de Monitorização do Estado de Emergência, *Relatório sobre a aplicação da 2.ª declaração do estado de emergência* 3 de abril de 2020 a 17 de abril de 2020, Ministério da Administração Interna, 27 de abril de 2020; Estrutura de Monitorização do Estado de Emergência, *Relatório sobre a aplicação da 3.ª declaração do estado de emergência* 18 de abril de 2020 a 2 de maio de 2020, Ministério da Administração Interna, 11 de maio de 2020.

important it was that the Parliament control the measures adopted during the end of lockdown⁴⁴. Despite the focus of the analysis – parliament and government –, one should not forget to consider the importance (or not) of the President of the Republic, especially through the so-called magisterium of influence. Last, but not least, compared with other European countries (e.g., Germany), until now the number of judicial cases is still low.

IV. Concluding a (short) journey

It should be noticed that changes made to the *Regimento* of the *Assembleia da República* were published at the end of August⁴⁵, but the new situation created by the challenges raised by the pandemic was neither the cause of the changes nor subject of new provisions made to this important instrument – except from the point of view of the functioning of the Committees. In the former version for both functioning and deliberating an absolute majority of the members was mandatory⁴⁶. Now, although the same majority is still required to deliberate, only 1/5 of the members of the Committee are necessary when the issue regards the functioning of parliament⁴⁷.

If we ignore the interesting case of the Azores, at national level, despite some innovations, the *Assembleia da República*, did not undergo a revolution in terms of the way it functions.

⁴⁴ *Leaders Conference Meeting (Reunião da Comissão de Líderes)* n. 20, 29 April.

⁴⁵ *Regimento da Assembleia da República* nr. 1/2020, August 31.

⁴⁶ Article 58/5 (*Regimento da Assembleia da República* nr. 1/2007; last amendment: *Regimento da AR* nr. 1/ 2018, January 22).

⁴⁷ Article 58/5.

Romania

A diminishment of the executive decision-making power

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In Romania, the sanitary crisis triggered by COVID-19 forced the application of two consequential, yet different constitutional and legal regimes of an exceptional nature: the state of emergency and the state of alert. The first is regulated by Article 93 of the Constitution and by the Emergency Ordinance no. 1/1999 concerning the state of siege and state of emergency¹ (hereafter EOG). The second is regulated by the Emergency Ordinance no. 21/2004 concerning the National System of Emergency Situations' Management² and the Law no. 55/2020 concerning measures for the prevention and fighting against the outcomes of the COVID-19 pandemic³ (hereafter Law no. 55/2020). Originally, the EOG no. 21/2004 was adopted to prevent risks and threats to national security. It was only the Law no. 55/2020 which was adopted by Parliament in May 2020 to specifically deal with the COVID-19 pandemic.

In this article, we shall present the constitutional and legal regime of the state of emergency and the state of alert emphasizing the role of the Parliament (see Section 2). Also, we shall present how the Parliament organized its functioning under the imperative of physical distancing imposed by the need to temper and eventually stop the spread of the SARS-COV-2 virus. Finally, we shall assess how the Parliament exercised its legislative and control functions during the state of emergency and the state of alert (see Section 3). The relevant case-law of the Constitutional Court of Romania (hereafter CCR) on the matter will be inserted in each Section.

I. Executive-Legislative Relations during the State of Emergency and the State of Alert

1.1. State of emergency

Article 93 of the Romanian Constitution provides that *“the President shall, according to the law, declare the state of siege or state of emergency in the entire country or in some territorial-administrative units, and ask for Parliament's approval for the measure adopted, within 5 days of the*

¹ Approved by Law no. 453/2004 of the Parliament, published in the Official Gazette no. 1052 on 12th November 2004.

² Approved by by Law no. 15/2005, published in the Official Gazette no. 190 on 7th of March 2005.

³ Published in the Official Gazette no. 396 on 5th of May 2020.

date of taking it, at the latest". If Parliament does not sit in session, it shall be convened *de jure* within 48 hours of the institution of the state of siege or emergency and shall function throughout this state.

The legislation implementing Article 93 of the Constitution on the *state of emergency* and the state of siege was adopted by emergency ordinance in 1999 in response to an internal political and social crisis. It set forth the legal framework of the state of emergency, defining it as "*a set of exceptional measures of political, economic and public order nature*" to be established in case of current or imminent dangers regarding national security or the functioning of constitutional democracy or "*the imminence of calamities or national disasters*". It also developed the constitutional provisions according to which the state of emergency can be declared by the President of Romania and has to be confirmed by Parliament within 5 days. It may last for a maximum of 30 days and can be renewed as many times as needed, each time with the approval of Parliament. Considering the constitutional and legal framework regulating the declaration of the state of emergency and the state of siege, the President of Romania chose to issue on the 16th of March 2020 Decree no. 195/2020⁴ declaring the state of emergency for 30 days across the whole territory of Romania. On the 14th of April 2020, the President prolonged the state of emergency for another 30 days by Decree no. 240/2020⁵.

The role of Parliament reflects the classical control function of the legislative branch over the executive branch. According to the Constitution and EOG no. 1/1999, the Parliament has the competence to approve the measure adopted by the President within 5 days at the latest. Following the Presidential Decree no. 195/2020 declaring the state of emergency the Romanian Parliament adopted Decision no. 3/2020 on the 19th of March 2020⁶. Parliament limited itself to the approval of the measure of declaring the state of emergency by the President. However, after the state of emergency was prolonged by Presidential Decree no. 240/2020, Parliament did not limit itself to the approval of the measure of prolonging the state of emergency by Decision no. 4/2020⁷. Among others⁸, it established that the restriction of rights and liberties (i) should be regulated only by normative acts with the force of law, exclusively for the prevention and fight against COVID-19 pandemic and (ii) should be thoroughly motivated and in accordance with Article 53 of the Constitution. Moreover, the Parliament's Decision provided that the duration of the restriction of rights and liberties should not be longer than the duration of the state of emergency.

From a legal-technical perspective, the main inter-connected topics reflecting the power relations between the executive and the legislative branches of government during the state of emergency focused on the legal nature of the presidential decree regarding the declaration and

⁴ Published in the Official Gazette no. 212 on 16th of March 2020.

⁵ Published in the Official Gazette no. 311 on 14th of April 2020.

⁶ Published in the Official Gazette no. 224 on 19th of March 2020.

⁷ Published in the Official Gazette no. 320 on 16th of April 2020.

⁸ For example, the Parliament's Decision established also an obligation for the Government to present a report every 7 days or anytime it is necessary concerning the measures adopted by the Government or the measures intended to be adopted by the Government, as well as the reasons which determined the adoption of these measures. Also, the Parliament established that the Court of Accounts should draft a report in 60 days since the end of the state of emergency depicting the findings regarding the way in which the Government managed public resources during the state of emergency, together with conclusions and proposals.

extension of the state of emergency, as well as on the identification of the public authority entitled under the Constitution to regulate restrictions of fundamental rights and liberties in the battle against COVID-19 pandemic. To these questions, which were heavily debated in the political arena, the response was finally given by the CCR. Thus, in Decision no. 152/2020⁹, prompted by the request of the Ombudsman to verify the constitutionality of EOG no. 1/1999, the CCR established that the presidential decrees for declaring and extending the state of emergency are normative administrative acts, issued by a member of the executive branch and meant to enforce EOG no. 1/1999 which regulates the legal regime of the state of emergency. However, according to the majority of the constitutional judges, because this normative act was approved by Parliament, it means that it is an administrative act of the President concerning Parliament.

As a consequence, according to Article 126 § 6¹⁰ of the Constitution, the legality of such administrative acts cannot be judged by a court. Building on this premise-argument, the CCR went further and established that the content of the presidential decree implementing measures provided by EOG no. 1/1999 might be submitted to a two-tier successive control mechanism. First, there is an *ex officio* parliamentary control over the presidential decree's content, based on the constitutional obligation of the Parliament to approve the declaration of the state of emergency by parliamentary decision. This control allows the Parliament to sanction the *ultra vires* exercise of the constitutional prerogative by the President if the latter regulates by presidential decree measures which are not provided by or are contrary to the provisions of the EOG no. 1/1999¹¹. Second, there is an optional *ex-post* constitutional control delivered by the CCR concerning the parliamentary decision approving or not the state of emergency declared by the President.

Concerning the public authority entitled under the Constitution to regulate restrictions of rights and liberties of citizens during a state of emergency, the CCR provide an answer in this same Decision no. 152/2020. In a crystal-clear, yet very formalistic manner, considering the limits provided by Article 53 of the Fundamental Law, the CCR established that only Parliament is entitled by law to restrict the rights and liberties of citizens. As a consequence of the constitutional revision which took place in 2003¹², neither the President by a decree issued under Article 93 § 1 of the Constitution, nor the Government by emergency ordinances or simple ordinances can regulate restrictions of the

⁹ Published in Official Gazette no. 387 on 13th of May 2020.

¹⁰ According to the Constitution, the judicial control of administrative acts of the public authorities, by way of the contentious business falling within the competence of administrative courts, is guaranteed, except for those regarding relations with the Parliament, as well as the military command acts.

¹¹ A separate opinion to Decision no. 152/2020, signed by two judges, signaled this *ultra vires* of the Constitutional Court, who can only review primary legislation and not secondary one, and argued that it infringes upon the separation of powers, specifically on the power of ordinary courts to review normative administrative acts such as presidential decrees.

¹² The constitutional revision brought significant changes to the legislative delegation in 2003. Art. 115§ 6 of the Constitution interdicts the adoption of emergency ordinances affecting the rights, freedoms and duties guaranteed by the Constitution. Corroborating art. 53 and art. 115 § 6 of the Constitution, the conclusion was pretty much clear: the Government cannot restrict rights and liberties by emergency ordinance. See Deaconu (Ș), "Comentariu articol 53", in Muraru (I), Tănăsescu (E.S.), (dir.), *Constituția României. Comentariu pe articole*, C.H. Beck, 2019, p. 461-462; Dănișor (D.C.), "Un pas important către statul de drept legal-parlamentar și unul incipient către un stat de justiție – cu privire la Deciziile Curții Constituționale nr. 152 și nr. 157 din 2020", *Revista de Drept Public*, n° 1-2, 2020, p. 33-34. For a different, more contextualized opinion, see Dima, (B.), "Considerații cu privire la regimul constitutional și legal al stării de urgență", *Revista de Drept Public*, n°1-2, 2020, p. 67-71.

citizens' fundamental rights and liberties¹³.

1.2. State of alert

The state of alert is not provided for in the Constitution¹⁴. It was introduced by EOG no. 21/2004 in the aftermath of the terrorist attacks that hit EU and NATO Members States in 2004. The state of alert is defined as a “*response to an emergency of particular magnitude and intensity*”. It allows temporary measures necessary for the prevention and removal of threats - among others - to life and human health. Initially, the state of alert was meant to address a different type of crisis and was subject to the discretion of the executive power. As such, it could be declared by an inter-ministerial body (National Committee for Special Emergency Situations) with the approval of the Prime minister. After its revision in 2014 and again in 2020, the legal regime of the state of alert became similar in some ways to the state of emergency.

EOG no. 21/2004 was submitted to a constitutional review by the Ombudsman on 3rd of May 2020, during the second period of the state of emergency. On 13th of May 2020, one day before the state of emergency expired, the CCR took a decision regarding the constitutionality of EOG no. 21/2004. In this Decision no. 157/2020, published in the Official Gazette on 15th of May 2020, the Court stated that several provisions of the EOG were constitutional only if actions and measures taken during a state of alert did not imply a restriction of fundamental rights¹⁵.

In a context of uncertainty like this, a difficult political consensus was reached between the Parliament and the Government when the latter decided on 12th of May 2020 to present a draft law dealing *specifically* with measures to limit the spread of the COVID-19 pandemic. This Law no. 55/2020 was adopted by Parliament within two days only - a time-record - and it was published in the Official Gazette on 15th of May 2020, just one day after the state of emergency expired. This new law further confused already fuzzy legislation regulating measures against the COVID-19 pandemic. It establishes a new procedure regarding the declaration of the state of alert only during the sanitary crisis caused by COVID-19 pandemic: a Decision adopted by the Government upon the proposal of the Minister of Interior Affairs for 30 days maximum, and which can be prolonged if the reasons are well-grounded for supplementary periods of 30 days maximum. The state of alert was systematically extended during this period. The last extension was on 14th December, for another 30 days. The law also provides that Parliament can approve the government's Decision within 5 days, with or without changes.

¹³ EOG no. 1/1999 regulates restrictions for the rights and liberties of citizens in case of a state of emergency or state of siege. However, despite this normative reality, the Constitutional Court decided that EOG no. 1/1999 is not unconstitutional, mainly because it was adopted before the constitutional revision in 2003 when Article 115 § 6 of the Constitution did not provide for the interdiction to adopt emergency ordinances affecting the rights, freedoms, and duties guaranteed by the Constitution.

¹⁴ See Popescu (C.L.), "Starea excepțională instituită / declarată constituțional, condiție a măsurilor derogatorii privind drepturile omului" *AUBD-Forum*, 26 Apr. 2020 (published on 5th of October 2020).

¹⁵ Again, a separate opinion signed by the same two judges which signed the separate opinion in the Decision no. 152/2020 pointed to hyper-formalistic interpretation of Articles 53 and 115 of the Romanian Constitution, the first requiring that restrictions on fundamental rights be imposed only through laws (interpreted by the Constitutional Court as normative acts issued only by the Parliament and not by the Government) and the second declaring in paragraph 6 that emergency ordinances “cannot [...] affect the status of fundamental rights”.

However, according to Article 77 of the Constitution, laws only come into force 3 days after their publication in the Official Gazette. As a consequence, even though the Law no. 55/2020 was published on 15th of May 2020 in the Official Gazette, it came into force on 18th of May 2020. At the same time, the state of emergency declared by the President expired on 14th of May and the Decision of the CCR establishing that EOG no. 21/2020 could not be used to regulate administrative measures restricting the rights and liberties of citizens was also published in the Official Gazette on 15th of May. Contemplating the spectre of a three-day lacuna of any binding restrictions, in some sort of absurd theatre of decision-making, the Government adopted EOG no. 68/2020¹⁶ on 15th of May, the aim of which was to modify EOG no. 21/2020 to provide an appearance of legality until the new Law no. 55/2020 came into force on 18th of May. Following the new rules established by EOG no. 68/2020, the National Committee for Emergency Situations adopted Decision no. 24 on 15th of May 2020 declaring the state of alert at national level. This Decision remained in force only three days, until Law no. 55/2020 came into force, which prompted the Government to adopt Decision no. 394/2020 declaring the state of alert at national level for 30 days¹⁷. Two days later, applying the provisions of Law no. 55/2020, the Parliament approved, via Decision no. 5/2020, the Government Decision declaring the state of alert with a couple of changes.

Once again, the originality of intermingling of powers vis-à-vis the legal regime of the state of alert regulated by Law no. 55/2020 did not escape the attention of the Ombudsman, which addressed the issue to the CCR. It considered that Parliament could not approve or revise a legally adopted administrative act issued by the Government since this would grossly violate the constitutional principle of the separation of powers. In its Decision no. 457/2020¹⁸, the CCR struck down the legal provision requiring the *ex-post* approval by Parliament of a Government Decision enforcing the Law no. 55/2020. As a consequence, all four Government Decisions prolonging the state of alert for consecutive 30-day periods were no longer approved by Parliament.

II. The Functioning of the Parliament during the State of Emergency and the State of Alert

2.1. Rules of procedure

Following the declaration of the state of emergency by presidential decree on 16th of March 2020 and its approval of the Parliament by Decision adopted on 19th of March 2020, both assemblies changed their Standing Orders to allow the use of electronic procedures for debating and voting. Thus, the Romanian Senate adopted By-law no. 16/2020¹⁹ on the 26th of March 2020, and the Chamber of Deputies adopted By-law no. 7/2020²⁰ on 2nd of April 2020. Their normative substance

¹⁶ Published in the Official Gazette no. 391 on 14th of May 2020. EOG no. 68/2020 provided that the state of alert can be declared at the national level, by the National Committee for Emergency Situations, with the approval of the Prime-Minister, for 30 days and it can be prolonged with supplementary periods of 30 days if necessary. At the local level, the state of alert can be declared and eventually prolonged by the Local Committee for Emergency Situations, with the approval of the prefect (local representative of the Government at the county level).

