Lachmayer, Konrad, and Matthias C Kettmann. "Conclusions: Pandemocracy – Governing for the People, without the People?." *Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19*. Ed. Matthias C Kettmann and Konrad Lachmayer. Oxford: Hart Publishing, 2022. 329–346. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781509946396.ch-017>>.

Downloaded from Bloomsbury Collections, www.bloomsburycollections.com, 26 April 2023, 15:08 UTC.

Copyright © The editors and contributors severally 2022. Released under a CC BY-NC-ND licence (<https://creativecommons.org/licenses/by-nc-nd/4.0/>). You may share this work for non-commercial purposes only, provided you give attribution to the copyright holder and the publisher, and provide a link to the Creative Commons licence.

Conclusions: Pandemocracy – Governing for the People, without the People?

KONRAD LACHMAYER AND MATTHIAS C KETTEMANN*

I. Emergency Approaches in the Pandemic

A. An Unexpected Health Crisis in Europe

The COVID-19 crisis took European governments by surprise. This unpreparedness¹ was not, however, truly justified, since various epidemics had spread locally and globally within the last two decades.² Since the COVID-19 pandemic affected people around the globe to a different degree than previous pandemics, a more differentiated approach was required, but had not been elaborated in advance. Governments were forced to make rapid decisions in a complex and uncertain situation.³ While European governments had faced many different crises in the last two decades,⁴ a pandemic of this dimension and severity had not been experienced in Europe for a long time.⁵ European governments were unprepared, both on the domestic front and on the transnational European level.

* We are grateful to the contributors of the country chapters for reviewing this comparative analysis.

¹ See M Poiares Maduro and PW Kahn, 'Introduction: A new beginning' in M Poiares Maduro and PW Kahn (eds), *Democracy in Times of Pandemic. Different Futures Imagined* (CUP, 2020) 1, 8.

² The WHO provides an overview of disease outbreaks news, www.who.int/emergencies/disease-outbreak-news.

³ Frankenberg pleads for a learning law to overcome the challenges of the pandemic; see G Frankenberg, 'COVID-19 und der juristische Umgang mit Ungewissheit' (*Verfassungsblog*, on matters constitutional, 25 April 2020) verfassungsblog.de/covid-19-und-der-juristische-umgang-mit-ungewissheit/.

⁴ In Europe, the first two decades of the 21st century were marked politically by terrorism, an economic crisis, a decline of the rule of law, challenges to principles-led, human rights-based migration governance and accelerated global warming. All these developments were characterised as crisis: security crisis, economic crisis, rule of law crisis, migration crisis and climate crisis. The COVID-19 pandemic is understood as a health crisis.

⁵ The 1918 influenza pandemic (also known as Spanish flu) infected in four waves approx. 0.5 billion people; between 20–50 million people died globally. See eg L Spinney, *Pale Rider: The Spanish Flu of 1918 and How It Changed the World* (PublicAffairs, 2018).

It seems entirely justified to call the COVID-19 pandemic a public health emergency, which can be understood as ‘something dangerous or serious [...] that happened suddenly or unexpectedly and needs fast action in order to avoid harmful results.’⁶ Faced with such an emergency situation, democratic governments had to decide not only how their measures could stop the emergency and deal with its effects, but also to what extent their measures would affect their country’s constitutional and democratic framework. The latter consideration was sometimes treated with too little caution, as the chapters in this volume demonstrate.

B. A State of Emergency?

Not every emergency situation gives reason to call for a (constitutional or legislative) state of emergency. Temporary restrictions of human rights and the empowerment of the governments to act fast, efficiently and effectively could already fulfil substantive criteria of a state of emergency but could – depending on the respective legal order – also be handled in a regular normative framework. Such a substantive perspective cannot be placed on the same level as a formal declaration of a state of emergency by a government. Moreover, different countries and legal traditions have established different (legal) concepts of states of emergency. From an overall perspective, states of emergency can provide a constitutional framework to limit the transfer of power to the executive in times of emergency, but could also legitimise extensive executive powers while bypassing parliament. The analyses of different European democracies⁷ in this volume demonstrate a wide range of approaches towards states of emergency.⁸

To understand the democratic dimension, it is necessary to clarify if a state of emergency has been declared (by parliaments or governments) and if this declaration has been in conformity with the constitutional framework of the respective country. As a precondition to this question, it is possible to distinguish between countries whose constitutions provide the possibility of a state of emergency and those whose constitutions do not.

i. Constitutions without a State of Emergency Concept

The Swedish, French and Italian constitutions do not provide for a constitutional state of emergency, at least not in relation to peacetime. In Sweden, a shift of legislative powers to the executive was discussed and later enacted, while in France

⁶ Cambridge Dictionary, dictionary.cambridge.org/dictionary/english/emergency.

⁷ In certain countries like Hungary democracy had already been under threat before the pandemic.

⁸ All countries discussed in the volume have been affected significantly by the pandemic, some of them in the first wave, some in the second or third wave. The different countries represent different legal cultures and different constitutional traditions. The similarities and differences illustrate how constitutional culture affects the reaction of the different countries to the specific crisis.

a state of emergency was declared by Parliament; in Italy a state of emergency was declared (not through Parliament but) by resorting to a statutory source, ie Legislative Decree no. 1/2018.

