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Parliamentary oversight in the health crisis

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Article 15 of the European Convention on Human Rights opens the possibility for signatory states to derogate from their obligations by invoking exceptional circumstances, but Rik Daems, President of the Parliamentary Assembly of the Council of Europe, has insisted on the need for parliamentary oversight of the measures taken by most States in response [to the health crisis](#).

[1] The authors would like to thank Sabine Ries, Julian Clarenne, Giacomo Delledone, Armel Le Divellec and Benjamin Morel for their careful proofreading.

[2] It merely supports "the European Commission's initiative to monitor emergency measures and their application in order to ensure respect for the fundamental values of the Union".

[3] As early as 2017, MP Aurélien Taquet had imagined a virtual Parliament "where each of his colleagues will appear on the screen, debating but from a distance". This premonitory idea was based on the observation that "being together today no longer implies being together at the same time in the same place".

[4] A rump parliament is now composed of only a small proportion of the members who normally make up the rump parliament. The English Rump Parliament thus corresponds to the Long Parliament purged after the purge led by Thomas Pride in December 1648. In Germany, the Rumpparlament refers to the MPs from the Frankfurt National Assembly, who met in Stuttgart from 6 to 18 June 1849 to unify the country under a constitutional monarchy. The aim was to avert the failure of the constitution of the "Paulskirchenverfassung" (Paul's Church).

[5] Only three members of the far-right Alternative für Deutschland (AfD) abstained from the vote.

[6] This decision of the German Parliament is part of the "democracy that can defend itself" (Streitbare Demokratie). In the context of inter-organ litigation, the Federal Constitutional Court regularly invokes this "constitutional imperative" (Verfassungsgebot) of the Bundestag's "ability to function" (Funktionsfähigkeit), as for example in its decision of 16 July 1991 (BVerfGE 84, 304).

[7] Christoph Schönberger et Sophie Schönberger, « Regiert bald in Notausschuss ? », *Frankfurter Allgemeine Zeitung*, 26 mars 2020 ; Jens Kersten, « Covid-19 – Kein Ausnahmezustand ! », *Zeitschrift für Rechtspolitik*, 2020, n° 3, p. 65.

However, there has been a general trend towards the loss of power by Parliaments to the benefit of the executive branch, even though the variety of configurations is plural. Some governments have taken advantage of the health crisis to strengthen their powers, sometimes beyond all [proportionality](#). This is especially the case [in Hungary](#), where a law adopted on 30 March grants "special powers" to the Prime Minister, in particular the power to legislate by decree and to derogate from legal provisions in the context of a state of emergency of indefinite duration, without providing for a [regular meeting of Parliament during this period](#). These developments have provoked hostile but rather moderate response within the European Union, to the extent that Hungary itself joined the joint declaration issued by the Member States "concerned about the risk of violation of the principles of the rule of law, democracy and fundamental rights arising from the adoption of certain emergency measures"[2].

In Poland, neither a state of emergency nor a state of natural disaster was formally declared, as both would have had the immediate effect of preventing the presidential elections scheduled for 10 and 24 May. It was finally postponed to a later date only four days before the scheduled date.

Largely dominated by the PiS (Law and Justice), the lower house (Sejm) adopted a revision of the electoral code on 6 April introducing the widespread use of postal voting. This determination to maintain the election despite the circumstances was explained in particular by the fact that polls were favourable to outgoing president Andrzej Duda, close to Jarosław Kaczyński. The leader of the PiS was forced to postpone the election by the leader of the Agreement Party, whose support was essential

to maintain his parliamentary majority.

Even beyond these examples, the role of parliaments has been largely reduced to the bare essentials in most European parliamentary systems. This is evidenced by the use of new technologies, with some parliamentary work being carried out at distance, by videoconference, which can only serve as a stopgap measure[3]. The increase in the number of select committee meetings attracted attention, with the risk of the development of forms of "rump parliaments"[4]. The Bundestag introduced § 126-a in its regulation allowing it sit in reduced format until 20 September[5]. The aim is to preserve the chamber's "capacity for action" (*Handlungsfähigkeit*), a recurring theme in Germany[6]. The Italian *Parlamento* is considering distance voting, while the President of the European Parliament has gone so far as to allow temporary voting by e-mail.

In spite of everything, at a time of "distancing", assemblies are more important than ever, the publicity of their work being a vector of the legitimacy of action undertaken by the authorities[7]. More specifically, oversight of assemblies remains an essential requirement of parliamentary democracy, including in times of health emergencies. Thus, some States can be distinguished by the introduction of oversight instruments that derogate from ordinary law, the scope of which should be studied in the light of the health, economic and political crisis affecting the world, the almost permanent state of emergency since the fight against terrorism and the emergence of technologies threatening freedom. Naturally, we do not aim to cover all the European parliamentary democracies in their entirety. Rather, the idea is to provide a representative comparative overview of the responses that parliamentary systems have given to

the Covid-19 health crisis in Europe, revealing a trend towards the withdrawal of parliaments from executive bodies and the limitation of parliamentary scrutiny.

I. THE SELF-IMPOSED DIVESTMENT OF PARLIAMENTS IN FAVOUR OF EXECUTIVE BODIES

The health crisis triggered by the progress of Covid-19 has not been without consequences for the institutional balance within European countries. The divestment to which the parliamentary chambers themselves agreed in favour of governments[8] has led to a political centralisation of the main competences for managing the health crisis to their own detriment and, in many cases, also at the expense of local authorities. As such, the health crisis has had an impact on all systems of government beyond the different forms of territorial organisation experienced by States. While this refocusing does not appear to be as pronounced everywhere, it can be observed in all the parliamentary democracies under consideration, whether they are marked by a high degree of vertical division of power or by a federal organisation.