¹⁷ Since then, 4 more Decisions were adopted by the Government to prolong the state of alert.

¹⁸ Published in the Official Gazette no. 578 on 1st of July 2020.

¹⁹ Published in the Official Gazette no. 252 on 26th of March 2020.

²⁰ Published in the Official Gazette no. 278 on 2nd of April 2020.

is almost identical. According to the Standing Orders' new provisions, in exceptional situations, officially established by qualified public authorities²¹, the meetings of the Permanent Bureau, of the Committee of the Leaders of the Parliamentary Groups (hereafter Committee of Leaders²²), of the permanent committees, as well as the meetings of the Plenaries will be managed through electronic devices, following a procedure which will be adopted by decision of the Permanent Bureau. Moreover, some new and highly contested provisions included in the Standing Orders provide that the Committee of the Leaders can change the procedure of the final vote for the draft laws on the agenda of the Plenary session.

Since the adoption of these changes to the Standing Orders, the two Houses of the Parliament have continuously used electronic devices for debating and voting drafts laws, both in Plenary sessions and in the internal structures, such as the Permanent Bureau and the permanent committees.

A group of MPs from the opposition parties asked the CCR to judge the constitutionality of Decision no. 16/2020 adopted by the Senate. They considered that procedures dealing with the functioning of Parliament have to be regulated directly by the Standing Orders and not by implementing decisions stemming from the Permanent Bureau. It would be an expression of the constitutional autonomy of Houses of the Parliament which are entitled to decide about their organization and functioning only by the vote in Plenary. The CCR rejected this line of argument and considered that the Decision of the Senate provided a necessary flexible regulation for any type of exceptional situations to come. According to the Court, the regulation of the concrete way in which activities of the Senate should be organized must take into consideration the specificity of the exceptional situation which demands remote debating and voting. Thus, it is for the Senate to decide how it will regulate such procedures, either directly in the Standing Orders or through a decision of the Permanent Bureau.

Another important topic which was easily overruled by the CCR (except two judges who signed a separate opinion) referred to the fact that the role and importance of the Committee of Leaders had gained too much discretionary power, including the power to decide on how the final vote on a bill must be organised. This Committee is neither a leading, nor a working structure of the Houses, but a mere political organ that cannot decide on fundamental procedures for the functioning of the Parliament. However, these arguments were rejected by the majority of the CCR, who favoured the idea of the autonomy and flexibility of Parliament when deciding how procedures for debating and voting should be used in exceptional situations.

2.2. Control mechanisms

The power relations between the executive and the legislative branches of government during the state of emergency and the state of alert could be characterized as mutual gridlock. Either the executive branch adopted measures via emergency ordinances to combat COVID-19 with Parliament

²¹ Such as epidemics, pandemics, extreme natural phenomena, earthquakes, acts of terrorism, and other situation which make impossible the physical presence of the MPs in the Senate and in the Chamber of Deputies.

²² The Committee is composed of the leaders of the parliamentary groups, according to the political configuration in each Chamber. The Committee has a massive political influence and its main attribution is to establish the agenda of the Plenary Session of each Chamber.

trying to double²³ or completely modify them²⁴, or Parliament adopted laws which, in turn, displeased the executive and prompt parliamentary opposition, the Government or the President to contest them in front of the CCR²⁵.

Even though most of the time the political quarrel between the executive and the legislative was high-pitched, compromise was reached under extreme urgency circumstances. Thus, Parliament adopted in just two days Law no. 55/2020 when existing legislation was not sufficient for the adoption of effective measures to combat the COVID-19 pandemic (see Section 2.2.). Also, following a Decision of the CCR and after heated negotiations in parliamentary committees, Parliament adopted Law no. 136/2020²⁶ concerning the organization of some measures in the field of public health regarding epidemiological and biological dangers²⁷.

During the state of emergency and the state of alert, Parliament vigorously exercised its traditional control mechanisms over Government. No less than 7 simple motions were adopted by the Chamber of Deputies and the Senate from 11th of May (during the state of emergency) until 7th of July (during the extraordinary session of the Parliament and the state of alert). Every major member of the Government²⁸ submitted simple motions, some of which eventually passed. However, in Romania, the Constitution does not provide for an individual motion of no-confidence, thus, simple motions are not conducive to mandatory dismissal of targeted ministers.

Following the political context of political controversies and institutional gridlock between the executive and the legislative, the parliamentary majority initiated a motion of no-confidence against the Government in a one-day extraordinary session of Parliament. The motion was registered on 17th of August, discussed during another extraordinary session of Parliament on 20th of August and submitted to vote on 31st of August, i.e. the last day of the second extraordinary session of the Parliament. However, the motion of no-confidence could not be effectively voted by the MPs because

²³ E.g., the Government adopted an EOG prolonging the mandates of the local elected officials and establishing the official date for local elections. The Parliament adopted a law regarding the same object, but with different solutions. This law was declared unconstitutional by the Constitutional Court in *a priori* constitutional control (see Decision no. 242/2020). Also, the Government adopted an EOG providing for economic and fiscal/tax measures. The Parliament adopted a law regarding the same object, but with much more economic and fiscal/tax measures of a quite populist nature. Again, this law was declared unconstitutional by the Constitutional Court in *a priori* judicial review (see Decision no. 154/2020).

²⁴ E.g., the Government adopted an EOG regulating certain facilities for debtors. When approved by the Parliament, the EOG was significantly changed so it would provide much more facilities. The law approving the EOG was submitted to a review of the Constitutional Court and its decision is still expected on the matter.

²⁵ E.g., the Parliament adopted a law providing that the Parliament has the competence to establish the date for parliamentary elections. This law was submitted to a review of the CCR, which decided that the law was constitutional. The decision has not been yet published in the Official Gazette and the law was not yet promulgated by the President who is strongly opposing it.

²⁶ Published in the Official Gazette no. 884 on 28th of September 2020.

²⁷ This Law regulates measures for quarantine, as well as measures for isolation of people for reasons of public health for epidemiological and biological dangers. It should not be mistaken for Law no. 55/2020 which regulates specific restrictive measures to be taken only in the case of COVID-19 pandemic.

²⁸ The Chamber of Deputies adopted 4 simple motions against four ministers: on the 11.05.2020 against the Minister of Public Finances – Mr. Cițu; on the 25.05.2020 against the Minister of National Education and Research, Ms. Anisie; on the 17.06.2020 against the Minister of Healthcare, Mr. Tătaru; on the 7.07.2020 against the Minister of Public Works, Development and Administration, Mr. Ștefan. The Senate adopted 3 simple motions against three ministers: on the 18.05.2020 against the Minister of Agriculture, Mr. Oros; on the 26.05.2020 against the Minister of Domestic Affairs, Mr. Vela; on the 9.06.2020 against the Minister of Labour Ms. Alexandru.

the quorum needed for the validity of the joint plenary session of the two Houses was not reached.

Considering that a motion of no-confidence cannot be registered in one extraordinary session of the two Houses of the Parliament and debated in another one, the Prime minister asked the CCR to rule upon a possible constitutional conflict between the Government and the Parliament. On 14th of September the CCR found that there was no constitutional conflict between the two authorities, thus accepting that a motion of no-confidence can be initiated not only in ordinary sessions of Parliament, but also during extraordinary ones too.

Last but not the least, when the President of Romania declared the state of emergency on 16th of March 2020 and extended it on 15th of April until 14th of May, the Romanian Parliament was sitting in ordinary session. According to the Standing Orders of the two Chambers, there are two ordinary sessions during the year: the first starts in February and Houses cannot go beyond the end of June; the second starts in September and cannot go beyond the end of December. When Parliament ended its ordinary session on 30th of June 2020, the state of emergency was replaced by a state of alert declared by the Government. The majority of MPs decided to convene the Senate and the Chamber of Deputies in extraordinary session as long as a state of alert is in place. Consequently, from 1st of July until 31st of August, the two Houses of the Parliament sat in a series of extraordinary sessions. They also used all their prerogatives to control and sometimes block decisions adopted by the Government.

III. Conclusions

The power relations between the executive and the legislative during the sanitary crisis reflects a situation of mutual gridlock. On the one hand, the President and the Government forced the adoption of restrictive measures which were necessary to temper the social, economic or sanitary effects of the COVID-19 pandemic, using either presidential decrees (during the state of emergency) or emergency ordinances. The parliamentary majority opposed most of the measures taken by the Government. Thus, it duplicated with laws any measures adopted via emergency ordinances, or it significantly changed or rejected some of them. On the other hand, the Government, the President, as well as the opposition parliamentary parties tried to block or postpone legislation adopted by the parliamentary majority.

Even though this constant mutual gridlock has been the rule of the game, there were a couple of situations in which extreme necessity forced a compromise between the parliamentary majority and the executive. Two of the most important pieces of legislation aiming to deal with the COVID-19 pandemic were adopted after negotiations between the parliamentary majority and the Government: the Law no. 55/2020 regulating the legal regime of the state of alert during the COVID-19 pandemic and the measures which might be taken by the Government and the Law no. 136/2020 regulating the procedures for isolation and quarantine in case of SARS-COV-2.

The Romanian Parliament has been extremely active in exercising its legislative and control functions during the state of siege and the state of alert. Moreover, because of a plethora of decisions rendered by the CCR, the competences of the executive power (President & Government) and the

legislative power (Parliament) have evolved as the sanitary crisis has unfolded. The rules of the game were re-written during this period. In the end, during the sanitary crisis Parliament's role has been relatively strengthened, while the executive decision-making power has been somewhat diminished.

As a consequence of the CCR's case-law, the content of the presidential decree declaring the state of emergency has been removed from the realm of judiciary control and submitted to a direct review of legality and opportunity by Parliament, as well as to an indirect judicial review by the CCR. This logic does not apply to the Government's Decision declaring the state of alert, which remains an administrative act issued by the Government in the execution of the law adopted by Parliament, and as such it can be submitted to a review in terms of its legality by regular courts. The logical consequence of the CCR's case-law is that the prerogatives of the President in a state of emergency were limited in favour of those of Parliament, while the prerogatives of the Government in a state of alert were liberated from a stronger and specific parliamentary control.

In the end, after two months in a state of emergency and almost five months in a state of alert, the Romanian system of government witnessed a significant boost to its parliamentary nature, an odd exception to the classic rule postulating that in a state of exception the executive reigns supreme, while the legislative remains quit. In Romania, both the executive and the legislative talked at the same time, thus covering and limiting each other.

Spain

A deep revision of Congress and Senate Standing Orders is needed

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I. Preliminary questions

The Spanish Constitution, in its art. 1, provides that *Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism*. Spain is a Parliamentary Monarchy, with a bicameral Parliament. Congress, nowadays, has 350 deputies and is the population's Camera of representation¹. The Senate, with around 265 Senators at present, is the Camera of territorial representation². Spain is an extremely decentralized country with 17 autonomous communities, each of them with its own regional Parliament. The constitutional system establishes three different frameworks, that are regulated in art. 116 of the Constitution, and the Organic Law 4/1981, of June 1, 1981³:

i. The first situation is the state of alarm that is appropriate⁴ in cases of catastrophes, (earthquakes, floods, fires, and major accidents), health crises, like epidemics or serious environmental contamination situations, shortages of essential products, and the suspension of essential public services, (like in 2010, during the air traffic controllers strike), if this circumstance is concurrent with some of the other aforementioned cases. The COVID 19 crisis is a clear situation that falls under the scenario of a health crisis. A major aspect is that during the state of alarm, it is impossible to suspend fundamental rights. It is only possible to establish *some limits over some rights*, like the freedom of movement for instance. The state of alarm is declared by the Government, by means of a Decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies is informed and must meet immediately for this purpose. Without their authorisation the said period cannot be extended. The Decree specifies the territorial area to which the effects of the proclamation apply⁵.

ii. The second framework is the state of emergency, ("*estado de excepción*", properly

¹ Art. 68 of the Spanish Constitution (SC) and art. 162 of the Organic Law 5/1985, of June 19, 1985.

² Art. 69 of the SC.

³ Official State Bulletin of June 6, 1981.

⁴ Art. 4 of the Organic Law 4/1981, of June 1, 1981.

⁵ Art. 116.2 of the SC.

speaking in Spanish), that is pertinent when the exercise of fundamental rights is threatened, or if there is an alteration in public order, or an anomalous functioning of democratic institutions, and it is not possible to resolve the crisis with the State's ordinary powers⁶. These were not the *de facto* circumstances to allow its declaration, because it was a *mere* health crisis, as we said. A state of emergency is declared by the Government by means of a Decree decided upon by the Council of Ministers, after prior authorisation by the Congress of Deputies. The authorisation for and declaration of a state of emergency must specifically state the effects thereof, the territorial area to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements⁷.

iii. The third case is the state of siege (martial law), which is pertinent in the event of insurrection or an act of force against sovereignty or territorial integrity. This was not the situation either. A state of siege (martial law) is declared by the absolute majority of the Congress of Deputies, exclusively on the Government's proposal. Congress determines its territorial extension, duration and terms⁸. In art. 116.5 of the Constitution special concern is given to the normal functioning of Parliament in all 3 of these situations. Congress may not be dissolved while any of the said states, remain in operation, and if the Houses are not in session, they must automatically be convened. Their functioning, as well as that of the other constitutional State authorities, may not be interrupted while any of these states are in operation. In the event Congress's dissolution or the expiration of its term, if a situation giving rise to any of these states should occur, the powers of Congress are assumed by its Standing Committee⁹, or "*Diputación Permanente*", comprising at present 69 deputies, distributed proportionally between all Parliamentary Groups.

Proclamation of states of alarm, emergency and siege cannot modify the principle of the Government's liability or that of its agents as acknowledged in the Constitution and the law¹⁰. Because of the increased number of citizens infected by COVID 19, at the beginning of March, the Government passed the Royal Decree 463/2020 on March 14, 2020¹¹ declaring the state of alarm, initially for the maximum period of time allowed by the Constitution, i.e. 15 days, and Congress was immediately informed on March 18, 2020, in application of art. 116.2 of the Constitution, and art. 97 of the Congress Standing Orders. The Congress authorized 6 extensions.

The Royal Decree of declaration, (a mere *administrative* norm), and the permits for the extensions given by the Congress, have *rank or value of Law*, according with the decision ("*Auto*") of the Constitutional Court 7/2012, of January 13, 2012 and the decision 83/2016, of April 28, 2016, because the sphere of application of another norms with force of Law, is affected.

Extensions of the state of alarm authorized by the congress

⁶ Art. 13 of the Organic Law 4/1981, of June 1, 1981.

⁷ Art. 116.3 of the SC.

⁸ Art. 116.4 of the SC.

⁹ Art. 116.5 of the SC.

¹⁰ Art. 116.6 of the SC.

¹¹ Official State Bulletin of March 14, 2020.

Extension	Period	Congress Session	Casted Votes	YES	NO	ABS	Royal Decree
1	Until 00:00 AM, 12 April 2020	March 25, 2020	349	321	0	28	RD 476/2020, of March 27, 2020
2	Until 00:00 AM, 26 April 2020	April 9, 2020	349	270	54	25	RD 487/2020, of April 10, 2020
3	Until 00:00 AM, 10 May 2020	April 22, 2020	345	269	60	16	RD 492/2020, of April 24, 2020
4	Until 00:00 AM, 24 May 2020	May 6, 2020	350	178	75	97	RD 514/2020, of May 8, 2020
5	Until 00:00 AM, 7 June 2020	May 20, 2020	350	177	162	11	RD 537/2020, of May 22, 2020
6	Until 00:00 AM, 21 June 2020	June 3, 2020	350	177	155	18	RD 555/2020, of June 5, 2020

The plenary session of the Constitutional Court convened on May 6, 2020, acknowledged action for a declaration of unconstitutionality submitted by the political party VOX against the declaration of the state of alarm (Royal Decree 463 and 465) and the Royal Decree 476, 478 and 492 approving the 3 initial extensions, (paradoxically, even if any of its deputies voted against the first extension), and the Order of the Minister of Public Health number SND/298/2020, understanding that there was a violation of articles 10.1, 16, 17, 19, 21, 25, 27, 35, 38, 55 and 116 of the Constitution. The Constitutional Court decision is still pending, but we think that the declaration of the state of alarm was constitutionally appropriate because of the special gravity of the health crisis.