The Swedish Constitution does not provide for a state of emergency in peacetime, but the introduction of such a concept was discussed. In Sweden, originating from situations that occurred in the 1970s, concerning an extra-legal state of emergency due to a debated principle of constitutional necessity, a debate has occurred on and off, mostly in literature.⁹ This concept of constitutional necessity would legitimise the deviation from constitutional law without having an explicit constitutional foundation. Although the Swedish state has continually rejected the concept of constitutional necessity since the introduction of the 'new' Instrument of Government in 1974, the concept arises in discussions whenever a crisis has occurred. Nevertheless, it still seems unlikely that governmental arguments towards an application of constitutional necessity would have been accepted in the pandemic.¹⁰

The French Constitution does not provide for state of emergency concepts except in Article 16 (presidential exceptional powers in the event of other serious threats) and Article 36 (state of siege in the event of foreign war or armed insurrection, which implies a transfer of various powers from the civilian to the military authority). This is why Parliament intervened to enable the executive to act as a matter of urgency in the COVID-19 crisis.¹¹ The Members of Parliament could have relied on two existing legislative bases (a statutory law of 1955 and Article L.3131-1 of the Public Health Code) but, under pressure from the executive, they chose to create a new emergency regime.¹²

The Italian Constitution does not provide state of emergency concepts except the state of war. However, it includes a provision (Article 77 Italian Constitution¹³), which was drafted with a view to natural catastrophes but was then interpreted more broadly.¹⁴ By relying on Legislative Decree No 1/2018 (ie, a statutory, not

⁹ See J Reichel and J Dahlqvist, 'Swedish Constitutional Response to the Corona Crisis – The Odd One Out?' in this volume.

¹⁰ *ibid.*

¹¹ In France, a state of emergency was declared based on the Act of Parliament, which introduced a fast-track procedure a new state of emergency system in a fast-track procedure. This ordinary statutory act was not referred to the constitutional judges. The specific Institutional Act suspended the deadlines for examining constitutional reviews. As the adoption of the Institutional Act did not consider appropriately the procedural framework laid down by the constitution, it clearly breached the constitution; the constitutional judges did not censure it, due to the 'specific circumstances' linked to the pandemic.

¹² See S Brunet, 'The Hyper-Executive State of Emergency in France' in this volume.

¹³ Art 77 Italian Constitution: 'The Government may not, without delegation from the Houses, issue decrees having the force of ordinary law. When in extraordinary cases of necessity and urgency the Government adopts provisional measures having the force of law it must on the same day present them for conversion into law to the Houses that, even if dissolved, shall be especially summoned and shall assemble within five days. The decrees lose effect from their inception if they are not converted into law within sixty days from their publication. The Houses can however regulate through laws juridical relations arising out of decrees not converted.'

¹⁴ Art 77 Italian Const is not explicitly circumscribed to natural catastrophes. Rather, in the mind of members of the Constituent Assembly, it should have been used to deal with these kinds of events.

constitutional source), a state of emergency was declared to confront the pandemic. After that, a set of decree laws deferring the adoption of rights-restrictive measures to decrees of the President of the Council of Ministers (ie, the head of the Italian government) were adopted. The decrees of the Presidents of the Council of Ministers were criticised for not meeting constitutional conditions to limit certain rights and freedoms.¹⁵

These examples show that, although a constitutional state of emergency did not exist, in times of crisis it depends on the bodies involved as well as the legal and political culture if the government is successful in introducing a new concept of state of emergency or not. While Sweden did not establish a state of emergency concept, the recurrent academic debate in Sweden about an extra-legal state of emergency illustrated the conceptual possibility. In Italy and France concrete concepts of state of emergency were established.

ii. Constitutions with a State of Emergency Concept

The UK, Hungarian, Swiss, German and Estonian Constitutions provide a state of emergency concept. While Hungary violated the constitutional framework by extending the concept of a state of emergency, in Switzerland the existing constitutional framework was active and the state of emergency was established in conformity with the constitution.¹⁶ In between these two poles of constitutionality and unconstitutionality concerning the declaration of a state of emergency, the Estonian case can be understood as a declaration of a state of emergency which was formally correct, but contradicted the constitutional principle of parliamentary democracy. In contrast to the aforementioned countries regarding the declaration of a state of emergency, the German and the UK's government did not declare a constitutional state of emergency in the COVID-19 pandemic.

a. Violating the Constitution by Creating a (New) State of Emergency

The Hungarian constitution provides an emergency clause, which was not fulfilled by the COVID-19 pandemic. As the Hungarian Fundamental Law only refers to natural and industrial disasters, a human pandemic was not considered to be encompassed by the Hungarian Constitution.¹⁷ In contrast to this constitutional

In practice, it was used to address a variety of circumstances, some of which did not even fit the concept of 'emergency'. See A Vidaschi, 'The Marginalisation of Parliament in Facing the Coronavirus Emergency: What about Democracy in Italy?' in this volume.

¹⁵ See A Vidaschi, 'The Marginalisation of Parliament in Facing the Coronavirus Emergency: What about Democracy in Italy?' in this volume.

¹⁶ Some constitutional scholars have argued that the measures aimed at addressing the (social and economic) consequences of the pandemic went beyond what Art 185(3) of the Swiss Constitution allows (eg, G Biaggini). See O Ammann and F Uhlmann, 'Switzerland: The (Missing) Role of Parliament in Times of Crisis' in this volume.