A. Centralization of competences within federal and regional states

In response to the health crisis, most parliamentary democracies have reacted by emphasising the pre-eminence of executive bodies over assemblies, which is moreover in line with the logic of majority parliamentarianism[9].

Italy declared the state of emergency on [31 January](#). The first steps taken by the government were supported by the legislative decision[10] No.1 of 2 January 2018 regarding the Civil Defence Code and Act No. 833 of 1978 establishing the National Health Service. Article 5 of the *codice della protezione civile* assigns an essential role to the President of the Council in the maintenance of law and order and the coordination of public authorities. Under the *emergenze di rilievo nazionale*, the latter is empowered to adopt orders contrary to any provisions already in force, provided that such derogations are expressly indicated and subject to compliance with the general principles of

national and European law[11]. Due to their sensitive nature, these orders require special justification.

In addition, the Italian public authorities have endeavoured to diversify the legal basis for the measures taken from 20 February onwards. Law No. 833/1978 and, in particular, Article 32 thereof, have been mobilised to allow the Minister of Health to issue orders on hygiene and public health for the entire national territory. As the health crisis intensified, the government deemed it necessary to adopt decree-law No. 6 of 23 February 2020 on *"urgent measures for the containment and management of the epidemiological emergency of Covid-19"*. According to Article 77 of the Constitution, a delegation of power from the assemblies is not immediately necessary for decree-laws (*decreti legge*), their vocation being to remedy an extraordinary situation of necessity or urgency. This decree-law empowers the competent authorities to adopt *"any containment and management measures that are appropriate and proportionate to the evolution of the epidemiological situation"*[12]. These powers are all the more important since the decrees issued by the President of the Council do not fall within the regulatory field but within that of orders, with all that this implies in terms of temporary derogation from the law in force. Since then, six decree-laws, eight decrees issued by the President of the Council, fourteen ordinances and twenty-five circulars issued by the Minister of Health, six circulars and a directive for the prefects of the Minister of the Interior have been [adopted](#). In real terms this normative structure reflects a ["logic of centralisation and speed"](#), but this praiseworthy search for efficiency has tended to undermine significantly the role of Parliament and local and regional authorities to the benefit of the Council of Ministers. Thus, there are uncertainties about the *ragionevolezza* – in other words the wisdom – and the proportionality of this measure[13]. In this regard, [Massimo Cavino](#) maintains that ["it is legitimate to have some doubts about the series of measures of which Decree-Law No 6/2020 is the first link"](#). The issue is all the more crucial in view of the question raised as to the adequacy of the balance struck between the right to health provided for in Article 32 of the Constitution and other fundamental rights and freedoms.

A similar assessment can be made in Spain, where

[8] Although explicitly authorized by Parliament, divestment on such a scale and over such a short period of time is, if not unprecedented, at least rare in most states. In France, this quantitative and qualitative disengagement does not seem to have had an equivalent since the beginning of the Fifth Republic. Elina Lemaire, "Can a parliamentary assembly function as a 'select committee'?" *Blog Jus Politicum*, 13 April 2020.

[9] Denis Baranger et Armel Le Divellec, « Régime parlementaire », in Dominique Chagnollaud de Sabouret et Michel Troper (dir.), *Traité international de droit constitutionnel*, Tome 2, Dalloz, 2012, p. 186 et s.

[10] Since they concern only limited areas, legislative decrees require a delegation law, which is valid for a fixed period of time. Thus the scope of *decreti legislativi* is circumscribed, which distinguishes them from *decreto-legge* (decreti-legge), provided for in Article 77 of the Constitution, and referred to above.

[11] Article 25 du code de la protection civile.

[12] Article 1 § 1 of Decree-Law No. 6 of 23 February 2020. These measures shall be adopted by decree of the Prime Minister, on the proposal of the Minister of Health, after consultation with the Minister of the Interior, the Minister of Defence, the Minister of the Economy and Finance and the other Ministers competent in the matter, as well as with the Presidents of the competent regions, if they concern a single region or certain specific regions, or with the President of the Conference of Presidents of the Regions, when they concern the national territory.

[13] This is an important requirement in the case law of the Italian Constitutional Court. In Decision No. 127 of 1995, the Court stressed "the exceptional nature of the power to derogate from primary legislation, conferred on administrative authorities with ordering powers, on the basis of a specific legislative authorisation. [...] Precisely, the exceptional nature of the legislative authorization implies that the powers of the administrative bodies must be well defined in terms of content, timing and manner of exercise (Judgement No. 418 of 1992)".

the government has passed several decree-laws even before declaring a state of emergency. Decree-laws may be issued "[in case of extraordinary and urgent need](#)" and are not submitted to parliamentarians for approval until 30 days later. Some ten decree-laws have been passed in connection with the health crisis. In addition, to have more substantial means to deal with the spread of the pandemic, the Spanish government declared a "state of emergency" on 14 March, for the second time since the restoration of democracy in 1975[14]. The *Congress of Deputies* was only asked to extend the state of emergency after the maximum period of fifteen days provided for in Article 116 of the Constitution. Although they could in theory make this extension subject to certain conditions, parliamentarians approved it readily. The declaration of a state of emergency took the form of Royal Decree No. 463/2020 of 14 March for the management of the health crisis, which the government issued in accordance with Organization Act No. 4/1981 of 1 June 1981. This text relating to the state of emergency specifies that it may be declared "*in all or part of the national territory, when health crises occur which involve serious alterations to normal life*".