II. The political debate about the state of alarm's extension

During the fourth extension, at the end of May, the Government wanted an additional extension, for a period surpassing 15 days. This led to great political debate and controversy. There is not any special constitutional or legal provision about how long the extensions must be. In Hungary Viktor Orban declared the emergency for an indefinite period, but we modestly think that it is not perhaps the best model of reference. It is extremely *risky*. With these extraordinary powers, the Government may operate with relaxed parliamentary controls, free from a periodical renewal authorized by Congress.

The Constitution only provides that the authorisation for and declaration of a state of emergency may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements¹², but it does not say how long the additional extensions of the state of alarm may be. When the state of alarm was declared in December 2010, during the air traffic controllers strike, by Royal Decree 1673/2010, of December 4, 2010¹³, the initial term of 15 days, was extended by the RD 1717/2010, of December 17, 2010¹⁴, until 12.00 PM of January 15, 2011, (4 weeks).

At the end of May of 2020, the Government was in a position of certain weakness in Parliament, and it was not clear how many additional extensions of the state of alarm Congress would be able to

¹² Art. 116.3 of the Spanish Constitution.

¹³ Official State Bulletin of December 4, 2010.

¹⁴ Official State Bulletin of December 18, 2010.

pass. The Government tried to obtain an extension for a longer period of time, because it was afraid of the political consequences of a *hypothetical*, (and *probable*, or at least, *possible*), defeat in Congress, that would have had great political cost. On the other hand, there was a serious risk of weaker oversight of the executive by Parliament, because the months of July and August are a period of parliamentary recess, and at that time, oversight of the executive is only possible by the Congress Standing Committee, or through extraordinary plenary sessions of Congress. A teleological interpretation was required, and a clever solution was needed, because during the state of alarm, the executive power has extraordinary prerogatives, and Parliament's control is required in particular.

Some authors, like Banacloche¹⁵ and Ruiz Robledo¹⁶, pointed out that there is a *general rule of Law* establishing that any extension may be longer than the initial term. This is a rule that directly inspired the drafting of art. 91.2 of the Congress Standing Orders, and the same logic deduced from art. 116.3 of the Constitution, which states that the declaration of a state of emergency may not exceed thirty days, subject to an extension for a further thirty-day period. It is logical that, if the first declaration may only be made for a maximum period of 15 days, then, any additional extensions should not be longer than this period of time and must be renewed every 15 days by the Congress. This is also our opinion. The solution given in 2010 is said to have been an *isolated* case, and it would not have been a constitutional *precedent*, properly speaking. Finally, the Congress permitted allowed two more extensions of two weeks, until June 21, 2020.

Francesc de Carreras, [said that](#) the successive extensions were adjusted to criteria of requirement, adequation and proportionality, due to the serious danger for public health caused by the COVID 19. We also think this, and we believe that the conduct of the executive declaring the state of alarm, and the Congress's decisions allowing its extension, were constitutionally justified. On 25 October the Spanish government declared a new six-month state of alarm ("estado de alarma") covering the whole country except for the Canary Islands. It came into force on 9 November. The six-month extension means that the government does not have to seek authorisation from Parliament every fortnight, as was the case in the spring.

III. Use and *abuse* of the Royal Decree Law

Another very sensitive issue was the recurrent use of a very particular Spanish type of norm, the so called, *Royal Decree Law*. In the Spanish constitutional system, there are two types of norms with "force" of Law:

- i. Ordinary and Organic Laws passed by Parliament.
- ii. Royal Decrees Laws made by Government and formally *ratified* or *validated* by Congress in 30 days (the Senate has nothing to say on this topic). The use of this feature by the Government is possible only in cases of extraordinary and urgent necessity. These are temporary legislative provisions which cannot affect the regulation of the basic State institutions, the rights, duties and liberties contained in Title 1, the system of the Autonomous Communities, or the General

¹⁵ Banacloche, (J.), "El debate abierto por la prórroga", *El Mundo*, 17 May 2020, pp. 8-9.

¹⁶ Ruiz Robledo, (A.), "Razones jurídicas para una prórroga corta", *El Español*, 19 May 2020.

Electoral Law¹⁷.

The Decree-Laws must be submitted immediately to the Congress of Deputies, which must be summoned for this purpose if not already in session. They must be debated and voted upon in their entirety within thirty days after their promulgation. Congress must expressly declare itself in favour of ratification or repeal within said period of time, for which purpose the Standing Orders shall establish a special summary procedure¹⁸. During that period of thirty days, their passage through the Parliament may be the same as for Government bills, by means of the emergency procedure¹⁹.

During the state of alarm, from March 14 until June 21, 2020, Parliament did not pass any new Laws, but the Government made 14 Royal Decrees Laws. In fact, during the first half of 2020, the Government made 24 Royal Decrees Laws, and Parliament did not pass any new *formal* Law, either *organic*, or *ordinary*.

The Government made *excessive* use of this feature. A clear example is the Royal Decree Law 8/2020, of March 17, 2020. This Royal Decree provides some urgent economic decisions because of the COVID 19 crisis. Nevertheless, its Final Disposition number 2 established that the Second Vice-President of the Government, Mr. Pablo Iglesias, would be member of the National Commission for the National Center of Intelligence. This raises several questions: Has it any economic relation with COVID? We think that there is none. Was it of extraordinary urgency and need? Not at all. It was only “urgent” and “necessary” for Mr. Iglesias, and there were many possible explanations for his potentially “created interests” which we would not care to comment on here. That reminds us slightly of the absolutist principle: *Rex facit legem*, as Ruiz Robledo cleverly described²⁰. Aragón Reyes understood that it is impossible to see the *extraordinary* and *urgent* need of this measure²¹. On May 6, 2020, the Constitutional Court acknowledged two constitutional appeals made by the conservative Peoples Party, and the radical-right party VOX, and the decision is still pending.

A fragmented, heterogeneous and disconnected legislation has been introduced, without a previous roadmap, that apparently aims to respond to an emergency, but it has been undertaken with great improvisation. A clear example of this lies in the Royal Decree Law 6/2020, of March 10, 2020²², published several days before the declaration of the state of alarm that includes provisions regarding the distribution of medicines, but also about mortgages, or the Asset Management Company from Bank Restructuring, which have no direct connection with the health crisis. This is also the case for the Royal Decree Law 15/2020, of April 21, 2020²³, which comprises a true mix of measures. This way of proceeding is a source of legal insecurity, because often it is difficult to see which norms, along with their content, are in force.

¹⁷ Art. 86.1 of the SC.

¹⁸ Art. 86.2 of the SC.

¹⁹ Art. 86.3 of the SC.

²⁰ Ruiz Robledo, (A.), “Debemos vigilar al Capitán Sánchez”, *El Español*, 25 March 2020.

²¹ Aragón Reyes, (M.), “Covid-19: Aproximación constitucional a una crisis”, *Revista General de Derecho Constitucional*, n° 32, April 2020.

²² Official State Bulletin of 11 March 2020.

²³ Official State Bulletin of 22 April 2020.

It is the Government's responsibility to prepare the State Budget and that of the *Cortes Generales*, (the Parliament), to examine, amend and approve it²⁴. The State Budget is prepared annually and includes all spending and income of the State public sector and in it shall be recorded the amount of the fiscal benefits affecting State taxes²⁵. The Government must submit the State Budget to the Congress of Deputies at least three months before the expiration of that of the previous year²⁶.

After the state of alarm, the public authorities had to resolve new cases of citizens infected by COVID 19. One of the most problematic cases was in the South of the province of Lérida, in Catalonia. The first legal remedy came with the regional government Resolution SLT/1608/2020, of July 4, 2020, limiting the freedom of movement, but a judge of first instance of Lérida did not ratify this on July 12, 2020. The judge said that the only solution was a new declaration of the state of alarm, because in his opinion, this Resolution surpassed the State's competences.

The answer to this judicial resolution on the part of the *Generalitat*, the Regional Government of Catalonia, was the [regional Decree Law 27/2020](#), of July 13, 2020 which modified the regional Law 18/2009, of October 22, 2009, of public health. Its art. 1, adding a new section, (k) to art. 55 of that regional Law, giving permission to regional health authorities to introduce restrictions regarding social activities, and citizens' mobility. Some authors like Flores Juberías and Sánchez Navarro [immediately recalled](#) that art. 86.1 of the Constitution, forbids the introduction of limits to fundamental rights and public liberties by means of Decree Law.

We must acknowledge that the regional Decree Law 27/2020, of July 13, 2020, has had *disturbing* consequences, because it allows regional health authorities to limit citizens' regular activity and their mobility.

The use of the Decree Law as a limitative instrument of fundamental rights is clearly unconstitutional. It is incompatible with art. 86.1 of the Constitution, as Carmona Contreras²⁷, pointed out. In all democratic States, the regulation of fundamental rights, and the possible introduction of limits over them, is an exclusive competence of the laws made by the representatives of the people assembled in Parliament. In the context of the health crisis, in which limitations affecting a general and indefinite collectivity of citizens, living in a particular territorial area had to be introduced, the formal declaration of the state of alarm in this area was required, especially when it is impossible to counter the crisis with ordinary administrative powers and instruments. The formal activation of this state of alarm is possible on the initiative of the regional President, who may ask to the national Government, for the formal declaration of the state of alarm. We must not forget that the central Government may delegate later the regular management of the state of alarm to the regional authorities. The direct use of the Decree Law by regional authorities is a clear case of the *spurious* use of this feature. The rule of Law is based on the full respect of procedures and guarantees. The

²⁴ Art. 134.1 of the SC.

²⁵ Art. 134.2 of the SC.

²⁶ Art. 134.2 of the SC.

²⁷ Carmona Contreras, (A.), "El fin no justifica los medios", *El País*, 16 July 2020.

purpose does not always *justify* the *means*. And the formal declaration of the state of alarm is linked to major political control exercised by the Congress that must be immediately informed, and which must authorize any additional extensions.

IV. The political oversight of the executive by Parliament

Parliament exercises the legislative power of State, approving its Budget, controlling Government action and holding all the other powers vested in them by the Constitution²⁸. At the beginning of March, several deputies were infected, and from February 26th until April 15th, 2020, there was not one session of questions and parliamentary control to the Government in Congress's Plenary. The function of control was in hibernation. Congress only gave its greenlight to the initial declaration of the state of alarm, and its 6 extensions of 15 days each, and validated the Royal Decrees Laws.

The use of videoconference was possible only in Presidium sessions, but no interventions were allowed by videoconference in Plenary sessions, (in which remote voting was permitted). There was a decision made by the Constitutional Court, of February 12, 2019, that established that the exercise of representative duties had generally to be developed, in a personal, face-to-face way. Is this a Parliament of the 21st Century? Is it possibly a situation closer to the 19th Century?

The Minister of Public Health appeared several times in the Congress's Commission of Public Health. The Senate did not hold any Plenary Sessions for one month. On March 17th, a Plenary Session was held to pass the Protocol of Incorporation of North Macedonia to NATO. There were no further Plenary Sessions until April 21st. What about regional Parliaments? Some of them were extremely inactive, like the Regional Parliament of Madrid, which was practically closed for one month. Greciet García wrote a paper describing the situation with a meaningful title: *What should never have happened*²⁹ and Presno Linera³⁰ cleverly asked if this was an *appropriate* kind of parliamentary *control*.

This extraordinary situation should not be a *carte blanche* for the Government³¹. Aragón Reyes pointed out the importance of the Parliamentary function of oversight, and that the Congress's Standing Orders cannot provide for all situations, and that COVID 19 was not a *letter of marque*. He defended a flexible interpretation of Congress's Standing Orders by its Speaker. Arnaldo said that democracy cannot *hibernate*, since democracy consists in the control of executive by Parliament. García Roca added that parliamentary control should not be interrupted by the state of alarm, and political control must continue. Canosa defended the use of remote sessions of control, and Garrido recalled that the fundamental right of political participation was under threat³². The same opinion was shown by Fuertes, when she said that this situation was an arbitrary limitation of Congress's

²⁸ Art. 66.2 of the SC.

²⁹ Greciet García, (E.), "La Asamblea de Madrid y el COVID-19: Lo que nunca debió suceder", *Cuadernos Manuel Giménez Abad, El Parlamento ante el Covid-19*, June 2020, pp. 115-146.

³⁰ Presno Linera, (M.A.), "Coronavirus SARS-CoV-2 y derechos fundamentales (7): control parlamentario del Gobierno durante el estado de alarma", *El derecho y el revés*, 9 April 2020.

³¹ See the editorial article of *El País*, 1 April 2020, entitled *Poder y liderazgo*. Also: Zarzalejos, (J.A.), "El Gobierno, fuera de control, (10 ejemplos)", *El Confidencial*, 2 April 2020.

³² Peral, (M.), "Tarjeta roja al Gobierno y a Batet: juristas afirman que los diputados deben poder controlar a Sánchez", *El Español*, 4 April 2020.

activity³³. As a conclusion, we must say that a deep revision of Congress and Senate Standing Orders, and their update is required³⁴.

V. Impact on the regional electoral process of Basque Country and Galicia: postposition of election day, and infected citizens' right to vote

On April 5, 2020, there was a double call for regional elections in Basque Country and Galicia. There was no *ad hoc* legal provision, but it required *common sense* in terms of thinking about a possible suspension. Nevertheless, the rule of law does not only consist in *common sense*, and also requires *legal security* which is pragmatically based in legal provisions. A clear, detailed, urgent regulation is necessary in this aspect. Art. 4 of the Organic Law 4/1981, of June 1, 1981 only provides that it is impossible to convene a referendum under the state of emergency (“*estado de excepción*”, properly speaking in Spanish) and the state of siege (martial law). But it does not say anything about what would happen in the event of a state of alarm if a referendum, or an election is called. In France, the timeliness of convening the first round of local elections on 15 March 2020 was the cause of controversy.

Both regional elections were finally convened on July 12, 2020, in a very complicated context, because there were two areas where the disease was particularly rife in the North of the province of Lugo in Galicia, and in the city of Ordicia, in the province of Gipuzkoa, in Basque Country. A resolution (“Auto”) formulated by the Supreme Court on July 11, 2020, dismissed the appeal presented by the Galician political party *Galicia en Común-Anova Mareas (Podemos Esquerda Unida Anova)* against the decision of the Central Electoral Board of July 9, 2020, allowing the regional election to take place, even though the sanitary situation in the district of A Mariña, in the North of Lugo was particularly delicate. The dismissal was founded by the Supreme Court in the delay of the petitioners presenting the appeal beyond 24 hours, which was considered *too long* a period of time for an alleged case of *emergency*, and because they did not specify the cautionary measures that had to be adopted by the Court³⁵.

An additional question emerged as election day grew closer, and the number of infected citizens was rising: Should infected citizens be allowed to go to vote?

The attitude of regional authorities in Basque Country and Galicia can be summarized as *too late, too furious*. Even though this situation was possible, and foreseeable, no legal or administrative provision was adopted to enable these citizens' right to vote. The response on the part of the authorities consisted in [a serious warning](#) to those who were infected, stating that if they did turn out to vote, they would be *committing a crime against public health (sic)*. There is no doubt that all fundamental rights must be exercised in a responsible manner, and that all citizens subject to

³³ Fuertes, (M.), “[Estado de excepción, no de alarma](#)”, *Revista de Prensa*, 20 April 2020, (accessed 16th July 2020).

³⁴ Abellán Artacho, (P.), “Sobre el control parlamentario al Gobierno central y a los Gobiernos autonómicos, durante la crisis del coronavirus”, *Cuadernos Manuel Giménez Abad*, nº 19, June of 2020, p. 133.

³⁵ Resolution (“Auto”), of the Spanish Supreme Court July 11, 2020.

quarantine, must respect it, and they must not put the health and life of others at risk.

But the main issue is whether the public authorities gave an *adequate answer* to the problem. Art. 3.1 of the Organic Law 5/1985 only forbids the vote by those sentenced to the main or accessory penalty of deprivation of the right to vote during the time of its compliance. And in its art. 3.2 it states that any person may exercise their right to vote *actively, consciously, freely and voluntarily, whatever their way of communicating it may be and with the required means of support*. What kind of *means of support* were provided by public authorities to those infected citizens under quarantine? The answer is *none*, and its inadequacy is particularly serious because it was clear from mid-March that the *health environment* was going to be very complicated in the not-too-distant future. It was perfectly foreseeable that the exercise of the fundamental right to vote might be difficult. But the lack of administrative and legal foresight had its consequences, because many infected citizens could not go to vote.