¹⁷ See F Gárdos-Orosz and Z Szenté, 'Using Emergency Powers in Hungary: Against the Pandemic and/or Democracy?' in this volume.

interpretation, the Hungarian Parliament enacted a Disaster Management Act in 2011, which can be considered as unconstitutional as it went beyond the definition of a disaster in the Hungarian Fundamental Law. As a first response to the COVID-19 crisis the Hungarian Parliament furthermore enacted an Authorisation Act in 2020, which also has to be seen as unconstitutional as the statutory act refrained from defining the legislative framework of the emergency powers of the government and delegated unlimited powers to the government.¹⁸

The Hungarian example illustrates that existing state of emergency concepts in a constitution or other provisions and procedures provided in a constitution do not prohibit the government and the parliament from breaching existing constitutional frameworks in times of crisis to strengthen their own power while claiming the need to do so. Many other countries in the COVID-19 crisis, however, proved that such a necessity to breach the constitutional framework did not exist. It was, therefore, merely a political smokescreen to argue in favour of a constitutional state of emergency.

b. Staying in Conformity with the Constitutionally Provided State of Emergency

An in-between situation could be observed in Estonia, where the government formally stayed in conformity with the constitutionally provided state of emergency, but did contradict the constitutional concept of parliamentary democracy. The Estonian government declared a state of emergency, which was formally in conformity with the Constitution and the Emergency Act. The declaration of the state of emergency, however, completely bypassed the Estonian Parliament and ignored the possibilities of involving it.¹⁹

Switzerland also made use of an intra-constitutional emergency concept. The Swiss Constitution provides an emergency clause (Article 185 Swiss Constitution),²⁰ which was activated in the COVID-19 pandemic.²¹ It provided sufficient possibilities for the Swiss government to take appropriate measures; this, however, does not mean that all measures taken by the Swiss government have been necessary (especially in light of legislative competences and direct democracy).²²

¹⁸ *ibid.*

¹⁹ See R Maruste, 'State of Emergency in Estonia' (*Verfassungsblog*, 17 May 2020) verfassungsblog.de/state-of-emergency-in-estonia/.

²⁰ There are actually two emergency clauses in the Swiss Constitution: Art 184(3) – which pertains to foreign affairs – and Art 185(3). In the COVID context, only the latter clause was relevant. See O Ammann and F Uhlmann, 'Switzerland: The (Missing) Role of Parliament in Times of Crisis' in this volume.

²¹ See also F Uhlmann and O Ammann, 'Switzerland and the COVID-19 Pandemic: A Look Back and a Look Into the Future' (*Verfassungsblog*, 1 March 2021) verfassungsblog.de/switzerland-and-the-covid-19-pandemic-a-look-back-and-a-look-into-the-future/; F Uhlmann, 'Concentration of Powers in the Federal Executive: The Application of Emergency Powers in Switzerland' (*Verfassungsblog*, 30 April 2020) verfassungsblog.de/concentration-of-powers-in-the-federal-executive-the-application-of-emergency-powers-in-switzerland/.

²² See O Ammann and F Uhlmann, 'Switzerland: The (Missing) Role of Parliament in Times of Crisis' in this volume.

These countries exemplify that constitutionally existing states of emergency might be activated in times of crisis, but that the constitutional frameworks usually do not provide crisis-based concepts of involving the parliaments in a way which is commensurate with upholding representative democracy. It still depends on the relevant statutory law and governmental decrees, which have to guarantee parliamentary involvement.

c. Not Using the Constitutionally Possible State of Emergency

The German Basic Law provides different forms of states of emergency,²³ but Germany did not formally declare a state of emergency.²⁴ Though not analysed in this volume, Austria can be mentioned as another example in this regard. Although the Austrian Constitution contains an emergency concept, the constitutional possibilities have not been considered to be practical or efficient with regard to a pandemic and were not activated by the Austrian government.²⁵ On the contrary, the reactions to the pandemic were taken within the regular constitutional framework. The UK government also did not declare a state of emergency, even though it used a wartime-style rhetoric. The Coronavirus Act did not exclude the government from the Human Rights Act;²⁶ the foundational approach was not to leave the constitutional framework and not to use the possibility of a state of emergency.

These countries proved that it was not necessary to activate a constitutional state of emergency in the COVID-19 pandemic. Although it might be argued that in different countries different constitutional pre-conditions exist to enable the same governmental measures, most of the relevant governmental measures could have been based on existing or newly enacted statutory health law.

d. Summary

In conclusion, besides the question as to whether a constitution provides a state of emergency, it seems highly relevant whether the respective country respects the existing constitutional framework. While Hungary, Italy and France breached the constitutional framework in the context of the declaration of a state of emergency, the Swedish, German and Swiss governmental reactions remained within the constitutional framework.

This, however, does not tell us anything about the constitutionality of the concrete measures taken on the basis of the declaration/non-declaration of a state of emergency. The Estonian case illustrates that formally correct procedures might

²³ See P Thielbörger, 'Germany – Federalism in Action' in this volume.

²⁴ *ibid.*

²⁵ See K Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis' (*Verfassungsblog*, 28 April 2020) verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/.

²⁶ See R Thomas, 'Virus Governance in the United Kingdom' in this volume.

still contradict the principle of representative democracy; debates in Sweden show us that the risk of breaching the constitutional framework can also exist even if no actual breach has occurred in the current situation.

C. Democratic Challenges

The discussions about a state of emergency illustrate how deeply the pandemic has affected the constitutional structures of democracy in European countries. Manifold democratic challenges can be identified. Most prominently, the shift towards the executive changed the interplay of the different institutional bodies, which significantly influenced the role of the parliaments and the people not only on a domestic level but also – from a neo-federalist perspective²⁷ – in the realm of European multi-level governance.

