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# The Parliament in the time of coronavirus

## Germany

# The German Parliament facing the pandemic. 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 government<sup>1</sup>. 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*)<sup>2</sup> 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 term<sup>3</sup>. 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 President<sup>4</sup>, is also considered as the "intrinsic legislator", whilst the Bundesrat is simply said to participate in legislative output<sup>5</sup>. However, the Bundesrat is fully involved in the examination of the "assenting

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<sup>1</sup> 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.

<sup>2</sup> This distinction, originally made by Max Weber, is frequently used to qualify the Bundestag.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.

<sup>3</sup> 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.

<sup>4</sup> Article 62 of the Basic Law.

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

acts" (*Zustimmungsgesetze*) since its vote is just as important as that of the Bundestag in this context<sup>6</sup>, over which it can exercise an absolute veto. On the other hand, parliamentary scrutiny is mainly 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 censure<sup>7</sup>.

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” (*Spannungsfall*) featured in article 80a, and also the “state of defence” (*Verteidigungsfall*) 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 impotent<sup>8</sup>. 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*)<sup>9</sup>.

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<sup>6</sup> 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.

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

<sup>8</sup> Cf. Jean-Philippe Derosier and Gilles Toulemonde, “The French Parliament in the time of coronavirus. A parliament on life support”, *Parliament in the time of coronavirus*, Robert Schuman Foundation, 2020.

<sup>9</sup> 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.

The members of parliament (*Mitglied des Bundestages, MdB*) quickly 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 countries<sup>10</sup>, 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 government<sup>11</sup>. § 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 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

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<sup>10</sup> 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.

<sup>11</sup> Claus Dieter Classen and Aurore Gaillet, « Covid : perspective allemande », *Blog Jus Politicum*, 8 April 2020 ; Philippe Cossalter, « Le droit public allemand et le Coronavirus », *Revue générale du droit*, n° 51830, 2020.

legislative provisions for a fixed period of time<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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 legislation<sup>15</sup>.

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"<sup>16</sup> 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 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

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<sup>12</sup> Until the health crisis is resolved and at the latest by 31 March 2021 pursuant to § 5 (4)-1 of the ISG Act.

<sup>13</sup> 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".

<sup>14</sup> Christoph Möllers, « Parlamentarische Selbstentmächtigung im Zeichen des Virus », *Verfassungsblog*, 26 March 2020.

<sup>15</sup> Basile 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.

<sup>16</sup> Christoph Möllers, „Parlamentarische Selbstentmächtigung im Zeichen des Virus“, *Verfassungsblog*, 26 March 2020.

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 complex<sup>17</sup>, 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 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 present<sup>18</sup>. In the end, the

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<sup>17</sup> W. Reutter, « Struktur und Dauer der Gesetzgebungsverfahren des Bundes », *Zeitschrift für Parlamentsfragen*, 2007, p. 299.

<sup>18</sup> Robert Roßmann und Georg Mascolo, « [Ein Rettungspaket für den Bundestag](#) », *Süddeutsche Zeitung*, 3 April 2020.

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 consecutively on the same day<sup>19</sup>. This reduction in time is not essential, however, since in the

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<sup>19</sup> § 81(1) of the Rules of Procedure of the Bundestag.

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 only<sup>20</sup>. 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 law<sup>21</sup>.

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<sup>20</sup> Philipp Amthor, « Bundestag et parlementarisme allemand en temps d'exception », *JP Blog*, 9 September 2020.

<sup>21</sup> Sven Jürgensen and Frederik Orłowski, « Critique and Crisis: The German Struggle with Pandemic Control Measures and the State of Emergency », *Verfassungsblog*, 19 April 2020.