The responsible exercise of fundamental rights, and the observation of quarantine should not be synonymous to the loss of voting rights. In the general elections of 2019, the decision (“Auto”) of the Supreme Court of November 8, 2019, made voting more flexible for policemen who had recently been sent to Catalonia on professional grounds, allowing them to vote by mail until that Sunday, November 10, 2019. Nevertheless, with [an astonishing resolution](#) of July 9, 2020, the Central Electoral Board, it was declared that in this case *the concurrent circumstances were not the same (sic)*. Many alternative measures could have been adopted to make voting rights more flexible using the national mail service or by providing a house-to-house process to collect votes, in a sufficiently safe way, as [some of pointed out](#).

An additional legislative and administrative solution would have been to enable the vote via the intervention of a notary, and the preparation of a special schedule for voting by these citizens during election day, [or via the creation of an ad hoc electoral poll](#). None of these measures were adopted, and *apathy* and *indifference* were the final attitude adopted by public authorities. It was a loss of precious time, and many citizens could not vote. Some authors like Carmona Contreras³⁶, were especially critical of this situation, when she said that the *new normality* cannot lie in the *erosion* of fundamental rights such as the right to vote, and the abusive use of the Decree Law.

³⁶ Carmona Contreras, (A.), “El fin no justifica los medios”, *El País*, 16 July 2020.

Sweden

How to make use of a flexible constitutional framework

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The Covid 19 pandemic has impacted the whole Swedish society, including the Swedish Parliament (Riksdag). Indeed, in a country where no specific constitutional framework for civil crisis is in place, it has been necessary to carry out organisational adjustments concerning the physical presence of the MPs and the voting procedure in order to enable well-functioning of the Riksdag during the pandemic (1). Additionally, for addressing the need of the organs of the State to act rapidly, a wider delegation of regulatory power from the Parliament to the Government was introduced (2) and the law-making process was shortened (3). Finally, the scrutinizing function of the Swedish Parliament was impacted. Indeed, the Committee on the Constitution's annual examination of the Government's handling was temporarily postponed during Spring 2020 and the Committee initiated a specific review of the Government's management of the Covid 19 crisis (4).

I. Adjusting routines for voting in Chamber and working in Committees

On March 16, 2020 the so-called group leaders of all eight party groups (i.e. parties) agreed that only 55 members should be physically present when voting in the Parliament Chamber. The decision only applied to voting procedure where normally no quorum rule exists in the Riksdag. In every other aspect all MPs remained formally in office and had to discharge their duties as normal, such as taking part in committee meeting/meetings. Before each vote, the parties decide which members should be present at the Chamber, so there is an alternation of the 55 members who participate in each voting session (usually once or twice a week). This agreement was later prolonged twice (in April and in August) to last at least until December 17, 2020.

The committees and the EU Committee continued to work, but with the opportunity for many members to connect digitally to some of the meetings (see below). Indeed, in order to facilitate the meetings of committees, in March 18, 2020 the Chamber (after agreement between all the parties) decided to elect all members of the Riksdag as extra deputies to all the permanent committees except three (Committee on the Constitution, Committee on Foreign Affairs and Committee on Defense). This was part of the general agreement between the parties in order to secure staffing of the

Committees by members.

The Riksdag Act (*riksdagsordningen*, (2014:801)) – i.e. the internal rules of the Riksdag and its organs/internal institutions such as committees – did not allow for committees to formally decide any formal proposals (*betänkande or utlåtande*) to the Chamber at distance (digitally). But the Committee on the Constitution took a legislative initiative and proposed¹ a change to these rules so that either the Speaker or the Chamber (by a simple majority vote) could decide that certain crisis circumstances are at hand and that during this period of time MPs could participate even in formal decisions in committees from distance via phone, Skype or other secure devices. A number of specific requirements must be met in order for such participation to take place, not least that the security requirements for the transfer of audio and video are sufficiently robust so that the Committee’s meeting can still be considered as closed (in Sweden the general rule is that Committee meetings are closed and private to their members though occasionally committees are free – and do sometimes – decide to hold public meetings and hearings). The change in the rules was approved by the Chamber² and came into effect June 17, 2020.

As of the voting on April 16, there is free sitting choice in the chamber for voting. With free seats, the members can sit anywhere and thus further apart (previously the members had specific seats and electronic voting programmes could not be altered to different seating).

One unforeseen additional effect of the above-mentioned reduction in the numbers of voting MPs is that errors in voting have become exceptionally scarce. Before the 55-members voting scheme, voting procedures occasionally resulted in unexpected results (i.e. not in accordance with election results and mandates), e.g. during the period of 3rd April 2019 – 11th March 2020 so-called “false majorities” successfully (and narrowly) won at least 13 votes on resolutions (*tillkännagivanden*) which went against the Government’s parties, whereas no such decisions have been taken since March 2020.

II. Enlarging delegation of regulatory power from Parliament to Government

The specificities of the Covid-19 pandemic and particularly the predictability of its evolution brought to light the need for the organs of the State to be able to promptly take measures enabling them to fight the spread of the coronavirus. Indeed, the law maker made the analysis that “*it is [...] important that there exists a legal framework giving the Government the conditions to promptly take the necessary decisions as soon as the need arises*”.³

In the meantime, there is no constitutional arrangement for civil crisis in Sweden, and therefore no specific constitutional mechanism giving the Government extraordinary power under such circumstances.

¹ See bet. 2019/20:KU16.

² See rskr. 2019/20:315.

³ Prop. 2019/20:155, p. 9.

Moreover, the already existing possibilities for the Riksdag to delegate to the Government the power to take “*regulations (föreskrifter) needed for an appropriate protection against infections and for the protection of individuals*”⁴ as stated in the law – more precisely in the Contagious Diseases Act – were considered as unclear in their scope and as insufficient for dealing with the situations raised by the pandemic.⁵

The way chosen then to remedy this problematic legal loophole was twofold: in parallel to the enlargement of the scope of the Communicable Diseases Act in order to enable the applicability of the act to the new disease, the Government even initiated the introduction of legislative amendments for temporarily enlarging the delegation of power from the Parliament to the Government on the basis of this act.⁶ The ambition of the Government – which wanted provisions giving it a wide margin of maneuver⁷ – has encountered resistance. Indeed, the Council on Legislation, in charge of the constitutional review of nearly all law proposals, criticized the “*vagueness and broadly designed*” proposed delegation.⁸ The Council wanted on the contrary a detailed provision containing a list of potential measures to be taken. The legally non-binding opinion of the Council on Legislation was followed by the Government in its proposal to the Riksdag. After amendments the Act listed – in a new provision, Section 6a added in Chapter 9 – five specific types of measures and a sixth “similar nature” category:

1. temporary restrictions on gatherings ; 2. temporary closure of shopping centres and other shopping venues; 3. temporary closure of social and cultural meeting places, such as bars, nightclubs, restaurants, cafeterias, gyms and sports facilities, libraries, museums and public meeting places; 4. temporary closure or other restrictions on transport; or the use of infrastructure, such as ports, airports or bus or railway stations, 5. temporary enabling of mutual trade or redistribution of medicinal or protective materials and other medical equipment in the case of private care providers and other private actors, or 6. temporary measures of a similar nature.

The reference in the Act to the situations when “*a Parliament decision cannot be awaited*” permitted limitation in a more precise manner of those situations where the transfer of regulatory powers from the Parliament to the executive was conceivable. This sentence was introduced in the Act in order to take into consideration the remarks raised by the Committee on the Constitution (*konstitutionsutskottet*).⁹

In summary, “*the proposal of the government means that the delegation of regulatory power in the Contagious Disease Act [was] completed with new provisions giving the Government the right to enact certain specific provisions that [were] needed because of contagion reasons in order to tackle*

4 Chapter 9, Section 4.

5 See Prop. 2019/20:155: p. 12.

6 We will come back to the procedure followed later on in this article.

7 i.e. the possibility to enact regulations “*concerning the relations between individuals and the State (det allmänna) which relate to obligations incumbent upon individuals, or which otherwise encroach on the personal or economic circumstances of individuals, but solely if it is necessary for disease control reasons (smittskyddsskäl) for tackle the spread of the virus which causes Covid-19*”. Prop. 2019/20:155, p.1.

8 Lagrådets yttrande 2020.04.06, Prop. 2019/20:155, p. 38.

9 See yttr. 2019/20:KU8y, p. 15.

the current virus outbreak.”¹⁰

The delegation of powers was nevertheless surrounded by the following protective mechanisms:

First, the delegation was limited for a period of 3 months maximum. The validity period (*giltighetstiden*) of the measures enacted on the basis of the act had to be adapted to this period and had to cease at the latest at the same time as the delegation provisions.

Second, the measures to be taken on the basis of the temporary delegation could not infringe fundamental rights as laid down in the catalogue of human rights of the Swedish Constitution which can only be restricted by a statute.¹¹ Such infringements remained the preserve of the Riksdag. Consequently, the measures taken could never lead to forced physical intervention (*påtvingat kroppsligt ingrepp*) nor restriction of freedom of movement.¹²

Thirdly, the measures taken had to be adequate, necessary and proportional and comply with the principles of objectivity.¹³

Fourth, the legislation included a mechanism of submission for each decision referred by the Government to the Riksdag for examination. The submission had to be made immediately after the decision was taken - immediately meaning the same day or the day after.¹⁴ Such submission had to be made by means of a proposition in each case. The Parliament had to actively take position. In case the Parliament made the same appreciation as the Government, the ordinance continued to apply until the validity period ceased. If the Parliament made another appreciation than the Government concerning the need of the measures, the Riksdag had the possibility of withdrawing the delegation of regulatory power by means of a law, or to enact a law that withdraws or replaces the ordinance.¹⁵

Fifth, the reformed law also contained provisions related to the possibility of lodging an appeal when it concerns administrative decisions involving individuals.¹⁶

Briefly, the amendments to the Communicable Diseases Act, which already ceased to apply June 30, 2020, were meant to enable the Swedish Government to take drastic measures such as closing bars, restaurants, airports, ports and shopping malls and to decide on the distribution of medical assets. The law maker was eager to emphasize that “*the proposed wider scope of delegation [...] doesn’t mean that extraordinary competence has been given which deviates from what applies according to the constitution*”¹⁷. It is interesting to note that the delegation of regulatory power for

10 Prop. 2019/20:155, p. 20. Interestingly, the preparatory works emphasize that “...in assessing what is needed in order to maintain an effective disease control (*smittskydd*) for tackling the spread of the virus, the assessment of the expert authorities must be of crucial importance”. Ibid.

11 Id., p. 38.

12 Id., p. 17. A decision concerning curfew would require a law.

13 Id., p. 18.

14 Id., p 21-22 which refers to prop. 2003/04:30, p. 244-245. In the final text the term “as soon as possible” (*snarast*) has been replaced by “immediately” (*omedelbart*). See prop. 2019/20:155, p. 40.

15 Id., p. 28.

16 Those decisions could be appealed by the administrative court if it was necessary in order to comply with art. 6.1 of the European Convention of Human rights. A leave of appeal was nevertheless required for lodging an appeal against the decision taken by the first level of jurisdiction.

17 Prop. 2019/20:155, p. 20.

fighting the spread of covid 19 was conceived as the use by the Parliament “*within the constitutional limits of the possibility to delegate regulatory power to the Government*”.¹⁸

III. Shortening the law-making procedure

To shorten the law-making procedure has been another way for promptly taking the measures required for fighting the spread of the coronavirus. As mentioned above, there are no mechanisms for civil crisis in the Swedish constitutional landscape. The Constitution and the Riksdag Act provide however for flexibility and permit accelerating the law-making process. Indeed, “*the Constitution is [...] shaped so that there are possibilities for faster decision and regulation-making which can among other things be used in situations of crisis*”¹⁹.

The possibilities of accelerating the regulation-making process concern both the pre-parliamentarian and the parliamentarian phases of the procedure. The flexibility does not however concern the number of steps which have to be followed (except for the consultation of the Council on Legislation) – indeed, all the steps have to be respected. The flexibility concerns only the delays, i.e. the time each step can take.

3.1. The phase of the preparation of regulations including a consultative procedure

Within ordinary law-making procedure, the legislative procedure – i.e. the procedure carried out in Parliament – is preceded by a pre-parliamentarian procedure, so to say, which responsibilities lie in the hand of the Government. Indeed, it is the Government which through the terms of reference (*kommittédirektiv*) decides the contours of the legal issue to be examined and by whom the task will be endorsed (a parliamentary committee /commission of inquiry or an individual investigator). Last but not least, it is the Government that is in charge of the conduct of the procedure leading to the submission of a draft bill to the Riksdag. The responsibility for the execution of the pre-parliamentarian phase of the law-making procedure is laid down in the Swedish Constitution, the Instrument of Government. According to Section 2 of Chapter 7 in preparing Government matters “*...the necessary information and opinions shall be obtained from the public authorities concerned. Information and opinions shall be obtained from local authorities as necessary. Organizations and individuals shall also be given an opportunity to express an opinion as necessary*”.²⁰

These requirements consisting in the consultation of interested stakeholders and which apply *inter alia* for the preparation of draft law may be said to correspond to requirements of due diligence and more particularly to requirement to furnish an adequate body of material for the decision maker (here the Government). It has also the function of “[providing] *valuable feedback and allows the Government to gauge the level of support it is likely to receive.*”

The Riksdag being a unicameral Parliament, this could further explain the importance of the

18 Ibid.

19 Id., p. 8.

20 As amended on December, 7, 2010.

consultative mechanism within the Swedish legislative procedure.

In principle, the time allowed for the stakeholders to submit their comments should be reasonable. Guidelines state that it should normally not be shorter than three months.²¹ “*However, there is no formal requirement for how long the consultation period must be and 24 hours may be sufficient in urgent cases*”.²² Nevertheless, not only the length of time granted to the stakeholders is of relevance to the quality of the consultative procedure. The number and the selection of the stakeholders are also to be taken into consideration. Indeed, as the Council on Legislation assessed during the legislative procedure leading to the introduction of amendments in the Communicable Diseases Act “*When it is considered necessary to provide a very short time for consultation, it is even more important with an adequate number and selection of consulted stakeholders*”.²³

3.2. The phase of the constitutional review by the Council on Legislation

This step may take place both within the pre-parliamentarian phase as well as during the parliamentarian phase since the procedure to submit a draft bill to the Council on Legislation may be initiated both by the Government and by a Committee of the Riksdag (Constitution, Chap 8, Section 21). This mechanism “*does not however apply if the Council on Legislation’s examination, [...] would delay the handling of legislation in such a way that serious detriment would result.*” (Constitution, Chap 8, Section 21, 3).²⁴ This means that the organ in charge of the control of constitutionality of the law (composed of justice of the two Swedish Supreme courts) may be put out of play due to emergency reasons (if the Government – or a Committee drafting a law proposal – choose this opt-out option). The legislative procedure followed during Spring 2020 for the adoption of the *Act on the temporary closure of activities in the field of schooling in the event of extraordinary events in peacetime*²⁵ is a good illustration of the application by the Committee of the Riksdag in charge of the draft law – the Committee on Education – of the exemption to request an opinion from the Council on Legislation.²⁶

3.3. The motions period

Even at the counterproposal stage, constitutional arrangements allow for the shortening of the length of the legislative procedure. The time for counterproposal (*motionstiden*) is regulated by the Standing Orders of the Riksdag. According to Chap 3, Section 12, motions in connection with a bill or a petition may be brought within fifteen days from the day when the bill or petition was notified in the chamber. However, according to Section 13 if a bill or a petition must be dealt with urgently, the Riksdag may, if it considers that there are special reasons, on a proposal from the Government or the parliamentary body that submitted the petition, decide on a shorter time for tabling counterproposals, although these shortenings “*should be a purely exceptional phenomenon*”.²⁷

21 According to the propositionshandboken Ds 1997:1, p. 34.

22 RIBB (J), “Om beredning, kungörelse och ikraftträdande av författningar i kristid”, *SvJT* 2020, p. 535.

23 Prop. 2019/20:155, p. 37.

24 Which is not motivated in the preparatory work, see 2009/10:KU10, p. 46.

25 Lag om tillfällig stängning av verksamheter på skolområdet vid extraordinära händelser i fredstid.

26 Bet. 2019/20:UbU25, p. 10-11. The exemption was decided in March, 18th 2020 in political unanimity and motivated by an imminent need to allow schools to close as early as March, 23rd.

