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COVID-19 PANDEMIC

ADAPTATIONS TO THE EXERCISE OF CONSTITUTIONAL DUTIES BY

PARLIAMENTS

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Parliament has an essential role in democratic life. However, is Parliament capable of fulfilling its function in times of crisis, emergency or existential uncertainty?

How should Parliament respond when it is itself threatened by a pandemic, when disorder and disruption threaten the lives of individuals and the economy, and the vital interests of the country?

As in all the countries of the world contending with the COVID-19 pandemic, the Swiss authorities and population have naturally turned to the government for guidance. This is understandable, given that the Executive is organised to respond to crises and to guarantee immediate and effective state action. It has the administrative capacity and the necessary expertise.

But, the pandemic has again shown that in a democratic state, the concentration of power in the hands of the government, while warranted in an acute phase, cannot be sustained over time. There must be parliamentary safeguards.

This raises the age-old dilemma between ‘urgency’ and ‘legality’, between ‘threat’ and ‘rule of law’, between ‘protection against danger’ and ‘protection of rights’.

In Switzerland, the Federal Assembly is the supreme authority¹. It enacts federal laws, decides on expenditures and has oversight over the government and the administration. ‘Where safeguarding the interests of the country so requires’² or ‘in order to counter existing or imminent threats of serious disruption to public order or internal or external security’³, the government has powers to enact binding emergency legislation.

These powers have their basis in the Federal Constitution and, in the case of pandemics, in the Epidemics Act. If the Federal Council decides to exercise these powers, it is effectively not subject to the scrutiny of the Federal Assembly.

The government can also make financial commitments and decide on expenditure or investments without consulting Parliament. This is the case ‘if a project must be carried out without delay’⁴ or ‘when the expenditure or the investment cannot be delayed’⁵.

Finally, the government can decide to mobilise the armed forces for active service or another form of deployment⁶.

The exercise of these emergency powers is regulated in the Federal Constitution and in federal legislation. The government can only use these powers if the situation is urgent and normal public services are unable to cope. It must take measures proportionate to the circumstances and respect the Federal Constitution.

¹ Art. 148 para. 1 of the Federal Constitution of the Swiss Confederation, of 18 April 1999 (Cst.).

² Art. 184, para. 3, Cst.

³ Art. 185, para. 3, Cst.,

⁴ Art. 28, para. 1 of the Financial Budget Act of 7 October 2005 (FBA).

⁵ Art. 34, para. 1, FBA

⁶ Art. 185, para. 4, Cst.

If a crisis situation is expected to last, Parliament will enact formal legislation to replace the measures taken by the government⁷. The validity of emergency government legislation varies from six months to a maximum of four years⁸.

Although the government is free to take its decisions independently, it cannot act alone. Before taking certain decisions, it must consult or inform various parliamentary bodies. In return, these bodies can ask questions, give their assessment and, if necessary, make a recommendation. However, their opinion is not binding and does not necessarily represent the view of Parliament as a whole.

As far as finance is concerned, the government cannot make emergency funds available without the prior consent of a parliamentary delegation composed of members of the two Councils⁹. Its opinion is binding.

During the pandemic, we experienced two distinct phases in the relationship between the government and Parliament.

At the onset of the extraordinary situation (mid-March 2020), the pendulum of power swung to the Federal Council which made full use of its special powers to tackle the emergency. The offices of the Federal Assembly agreed unanimously to suspend the work of the Councils and the parliamentary committees. The aim was for Parliament to avoid any outbreak of the disease and to reorganise its business. From the outset, the Council Offices clearly asserted their right to meet any time and in any place, regardless of the government's ban on assemblies. As a matter of fact, our constitution explicitly requires the majority of Council members to be physically present for Parliament to take decisions¹⁰. The Council Offices were loath to derogate from this provision.

During this first period, the government introduced a series of health, economic and social measures involving financial commitments of several billion francs. To release the emergency funds, the government had to seek the approval of the Finance Delegation, which is a joint body of the two Councils. The Delegation held several hearings and requested additional reports and information.