In that regard, the following considerations will focus on the role of the parliaments in the COVID-19 pandemic, especially their interplay with the respective governments (section II). Moreover, the multi-level dimension of democracy will be analysed with regard to international organisations, the European Union and federalism or decentralisation in times of the COVID-19 crisis (section III). This comparative analysis includes the countries (and respective chapters) presented in this volume: Germany, France, Italy, the United Kingdom, Hungary, Sweden and Switzerland.²⁸ The overall question to be addressed is to what extent domestic governments (re)acted for the people without participation of the people, especially their (parliamentary) representatives.

II. The Role of the Parliaments

A. Introduction

In emergency situations – regardless of the formal declaration of a state of emergency – a rapid response by a government is not only expected but also demanded (by the people). From a democratic perspective, it is relevant whether governmental measures are in conformity with the constitution and statutory law: if they are, the parliamentary oversight concerning the measures taken will tell us something about the relevance of democracy in times of crisis; if not, the method of involving the parliament indicates the degree to which the concept of a representative democracy is realised in times of crisis.

Different strategies of government can be observed and shall be distinguished. The range of approaches is very broad and can be distinguished by the depth of

²⁷ See www.federalism.eu/projects/overview/.

²⁸ Further references to other European countries will only be selective.

the involvement of the respective parliament. From bypassing the parliament or a one-stop involvement by obtaining a general approval by the parliament to the concretisation and therefore limitation of measures by the parliament, as well as the opposition towards governmental measures, a variety of responses could be observed in the COVID-19 pandemic. The chosen mixture of parliamentary involvement in each country gives us an impression of the resilience of representative democracy in times of such a health crisis.

B. Bypassing Parliament

A general bypassing of parliament could not be observed in the analysed European countries. The Hungarian government bypassed the Parliament on existing provisions of the Hungarian constitution and statutory law, which could not be applied, as the constitutional requirements were not fulfilled. At the end of March 2020, however, Parliament legitimised governmental action by an Act of Parliament (still not fulfilling the requirements of the constitutional framework).²⁹ In France too, Parliament retrospectively legitimised governmental action (Decree of 16 March introducing a general lockdown) by an Act of Parliament of 23 March 2020.³⁰ Elements of bypassing the parliament could also be observed in Italy concerning decrees of the head of the executive without parliamentary approval nor (at least in the first instance) information.³¹ It seems that this only refers to exceptional cases and not to the regular procedure in the COVID-19 crisis in Italy.

Another example can be observed in the UK.³² In a fast-track procedure, the UK Parliament approved a statute of more than 350 pages.³³ Further regulations based on secondary legislation were introduced based on this legal foundation. Significantly, the Westminster Parliament could not substantively debate these regulations. Although regulations by constitutional convention had to be laid before Parliament at least 21 days before entering into effect, in the COVID-19 crisis most of the regulations came into effect before being laid before Parliament. There were no means by which Parliament could amend regulations and parliamentary scrutiny remained unsatisfactory. Step by step, the Westminster Parliament was able to regain some power by having more time to debate and discuss secondary legislation.³⁴

It seems deeply problematic when governments do not respect the role of the parliament in times of crisis. Parliaments have an important role in ensuring that

²⁹ See KL Scheppele and D Pozen, 'Executive Overreach and Underreach in the Pandemic' in Poiaries Maduro and Kahn (n 1) 38, 40–43.

³⁰ See S Brunet, 'The Hyper-Executive State of Emergency in France' in this volume.

³¹ A Vidaschi, 'The Marginalisation of Parliament in Facing the Coronavirus Emergency: What about Democracy in Italy?' in this volume.

³² See R Thomas, 'Virus Governance in the United Kingdom' in this volume.

³³ *ibid.*

³⁴ *ibid.*

the legitimacy chain to the people remains intact. The cases illustrate that parliaments had to fight to be considered instead of governments attempting to involve them properly (even if the usual standards regarding the necessary timeframe could not be met).

C. Legitimising a General Transfer of Power by the Parliament

In Italy, measures adopted by the head of government through his own decrees were based on a set of decree laws. Decree laws have the same force as ordinary legislation, are adopted by the government as a whole (ie, the Council of Ministers) and need to be submitted to the Houses of Parliament, which, within 60 days, decide whether or not to convert them into permanent legislation. Yet these decree laws were very vague and left much to the discretion of decrees of the President of the Council of Ministers, which have a lower rank than law in the Italian hierarchy of legal sources; they are adopted by the sole head of government and are not scrutinised by Parliament. In March 2020, a further decree law obliged the President of the Council of Ministers to inform the two houses of Parliament before adopting rights-restrictive measures through his own decrees.³⁵ In some cases the information only took place *ex post*. In the latter case the houses could not vote on the resolution, but could only engage in an *ex-post* debate; possibilities of approval were quite limited.

In France, the new statutory law empowered the government to legislate by decree laws called ordinances.³⁶ The Senate limited the transferred measures at least to a certain extent, though these were still very broad. The government could govern through ordinances, which could derogate statutory law for the time of emergency.³⁷

The Hungarian case also falls in the category of ‘general legitimisation of transfer of power’ by the parliament. Parliament gave its consent to any emergency decree *ex ante* as long as governmental measures were necessary and proportionate to address the emergency. As a safeguard, the government regularly had to inform Parliament of the measures taken (*ex post*). The Hungarian Parliament could only withdraw the transfer of powers; the first state of emergency was not limited to a

³⁵ See A Vidaschi, ‘The Marginalisation of Parliament in Facing the Coronavirus Emergency: What about Democracy in Italy?’ in this volume.