27 Prop. 1973:90, p. 541.

Furthermore, this mechanism “*must never be completely put out of play*”²⁸, thus one day is regarded as a minimum.²⁹

As described in this section, there are possibilities to shorten the length of the law-making procedure at diverse stages: in reducing the delay of the consultative procedure, in putting aside the review of the Council on Legislation and in reducing the delay for tabling counter-proposals (*motionstid*). The reform of the Communicable Diseases Act (2004:168) took for example ten days, including the referral of the draft bill to the Council on Legislation for their consideration. Not only the consultative procedure went rapidly in this case. Even the Government, the Council on Legislation and the Parliament acted quickly. In the meanwhile, the Council on Legislation criticized the carrying out of the consultative procedure, both with regard to the time aspect (the stakeholders had 24 hours to send their comments, beginning on a Saturday evening) and for the small number of the stakeholders selected for the consultation as well as for their selection.³⁰ The Council concluded in expressing its concerns regarding the fulfilment of the constitutional requirements for the preparation of regulation (*beredningskravet*).³¹

IV. Scrutinizing the Government’s actions in civil crisis

Chapter 1 Article 4 of the Swedish Constitution states that “*the Riksdag scrutinizes the governing and administration of the country*”. It is in this capacity that several tools for scrutiny and constitutional review of the Government’s steering of Sweden exists. One of them is the examination of the Committee on the Constitution. This examination is made during the year and often produces two large volumes which are debated in the Chamber. On 24 March, 2020 the Committee decided to postpone its regular spring examination of the Government until further notice on account of the coronavirus outbreak. The task of the Committee to examine the manner in which Government ministers perform their duties and the handling of Government business is laid down in the Constitution (Chapter 13 Articles 1-2). The provision states that the Committee shall, whenever there is reason to do so, but at least once a year, inform the Riksdag of what it considers worth drawing attention to. The Committee's assessment then was that in view of the situation that prevailed as a result of the coronavirus, its work on the examination of the Government should be postponed. The Committee decided therefore not to hold any hearings as part of its examination during the Spring and it also decided that the examination would be resumed as soon as it can be carried out in more adequate forms than those that were possible in March.

On June 4, 2020 the Committee on the Constitution decided that it would resume its examination activities. It established a preliminary schedule for its resumed examination activities. According to the schedule, a decision concerning hearings will be taken after the opening of the Riksdag session on 8 September (and indeed these hearings were later resumed and started in October 2020).

28 Ibid.

29 HOLMBERG (E.) et al., *Grundlagarna*, 2nd ed., 2006, p. 668, referred to in 2009/10:KU10, p. 46. The Committee on Legislation emphasizes the “*importance that the proposals (propositioner) contain the reasons for the proposal to shorten the motionstid*”. 2009/10:KU10, p. 77.

30 Id., p. 37.

31 Ibid.

On June 26, the Committee on the Constitution started to plan its examination of the Government's handling of the corona crisis. The parties in the Committee have agreed that the examination should not be limited to the reports submitted to the Committee but should focus on the exercising of Government power from a broader, constitutional, perspective. The exact focus will be discussed in greater detail when the Committee meets again after the Summer.

On September 24, 2020 the Committee on the Constitution discussed its examination of the Government's handling of certain issues, etc. during the corona pandemic.³² The Committee instructed its chancellery to prepare a review of the Government's actions in the following areas: (a) The preparation of "quick bills" (see below), (b) Consultation with the Committee on EU Affairs, (c) Measures to secure the availability of protective equipment and other medical supplies, (d) Measures to coordinate access to intensive care units, (e) Measures for extended testing and infection tracing, (f) Introduction of a participation limit for public gatherings and public events, (g) Introduction of a restraining order in elderly care and (h) Introduction of distance education in the school system.

The Committee has reviewed civil crises before and more especially the Government's preparation including consultative procedure for so-called "quick bills" (*propositioner i kristid*). This was done e.g. in 2009³³ when the Committee examined the Government's handling and preparation of such bills during times of crisis that can be drawn from both the Swedish banking crisis of 1990–1994, the global financial crisis of 2008–2009 and the pandemic crisis of 2009, with regards to A(H1N1)-virus (or swine-flu). According to the Committee, the preparation routines generally worked well during those crises, not least because these routines provide a scope for flexibility and fast administration, at the same time as opinions are obtained from the relevant bodies. Experiences from these three crises also showed that deadlines for submitting comments during the so-called consultative procedure were shortened during a crisis, sometimes considerably. That this happens, however, follows from the urgent nature that normally characterizes a crisis. Sometimes the submission of bills to the Council on Legislation were omitted on the grounds that a consultation procedure would delay the legislative process so that considerable detriment would arise. Finally, with regard to the contacts between the Government and the Riksdag prior to submitting proposals for a shortened motion's time (*följdmotionstiden*), the Committee's review suggests that the practice that follows from praxis was not been fully complied with. The Committee emphasized the importance of completing all contacts before the Government decides on a proposal for a shortened motion's time as well as the importance that these so-called "quick bills" contained justifications regarding proposals for the shortened motion's time.

V. Conclusions

The adaptation of the internal working of the Riksdag – changed voting procedures, etc. – has worked flawlessly. As far as it can be assessed up to now, it seems that the legal tools at the disposal of the regulation-makers have been sufficient in regard to the measures the state actors aimed to take for tackling the situations generated by the Covid 19 pandemic. Some problems concerning the

³² See section 5 in the protocol 2020/21:3 of the Committee on the Constitution.

³³ See bet. 2009/10:KU10, pp. 45-78.

current legal framework for preparedness (*författningsberedskap*) have nevertheless been identified by Jonsson Cornell; such as fragmentation of the regulation, increase of the risks of conflict of norms, lack of efficiency and other vulnerabilities.³⁴ Moreover, the question may be raised on whether the Swedish legal framework would be adequate in case of even more serious pandemic.

A decade ago a Government Inquiry (*Grundlagsutredningen*)³⁵ which reviewed the whole Swedish Constitution had suggested a mechanism giving extraordinary (legislative) powers to the Government in times of civil crisis. The Inquiry's proposal was later rejected by the Government after some criticism during the consultative stage of the legislative procedure.³⁶ The Covid-19 pandemic gives us the opportunity to thoroughly – albeit in a preliminary way/manner – reflect once again on the “*review of the preconditions for legal action in peacetime crisis*”.³⁷ The Swedish State must have robust and adequate legal tools at its disposal if such situations of serious pandemic or other civil crisis occur. However, striking the balance between, on the one hand, the need for flexible constitutional framework giving the Government room to maneuver and handle a civil crisis as it evolves, and the need to safeguard democratic freedoms and liberties, constitutes a delicate exercise. As new investigations – both through the Government's initiative to form a so-called Corona commission³⁸ and the review which the Committee on the Constitution has instigated – will have been completed, a more precise assessment of the eventual need for changes of the legal framework for preparedness or of constitutional boundaries of Parliament and Government will become possible.

34 Anna Jonsson Cornell, ”Författningsberedskap i praktiken – en kommentar med anledning av lagen om ändring i smittskyddslagen, *Svensk Juristtidning*, p. 377.

35 See SOU 2008:125.

36 Prop. 2009/10:80, p. 207.

37 See yttr. 2019/20:KU8y, p.16.

38 On June 30, 2020 the Swedish Government appointed a committee of inquiry to evaluate the measures taken to limit the spread of COVID-19. As committee chair the Government appointed a former judge with spotless credentials (both Justice and President of the Supreme Administrative Court who also served at the Court of Justice of the European Union) and as committee members, seven academics and members of society (amongst them a priest). The committee of inquiry is to submit its final report by February 2022. Two interim reports are to be presented, one on 30 November 2020 and the other on 31 October 2021. The first interim report is to concern the spread of the virus in the health and social care of older people.

United Kingdom

Between continuity and innovation, the question of the effectiveness of distance democracy

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Like the other Parliaments of the countries affected by the Covid-19 pandemic, particularly in Europe, the British Parliament has faced the enormous challenge of adapting its procedures to make them compatible with the new health requirements.

The originality of the British Parliament lies in the configuration of the parliamentary building, as it comprises in one place the House of Commons (650 MPs - Members of Parliament) and the House of Lords (more than 800 peers), as well as more than 3,000 civil servants, plus parliamentary staff and assistants. The circulation of the virus or the acceleration of its spread is therefore highly probable, as in any enclosed area with a large number of people, it being understood that among them, as among the general population, some suffer from conditions that can be considered "at risk". This is particularly true of members of the House of Lords, whose average age is 70 (the oldest being born in 1925).

The other problem specific to the British Houses is the scarcity of remote or proxy procedures. Debates, of course, but also most of the means of oversight provided for in parliamentary law thus require the presence of MPs and peers. The procedures, some of which are centuries old, sometimes seem anachronistic, outdated or ill-suited to the modern age of new technologies.

For example, since 1836 in the House of Commons, voting has been done "by ear". The Speaker asks the question, puts it to a vote, and asks each side voting yes or no, to say "aye" or "no". The Speaker then judges by ear which side has won the most votes. He then announces: "*I think the 'ayes' (or 'nos') have it*". The House must then confirm the Speaker's conclusion, but if some MPs challenge his judgment, they must continue their exclamations in favour of the "yes" or "no". In this case the Speaker gives the order to "clear the lobbies"¹ in view of proceeding to a "division", which is a more precise count of the votes between opponents and supporters of the question by way of physical separation. The division is announced by an audible signal in *Westminster* and in other places

¹ There are two *lobbies*, to be able to count the votes in support (aye) and against (no).

frequented by the MPs. In this way, they can join the lobby of their choice. The Speaker then waits for two minutes and can again give his assessment, which is sometimes accepted at this stage. The Speaker has the discretionary power to continue the procedure or to stop it if he considers that the division has been unnecessarily requested. If the Speaker's opinion is criticised, each MP must leave the lobby registering his or her name as they leave. A *teller* of the two sides present in each lobby counts out loud, for no more than six minutes. At the end of eight minutes, the Speaker orders the lobbies to close. The two tellers from each side must face the Presidency, with those representing the majority votes to the left of the Speaker. They must stand five steps from the House table², bow before the president, advance to the table and bow again. One of the tellers from the majority announces the result. A clerk transfers the document containing the number of votes to the Speaker, who confirms the announcement.

A new procedure, introduced during the 2001/2002 session, provides for the postponement of the vote when the Speaker's conclusion is criticised during a vote after the moment of interruption. The division does not take place at that time but is automatically moved to the following Wednesday of the next sitting ("deferred division"). On that day, a voting paper is published together with the "vote bundle" (working documents sent daily to the MPs). It lists all the questions to which the postponement procedure was applied the previous week. For each question there is a box in which MPs must write "aye" or "no". They must then table the ballot between 11:30 and 14:00 on Wednesday. The count is made by the clerks and sent to the Presidency, which announces it immediately. Some questions are nevertheless exempted from this procedure. These include all those relating to bills and proposals and the division of time for their examination (programme motions). Amendments are also exempted. The possibility of remote legislative voting has existed for a short time now however: a resolution dated 28th January 2019³ allows MPs who are on parental holiday to appoint a colleague who establishes a proxy. However, this proxy is not allowed in other circumstances or for other reasons.

Likewise, most parliamentary oversight procedures demand the physical presence of MPs and peers. Notably several types of oral questions⁴ which were introduced as of 1721, when the first question was documented in the House of Lords, even though these became more frequent and took their present shape as of 1832⁵. Also, all daily question sessions, notably the Prime Minister's Questions on Wednesdays are held in person.

Prime Minister's Questions that were introduced in 1961 take place on Wednesdays from midday to 12:30pm (since 2003). In addition to this, Question Time takes place for an hour from Monday to Thursday before the start of work by the House. The ordinary procedure for the submission

² Table positioned between the government and the opposition benches, in front of the Speaker's chair. Historically it was used to place motions, questions, reports, which are now transferred to the offices (*Table Office, Journal Office, Public Bills Office*).

³ *Hansard* HC Deb. vol. 653, col. 596. See the guide on the use of proxies : *Scheme on proxy voting for use under para (4) of Resolution of 28 January 2019*.

⁴ As an exception to the oral nature of parliamentary questions, there are three types of "questions for written answer". They may be questions intended to be answered orally, but which have not been considered in the sitting due to lack of time. They may be simple written questions, which are published two (sitting) days after their receipt by the Table Office and are usually dealt with within a week. Finally, there are priority questions, or "questions for a written answer on a named day", which impose a date on the competent minister to reply between three and ten sitting days later. Questions may be sent to the Table Office, or, unlike oral questions, directly to the ministry concerned.

⁵ On 9 February 1721 (*Parliamentary History of England*, vol. 7 (1714-1722), col. 1709).

and allocation of questions is very formal. The question is received by the Table Office, which establishes a random order between all the questions by means of a computerised procedure. Each MP may ask two questions per day, to two different ministries. The order of appearance of the ministries is determined at the beginning of the session, with each ministry being allocated a specific day with other ministries. A rotation ("rota") is instituted, with four main ministries alternating in first place at each session. The MP can then ask his or her question on the following day, as well as a supplementary question. Other supplementary questions may be asked in an order determined by the Speaker, alternating between majority and opposition, but according to a rather random custom of members of the House standing up to attract the attention of the Speaker ("catching the Speaker's eye"). When he considers that the number of supplementary questions is sufficient, the Speaker calls the next question. The organisation of Question Time is therefore up to the Speaker. Fifteen to twenty questions are asked each day.

A second procedure is called "urgent questions". Before the 2002/2003 session, the procedure was known as "private notice questions". The MP must send the question before 11.30 a.m. on Monday, 10 a.m. on Tuesday and Wednesday and 8.15 a.m. on Thursday (Standing Order No. 21). The Speaker must determine whether the question is indeed of an urgent nature and whether the matter is of public interest. The Minister is informed immediately, and the urgent question session takes place after Question Time.

Subsequently, "topical questions" were introduced in the 2007/2008 session following a proposal by the House of Commons Modernization Committee⁶, so as to allow the government to respond directly to the events of the day or very recent events. The procedure was first introduced on 12 November 2007⁷. These questions may be put to the ministers without being tabled in advance ("without notice"), during the last fifteen minutes of Question Time.

Moreover, since 23 January 2003⁸ in *Westminster Hall*⁹, the cross-cutting questions procedure provides for the questioning of several ministries that are competent on an issue. Four meetings per session must be devoted to them¹⁰. In the House of Lords, an important question procedure exists in the form of "unstarred questions"¹¹ (before the 2006/2007 session) then "questions for short debate". This is a question to a member of the government that gives rise to a debate. It differs from a motion because there is no right of reply. This type of debate takes place last during a sitting.¹²

Finally, oral questions are a highlight of British democracy and require the physical presence

⁶ *Select Committee on the Modernisation of the House of Commons, Revitalising the Chamber, The role of the backbench Member, First report session 2006/2007*, 20 June 2007, HC 337, page 28.

⁷ *Hansard* HC Deb. vol. 467, col. 392.

⁸ *Hansard* HC Deb. vol. 398, col. 143 WH.

⁹ It is a kind of second House of Commons, set up as a hemicycle to mitigate political confrontation. Even if the turnout is fairly low (10 to 12 MPs, with a quorum of 4), the debates organised in this annex allow MPs to discuss certain subjects away from government and media pressure.

¹⁰ The procedure is as follows: several members of the government are present. A first question is asked and the competent minister answers. The member who asked the question may ask a supplementary question and the minister who initially answered, or another minister, may answer. The Speaker of the House then calls other members to ask questions, including members of the opposition. The author of the initial question may also ask a supplementary question. This new procedure is not a series of mini debates, and each intervention must be short and to the point.

¹¹ Issues not marked with a star on the agenda. Questions marked with a star are intended to request information, without debate.

¹² The debate lasts 1h30.

of members of the Houses and the Government. The same applies to the work of the Select Committees, which meet and conduct hearings only in person.

The health crisis therefore has presented a particular challenge with regard to the continuity of the committees' oversight mission or legislative work. But beyond these practical aspects, important theoretical questions are also raised by the modification and adaptation of parliamentary procedures.

I. The suspension of the Houses and the work of the Select Committees

On 23 March 2020, Prime Minister Boris Johnson announced the main lockdown measures (closure of non-essential shops, restriction of public events in particular). The subsequent bill was examined and adopted by the House of Commons on March 23rd¹³, by the House of Lords on 24 and 25 March¹⁴, and subsequently it received royal assent¹⁵. During these three days, the Houses adapted their procedures to respect the physical distance between their members: physical presence was reduced within the Houses and voting was carried out in small groups. In addition, the proceedings in Westminster Hall were suspended until further notice. On 25 March the Houses also decided to suspend their work (*recess*¹⁶) for the Easter holidays, instead of 31 March as previously planned. The Houses did not meet again until 21st April.