Otherwise, Parliament suspended its legislative work in order to concentrate on its oversight activities. In the last two weeks of March, for example, it asked the Federal Council 56 questions about the coronavirus. At the beginning of April, the parliamentary committees resumed their work, in part by videoconference, and sent 44 requests for information and other questions to the government. They also conducted numerous hearings and requested reports.

At the end of March and the beginning of April, the Council Offices decided that the Councils would meet in conference rooms outside the Parliament Building that provided enough space for members to comply with distancing rules.

In the first plenary session after the declaration of the extraordinary situation, Parliament retrospectively approved the government's funding commitments. It also

⁷ Art. 184, para. 3, Cst., *in fine* ; Art. 185, para. 3, Cst.

⁸ Art. 7c, para. 2 ; Art. 7e, para. 2, let. a of the Government and Administration Act of 21 March 1997 (GAOA).

⁹ Finance Delegation of the two Councils.

¹⁰ Art. 159, para. 1, Cst.

approved calling in the armed forces to provide support. During this extraordinary session, the members of Parliament and the parliamentary groups made full use of their rights to ask the Federal Council questions and make other requests. As many as 204 parliamentary motions were tabled in connection with the pandemic.

Over time, the pendulum of power shifted back to Parliament, which recovered its traditional role as legislator. As of May, all new funding requests were approved by the Councils under the ordinary procedure. In June, Parliament enacted legislation on the track and trace system. As of September, Parliament returned to its chambers in the historic Federal Palace, where Plexiglas partitions had been installed between the desks.

This symbolic return to the Parliament Building marked the restoration of the Federal Assembly's regular powers. At the end of the summer, Parliament incorporated much of the emergency law into ordinary law, in a specific COVID-19 Act¹¹, which was declared urgent. This act also limits the powers of the government in the management of the pandemic and urges the government not to exercise its particular competence 'if the same objective can be achieved using regular or emergency legislative procedures'¹². The Federal Council must also 'inform Parliament regularly, in good time and comprehensively about the implementation of this Act [and] consult the relevant committees beforehand about planned ordinances and amendments to ordinances'¹³. In emergency cases, the government has to inform the presidents of the competent parliamentary committees¹⁴. In the spirit of direct democracy, this act has been put to a referendum for Swiss voters to make a final decision.

In retrospect, the Swiss Parliament voluntarily suspended its legislative work for a week (from 16 to 23 March 2020) and the committees, with some exceptions, for three weeks (from 16 March to 5 April 2020). Throughout the crisis, the democratic and financial oversight of the government's actions was maintained using ordinary parliamentary instruments. From May onwards, Parliament got back to business in order to exercise all its prerogatives.

Apart from making certain changes to the procedural rules (e.g. introducing online voting for members of Parliament who are in quarantine or isolation), Parliament relinquished its power to enact emergency provisions¹⁵ to avoid putting itself at odds with the government. It also rejected the idea of creating *ad hoc* bodies dedicated to crisis management, preferring to build on tried and tested structures and procedures. In fact, the continuity of parliamentary action was guaranteed throughout the crisis.

This collective management of the pandemic by the Federal Council and Parliament has been effective and has strengthened the democratic legitimacy of emergency legislation.

Three elements proved to be decisive:

¹¹ Federal Act of 25 September 2020 on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19.

¹² Art. 1, para. 2, COVID-19 Act.

¹³ Art. 1, para. 4, COVID-19 Act.

¹⁴ Art. 1, para. 5, COVID-19 Act.

¹⁵ In particular on the basis of Art. 173, para. 1, let. c, Cst.

1. A system for the distribution of powers and duties between Parliament and the government that is rigid enough to avoid excesses and flexible enough to adapt. The existing bodies and structures have proven their worth.
2. Regular and constant exchange between the government and Parliament, mainly through the presidents of the Councils and committees and their deputies. In Switzerland, collaboration between Parliament and the executive branch has gone beyond what is required by the Federal Constitution and the law.
3. Strong leadership on the part of the Federal Council, but also on the part of the Councils, with a Parliament that did not hesitate to assert its rights when necessary.

For democracies are like individuals: it takes a crisis to reveal their maturity and strength of character.