³⁶ Article 38 of the French Constitution: ‘In order to implement its programme, the Government may ask Parliament for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law. Ordinances shall be issued in the Council of Ministers, after consultation with the Conseil d’État. They shall come into force upon publication, but shall lapse in the event of failure to table before Parliament the Bill to ratify them by the date set by the Enabling Act. They may only be ratified in explicit terms. At the end of the period referred to in the first paragraph hereinabove Ordinances may be amended solely by an Act of Parliament in those areas governed by statute law’.

³⁷ See S Brunet, ‘The Hyper-Executive State of Emergency in France’ in this volume.

certain time period; only the second one was limited. Parliament did not approve or review any specific measure.³⁸

A general legitimisation of governmental emergency measures does not sufficiently specify the possible measures that can be taken by the government through legislation. It might even open up the possibility to enact governmental decrees or ordinances which violate or amend statutory law. The parliaments are usually only informed *ex post* and cannot change the enacted ordinances. Such a situation endangers the application of democratic principles. The necessity argument did not seem convincing as – at the very least – *ex post* review and rejection of governmental measures should be possible. Fast-track parliamentary procedures and the limitation of transfer of powers would – in contrast to this general legitimisation concept – uphold certain standards of parliamentary democracy.

D. Legitimising the Particular Measures by Statutory Law

In Sweden, Parliament was not initially involved as the measures taken were based on the existing constitutional and statutory framework. Sweden has chosen a soft law approach, mainly in favour of non-binding measures.³⁹ Step by step, the Swedish Parliament amended relevant statutory law to allow the government to introduce stronger measures. Some amendments made in 2020 were never used by the government. However, the parliament eventually enacted a new statutory ‘pandemic’ law in 2021, which enabled further measures by the government.⁴⁰

In the case of Switzerland, the government started with frenetic regulatory activity based on the existing constitutional framework to enact ordinances, but with the COVID-19 Act adopted in September 2020, Parliament created a regulatory framework for this specific situation.⁴¹ This statutory act created not only the obligation to inform Parliament, but also the requirement to consult the relevant parliamentary committees before emergency ordinances are adopted or amended. However, no parliamentary veto right was introduced. The integration of Swiss Parliament remained limited and did not offer a full deliberation of the governmental measures.⁴²

The German Parliament amended the relevant statutory law to grant more competences to the Federal Minister of Health, excluding the involvement of

³⁸ See F Gárdos-Orosz and Z Szente, ‘Using Emergency Powers in Hungary: Against the Pandemic and/or Democracy?’ in this volume.

³⁹ J Reichel and J Dahlqvist, ‘Swedish Constitutional Response to the Corona Crisis – The Odd One Out’ in this volume; see also H Wenander, ‘Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism’ (2021) 12 *European Journal of Risk Regulation* 127, 134–42.

⁴⁰ J Reichel and J Dahlqvist, ‘Swedish Constitutional Response to the Corona Crisis – The Odd One Out?’ in this volume.

⁴¹ See O Ammann and F Uhlmann, ‘Switzerland: The (Missing) Role of Parliament in Times of Crisis’ in this volume.

⁴² *ibid.*

the second chamber of Parliament. Statutory law, however, still legitimised only particular measures and not a general transfer of powers.

The limitation of governmental measures by parliamentary restrictions laid down in statutory law definitely contributes to accountable actions of government in times of crisis. This, however, as the examples illustrate, neither led to a full involvement of parliament nor guaranteed parliamentary scrutiny. It still led a reasonable approach in this time of crisis by involving the parliament at least in the explicit limitation of governmental measures, while at the same time rejecting a *carte blanche* for governmental actions.

E. Approving or Opposing Governmental Measures

The number of examples of parliaments having explicitly to approve certain governmental measures is limited, but a few could be identified. In Italy, there were certain possibilities for the Italian Parliament to exert influence.⁴³ The decrees of the President of the Council of Ministers had to be submitted to Parliament, which could engage in a debate about them, but had no legally binding tools to change the government's will. The French Senate limited the overall transfer of powers to certain listed measures. Thus, at least a certain parliamentary resistance could be identified in the Senate; an approval of certain governmental measures, however, was not included.⁴⁴ In Austria, the main committee of the parliament has to be involved when the government plans hard lockdowns.⁴⁵ Moreover, the second chamber of parliament, which is considered to be quite weak and can only postpone statutory bills for eight weeks, has become influential as statutory measures have to be enacted quickly and the government does not have a majority in the second chamber. The government, therefore, has to find compromises with opposition parties regarding the COVID-19 legislation.⁴⁶

F. Reviewing/Surveying Measures

The review of governmental measures can create governmental accountability. There are no reasons not to involve parliament to critically review governmental activities in times of crisis, especially after the measures have been taken. On the contrary, the parliamentary involvement in surveying governmental

⁴³ A Vedaschi, 'The Marginalisation of Parliament in Facing the Coronavirus Emergency: What about Democracy in Italy?' in this volume.

⁴⁴ See S Brunet, 'The Hyper-Executive State of Emergency in France' in this volume.

⁴⁵ See K Lachmayer, 'Muddling through Mutation Times or the Return of Federalism in Austria: From Covid-19 Response to the Vaccination Campaign' (*Verfassungsblog*, 8 May 2021) verfassungsblog.de/muddling-through-mutation-times-or-the-return-of-federalism-in-austria/.