It should be noted that the decree grants extensive powers only to members of the government exercising an essential function in the management of the crisis. The Ministers of Defence, the Interior, Transport and Health may, in this capacity, "take the decrees, resolutions, provisions and interpretative instructions" that prove necessary to "protect persons, property and places", without any particular intervention by Parliament. The state of emergency has had the effect of centralizing certain crucial powers in Madrid and relieving the Autonomous Communities of them. The Royal Decree of 14 March stipulates that all law enforcement agencies are placed directly under the authority of the Minister of the Interior, including those that normally depend on local authorities, while the Minister of Health is placed at the head of all civil health authorities for the purpose of distributing health resources [throughout the country](#). This refocusing of powers has been strongly criticised by some Autonomous Communities, in particular Catalonia and the Basque Country, which considered that the decree "[violated their powers in the field of health](#)

[management](#)". In all events, it is undeniable that the declaration of the state of emergency marked a new phase in the political management of the crisis, as the government initially allowed the Autonomous Communities to act under the "old health sector law" and to take specific public health measures adapted to the [local situation](#)[15].

In Belgium, the local executives acted before the federal government, which was only able to do so by virtue of the special powers granted by the federal Parliament. The parliaments of Brussels, Wallonia and the French Community did not wait long to take the initiative by delegating powers to the local executives. The prerogatives thus exceptionally delegated by these local assemblies, with the notable exception of the Flemish Parliament, enabled them to take [appropriate measures](#) directly and to develop legislation "[without going through a long and cumbersome parliamentary procedure](#)". The growing pressure of the health crisis has enabled the release of a political situation that seemed inextricable [at federal level](#). Negotiations for the formation of a coalition government had been ongoing for more than ten months and a government had been expediting [day-to-day business](#) since December 2018.

Sophie Wilmès became head of government in October 2019. On 19 March, the MPs of nine political parties expressed their confidence (Wilmès II government) under special conditions, since the vote was held in three different rooms in the *Palais de la Nation*, the seat of the Federal Parliament, so as to avoid any risk of spreading the virus[16]. The Prime Minister pledged to stick to business as usual for areas not related to the health crisis and to seek confidence again in six months. The Belgian executive was granted "special powers" when Parliament voted on two enabling laws[17] the use of which was implicitly based on article 105 of the Constitution[18]. Under these enabling laws, the predecessor of which dates back to the fight against the A/H1N1 influenza pandemic in 2009, the federal government can issue "royal orders of special powers" for a period of three months, renewable once, in areas of competence related to the management of the health crisis and its

[14] The state of alert had so far been implemented only once, in 2010, to allow the Head of Government, José Luis Zapatero, to restore public air transport service, following the strike by air traffic controllers. Marc Carrillo, "La ley ante el coronavirus", *El Periódico*, 10 March 2020. Unlike the other two exceptional states referred to in the Spanish Constitution, a state of emergency and a state of siege, its initiation is not subject to the prior authorisation of the Congress of Deputies. See José María LaFuente Balle, "Los estados de alarma, excepción y sitio", *Revista de derecho político*, 1990, No. 31, pp. 33 et seq.

[15] Denis Jouve, « L'état d'alerte : la centralisation des pouvoirs face au Covid-19 en Espagne », *op. cit.*, p. 1.

[16] The extraordinary nature of this election is also due to its result: "[almost two thirds of the members of the assembly gave confidence to a three-party government with only 38 seats, just a quarter of those in the assembly](#)".

[17] The first law relates to matters adopted "on an equal footing" by the House of Representatives and the Senate under article 74 of the Constitution, while the second law relates to "matters subject to optional bicameralism under article 78 of the Constitution", which are voted on by the House of Representatives and optionally, at its request, by the Senate. This division into two texts follows the [express request of the State Council](#).

[18] Article 105 of the Belgian Constitution: "The King has no powers other than those formally attributed to him by the Constitution and the special laws enacted by virtue of the Constitution itself".

socio-economic consequences. The powers granted to the executive are therefore very extensive, to the point that it practically enjoys, according to Céline Romainville's formula, "[a blank cheque](#)" on the part of the parliament, even though directly applicable measures can only become legislative acts after their adoption by Parliament. A formation called "K+10" holds a weekly meeting in order to ensure better operational management of the crisis. It comprises a small Council of Ministers including the Prime Minister and the Deputy Prime Ministers of the government, as well as the leaders of the parties that have granted it special powers[19].

Germany did not declare a state of emergency. While the Basic Law does provide for an "emergency laws" (Notstandsverfassung)[20], the latter was not considered applicable in the present circumstances. Article 35 of the Basic Law could have applied, since the health crisis is no different from the cases of "natural disaster" and "particularly serious disaster" referred to in those constitutional provisions. This reluctance to resort to Notstandsverfassung stems from both historical factors and because the effects attached to these constitutional provisions do not allow for a meaningful response to the health crisis. Nevertheless, a tendency towards centralization has been observed across the Rhine: on the one hand, from the Länder to the Bund - at least for certain powers - and, on the other hand, from the Bundestag to the [Federal Government](#), which has resulted in a strengthening of the competences of the Federal Ministry of Health. With regard to the first trend, the Länder acted individually, before a form of political coordination emerged under the Infection Protection Act (Infektionsschutzgesetz), amended on 25 March. Article § 28 of this law stipulates that in the event of a finding or suspicion of infection, the "competent authorities" are empowered to take proportionate and provisional "protective measures" which may run counter to fundamental rights (personal freedom, freedom of demonstration and inviolability of the home). According to article § 32, the executive bodies of the Länder may take the route of regulation (Rechtsverordnung). With regard to the second trend, centralization has taken place in favour of the Federal Ministry of Health. Thus, § 5 2-1 of the ISG provides

that this Ministry is authorised to oblige persons returning from abroad to provide information on their state of health or to have themselves examined. Consequently, the implementation of the law, which is the responsibility of the Länder under Article 83 of the Basic Law, appears to have been transferred to the Federal Ministry. However, such empowerment is not possible under ordinary law. The provisions of § 5 (2) of the ISG empower the Federal Ministry of Health to adopt "deviations from the provisions of this Act by decree without the consent of the Bundesrat". The scope is wide, since this concerns almost all laws applicable to the development, production and distribution of medicines and laws aimed at ensuring the functioning of the health system and the supply of the population. By breaking away from the Bundesrat's opinion, the established mechanism goes even further than Italian centralisation, where the President of the Council is still obliged to consult the regional authorities, even if their opinion is not binding. The situation is particularly astonishing in a federal system.