During this period, only the Select Committees continued their work remotely ([letter](#) from the Speaker of the House of Commons dated 27 March 2020). The members of the *Select Committees* can continue their work via e-mail, calls, or videoconference using Zoom, on condition that the Committee Clerk is copied on each written communication and that the communication system is approved by the *Parliamentary Digital Service*.

On 8th June 2020, [the decision](#) was taken to continue work remotely until 17th September.

II. Legislative Work

With regard to legislative work, following the Easter recess, two motions were debated in the House of Commons, regarding the hybridization of procedure and distance voting, and were adopted on 22 April¹⁷. Hybridization means that the maximum number of MPs physically present may not exceed 50. Up to 120 other MPs can attend the debate or ask questions via the Zoom platform, and remote voting can be organised. A list of 'substantial' or 'essential' business subject to hybridization

¹³ *Hansard* HC Deb. vol. 674, col. 176.

¹⁴ *Hansard* HL Deb. vol. 802, col. 1794.

¹⁵ *Hansard* HL Deb. vol. 802, col. 1794.

¹⁶ Each Parliament (i.e. the period between two parliamentary elections) is divided into sessions. Until 2010, a session began in November and ended at the end of October of the following year, and the end date was set for the spring (April or May) after this date. During these periods, a number of 'holidays' are determined, during which sessions of Parliament are adjourned, i.e. it does not sit. These "vacancies" are commonly referred to as "recess", although the term strictly applies to periods when the session of Parliament is prorogued. After each session, the Queen's speech marks the beginning of the new session. Recess in the strict sense refers to the time between sessions, between prorogation, which marks the end of the session, and the delivery of the Queen's speech. Prorogation may also be pronounced before a dissolution of the House of Commons.

¹⁷ *Hansard* HC Deb. vol. 675, cols. 80 et 88.

was adopted (these are debates on bills and their adoption, questions to ministers and ministerial statements, as opposed to 'non-essential business', which can be postponed).

In application of these new rules, a historic remote vote was held on 12 May¹⁸. While the motion being debated was limited in scope (it follows a general debate on Covid-19), it was the first form of distance voting in the House of Commons. This hybridization was in effect until June 2 (with the Houses suspended again between May 20 and June 2).

On 2 June 2020¹⁹, hybridization was dropped in the House of Commons in favour of a physical return of MPs subject to the rules of distancing, from which some with medical risks may be exempted. They can designate a colleague who will then vote by proxy, thanks to an extension of the cases provided for in the resolution of 28 January 2019. These new rules were adopted precisely by applying physical distancing: a long line of MPs, at a distance of two metres from each other, extended several hundred metres across the garden to the outside of the building in order to vote on motions. The abandonment of the Virtual Parliament has been strongly criticised by the opposition, who denounce it as a hasty and risky measure, but also as a discriminatory one against MPs suffering from medical conditions. There are quite a number of these MPs, because on 21 July²⁰, the list of MPs affected comprised nearly 200 names, i.e. nearly a third of those present in the House. Those opposed to the scrapping of the virtual parliament also objected to the presence of Minister Alok Sharma, who showed signs of fever and physical malaise during the second reading of the Corporate Insolvency and Governance Bill on 3 June 2020. He finally tested negative at Covid-19, but the image of the visibly tired, sweaty Minister at the desk made a lasting impression.

On 4 June, measures were adopted so that MPs who cannot be present for medical reasons can take part remotely in certain procedures (oral questions, urgent questions and ministerial statements). These measures were renewed on 1 July, 2 of September and 22 October. They will be in place until 30 March 2021.

As far as the House of Lords is concerned, virtual procedures were applied from the very beginning of the lockdown, via the platform Teams. Since 8 June²¹, the House has used a hybrid procedure. This means that a minimum of three and a maximum of thirty peers may be physically present in the House, as opposed to 50 members present virtually if they have previously registered for the agenda item concerned. Distance voting continues to apply, unlike in the House of Commons. A [guide](#) to hybrid procedures was issued by the House Procedure and Privileges Committee on 5 June 2020.

¹⁸ *Hansard* HC Deb. vol. 676, col. 218.

¹⁹ *Hansard* HC Deb. vol. 676, col. 757.

²⁰ *Hansard* HC Deb. vol. 678, col. 2129.

²¹ Motion approved on 4 June 2020, *Hansard* HL Deb. vol. 803, col. 1449.

III. Theoretical questions raised by the modification of parliamentary procedures

Beyond the practical problems posed by the hybridisation of procedures during the period of the health crisis, many theoretical questions were raised in connection with these changes in parliamentary law.

Firstly, the procedure for amending parliamentary law itself is worthy of interest. Some aspects of parliamentary procedure do not require formal amendments to the Standing Orders of the Houses²²: This concerns, for example, the reduction of the number of MPs attending the House. In this case, a simple informal agreement between the parties would suffice. In other cases, however, a formal amendment of the Standing Orders would be necessary, i.e. an amendment by a majority of the House itself. To simplify the procedure for the required changes, the motion on 22 April²³ regarding the organisation of the hybrid Parliament provides the Speaker with unprecedented powers, the so-called “*Henry VIII powers*” in reference to the king’s authoritarianism, allowing him to adopt *Temporary Orders* requiring the simple agreement of the *Leader of the House*²⁴. Moreover, the motion creates a new form of parliamentary organization, similar to that of a “Bureau”: the leaders of the three main parties²⁵ can decide on the agenda of the House instead of the House itself.

Secondly, this confirms that the rights of MPs who are neither part of the majority nor of the main opposition parties²⁶ (*backbenchers*) are significantly reduced. This is particularly the case with regard to the inclusion of proposed legislation on the agenda: this procedure is very restrictive in normal times and has been deemed to be “non-essential parliamentary business” during the crisis, which makes the situation of the isolated member of parliament even more complex.

It is important to remember that Standing Order No. 14 provides that Government business takes precedence at each sitting. Standing Order No. 27 also provides for the right for ministers to organize the agenda of government business at their discretion.

Standing Order No. 14 reserves twenty days for opposition leaders (“opposition days”), and thirteen others for proposals by members of parliament, during which the subjects chosen by the latter have priority over the government agenda. Thus, thirteen Fridays per session are reserved for the examination of these texts (from 9:30 am to 2:30 pm). In practice, the first seven Fridays are devoted to the second reading of proposals, the last six to the other stages of the procedure and to the examination of the Lords’ amendments. The text of an MP in a position below the seventh place is therefore in an unfavourable situation. Two possibilities then exist.

If the text called first is not particularly controversial, the proposal can be examined in the

²² These are written standards adopted without any particular procedure by the House concerning the procedure laid before it, in particular the conduct of debates, but also the discipline of its members.

²³ *Hansard* HC Deb. vol. 675, col. 75.

²⁴ Minister responsible for relations with Parliament

²⁵ Conservative Party, Labour Party and the Scottish National Party.

²⁶ Under Standing Order No. 14, 20 sitting days are reserved for the opposition, which sets the agenda as a matter of priority. Although only the official opposition (Her Majesty’s Most Loyal Opposition) is theoretically concerned, it often graciously allocates some time to one or more other parties not belonging to the majority.

remaining time.

In other cases, the MP can have his proposal examined on second reading without debate at 2.30 pm. The procedure is then as follows: the clerk announces the proposals, and if an MP shouts "objection" when announcing a text, it cannot be examined on second reading. The author of the proposal must then determine another Friday, and during the time available to him, convince the members of the House of the interest of his text. The objection is often made by a majority MP, and if the government does not support the text, the chances of the proposal being considered are slim. Finally, the government may allocate additional time on a day other than Friday for the consideration of a proposal by an MP when it considers it necessary. In practice, this opportunity is rarely given to members of the House.

Hence, three procedures are available to MPs wishing to introduce a private member's bill.

The first is that of the ballot, governed by Standing Order No. 14. Among 400 competitors, twenty MPs designated by the ballot queue up to present their bill and have an advantage over the other MPs who introduce a text autonomously. On that day a draw is organised for the twenty proposals that will be discussed on the Fridays provided for that purpose. The MP in charge of the first text of each session must ask for a closing vote ("closure") during the second reading before 2.30 pm, to prevent his/her opponents from dismantling it during the debates. If the opponents control the debate until that time without the question being voted on, the examination of the text is then adjourned. The Speaker only checks that there has been sufficient debate on the text before putting it to the vote. This ensures that the proposal is referred to a Standing Committee. Once this stage has been completed, proposals have no special right of priority over other texts.

Most of the other proposals are presented according to the procedures of *Standing Orders* n°57²⁷ and 50 (according to the ordinary procedure, any member of the House may present a bill as long as its main purpose is not the creation of a public office) and n°23 ("Ten minute rule")²⁸ after the draw. On the Fridays designated to this effect priority is given to the texts whose examination is the most advanced²⁹, whether this involves texts that were part of the draw or other draft bills³⁰. Finally, it should be noted that a proposal by a Lord that has passed all the stages in the Upper House must be endorsed by an MP before it can be considered by the Commons, but in general, it will only be considered after proposals from members of the Lower House. Thus, proposals from the Lords are rarely successful.

Already unenviable, the plight of backbenchers has not improved during the health crisis: the

²⁷ Standing Order No. 57 provides for an ordinary presentation of texts after examination of the proposals admitted to the ballot, which means that these texts are almost never debated for lack of time. They generally deal with subjects that are not very controversial.

²⁸ The "Ten Minute Rule" is provided for in Standing Order No. 23, for texts with a lesser impact on legislation than proposals submitted to the ballot. The aim is to draw attention to a subject or the need to revise legislation. The author of the proposal can then defend it in a short speech to which an opponent can respond, during the Tuesday and Wednesday sessions after questions. When the House votes in favour of the text, it is allowed to proceed to the first reading. The text may not be tabled before the 5th Wednesday of the session, and not before 10.15 a.m. 15 sitting days before the day on which it is due to be presented (which in practice generally represents 3 weeks). Members of parliament compete to present their texts, and the rule is that the first to arrive is the first to register, even if certain tacit rules of priority are observed.

²⁹ In order: consideration of the Lords' amendments, 3rd reading, report stage, committee stage and 2nd reading.

³⁰ Sometimes, the government "offers" texts to some of its MPs, when it has not found the time to put them on the agenda, for example.

timetable for the presentation of bills, initially running from 13 March to 10 July, has been postponed several times, and was set from September onwards, as the presentation of these texts was not considered to be part of "essential business". The question of guaranteeing the rights of backbenchers is now being raised.

Thirdly, the effectiveness of parliamentary oversight is under challenge. In particular, certain opposition rights had to be set aside for practical reasons, such as the holding of "opposition days", which did not take place between 4 March³¹ and 15 July 2020³², whilst their normal pace is one session per month. The same applies to the procedure for "topical questions", which has been totally interrupted because it has not been possible to guarantee the presence of the minister to whom the question is addressed on that particular day. Similarly, the work of Westminster Hall has been suspended until further notice, despite the fact that this assembly is supposed to be a less passionate place of debate than the House of Commons itself, which is subject to strong political pressure. The House of Lords, despite its undemocratic character, represents a strong check on the power of the majority, and has been greatly constrained by the hybridisation of procedures that allows only a small number of peers to participate.

Finally, the effectiveness of party discipline is also problematic. Regarded as a 'nightmare' for the whips, the dispersal of MPs throughout the country enabled by proxy voting makes their work much more difficult. Whips are responsible for discipline within their parties, especially for ensuring discipline during important votes, such as three-line whips (votes designated as important by the parliamentary group leader). When the whips can no longer meet MPs in the corridors of Westminster, it is more complicated to personally ensure their vote. The lack of party discipline does not currently pose a drastic problem because the texts under discussion are not first-rate, but one thinks of the difficulties that it could cause during more important votes, relating to Brexit for example.

In addition, the whips are involved in setting the agenda during informal negotiations ("usual channels"³³) requiring a physical meeting. The virtual *usual channels* may not be as flexible or efficient when organised remotely.

Ultimately, the British Parliament has been able to respond to the health requirements and adapt its procedures to ensure a minimum continuity in its work. Nevertheless, some of the intricacies of procedure and many of the modalities of parliamentary scrutiny in the UK have been set aside during the pandemic. While modern parliamentary law has been forged over several centuries, a long-term crisis could also call into question traditions and customs because of the imperative need for it. The effectiveness of democratic control is nevertheless at stake, and in the absence of a formal constitution, the standards of parliamentary law allowing the Houses to act as a counterweight to the government, could easily be called into question.

³¹ *Hansard* HC Deb. vol. 672, col. 903.

³² *Hansard* HC Deb. vol. 678, col. 1523.

³³ Expression referring to the informal relationship between the whips of the different parties and the leaders of the majority and opposition. It refers to arrangements and compromises regarding the conduct of parliamentary procedure. Often denounced by backbenchers, this cooperation avoids confrontation to some extent and speeds up the legislative process.

European Parliament

The European Parliament in the Covid-19 crisis. A remote Parliament

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The COVID-19 crisis has had a profound effect on European parliamentary practice. It continues to do so, and at the time of writing there is every reason to believe that this situation will continue for a long time to come. Nevertheless, the European Parliament has been quick to respond to the challenges that the epidemic has posed to its functioning. In two successive decisions on 2 and 9 March 2020, it took several emergency initiatives, the main one being to establish a mechanism for remote debate and voting. These measures have also taken other forms, such as the initiation of a reform of the institution's internal rules of procedure. Based on an executive component and a legislative response, the European Parliament's institutional response reveals the intrinsically *sui generis* nature of European parliamentary democracy: the variety of solutions developed reflects the proportional and consensual nature of its operating methods.

Like other assemblies, these measures aim to respond to the democratic, organisational and health challenges that COVID-19 implies. For the European Parliament, this means ensuring the continuity of its work while preserving the health security of the people involved, i.e. naturally that of the MEPs but also that of the teams ensuring its functioning. These measures of continuity are reflected in the use of remote working methods, which are clearly impacting parliamentary work as a whole.

The European Parliament's response to the crisis can be divided into two types. Firstly, action by the Parliament's executive authorities to ensure immediate institutional continuity. These are the adjustment measures decided upon by the Presidency of the Parliament, its Conference of Presidents (COP), its conference of Committee Chairmen (CCC), its Bureau and Quaestors. Secondly, there is the legislative and regulatory response, which aims to adapt its internal rules and is mainly structured around the working group on the rules of procedure, which was created by the Committee on Constitutional Affairs (AFCO)¹. These two categories deserve separate attention and will therefore be the subject of a specific presentation.

* The scientific contribution defended by the author in this article represents his personal opinion and can in no way express an official position of the European Parliament.

¹ AFCO's competence regarding the interpretation of the Rules of Procedure of the European Parliament (RIPE) is described in Annex 6 RIPE.

I. Regulatory Measures

1.1. General Measures taken by the Presidency of the European Parliament and its Bureau

The COVID-19 crisis has placed the executives of the Assemblies in a political dilemma: to respect the competences and rights of individual members in times of crisis while at the same time preventing parliamentary activities² from becoming vectors of contagion within the institutions concerned and, ultimately, preventing them from functioning fully.

The European Parliament, through its President and on the basis of the executive competences linked to the function³, provided a response to this dilemma on 2 and 9 March 2020⁴ by means of a decision. Action is based on the executive powers of the President (Rule 22 §5 of the Rules of Procedure (RIPE)), which establishes that the Presidency is responsible for the security and integrity of Parliament's buildings, as well as on an opinion from the medical team. In the present case, it should be recognised that *force majeure* also supports the validity of the measures taken.

It was on the basis of this decision⁵ that as early as March the President took a series of measures deemed necessary to stem the epidemic in the Parliament: the institution closed, trips to and arrivals from contaminated areas were limited and even prohibited. Regarding the parliament the decision committed the Parliament to the digitisation of its work requesting the Secretary General to ensure the digital accessibility of the work of all of the Parliament's services⁶. As a consequence, it was made a rule to wear a mask in all of the Parliament's workstations on 8 May⁷, the obligatory testing of a body temperatures was introduced on 15 June, likewise an internal screening centre in the Parliament⁸. Most of these measures were extended by a Bureau decision on 25 November 2020⁹ until 31 March 2021.