⁴⁶ *ibid.*

measures creates not only political debate on emergency activities but also an enormous potential for institutional learning.

Attempts to review or survey governmental measures existed at least in France and the UK. In France, Parliament started to investigate the governmental measures by committees of enquiry. But in June 2020, the President of the Republic started a fact-finding mission by experts on his own to relativise parliamentary activities; at the beginning of 2021, the democratic committee of enquiry of Parliament was dissolved by the governing majority.⁴⁷ Parliamentary scrutiny could be observed in the form of parliamentary committees in the UK. Given the nature of the emergency, they represented more of a retrospective accountability.⁴⁸

G. The Limitations of Deliberations in Parliaments

A further challenge of parliamentary involvement concerned fast-track procedures of parliaments and the question whether parliaments should meet in person or online. Both developments raised the question whether the deliberative function of parliaments was upheld in times of crisis or if it was thwarted.

In all countries compared, acceleration of parliamentary procedures could be observed. In many cases, a proportionate timeframe for parliamentary deliberation was often not provided. One might distinguish between fast, faster and turbo legislation. How many hours or minutes should the parliament be involved or be able to debate? It becomes clear that parliaments had to take decisions too quickly without actually having enough time for debate. The problem intensified as the relevant statutory law concerned the transfer of powers from the parliament to government.

The other (much-debated) topic relates to the question whether members of parliament shall meet in person or only online. Meetings which only take place virtually limit the possibilities of direct parliamentary deliberations. Meetings in person, however, conflict with health requirements during the COVID-19 pandemic. Moreover, many constitutional and legislative frameworks did not provide specific regulations on the topic and had to be amended to enable new concepts.

The Swiss Parliament, for example, convened for an extraordinary session outside the regular parliamentary building in an exhibition centre in the capital.⁴⁹ This location enabled Parliament to stick to health recommendations and physical distancing, while complying with statutory law. Swiss scholars have highlighted that the establishment of virtual meetings would require further amendments and concrete determination by statutory law.⁵⁰

⁴⁷ See S Brunet, 'The Hyper-Executive State of Emergency in France' in this volume.

⁴⁸ See R Thomas, 'Virus Governance in the United Kingdom' in this volume.

⁴⁹ See O Ammann and F Uhlmann, 'Switzerland: The (Missing) Role of Parliament in Times of Crisis' in this volume.

⁵⁰ *ibid.*

In Italy, remote voting was not introduced and thus all space available in Parliament was used to allow as many members of Parliament as possible to attend.⁵¹ In other cases, only half of the members of each house could participate in person. Germany reduced the requirements for quora⁵² and France introduced reduced formats for parliamentary sittings combined with proxy voting.⁵³ Although Estonia is renowned for its digitalised government, rules for remote voting in Parliament were missing.⁵⁴ In the UK, remote voting was introduced and then switched to a hybrid basis with a mixture of in-person and virtual participation.⁵⁵

These examples illustrate a broad variety of approaches in dealing with physical distancing in parliamentary meetings and remote voting. It depends on the existing constitutional framework, the willingness to amend the regulatory framework and the approach to virtual meetings and remote voting in parliaments, which ranged from pragmatism to scepticism. It can be concluded that it depends on the respective political and legal culture if new forms of deliberation are accepted; the change of the way parliamentary debate takes place when using technological support can not be ignored.

H. Conclusion

Different forms of governmental engagement can be distinguished. The shift of power from the parliaments to the executive is not only a question of executive emergency powers, but also related to the self-understanding of parliaments and parliamentarism. In this regard, it is possible to identify different grades of engagement of parliaments in European democracies. The authors suggest distinguishing between confident parliaments, 'business as usual' parliaments, hesitant parliaments and obedient parliaments.

i. Confident Parliaments

During the developments of 2020 the UK Parliament became more confident and demanded increased parliamentary scrutiny.⁵⁶ With regard to the French Parliament, a certain ambivalence can be observed. On the one hand the French Parliament could even be understood as obedient⁵⁷ in transferring power to the

⁵¹ See A Vedaschi, 'The Marginalisation of Parliament in Facing the Coronavirus Emergency: What about Democracy in Italy?' in this volume.

⁵² See P Thielbörger, 'Germany – Federalism in Action' in this volume.

⁵³ See S Brunet, 'The Hyper-Executive State of Emergency in France' in this volume.

⁵⁴ Maruste (n 19).

⁵⁵ See R Thomas, 'Virus Governance in the United Kingdom' in this volume.

⁵⁶ *ibid.*

⁵⁷ See below.

French government, but on the other hand both the Senate and the opposition parties seem to be quite confident in opposing the enormous transfer of powers to the executive. Their options for succeeding in prohibiting this transfer of powers were quite limited, however.

ii. 'Business as Usual' Parliaments

The approach of the Swedish Parliament could be characterised as 'business as usual' (although some aspects of how the parliament works have been altered to fit the pandemic situation). While at the beginning of the pandemic in Sweden the government did not intervene in the legal framework and limited itself to a soft law approach, Parliament provided limited powers to the government as time went on.⁵⁸ This reflects a normal approach of legislation and representative democracy although the limiting of members of parliament actually present in person could challenge the notion of representative democracy. In Germany, Parliament also remained active and provided the necessary amendments. Only regarding parliamentary scrutiny it could be observed that Parliament was restricting itself.⁵⁹

iii. Hesitant Parliaments

A good example of a hesitant parliament is the Italian one; although it had the possibilities to get involved (to a limited extent, ie only by debating forthcoming measures to be adopted by the President of the Council of Ministers), it did not always engage in thorough and in-depth discussion.⁶⁰ The Swiss Parliament did not appear to bear political responsibility for the measures taken during the pandemic.⁶¹ The legislator legitimised the transfer of powers to the government to take the necessary emergency actions and did not oppose its limitation and restrictions. Although the Swiss Parliament was involved before certain governmental measures were taken, it was still hesitant to push for further involvement and to introduce deliberation on the governmental measures.