The fact that a federal ministry may not only implement, but also derogate from legislative provisions for a specified period of time[21], goes beyond the boundaries of the field within which it has the power to issue orders. This new ministerial prerogative appears difficult to reconcile with Article 80 (1) of the Basic Law whereby "*the federal government, a federal minister or the executives of the Länder may be authorized by law to issue regulations. This law must determine the content, purpose and scope of the authorization granted. The regulation must state its legal basis. If a law provides that an authorisation may be subdelegated, a regulation is required for the delegation of the authorisation*". This area "reserved" to Parliament (Parlamentvorbehalt) is essential. Autonomous regulations are in principle excluded, while legislative delegations are viewed with suspicion. Criticism of the constitutionality of the system are all the more numerous since, as [Christoph Möllers](#) points out, it is precisely in times of crisis that the question of political negotiating venues, which is crucial in view of the general ban on meetings, arises[22]. It is therefore doubtful whether Parliament has taken the right decision to withdraw at this point from the production of regulations, even if the system is accepted as

[19] While parliamentarians from the Nieuw-Vlaamse Alliantie Party (NV-A) did not vote confidence, they nevertheless agreed to grant special powers to the Government.

[20] This term refers to the "innerer Notstand" (innerer Notstand) of Article 91 of the Basic Law (FL), relating to (insurrectional) crises threatening the liberal and democratic constitutional order, as well as the "Spannungsfall" (Spannungsfall) of Article 80a FL and the "Verteidigungsfall" (Verteidigungsfall) of Title X (Articles 115-a to 115-l) of the Basic Law, relating to armed aggression of the territory. It is also important to mention the provisions of Article 35 FL on mutual assistance between the Bund and the Länder in the event of a "natural disaster" or "particularly serious incident".

[21] Until the health crisis is resolved and at the latest by 31 March 2020 according to § 5 (4)-1 of the ISG.

[22] Christoph Möllers, « Parlamentarische Selbstentmächtigung im Zeichen des Virus », Verfassungsblog, 26 march 2020.

being in conformity with the Basic Law, especially since the enactment of regulations is no [faster than that of legislation](#). Finally, the government has been affected by this new organisation of powers. Due to the emergency, essential powers are in fact likely to be exercised by the Federal Ministry of Health in agreement with other ministries depending on the matters in question. This strategic reduction of decision making within departmental spheres alone could gradually lead to a certain "[depoliticization of far-reaching decisions at the highest level](#)". Beyond these considerations of democratic legitimacy, the questions concern the normative system and are of a procedural nature. It is important to prevent the fundamental norms structuring the division of labour between Parliament and Government on the one hand and between the Federal Government and the Länder on the other from being subject to an unwritten constitutional emergency clause. Nor is it possible to wait for judicial review to resolve these issues.

In an emergency, the judge usually exercises a great deal of restraint, so that the legal texts that are supposed to guarantee the rights of individuals in a democracy might ultimately no longer be respected to the letter. Only the representatives of the people, whose elective legitimacy endures in times of crisis, have sufficient political resources to control profound - albeit temporary, but often long-term changes in the rule of law and executive actions. This presupposes that there is the political will and that parliamentarians have exceptional means of oversight adapted to these exceptional times.

B Centralization of competences within unitary States

France has established a "state of health emergency" along the lines of that provided for by Act No. 55-385 of 3 April 1955[23]. Rather than resorting to this system, the government has developed an ad hoc system. According to the explanatory memorandum of the emergency bill, the health crisis, "unprecedented in a century, highlights the need to develop the means available to the executive authorities to deal with the emergency" and, due to its "hitherto unimagined scale", calls for a response "on a scale that could not itself

have been envisaged when the existing legislative and regulatory provisions were devised". The government has established a new state of emergency in response to this extraordinary challenge. On the basis of Laws Nos. 2020-290 of 23 March 2020 and 2020-365 of 30 March 2020, the declaration of a state of health emergency allows the Prime Minister to take, by decree, measures restricting freedom of movement, freedom of enterprise and freedom of assembly, measures to requisition any goods and services needed to end the health disaster, and temporary price control measures. These measures must be proportionate to the risks involved. The Minister of Health has the power to decide by order all other measures that fall within the framework set by the Prime Minister[24]. There is thus a concentration of power in favour of the government, even if during the legislative procedure (abnormally swift from a constitutional point of view), the government is not able to make the necessary changes[25], Parliament [has been able to impose](#) some of its views on the executive branch. In addition, like its Spanish and Italian counterparts who have used decree-laws, the French government has legislated massively by means of Statutory Instrument, as empowered by Parliament through the law of 23 March. In one month, no fewer than [46 Statutory Instruments were issued](#) to deal with the Covid-19 epidemic. As the political consensus was then total, the law of 23 March 2020 was not referred to the Constitutional Council.

While the process of de-confinement began on 11 May, the executive branch wished to extend the state of health emergency until 23 July thanks to a law adopted by the two assemblies on 9 May.

The British Parliament passed the Coronavirus Act 2020, which gives the government extensive powers. The Act was introduced in the House of Commons on 19 March without debate, before going through two days of successive committee and plenary sessions, then going through all stages of discussion in the House of Lords on 25 March and being enacted the same evening. Its rapid adoption was enabled by the vote on 23 March on a resolution to suspend the internal rules of the House of Lords on the proposal of the minister responsible for relations with Parliament. The short time devoted to the examination of this bill

[23] The "safe" state of emergency was triggered on six occasions, in 1955, 1958, 1961, 1984, 2005 et 2015.