In this context of limited access to workplaces and the mobility of parliamentary personnel, the question of the seat of Parliament once again came to the fore, since in order to limit contagion and to comply with health obligations, it has become difficult for MPs, parliamentary teams and civil servants to travel between Belgium and France. Thus, since March 2020, it has not been possible to hold any sessions in Strasbourg even though the treaties provide for 12 plenary sessions per year in the Alsatian capital.

Although the MEPs are not linked to Brussels (even though some of them remain in residence

² In particular, the fact that Members of the European Parliament generally travel between their constituencies and the Parliament's places of work on a weekly basis, thus considerably increasing the epidemiological risk.

³ Article 22 par. 5 RIPE : « Le Président est responsable de la sécurité et de l'inviolabilité des bâtiments du Parlement européen. »

⁴ This decision was renewed unchanged by decision on 26 March, 29 April, 28 May and 24 June.

⁵ In practice, this decision, politically validated by the Conference of Presidents, is updated every month and on that occasion amended if necessary to add new features.

⁶ Last introductory paragraph: "IT tools should, as far as possible, replace physical meetings and thus contribute to enabling the Parliament to carry out its essential functions" Reference: DV1202751 EN

⁷ Document PE644.381/QUEST

⁸ Document PE657.899/BUR

⁹ Document PE660.654/BUR

there), almost all of the administrative and political players in the Parliament are Belgian residents and have therefore been subject over this period either to a travel ban or to quarantine on the outward and return journeys (which is in effect a form of travel ban or at least a very strong incentive to comply). Moreover, beyond issues related to the mobility of people, the introduction of mechanism for distance voting¹⁰, which enabled and recommended teleworking, the official organisation of the session in Strasbourg would certainly have resulted in significant absenteeism and thus the weakening of the legitimacy of the Alsatian capital as the seat of the institution.

In this regard, the Bureau of the Parliament tried to reinstate the place of sessions in Strasbourg in a communication of 13 July 2020¹¹. The latter presented a mechanism to allow a return to Strasbourg and aimed to reduce the risks of contagion by prescribing, in particular, a limit on the number of staff present on site and the services. It followed France's diplomatic protests and preceded the French President's letter of 27 September 2020 recalling the role of the Strasbourg headquarters. Although we are not in a position to judge the intention of this communication, it seems to be a diplomatic response to an exceptionally complex situation in which the organisation of plenary sessions in Brussels contravenes the European treaties. However, it appears also that as long as voting operations can be carried out remotely, the movement of MEPs to Strasbourg is largely compromised. This is an insoluble problem, since as long as the health situation has not stabilised in all EU Member States, the distance voting system is likely to continue to apply and make their presence in the Alsatian capital discretionary.

However, a certain decline in the epidemic suggested that the measures taken by Parliament might be relaxed. However, the second wave finally led to a strengthening of the measures in force, as shown for example by the President's decision on 29 October 2020.¹² The physical presence of MEPs was banned¹³, with the exception of some trilogues and certain representatives such as the Presidents of the Commission. Moreover, all physical meetings in the Parliament's buildings were banned. This decision also resulted in the closure of the membership register until 23 November, while the rest of these measures were in force until 1 December.

1.2. Measures to adapt legislative work: guidelines for implementation by the Conference of Committee Chairmen

The European Parliament's work focuses a great deal on the work undertaken by the parliamentary committees. Now 27¹⁴, these committees prepare the legislative documents that are submitted to the vote in the plenary session of the European Parliament. The implementation of the decision taken by the President of the Parliament, which generally and indeterminately concerns the Parliament as a whole, must nevertheless proceed from a separate act, in particular to move forward

¹⁰ Distance voting which implies that all voting operations are carried out digitally, is also referred to as a hybrid voting mechanism as it also allows physical participation in certain limited cases.

¹¹ Document PE653.525/BUR.

¹² Document PE660.561/BUR.

¹³ Document PE 654.720.

¹⁴ 23 ordinary parliamentary committees (AFET having two sub-committees) and 4 special parliamentary committees whose work began under the 2019-2024 mandate.

regarding the precise details of the voting arrangements, which is central to parliamentary activity. This is the purpose of the guidelines for implementation of the decision by the Conference of Committee Chairs (CCC)¹⁵.

The document dated 8 April 2020 supports the decision of the Bureau of Parliament on the modification of the voting modalities in the plenary session (amendment of 20 March 2020 modifying the Bureau's decision of 3 May 2004 concerning the voting modalities) in preparation for the plenary session of 26 March 2020. Non-binding guidelines, it does not, however, constitute a legal basis for operations in parliamentary committees, but rather a series of indications, which the committee secretariats are then responsible for implementing according to their own practices, which often tend to differ. Nevertheless, the general elements presented below certainly form the basis of parliamentary practice over the period.

From a general point of view the document recalls that the plenary session procedure in exceptional circumstances¹⁶ is the benchmark for parliamentary committee procedures. The principle guiding voting is to have a separate vote on amendments to legislation and a final vote after the vote on the amendments¹⁷. The principles relating to participation in the vote are as follows: all votes, whether by members physically present (this was always possible except during the second wave) or virtually, must be cast by e-mail; deputy members must be notified in advance of the vote and thus receive in advance the ballot papers relating to a voting session organised in a parliamentary committee; the checking of the quorums is carried out at the beginning of the session on the basis of the members who are present and voting.¹⁸

With regard to the establishment of voting lists, the document is extremely technical. It recalls the usual principles for the constitution of voting lists, prohibiting separate voting on compromise amendments¹⁹, as well as oral amendments on the basis of the *lex specialis* provided for in RIPE²⁰.

It should also be remembered that these voting lists take on a particular dimension in debates in the European Parliament. Firstly, in the context of the often-fluctuating majorities due to proportional representation, group discipline plays less of a role than in the national parliaments and, consequently, the voting lists are studied by each parliamentary office. Secondly, the fact that voting does not take place with MEPs being physically present means that they cannot rely on visual messages of the sitting (thumbs up, thumbs down by the rapporteurs of each group indicating voting instructions). The voting list is therefore studied and worked on individually by the parliamentary offices.

The voting procedure in exceptional circumstances, as described in the guidelines, is representative of the practice for all votes that have taken place in this period. It is, of course, suitable

¹⁵Guidelines of the Conference of Chairs of the Parliamentary Committees 8 April 2020, PE639.592v03.

¹⁶The term "exceptional circumstances" refers to the name adopted by the Working Group on the Rules of Procedure in preparation for its reform.

¹⁷Point 1 and 2 CCC Guidelines 8 April 2020.

¹⁸Point 3,4,5,6 CCC Guidelines.

¹⁹Point 7.4 Guidelines).

²⁰Article 180 par. 6 RIPE.

for votes in plenary session, since it is not the parliamentary committee secretariats but the plenary session services that ensure the reception, validation and recounting of votes in this case.

The new voting procedure takes place by e-mail only²¹. All votes are taken by roll-call, i.e. the vote on each amendment is public and the results of individual votes on each item on the voting list are made public²². This differs from traditional plenary votes, which are, as a general rule, only roll-call votes if a group of MEPs so requests.

At the opening of the vote, the MEPs whose names have been communicated to the secretariat of the parliamentary committee by the referring political groups, receive a voting list that is to be completed and returned from the MEP's address by e-mail to the secretariat of the parliamentary committee responsible for the final tally. This voting list corresponds to a single text and these are voted on in two voting sessions, first the amendments and then the final vote. There is an important difference here with the plenary session votes. While an identical voting procedure was introduced in the first weeks of spring 2020, a dedicated page on the European Parliament's intranet prevents attachments from being sent by e-mail and provides for voting on a dedicated secure portal, where MEPs fill in their voting list directly. In plenary sessions, votes are not cast on a single text per voting session but on a set or "batch", which the plenary session offices make up according to the total number of votes to be cast during the week of the session. The logical sequence, i.e. the vote on amendments and the final vote, is of course maintained.

II. Legislative measures: adaptation of the Parliament's rules of procedure

Following the vote in plenary session on 26 March 2020, with the introduction of electronic voting for the first time, at the beginning of April the European Parliament instructed its "working group dedicated to the rules of procedure" to work on possible reforms to adapt its functioning to exceptional circumstances which would prevent it from functioning normally.

The aim of this group was to produce by the summer of 2020 proposals for amendments that could form the basis of a parliamentary report amending the RIPE. The working group's discussions were organised around several subjects and on the chosen methodology. Should the RIPE be amended article by article or, on the contrary, should a particular article be dedicated to exceptional circumstances, even if this means giving it a transversal application? In the end, the latter approach was favoured and made it possible to address various questions, such as, for example, the definition of exceptional circumstances, their impact on the normal rules of operation, or the central democratic issue of the reform, namely the modalities of control of the acts of the parliamentary executive over the period.

The report finally attributed to Gabriele Bischoff (S&D, DE) was presented to the AFCCO committee on 10 July and voted on 12 October 2020 in the parliamentary committee. Its vote in

²¹ And this even if during the period, with the exception of weeks 44 and 48, the presence of intervening MPs was permitted.

²² Except for secret votes which are organised according to a special procedure.

plenary session is scheduled for December. It adds a new Article 237 to the RIPE, which is divided into three parts. Article 237 a, entitled "Exceptional measures", applies to situations in which the European Parliament cannot operate in a conventional manner or meet its obligations and must temporarily derogate from its conventional modes of operation so that it can continue its activities. However, this is only possible subject to the conditions of validity of the criteria of *force majeure* (i.e. the external nature of the event, its unforeseeable and unstoppable nature). Moreover, it is the President of the European Parliament who implements this article if he or she considers that there is a definite danger or that it is impossible for the institution to meet in accordance with its normal working methods.

The measures taken by the President are then subject to increased scrutiny by the Conference of Presidents (which brings together the executives of the political groups) and by the MEPs themselves, who may, by means of an average threshold (10% of the MEPs), obtain a vote at the opening of the next plenary session on the approval of the measure (and not its revocation or annulment). The *de facto* annulment of a Presidency decision takes effect only at the end of the plenary session. This is to prevent, among other things, the annulment of decisions affecting the session during which the vote is held.

Article 237b is entitled "*disturbance of the political balance within the Parliament*" and allows the President to arrange for the remote participation of certain members belonging either to the same political group or possibly to the same geographical group if their involuntary absence disturbs the political balance within the Parliament on a lasting basis.

Article 237b allows for the introduction of the system of remote participation as provided for in the new Article 237c. This system is largely based on the experience of the first few months of the distance procedure and guarantees in particular the individual nature of the vote and respect for the capacity of Members to express themselves freely in plenary sessions. It provides that the President of Parliament permit the distance participation arrangements, thus enabling all Members to exercise some of their rights through the use of remote connection tools. The article nevertheless provides that rights that cannot be exercised in this way are subject to arrangements for which the Presidency is planning a specific measure. Article 237d, the last article of the reform, provides that, for the purposes of the respect for the physical distance between Members present in Parliament, all rooms used for the plenary session shall be considered as collectively forming part of the hemicycle.

If a favourable opinion had to be given regarding adaptation, the European Parliament would certainly get one. The rapid response of the executive authority, the establishment within a matter of days of structure for distance voting and participation, all in agreement with the main political groups, are all points to be added to efficient management both in terms of short-term regulation and the legislative perspective given by the reform of the rules of procedure introduced by the Bischoff report.

However, other elements that unfortunately could not be studied in greater depth in this article will have to be examined in more detail. The measures that Parliament has introduced and its

executive and legislative response raise a large number of fundamental questions as to the legality of the arrangements that have been provisionally made, specifically as regards their adequacy to the fundamental principles of parliamentary democracy, namely respect for the individual competences of Members of Parliament, who are elected by European citizens. These questions, such as the study of the proportionality of the measures, the legal basis for amending the Rules of Procedure in times of crisis, the numerical independence of voting procedures, in particular through the obligation to internalise the tools, and compliance with transparency obligations as laid down in the code of conduct for Members of Parliament during dematerialised working meetings, will need to be studied more closely to complement the factual presentation of the adaptation tools as carried out in this analysis.

Protecting Members and staff, ensuring business continuity and implementing practical solidarity

Klaus Welle

Secretary-General of the European Parliament

I. Introduction

Measures taken to contain the spread of COVID-19, including restrictions imposed by Member States, have represented a major challenge for parliamentary democracy. This concerns in particular efforts to safeguard legislative and budgetary powers as well as political scrutiny.

The above is especially true for the European Parliament. A unique multinational and multilingual Assembly made up of 705 members, elected in 27 Member States.

From the onset of the COVID-19 pandemic, the European Parliament had to take various, often unprecedented, decisions aimed at minimising the risk for Members and staff, while ensuring that the Institution remains in a position to continue its core activities. This has allowed Parliament to play its full role in adopting any measures required at EU level to respond to, and mitigate the impact of pandemic crisis.

The decisions were taken by the President and Parliament's governing bodies, especially the Bureau. As regards Parliament's administrative operational functions and staff, measures were put in place by the Secretary-General.

In terms of remote participation, the deployment of a complex, multilingual solution which would normally require months if not years was implemented in only few weeks. From March until November 2020 the remote meeting system was used for over 1680 meetings with more than 138 000 participants in total, thus allowing for Members to fully exercise their functions.

A remote voting system was conceived in accordance with the relevant provisions of the Electoral Act and the Members' Statute. The system has been in place since March 2020 and its application is prolonged until the end of March 2021. It has been constantly upgraded and improved. Since March until November 2020, it has allowed for 355 voting sessions and 4575 voting operations.

Next to enabling remote participation and voting, the European Parliament had to cope with the challenges of a multilingual and open Institution. This concerns among others interpretation and the visitors' offer. Plans were implemented to increase interpretation during the pandemic and specific online programmes for visitors were put in place.

The Institution has overall proven a high degree of resilience and capacity to adapt and transform. Collective efforts by Members and staff allowed keeping the House of European democracy operational and so enabling it to play its full role to respond to the pandemic crisis in the interest of the citizens.

The measures taken during the crisis are structured along three axes and objectives which are further described in the following parts: protecting Members and staff, ensuring business continuity and implementing practical solidarity in the host Member States.

II. Protecting Members and staff

– Immediate measures

With a view to contain the spreading of the virus, avoiding that Parliament (hereinafter “Parliament”) becomes a transmission hub for COVID-19 and assuring business continuity, as of 24 February 2020 the Secretary-General instructed all services to take immediate measures. These concerned among others the following:

- upgraded sanitary procedures and advice to Members and staff, including adaptations of the in-house sanitary system;
- regular updates on the spreading of the virus and communication on preventive measures from the Medical Service (e.g.: physical distancing and hand-washing);
- instructions to Parliament’s staff having travelled to the most affected areas;
- advice to Members planning to travel, or having travelled to the most affected areas.

In order to protect the core functions of Parliament from disruption, on 2 March 2020, the President decided to take a number of urgent measures with immediate effect. On 8 March 2020, the Secretary-General placed all staff belonging to a risk group either on a teleworking scheme or reassignment to a less-exposed post.

On 11 March 2020, all Directors-General were instructed by the Secretary-General to set up a 70% teleworking regime for all staff whose physical presence was not indispensable. In light of the evolution of the pandemic, this measure was revised on 15 March 2020, allowing for 100% teleworking arrangements for all staff whose physical presence was not indispensable. Similar guidelines were sent from the Quaestors to Members, recommending them to put in place teleworking arrangements with regard to their Accredited Parliamentary Assistants (APAs) and other staff, including trainees.

– Risk-mitigation measures

At its meeting of 27 April 2020, based on a proposal from the Secretary-General, the Bureau approved measures aimed at mitigating the risk of infection for Members and staff physically participating at meetings. This concerned physical distancing and reduction of physical presence on the one hand, and health-security prescriptions on the other.

Objective	Measures
Reducing physical presence / ensuring physical distancing	Continuation of teleworking for the administration albeit at a reduced percentage of staff to reduce physical presence in the buildings
	Only one parliamentary assistant per office
	Physical distancing to be implemented in all areas including meeting rooms
	Linking the electronic voting system of the Chamber to room PHS 3C050 to ensure physical distancing during plenary votes
	Determining the maximum number of people allowed in catering outlets and other common areas
Strengthening health security	Obligatory wearing of community masks by everybody except when being alone in the office
	Mandatory checks of body temperature at all Parliament entrances
	Mandatory checks of external companies' staff, including drivers for deliveries, in relation to the wearing of masks and body temperature
	Wearing of gloves and masks for cleaning staff at all times
	Health and safety protocols for hotel rooms (only hotels or similar establishments complying with the protocols will be recommended to Members)

Next to reinforced physical distancing measures, additional preventive measures were put in place. Such measures complemented and reinforced those already in place, namely: (i) meticulous and repetitive hand hygiene, including avoiding touching eyes, mouth and nose; (ii) cough and sneeze etiquette; (iii) social distancing; (iv) cleaning of frequently touched surfaces; (v) case and contact management.