iv. Obedient Parliaments

The Hungarian Parliament can be understood as an obedient one since it did not involve itself in the relevant measures of the government but only created a general statutory (though unconstitutional) basis for governmental action.⁶² In contrast

⁵⁸ J Reichel and J Dahlqvist, 'Swedish Constitutional Response to the Corona Crisis – The Odd One Out?' in this volume.

⁵⁹ See P Thielbörger, 'Germany – Federalism in Action' in this volume.

⁶⁰ See A Vidaschi, 'The Marginalisation of Parliament in Facing the Coronavirus Emergency: What about Democracy in Italy?' in this volume.

⁶¹ See O Ammann and F Uhlmann, 'Switzerland: The (Missing) Role of Parliament in Times of Crisis' in this volume.

⁶² See F Gárdos-Orosz and Z Szenté, 'Using emergency powers in Hungary: against the pandemic and/or democracy?' in this volume.

to the formal possibilities to review and debate the proportionality of the measures, Parliament even enabled the transfer of decrees into statutory law by the Act on Transitional Rules.⁶³ The French Parliament can (partly) be understood as an obedient parliament as it enabled the huge transfer of powers to the executive and even stopped its own committees of enquiry from working.⁶⁴ This perspective, however, only reflects the governmental majority and not the position of the opposition parties.⁶⁵

III. Multi-Level Democracy

A. The Re-Concentration of Power on the Domestic Level

The pandemic is not only affecting the nation states, but also international, supra-national and sub-national governance. All levels of the multilevel governance have been challenged by this global pandemic. The effects of the pandemic on the democratic dimensions of rising governance networks are no less than those on the domestic level. The first observation regarding multi-level governance is that the domestic governments not only used emergency powers to obtain competences from the legislator (in a horizontal dimension), but also concentrated their power (in a vertical dimension) from other layers of the multi-level system of governance. Thus, international, European and sub-federal states and entities lost powers in favour of domestic governments. Such a centralisation of power on the domestic level would have required an even greater horizontal oversight and review by domestic parliaments, which – as described above – did not take place.

B. The Role of the WHO

The COVID-19 pandemic is a global crisis and the reaction of humanity to this global challenge has required an international response. The UN sub-organisation WHO (World Health Organisation) plays a significant role in addressing global pandemics. As analysed in this volume, the emergency committees of the WHO operated as a black-box and were thus lacking in transparency.⁶⁶ Wrong decision making (eg, concerning travel restrictions) or the influence of certain Member States on the decision-making illustrated the necessity to improve the transparency, objectivity and independence of this international organisation.⁶⁷ Democratic improvements could be achieved by stronger representation, public

⁶³ *ibid.*

⁶⁴ See S Brunet, 'The Hyper-Executive State of Emergency in France' in this volume.

⁶⁵ *ibid.*

⁶⁶ P Villareal, 'Pandemics, Expertise and Deliberation at the International Level' in this volume.

⁶⁷ *ibid.*

deliberation and transparency.⁶⁸ This also includes the need to incorporate legal expertise and to develop substantive justifications for decision-making in the expert committees of the WHO.

C. The Missing Competences of the European Union

The potential of the Union to manage the crisis was enormous. The transnational dimension of the health crisis favours transnational entities to coordinate measures and enable rapid and consistent action. The possible coordinative tasks start with information exchange, facility support, uniform sourcing strategies and the development of strategies for the freedom of movement or goods. The Union, however, suffered from a lack of competence in health policies, inertia in crisis management and the clear focus of the Member States on their own countries, ignoring European solidarity. It is significant and rather symbolic that in 2020 statistics on COVID-19 infection fatalities only concerned each Member State; a European statistic was not presented to the public.⁶⁹ The minor issues the Union was able to take on (eg, the management and procurement of vaccines) did not lead to satisfying results.⁷⁰ The effects of this lack of initiatives and competences⁷¹ on the one hand and the lack of efficiency and effectiveness on the other hand did not strengthen European democracy. While at the same time the Union took action regarding authoritarian tendencies in Eastern Europe,⁷² the institutions of the EU remained silent regarding constitutional violations of other Member States in the context of the COVID-19 pandemic. As a result of the lack of European legislation in the context of the pandemic, the role of the European Parliament was marginalised not only in approving measures, but also in reviewing violations of European law by the Member States in their responses to the COVID-19 crisis.

D. Struggles with Decentralisation and Federalism

While international and transnational organisations lost influence and power to domestic governments, sub-national entities were also under pressure (due to the measures of the federal/central governments). Although the United Kingdom

⁶⁸ *ibid.*

⁶⁹ But see eg ec.europa.eu/eurostat/web/covid-19/overview; ec.europa.eu/eurostat/statistics-explained/index.php?title=Weekly_death_statistics; www.ecdc.europa.eu/en/cases-2019-ncov-eueea. In the public of the Member States, European statistics did not play a significant role.

⁷⁰ A Naumann, 'The EU-Response to Fighting the Coronavirus – Coordination, Support, Action – Heeding its Citizens' Calls?' in this volume.