[24] For a more detailed presentation of the arsenal now provided for the executive bodies, cf. Anne Levaed, « État d'urgence sanitaire : à nouveau péril, nouveau régime d'exception », *La semaine juridique*, n° 13, mars 2020, p. 613-616 ; Jean-Éric Gicquel, « Covid-19 : crise sanitaire et crise des normes », *Recueil Dalloz*, 2020, p. 719 et s.

[25] The Constitutional Council refused to censure the failure to comply with the constitutionally defined deadlines, stating 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 procedural rules laid down in Article 46 of the Constitution" (Decision No. 2020-799 DC of 26 March 2020 on the emergency organic law to deal with the Covid-19 epidemic).

appears all the more disproportionate as its volume is 329 pages (compared to only 12 pages for the French law of 23 March 2020).

Unlike the French government, which has suspended all current reform projects until further notice, including the delicate pension reform, the British executive wishes to continue implementing its political programme[26]. The immigration bill is still on the agenda. There are still many questions about the voting process, although the Speaker of the House of Commons initially suggested doubling the "split vote" time, usually set at twenty minutes, which involves counting the votes by taking into account the passage of members through two separate corridors of access. This adaptation could have considerably increased the length of the vote, which led some members to choose the option of digital voting, without the issue being decided at this stage[27].

[26] Consideration of the immigration bill, which was originally on the agenda for the first week of the resumed session, has, however, been postponed to allow time for the necessary fine-tuning of the remote voting system.

[27] In France, a system of voting delegation has been introduced to enable group chairmen to vote for all members of their group.

[28] Article 24 of the French Constitution makes this distinction by stating: "Parliament passes the law. It controls the action of the Government. It evaluates public policies". This is also the case, for example, in the German and Spanish constitutions which, like many other foreign constitutions, differentiate between the functions of legislation and control, without, however, recognising a third function autonomously.

[29] Thus René Capitant considered that "when we speak of the separation of powers, of the legislative and the executive, we are still speaking the language of the constitutional monarchy", (« La réforme du parlementarisme », rééd. in *Écrits d'entre-deux-guerres : 1928-1940*, Éditions Panthéon-Assas, 2004, p. 327 et s.).

Lithuania reacted early: the "declaration of extreme situation" was formulated by the government as early as 26 February without any intervention by the Seimas (Parliament). The 1998 Law on Civil Protection, which empowers the government to take direct action in the event of "[an extreme situation of sudden and serious danger to the life or health of the population](#)" and in particular to ensure "[the provision of necessary material resources](#)", was adopted in 1998, appeared to be the most suitable for the circumstances. Unlike its two Baltic neighbours, but like its German counterpart, the Lithuanian government did not consider it necessary to declare a state of emergency, despite the insistent demands of the opposition. The question, relayed by [certain lawyers](#), is whether this declaration of an extreme situation constitutes a sufficient legal basis to justify restrictions on freedoms in the current health context, or whether such restrictions can only be justified under the [2002 State of Emergency Act](#), whose existence is provided for in the 1992 Constitution. This debate will not be decided by the Constitutional Court for several months at the earliest, following an individual appeal challenging the constitutionality of the Civil Defence Act of 1998. In any event, the government's refusal to declare a state of emergency directly affects the parliament, whose oversight capacity remains limited, even though the government has more prerogatives

than usual. The executive's room for manoeuvre would be greater in the event of a state of emergency but, at the same time, parliamentary control could be more extensive than at present. The situation is similar to that in Poland, where the executive is willing to allow itself a significant degree of discretion.

In Europe, many parliaments have conferred extensive powers on the government (Belgium, France, Germany, Italy, Lithuania, Spain and the United Kingdom in particular). Two clear trends seem to be emerging: on the one hand, the powers of the executive bodies have been strengthened to the detriment of the assemblies; on the other hand, the same executive bodies enjoy greater prerogatives to the detriment of the deliberative bodies of territorial authorities or, as the case may be, federated entities. These changes have been made as a matter of urgency, without it being possible to consider in detail the question of the possible strengthening of parliamentary scrutiny arrangements. Before confinement, some parliamentarians had to improvise the conditions for the continuity of their activities by using new technologies, while some were not obliged to plan the practical details of their work remotely. Generally speaking, a contradiction that is difficult to overcome emerges between the decisive nature of the decisions taken by the government and the relatively unobtrusive control exercised by parliament.

II. THE TREND TOWARDS THE NEUTRALISATION OF PARLIAMENTARY OVERSIGHT

Parliaments have consented to the concentration of powers in favour of the executive bodies, which calls for a counterpart in terms of oversight. Falsely clear[28], the distinction between legislation and oversight carries with it representations of original constitutionalism[29]. Yet because of what Pierre Avril calls their "[fundamental unity](#)"..., these go hand in hand: for example, the triggering of a review into the constitutionality of laws, granted to parliamentary minorities, is likely to be a matter for legislation and review. Legislation may give rise to scrutiny and vice versa. This aspect, which is often overlooked, tends to underline the extreme diversity of monitoring activities,

as shown, for example, by Title III of the Rules of Procedure of the *National Assembly*. This brings together a variety of procedures, ranging from accountability to investigations. Contrary to the traditional, restrictive conception of the Constitutional Council, parliamentary oversight is in fact "[at the crossroads between accountability and representation](#)". The fact remains that in these times of confinement resulting from the health crisis, parliamentary oversight is minimalist, while the restriction on individual freedoms "[deserves more debate, especially in view of the economic, social, family, psychological and political consequences it will have](#)".