– Reinforced risk-mitigation measures

As of mid-September 2020 and throughout the month of October, the pandemic situation sharply deteriorated in Europe, especially in Belgium, one of Parliament's host Member States. The total number of confirmed cases in this country increased from 125 605 on 1 October to 442 181 on 31 October.

During that month, Belgium was the EU Member State displaying the worst 14-day cumulative rate of Covid-19 cases per 100 000 inhabitants, corresponding to 1 631. October 2020 was for Belgium by far the worst month since the beginning of the pandemic crisis.

In light of those dramatic developments, the Belgian federal and regional authorities reinforced so-called “non-pharmaceutical interventions” (NPIs). These included, *inter alia*, partial lockdowns (closure of bars and restaurants, etc.), mandatory teleworking and stricter preventive measures, such as mask wearing in all public spaces.

Against this background, on 26 October the Secretary-General instructed all Directorates-General to apply 100% teleworking for all staff members whose physical presence is not absolutely necessary. On 27 October, the President amended his decision relating to COVID-19 with a view to further reducing physical presence on Parliament premises. Accordingly and until the end of November 2020, all meetings of Parliament governing bodies, plenary, ordinary and extraordinary committees and political groups were held remotely without physical presence of persons other than the chair, and indispensable staff.

During the first weeks of November, the restrictions imposed by the Belgian Federal and Regional governments started showing a first positive impact. In the 7-day period from 6 to 12 November the rate of new confirmed cases decreased by 47%. Hospitalisations also went down by 22%. The reproduction factor dropped in the whole country below 1, i.e. to 0,861.

In light of the above, at its meeting of 23 November 2020, the Bureau approved the following reinforced risk-mitigation measures to enable Members' physical presence at official meetings as from December 2020 while staff continue to telework and all other preventive and health-safety prescriptions remain in place:

- introduction of 100% teleworking also for political group staff. If needed, possibility for political groups to notify a precise numerical exemption list of up to 15% of their staff from this requirement as indispensable ahead of a given week;
 - requirement of on average 80% teleworking for Members' staff per month; only one staff member per Member present on Parliament's premises at any given time; invitation to Members to increase the teleworking scheme of their staff up to 100%;
 - physical distancing in the Chamber or meeting rooms increased from 1.5 to 2 meters;
 - obligation for Members and their staff who have tested positive for COVID-19 to immediately inform Parliament's Medical Service, including on any contacts to ensure proper contact tracing;
 - mandatory mask wearing in Parliament's official cars at all times;
 - mandatory mask wearing at meetings with physical presence at all times, including when speaking (this provision does not apply to Members chairing meetings and to Members speaking in Plenary if they use the front rostrum);
 - in addition to PCR tests, rapid antigen tests were made available as of 1 December as an additional health-security measure for long duration meetings such as trilogues.
- **Testing and vaccination**

As from 13 May 2020, testing in local laboratories was made available for Members who needed a negative SARS-CoV-2 result in order to avoid the obligation to observe quarantine upon return to their country of residence. In addition, and as decided by the Bureau in September, an onsite PCR testing facility on Parliament's premises was implemented in a timeframe of only two weeks. The screening centre started operating as from 5 October 2020, providing for a capacity of 200 up to 350 tests per day.

In line with the reinforced risk-mitigation measures approved by the Bureau on 23 November 2020, rapid antigen tests (RATs) were introduced as from 1 December for on-site long duration meetings such as trilogue meetings. It is important to recall that RATs cannot and should not replace PCR testing. RATs are not as sensitive and accurate as PCR tests, which are able to detect also small amounts of the SARS-CoV-2 virus. Nevertheless, RATs can detect potential “super-spreaders” with a very high degree of infectiousness.

Since December 2020, pending the approval of the first vaccines by the responsible European regulatory authorities, Member States are preparing for mass vaccination campaigns. 2021 will be a transition year in which Parliament should focus on vaccination whilst still adhering to health safety and risk-mitigation measures.

Parliament’s Medical Service is following the situation closely and has asked public health authorities to actively participate in the campaigns in the three workplaces. In Belgium, Parliament is in the process of acquiring the status of accredited COVID-19 vaccination centre as one of only four in Brussels. This would enable the Institution to start a vaccination campaign in line and in parallel with federal and regional authorities while reducing the burden on the Belgian health-care system.

III. Business continuity

Since the COVID-19 outbreak, the Secretary-General instructed the services to start appropriate contingency planning and to ensure business continuity, namely that Parliament’s core functions remain operational. Services were tasked to develop solutions to facilitate the participation of Members in Parliament’s activities in situations when they cannot physically attend meetings. These technical solutions had the objective to allow Members to listen to proceedings, ask for the floor, intervene in the meeting with interpretation and vote.

– Remote participation

The deployment of a complex, multilingual solution would normally have taken several months if not years. Parliament services speeded up the required specific technical tests to allow for the immediate deployment of the system which was successfully used for the first time to hold the extraordinary meetings of the Conference of Presidents on 19 March 2020 and of the Bureau on 20 March 2020.

From 19 March until 30 November 2020 the remote multilingual meeting system was used for over 1 680 meetings with more than 138 000 participants in total. Since October 2020, Parliament services are deploying a new version of the platform. It includes improvements in sound quality and a multi-view option to enhance interactivity in the discussions.

Since the second plenary session held in October 2020, Members can also intervene remotely from Parliament’s Liaison Offices (EPLOs) in the Member States. The overall assessment of the first-ever hybrid plenary sessions is positive. No major technical issues were reported as regards the delay of interventions, quality of the streaming or connections.

– Remote voting at plenaries

Article 6 of the Electoral Act provides that Members shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate. Likewise Article 3(1) of the Statute for Members provides that votes shall be held on an individual and personal basis.

In accordance with the above, Rule 186 of Parliament's Rules of Procedure (RoP) on the right to vote provides that the right to vote is a personal right and Members shall cast their votes individually and in person. Rule 187 RoP on voting empowers the President to decide at any time that the voting operations be carried out by means of an electronic voting system.

Rule 192 of the Rules of Procedure, on the use of the electronic voting system provides, in paragraph 1, that the Bureau shall lay down instructions determining the technical arrangements for use of the electronic voting system. Accordingly, the Bureau Decision of 3 May 2004 on rules governing voting, as amended, lays down the technical arrangements for electronic voting.

In light of the restrictions imposed by the Member States, including on travelling, at its meeting of 20 March 2020 the Bureau decided to review its rules on voting to allow Members to vote remotely. This was necessary to enable Parliament to adopt the urgent measures proposed by the European Commission as part of the EU-coordinated response to COVID-19.

The new provisions provide for a temporary derogation on public health grounds, upon decision by the President, to enable the vote to take place by an alternative electronic voting procedure, with adequate safeguards to ensure that Members' votes are individual, personal and free, in line with the provisions of the Electoral act and the Members' Statute. Members receive electronically, via email to their official email address, a ballot form, which is returned, completed, from their email address to the relevant Parliament's functional mailbox.

The remote voting system has been in place since March 2020 and its application is prolonged until the end of March 2021. The system was progressively technically upgraded and improved. It made it possible to have a valid tool to ensure the operational capacity of Parliament in the current context of public health emergency.

– Remote voting in parliamentary committees

Parliamentary committees play a key role in enabling Parliament to exercise its legislative and budgetary function as well as scrutiny powers and definition of political priorities for the institution. It is therefore essential to safeguard their operation, especially in times of crisis when sectoral legislation is necessary.

On 8 April 2020 guidelines on remote voting were approved by the Conference of Committee Chairs. This allowed for the adoption of committee positions on key files.

An electronic voting application iVote has been deployed in committees to enable the processing of complex voting lists remotely. The tool enables the creation of a digital voting list and the submission of ballots from remote. The tool relies, however, on an external IT infrastructure. As

a consequence, Parliament services started working on an alternative solution, fully developed in-house. The new tool (“EP Vote”) provides a secure, Parliament-owned solution. It ensures full control of the data flows and storage.

EP Vote is being gradually rolled-out prioritising committees which do not have a remote voting application yet (see table below). According to the planning including the first two weeks of December 2020, the application is successfully tested and used in 10 committees.

– **Enhancing teleworking capacities and digital workflows**

The network infrastructure was immediately strengthened, the roll-out of ‘hybrid’ computers was accelerated and IT support reinforced. These devices enable working from remote as at an office computer. They also work as a phone via a dedicated application. Various tools were made available to Members and staff for virtual meetings. These include: computer-accessible multipoint facilities that can be booked like a meeting room, a multi-device tool where smaller and sensitive meetings can be organised using Parliament’s own infrastructure and a multi-device tool for larger, less sensitive meetings operating in the cloud.

In parallel, administrative workflows were digitised to the largest possible extent. This concerns both applications and services for both Members and staff. In view of the increased needs of teleworking, on 11 May 2020 the Bureau decided to equip all Members with three per office and each staff member with one hybrid computers. As at 9 December 2020, more than 10 000 hybrids were deployed.

To enhance the well-being of staff while teleworking, the responsible services assessed staff needs for additional teleworking equipment. This concerns in particular external screens, keyboards, mice and ergonomic chairs. Staff who needed it most could receive these items from the existing stocks. 2326 screens, 2069 keyboards, 1968 mice and 378 ergonomic chairs were distributed until November 2020.

– **Interpretation capacity**

A multilingual Institution where 705 Members can freely express themselves in their mother tongue relies heavily on interpretation. Parliament provides interpretation from and into the 24 official languages of the Union.

The ongoing pandemic is hampering the Institution’s interpretation capacities because of several factors. These include, inter alia, the restrictions imposed by the Member States which make it nearly impossible for freelance interpreters to regularly travel to Parliament’s places of work as well as the sanitary measures put in place under the guidance of Parliament’s Medical Service. These measures reduced the capacity of the available interpretation infrastructure by limiting the number of interpreters working in meeting rooms and therefore the number of languages.

In light of the above and with the view to enable Members to fully exercise their mandate while protecting interpreters, several actions are being pursued to increase interpretation capacities during

the pandemic. These range from reinforcing the overall technical infrastructure (e.g. installing mobile interpretation booths) to remote interpretation, a field where Parliament is becoming a reference and standards-setter at global level.

– **Online visitor offer**

Parliament invests considerable efforts in the services it offers to visitors. The return of such investments is invaluable. It has led to a constant increase of visitors from all over Europe and beyond, to increased turnout in the last European Elections. Most importantly, it contributes to reinforcing the citizens' sense of belonging to the European project and thus to strengthening European identity.

Against this background, and in order to compensate for the lack of physical visits while supporting Members in their communication activities, Parliament responsible services have developed a wide-ranging online offer for visitors during the pandemic crisis. The offer includes online lectures to groups at Members' request. The seminars are tailored to the language and the needs of the specific audience. They explain the work and powers of Parliament and provide an opportunity for discussion with Members.

The European Youth Seminars, which have been organised since 2016, were transformed into webinars. Moreover, a virtual visit of Parliament's seat in Strasbourg is available in 24 languages on the Parliament's Visitors' website. Likewise, an application is also available for download to guide online visitors through the Parliament in Brussels. On demand, additional online material is also available. This includes, for instance, a presentation on Parliament from the hemicycle in Brussels which was organised for the online edition of Europe Day 2020.

– **Online and hybrid events**

Since the outbreak of the COVID-19 pandemic in Europe, Parliament's services had to migrate a number of flagship events into the online sphere. This notably included the 2020 iteration of the European Youth Event (EYE), the Europe day events, the events and activities around the State of the European Union debate (SOTEU) as well as a number of events organised by Parliament Liaison Offices (EPLOs) at national level. The reorganisation of these events had to take place rapidly. Their concept and implementation were redefined in order to cater for the specific nature of the online environment, both in terms of technical solutions and implications on content and format. Despite these constraints, the outcome proved overall highly successful.

Sixty interactive activities in different formats were organised for the online edition of the EYE, with 140 speakers. While 13.000 participants were registered for the EYE 2020 in Strasbourg, the EYE online had 3.7 million video views and 29.000 engagements. At EYE 2018, 10.000 participants assisted on average to a minimum of four activities over the two days of the event; for the EYE online, 18% of participants attended two activities and 39% attended three to five activities. The online iteration of the Europe Day event ensured coverage thereof in media outlets in all 27 Member States. Parliament appeared in almost 1150 news in the EU open online media, and there were images broadcast on 24 TV channels.

IV. Practical solidarity

Several measures of practical solidarity were and are being implemented vis-à-vis the host Member States. The measures enabled to help people in need while sustaining sectors particularly hit by the crisis, in particular the catering and restaurant one.

– Strasbourg

Measures included the following:

- charity food production, up to 500 daily meals were prepared on Parliament's premises for medical personnel and people in need, starting on 29 April until 31 July 2020;
- the charity meals production re-started on 9 November 2020 and is planned until the end of June 2021;
- in agreement with the *Préfecture de la Région Grand-Est* and the Regional Health Agency (ARS) a Covid-19 screening centre in the WEISS building was available on Parliament's premises from 11 May until 3 July 2020.

– Brussels

In the capital of Belgium, the co-operation was implemented on three axes:

- daily provision of up to 1 000 meals to medical personnel and other people in need until end July 2020 and of 500 meals since the beginning of November 2020 until the end of June 2021;
- provision of a separated part of a Parliament's KOHL building as a shelter to 107 women in a vulnerable position until the end of August; and
- transport was provided by Parliament's car service to deliver the meals to the charities as well as driving of Brussels medical personnel who have difficulties to find transport after nightshifts.

In addition, since its opening on 1 September 2020 and until the end of October, lunchtime concerts were organised in Parliament's Citizen's Garden. Besides representing an interesting offer for the local communities, the concerts allowed to support classic musicians during the pandemic crisis.

– Luxembourg

In Luxembourg, up to 500 daily meals were prepared on Parliament's premises for medical personnel and people in need as of 29 April until end of July 2020. The production of charity meals re-started on 13 November and is scheduled to continue until 30 June 2021.

V. Conclusion

Parliament has been remarkably successful in adapting to the dramatic changes triggered by the pandemic. It was able to draw upon existing contingency plans to further build on digitalisation, allowing for the smooth introduction of large teleworking regimes, remote voting and online debating and participation tools.

On the other hand, in the fast-paced, dynamic, multilingual and multicultural environment that distinguishes Parliament, face-to-face meetings are an essential part of its working processes. Without them, Parliament's unique 'esprit de corps', underpinned by the many Europeans who come from across our continent to work together, is severely narrowed.

This does not mean that the Parliament should and will go back to the way things were before the crisis. The pandemic has revealed how digital tools can expand and even improve dialogue with external partners, as well as with parliamentarians from around the world. Technology has also allowed to open new channels of communication with the citizens. This has brought the Institution closer to them in a time of great uncertainty. During Covid-19 Parliament is showing a remarkable resilience and capability to adapt and transform. Learning from and building on the lessons of the crisis to further reinforce the Institution's capabilities will be a key exercise to prepare for the new normal and to respond to the new crises after the pandemic.

The impact of the health crisis on the functioning of Parliaments in Europe

Confronted by the first wave of epidemics that swept across Europe in March 2020, parliaments were forced to respond quickly. Challenged by a sudden and generalised slowing in economic and social activity, due to the health measures that had been imposed, most of them wished to maintain at least some semblance of activity. The relation with time that parliaments have developed in this regard is complex and largely conditioned by the urgency of the situation.

This study aims both to report on the impact of the pandemic on the leading democratic institution in our countries – the Parliament – and to launch the second phase of an international research project initiated in 2016 by the University of Lille on the subject of "The Parliament and Time". The Robert Schuman Foundation, in partnership with this university network, has published a series of contributions on the developments in the functioning of the parliaments of twelve states European countries during this particular year (Germany, Belgium, Bulgaria, Spain, France, Greece, Latvia, Poland, Portugal, Romania, United Kingdom and Sweden), as well as the European Parliament.

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