⁷¹ *ibid.*

⁷² See eg European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law; or 'MEPs express concerns over attacks on media in Poland, Hungary and Slovenia' www.europarl.europa.eu/news/en/press-room/20210304IPR99220/meps-express-concerns-over-attacks-on-media-in-poland-hungary-and-slovenia.

cannot be qualified as a (full) federal state, the devolutions of the last decades have transferred power to sub-national levels. In the pandemic, strong centralising tendencies could be observed in the UK government; the London-centric mindset of the central government revealed a structural weakness of governing the pandemic.⁷³ In France, centralism was already very strong in health policies before the crisis. During the crisis, it was up to the central state to enact measures and representatives of the central government were empowered to adopt more restrictive measures. Local autonomy was further weakened.⁷⁴

In Germany, federalism influenced the particular form of crisis governance. The German example illustrated that federalist approaches can both assist and inhibit efforts to fight the pandemic effectively.⁷⁵ Only if the executive is balanced with cooperative federalism the federalist approach can create structural advantages.⁷⁶

In both the British and German cases, the COVID-19 pandemic revealed many lessons to be learned to improve the respective federalist approach and calls for reform of the federal system. In other countries, like Switzerland and Austria, the role of federalism did not lead to a debate concerning reform of the federalist system. While in Switzerland the cantons have been quite active and the federal government intervened to create a more coherent approach,⁷⁷ the Austrian federal government has been dominant in health governance and also enacted ordinances which have been applicable only in certain regions.⁷⁸

E. Conclusion

The reactions of the domestic governments regarding the COVID-19 pandemic can be understood as a backlash to multi-level governance in Europe.⁷⁹ While the domestic governments concentrated power on the national level, the weaknesses of the nation state approach became clearly visible. The potential of flexibility of local and regional solutions supported by cooperative federalism and the potential of international and transnational approaches to fight the pandemic are significant. The realisation of these potentials could not be observed and the effectiveness of the other layers of multi-level governance was missing. This also led to a degeneration of the democratic dimensions of multi-level governance.

⁷³ See R Thomas, 'Virus Governance in the United Kingdom' in this volume.

⁷⁴ See S Brunet, 'The Hyper-Executive State of Emergency in France' in this volume.

⁷⁵ See P Thielbörger, 'Germany – Federalism in Action' in this volume.

⁷⁶ *ibid.*

⁷⁷ See verfassungsblog.de/switzerland-and-the-covid-19-pandemic-a-look-back-and-a-look-into-the-future/ and O Ammann and F Uhlmann, 'Switzerland: The (Missing) Role of Parliament in Times of Crisis' in this volume.

⁷⁸ See Lachmayer (n 45).

⁷⁹ AJr Golia et al, 'Constitutions and Contagion – European Constitutional Systems and the COVID-19 Pandemic' (2021) *81ZaöRV/ HJIL* 147, 158 came to another conclusion: 'By contrast, the pandemic did not trigger a single common trend in relation to the vertical allocation of power, either towards centralisation of emergency governance at the national level or towards de-centralisation towards sub-national units.'

Democracy was thrown back to the national level of governance and, thus, especially to the parliaments, which – as analysed above⁸⁰ – were marginalised in the crisis by the domestic governments.

IV. Final Conclusions

The pandemic posed an enormous challenge to European democracies. Besides dealing with overcrowded hospitals, the unexpected death of hundreds of thousands of people and enormous economic consequences, one of the crucial challenges was the upholding of the democratic model during times of crisis. Although the shift of power towards the government seemed to be inevitable, the role of the parliaments in the COVID-19 pandemic revealed the state of affairs regarding democracy in Europe. The pandemic can be understood as an endurance test for democracies, which are already challenged by populism, illiberalism and authoritarianism in the upcoming third decade of the twenty-first century.⁸¹

Although most of the countries compared carried out measures that limited democracy in a disproportionate way, this analysis has illustrated that different reactions were possible to uphold democracy. Parliamentary debate can be organised in various ways, including a change of location and remote meetings. Most of the measures (though perhaps not in the first wave of the crisis) would have had enough time to be prepared and debated properly in parliament. Parliamentary approval and scrutiny could have been guaranteed to uphold representative democracy. In most of the countries, the crisis led to exorbitant governmental measures which infringed upon democracy without the required necessity being present. These limitations of democracy turned out to be too far-reaching and intrusive.

The missing element in European democracies was a lack of preparedness to guarantee democracy in a crisis mode. State of emergency concepts are used to focus on the empowerment of the government and not on the establishment of parliamentary modalities to uphold legislation and parliamentary scrutiny in extreme situations. Crisis legislation attempts to restrict rights to uphold public order instead of establishing differentiated structures to uphold the exercise of rights. The conclusion is therefore that the traditional government-based understanding of crises has to be overcome and a democracy-based concept of the state of emergency should be established. The enabling of a parliamentary mode of crisis would be able to stop the (old monarchic) belief that it is the government and not the people, the Parliament and the public, which is destined to participate in crisis governance. Cooperation between the different state powers and the relevant multi-level network should be what provides the relevant crisis governance to guarantee democracy and such an approach would also effectively counter the spread of populism and authoritarianism in the twenty-first century.

⁸⁰ See above.

⁸¹ See G Halmi, 'The Pandemic and Illiberal Constitutional Theories' in this volume; J-W Müller, 'Populism versus Democracy during a Pandemic: Some Preliminary Considerations' in this volume.