In order to ensure the parliamentary continuity of their work, many assemblies have made rapid changes to their rules of procedure or have taken a decision via a ruling adopted by their governing body: does the first course of action indicate that these arrangements for remote meetings are likely to continue, albeit only partially? In addition to this fundamental question, the question of the practical consequences for the acuteness of oversight arises, given how difficult it seems for parliamentarians to develop an iterative exchange with their interlocutors at hearings of ministers and administrative officials at a distance. As it has been exercised in recent weeks, parliamentary oversight tends to vary from one assembly to another in terms of methods, aims and effects. In this respect, some parliaments have chosen to continue to use the "traditional" arsenal of parliamentary oversight during the period of the health crisis, while others have opted for monitoring techniques that are not part of the ordinary law.

A. "Traditional" oversight instruments to overcome an exceptional situation

Despite the exceptional nature of the situation, no specific parliamentary oversight mechanisms were set up in Germany and Italy in the context of the health crisis, apart from virtual meetings to ensure parliamentary continuity. The lack of specific monitoring is worrying, given the infringements that may be made in respect of certain individual freedoms. Moreover, a constitutional bill was tabled on 30 March

last by Stefano Ceccanti and other members of the Camera dei deputati with a view to inserting Articles 55 bis and ter into the 1947 Constitution in order, on the one hand, to organise the procedure for the declaration of a state of emergency in the supreme law and, on the other hand, to provide for the establishment of a special parliamentary committee in such circumstances.

In Spain, the Cortes Generales have not set up a parliamentary committee dedicated to the management of the epidemic. However, the declaration of a high alert status does not relieve the government of its responsibilities, as stated in Article 116(6) of the Constitution^[30]. Parliament is therefore being called upon to play a central role in overseeing the actions of the executive branch, as the President of the *Congress of Deputies* pointed out, stating that the Congress should "[continue to perform its constitutional functions of legislating and overseeing the government, while taking into account the pluralism of the Chamber](#)". Meetings are therefore being held both in the Chamber and in committee, but with a limited number of Members present and by facilitating remote participation in debates.

The logic is quite similar across the Channel. In response to the health crisis, the British Parliament has chosen to bring forward its "holidays" and suspend most of its activities for a month. This abrupt interruption of parliamentary activity led the Speaker of the House of Commons to urge the Minister for Parliamentary Relations to continue to hold question time with the Government. In a letter dated 1 April, he pointed out that the requests for information from MPs, "[overwhelmed with questions and personal requests from citizens waiting to be answered](#)" on crisis management, could not wait until the restart of the session. Although this request was not acted upon, parliamentary activity was not reduced to nought, as several Select Committees have held meetings in the meantime. The Health and Social Care Committee held the first virtual meeting in the history of the British Parliament on 26 March, in order to continue its oversight of the health management of the crisis, while the Treasury Committee met to assess the financial implications of the crisis.

A few other specialized committees have met remotely, allowing the maintenance of a minimum level

^[30] Article 116(6) of the Spanish Constitution: "The declaration of a state of alert [...] does not alter the principle of the responsibility of the Government and its agents recognised in the Constitution and the laws".

[31] *Nor has the Liaison Committee, which brings together all the chairs of the Select Committee of the House of Commons and is normally responsible for arranging hearings of the Prime Minister from time to time, met since the start of the health crisis. However, the Prime Minister had already cancelled his last appearance before this Committee on 23 October 2019, the day before his hearing, and promised to attend within six months.*

[32] *The use of these means of communication has not been without difficulty for some, as conceded by the Minister for Relations with Parliament. After recalling that Parliament had been unable to sit during the Black Death of 1349, Jacob Rees-Mogg said that "thanks to modern technology" he had been able to "surpass 1349" and thanked his colleagues "as traditional as he was for accepting these new constraints". The House of Commons Committee announced on April 16 that the system would be extended to motions and legislative debates "once the hybrid process is deemed satisfactory and sustainable.*

[33] *On the occasion of the hearing of Minister Nicole Belloubet by the Senate's Law Committee on April 9, 2020, for example, the intervention of several parliamentarians was made difficult by difficulties in using the videoconferencing system. One Senator, in particular, was able to begin her intervention only after a minute of unsuccessful attempts, not without having let slip a few inappropriate words that she thought were inaudible.*

[34] *Such a development did not appear necessary insofar as, in accordance with the European Treaties, the action of the European Union in health matters is secondary to that of the States.*

of control. On the other hand, no ad hoc committee has been established to monitor the government's action in health matters and the implementation of the Coronavirus Act 2020 transversally[31], hinting at an unusually inactive British Parliament. Resumption after the Easter recess has seen some activity, with the House of Commons planning to hold about 20 virtual Select Committee meetings per week, which is "[less than usual but probably sufficient given the circumstances](#)". In a letter sent on 14 April to each Member of Parliament, the Speaker announced that parliamentary business would be resumed in a new way, forcing the centuries-old British Parliament to become a virtual assembly, at least for a while. These arrangements were approved without a formal vote at the first plenary sitting of the House of Commons on 21 April, in the presence of some 30 MPs. In force until 12 May, the "Hybrid Control Procedures Motion" reduced the usual length and number of meetings, while allowing the Speaker to limit the number of participants. The Speaker restricted the physical presence of 50 MPs in the plenary session, which can be attended by up to 120 MPs by videoconference![32]!

In Lithuania, the traditional repertoire of parliamentary oversight has found application. As early as 18 March, the Seimas Bureau recommended that committees organise their meetings remotely in accordance with Rule 186(11) of the Seimas Bureau's Rules of Procedure. While this recommendation is generally being followed, the chairmen of some committees have insisted that physical meetings be maintained. In addition, a few plenary sittings took place in the Chamber, despite the rules on physical distancing. In addition, the Seimas modified the parliamentary calendar and brought forward the break by one week originally scheduled for the end of May. Following its meeting on 23 March, the Seimas Bureau instructed the Parliamentary Committee on Public Order to present an assessment of the legal framework for the management of the health crisis and to propose more appropriate regulations. The Bureau meeting, partly organised remotely, was broadcast online on the Seimas' YouTube channel.

The Lithuanian Parliament therefore differs from the majority of parliaments in Europe, which have organised their meetings via the

"Zoom" application, which raises questions as to the reliability of this system. In the context of videoconferencing, the President of the sitting often seems to be more strictly responsible than usual for meeting deadlines, at the risk of seeing him or her gradually turning into a mere "[web moderator](#)". These technical and procedural difficulties should not be ignored, as they are likely to hamper the proper conduct of the debate[33]. It must be acknowledged that, due to their difficult organizational conditions, these videoconference meetings, whose purpose is to follow up on the measures taken by the government, "[have no other consequences than to inform, rather than to check](#)". The use of ordinary instruments does not seem to allow parliaments that have made this choice to guarantee sufficient oversight in view of the seriousness of the social and economic situation. It remains to be seen whether this oversight, which is made more difficult by videoconferencing, is exercised more effectively in parliaments that have set up specific and dedicated mechanisms to deal with the crisis.

As for the European Parliament, it has chosen to transform itself into a virtual parliament. Unlike the national parliaments, it has not conferred any additional powers on the European executive[34], but it was forced to adapt its monitoring activity. Its timetable has been drastically revised so that it will not resume plenary sessions in Strasbourg until next September. The Conference of Presidents decided to replace them with "mini-sessions" scheduled in Brussels under special conditions in terms of their duration (1 day) and audience, since only group chairmen are allowed to speak in the Chamber, whereas the 100 or so MEPs present in Brussels do not attend. During the plenary sittings on 26 March and 16 April, the President of the European Commission spoke in front of an almost empty hemicycle, with most MEPs attending by videoconference. The practice is similar in the standing committees, which have continued their activities in a lighter manner. Oversight of the European executive is relatively weak when one considers the number of meetings held since the beginning of the crisis and the fact that no special committee or committee of inquiry has been set up to ensure specific follow-up.

B. Reinforced" oversight instruments commensurate with the health crisis?

In Europe, some parliamentary democracies have decided not to use the "ordinary law" for parliamentary oversight, which is considered "beneath the scale of the health crisis", but to resort to "exceptional" means. This has been the case in Belgium and France to some extent. Over and above the slogans about "strengthened" parliamentary scrutiny, it is important to know whether the reality is in line with the expectations that have been raised. However, it is likely that this is not always the case, since it is mainly the majority that directs and, in so doing, curbs oversight work.

In Belgium, in order to better control the action of the federal government within the framework of the texts implementing the law of special powers, the Chamber decided to create a "Covid-19 Standing Committee", whose status has the advantage of limiting neither its duration of exercise nor the scope of its broad and varied missions. The fact remains that this control depends in practice on the government's willingness to cooperate. While this is generally not wanting, it may be noted that the Federal Minister of Social Affairs and Public Health has decided to postpone her hearing for several days, preferring the time for decision and action to that of parliamentary control. The establishment of the Covid-19 Committee is significant. In Belgium, only the Federal Parliament, through the Chamber, has maintained relatively sustained activity, while limiting the debate in plenary session to the chairmen of parliamentary groups and one of their members. The majority of the Chamber has adapted its rules of procedure, adding an article stating that "in the event of a serious and exceptional situation which threatens public health and which prevents members of the Chamber from being physically present", parliamentarians taking part in the electronic ballot will be counted as present. The Brussels and Walloon parliaments have provided for the virtual participation of their members in a discussion on an urgent resolution, while the latter has also amended its rules of procedure in order to organise a system of double identification during votes. However, the question of guarantees of the security and sincerity

of the votes thus cast remains, since such questions have been raised by the transalpine doctrine, in particular[35].

Some parliaments suspended their work for several weeks in Belgium. The Parliament of the French Community closed its doors until 19 April, while the Flemish Parliament decided to restrict access to the plenary session to sixteen members and to suspend all its committee meetings, before allowing them to resume remotely from 8 April. In the Walloon Parliament, the plenary sitting of 15 April provided an opportunity for the six MPs present to activate, in the absence of a quorum, the new Rule 80.3 of the Rules of Procedure, which allowed their colleagues to participate without being physically present, thus inaugurating a hybrid and novel form of discussion. This is not neutral with regard to the virtual nature of parliamentary oversight in the management of the health crisis.

In France, the state of health emergency is close to the "traditional" state of emergency concerning the modalities of parliamentary control. Although the idea of subjecting the state of emergency to "[specific control, in response to parliamentary concern about counterbalancing the attribution of exceptional powers to the executive branch](#)" emerged in 1985, then in 2005[36], it was not legally realized until three decades later. This particular method of oversight results from an amendment adopted unanimously on 18 November 2015: since then, under the terms of Article 4-1 of the Act of 3 April 1955, "the National Assembly and the Senate shall be informed without delay of the measures taken by the government during a state of emergency. The administrative authorities shall transmit to them without delay copies of all the acts they take in application of this law. The National Assembly and the Senate may request any additional information within the framework of the monitoring and evaluation of these measures". The parliamentarians decided on a strict framework to the government and the administration. Prior to the promulgation of the law, the Law Committees of both assemblies exercised the prerogatives attributed to the Committees of Inquiry. The "traditional" means of oversight, including fact-finding missions, were not called upon, because they seemed "*below the level of the exceptional situation that typified the state of emergency*"[37].

[35] This is causing controversy in Italy, in particular, Cf. Renzo Dickmann, « Alcune questioni di costituzionalità in tema di voto parlamentare a distanza », *Federalismi*, avril 2020 ; Maurizio Bozzaotro, « Alcune considerazioni su voto parlamentare a distanza, corpi del sovrano e metafisica costituzionale della presenza », *Forum di Quaderni costituzionali*, n° 2, 2020.

[36] Julie Benetti, « Quel contrôle parlementaire de l'état d'urgence ? », *Constitutions*, n° 4, 2015, p. 518.

[37] *Ibid.*

Renewed in October 2017 with the SILT law, this monitoring "*by its very nature is exceptional*" aims to remedy the introduction into ordinary law of instruments specific to states of emergency, as was the case after the wave of terrorist attacks. Reinforced oversight is the responsibility of the Law Committee[38]. The practical arrangements for monitoring vary from one chamber to another because of the principle of autonomy. In the National Assembly, three MPs are devoted to it, including the Chairwoman of the Laws Committee, as well as two co-rapporteurs from the majority and the opposition. The senators have established a pluralist monitoring committee. This is a form of permanent internal mission of the Law Committee. Thus, all groups are directly integrated into the said committee. The senatorial logic differs from that of the National Assembly, which reflects their differences in the way they view their relationship to their internal pluralism.

In the context of the state of health emergency, a control mechanism was included in Article 2 of the Act of 23 March at the insistence of the French Senate[39]. Moreover, as early as 17 March, the Conference of Presidents of the National Assembly set up an information mission on the impact, management and consequences of the epidemic. All the standing committees and delegations are represented on it, as are the group chairmen. In so doing, the National Assembly seems to be moving somewhat closer to the model that has emerged from senatorial practice. The choice has been made to distinguish two phases. During the first phase, the aim is to ensure closer monitoring of the management of the health crisis. The President of the National Assembly chairs the fact-finding mission and is also its general rapporteur, with the eight committee chairmen as co-rapporteurs. Of these, seven are from the majority[40]. The under-representation of the opposition in all its sensitivities raises questions. Then, in the second phase, a new general rapporteur from the main opposition group and a co-rapporteur of the majority are to be appointed. The mission will then be given the prerogatives of a committee of inquiry. While this future rebalancing in favour of the opposition appears at first sight to be positive, it also calls for caution. On 25 March, the Senate's Laws Committee set up a pluralist monitoring

mission, chaired by Philippe Bas, and comprising eleven senators representing all the groups. The monitoring carried out within this framework extends to the Committee's areas of competence, such as the safeguarding of individual liberties, the protection of persons during confinement, the possible use of personal data, the continuity of essential public services, the actions implemented by local authorities and the conditions for organising the second round of municipal elections. The mission decided to adopt a thematic approach, relying on feedback from the field, regular communication of decisions taken by the government, prefects and mayors, and hearings with the ministers concerned.

While the merits of these initiatives to establish "enhanced" parliamentary oversight are indisputable, one cannot help but observe "[a certain retreat from what is provided for in the 1955 Act](#)". On the one hand, a state of health emergency postpones parliamentary authorization to one month, rather than the twelve days provided for under the "traditional" state of emergency. On the other hand, the economic emergency and adaptation measures provided for in Title II of the Act are not covered by this state of emergency in the strict sense of the term and, therefore, are not subject to the obligation of informing the assemblies. The Senate has not managed to impose its views. The same applies to the implementing measures. In this respect, the existence of a "[critical distance](#)" power and, in the words of [Norbert Gehrig](#), "dualism" for the benefit of the opposition is undoubtedly necessary, so that parliamentary oversight does not remain illusory and in view of reviving parliamentary oversight neutralised by the majority. This is evidenced by the obvious asymmetry between the National Assembly and the Senate (currently dominated by the opposition) regarding the deconfinement plan on the basis of Article 50-1 of the Constitution.[41] : while the vote was in favour of the executive in the Assembly but against in the Senate. The lack of political solidarity between the "scrutiniser" and the "scrutinised" is likely to reinforce the acuity of the monitoring carried out within the chambers.

[38] Cf. Jean-Paul Fourmont, « La constitutionnalité du contrôle parlementaire renforcé en matière de lutte contre le terrorisme ? », *Petites Affiches*, 2020 (publication in progress).

[39] In its notice, the Council of State considered that this reinforced monitoring was unconstitutional.

[40] Only the Chairman of the Finance Committee has been a member of the parliamentary opposition since a practice intended by the President of the Republic Nicolas Sarkozy in 2007, then on the basis of the revision of Article 39 of the Rules of Procedure of the National Assembly following the constitutional revision of 2008 on 27 May 2009.

[41] Under the terms of these provisions established by the 2008 constitutional revision, the Government may, on its own initiative or at the request of a parliamentary group, make a statement on a given subject that gives rise to debate and may, if it so decides, be put to a vote without incurring its responsibility.

Beyond political slogans, the future will tell whether "enhanced" parliamentary oversight, as practised in France, proves to be more effective than "ordinary" parliamentary oversight, as practised in most of Europe's parliamentary democracies. Far from being anecdotal, the "[oversight function is the parliamentary function par excellence](#)". It is not simply a commitment to political accountability on the part of the government, but refers to "all the means, legal or otherwise, used by the assemblies to get the government to explain the choices it proposes, the appropriateness of the resources allocated for the purposes it claims to be pursuing, the way in which the funds granted to it by the assemblies are used, the examination of the functioning of the public services it runs, the anomalies or malfunctions that may occur in them and which would justify special investigations, the conditions under which it [implements legislation](#), etc ..".

In terms of oversight, the parliamentary majority limits itself to justifying the initiatives taken by the executive branch. While the observation of the practice does not encourage optimism, one can nevertheless hope that the health crisis will be an opportunity for the Fifth Republic to regenerate itself and escape the torments of "[negative parliamentarianism](#)".

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