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by

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to the General Debate on

“The role and workings of Parliament in crisis situations”

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Introduction and purpose of the general debate

Parliament plays a vital role in a country's democratic life. However, although its tasks are clear when everything is running smoothly, its role, function and capacity to react are less obvious in times of crisis.

First, we should define what a crisis is. Definitions can vary quite considerably depending on one's point of view.

We understand a **crisis** to be an event that poses a threat to existential conditions in a country. It **involves an extremely serious level of disruption or disorder that is likely to cause serious physical harm to people or property, affect the country's crucial interests or have a long-term negative effect on the work of the public authorities**. A crisis thus entails an existential degree of threat, urgency and uncertainty. A crisis may be of natural, technical or human origin. Examples include natural disasters, serious technological accidents, cybercrime, war, terrorist attacks, epidemics, large-scale industrial contamination, and so on.

This definition of a crisis does not include events that give no cause to fear for people's lives or property, and in which government institutions are faced with a challenge and cannot simply manage the situation by normal means (a political crisis, economic crisis, etc.).

Every crisis requires **immediate action by the state**. It calls for rapid decisions and the provision of exceptional resources designed to contain a major risk and to limit its repercussions.

Normally it is the task of the government, working with parliament, to manage a crisis. However, in view of the urgency and uncertainty in such a situation, it can be difficult to manage a crisis while still adhering to the normal deadlines and procedures of parliament.

It is therefore worthwhile to devise a special system that differs from the normal parliamentary process at a suitably early stage. This **must allow the government to ensure the state's ability to act in exceptional situations, while at the same time allowing parliament to guarantee respect for the rule of law**. The system must also take account of the fact that, depending on the magnitude of the crisis, the authorities concerned may no longer be able to function normally.

The purpose of this debate will be

- (i) to consider how to resolve the conflict between 'urgency' and 'legality', and
- (ii) to assess the various measures that enable a parliament to guarantee its ability to function in crisis situations and fulfil its role in the decision-making process and in monitoring government action.

Existing legal framework in Switzerland for responding to a crisis

The extended powers given to the government: emergency law

Respect for the principle of legality is a pre-condition for public action: all state activity should have a basis in law. In Switzerland, parliament has the power to approve federal acts (Art. 164 of the Constitution, Cst.) and to decide on expenditure and the budget (Art. 167 Cst.).

In certain exceptional circumstances, **the government has the power to take measures that do not have a formal legal basis**. This may involve issuing ordinances, i.e.

general and abstract rules, or taking decisions on how to tackle a specific situation. The Federal Constitution confers this right on the government 'where safeguarding the interests of the country so requires' (Art. 184 para. 3 Cst.) or 'in order to counter existing or imminent threats of serious disruption to public order or internal or external security' (Art. 185 para. 3 Cst.).

This non-statutory law is known as '**emergency law**'. It is based directly on the Constitution and is not normally subject to the scrutiny of parliament. In principle, measures taken by the government under the heading of emergency law lie *praeter legem* or outside the law; they define or supplement the legal position in an area where the law is not settled. This is not surprising in the particular context of a crisis, where the lack of time and the unpredictability of a situation make it impossible to establish a clear legislative framework in advance to cover the action that the authorities may need to take.

Federal law also regulates the **government's financial powers**. In certain circumstances, the government can make financial commitments and decide on expenditure and investments **without consulting parliament beforehand**. This is the case 'if a plan must be implemented without delay' (Art. 28 para. 1 of the Financial Budget Act, FBA) or 'if the expenditure cannot be postponed' (Art. 34 para. 1 FBA).

Lastly, in emergencies the government can decide **to mobilise the armed forces** for active service or for some other form of deployment (Art. 185 para. 4 Cst.).

It should be noted here that the current framework is based on the understanding that the government is fully able to function in all circumstances and is capable of exercising its authority. If this is not the case or 'if the security of federal authorities is endangered', the President of the National Council (lower house) or in his or her absence, the President of the Council of States (upper house) is required to convene the two chambers of parliament immediately (Art. 33 para. 3 of the Parliament Act, ParlA). This provision dates back to the 19th century, but as far as we are aware, it has never been applied.

Conditions for enacting emergency law and parliamentary safeguards

The enacting of emergency law is regulated by the Constitution and by the law, in particular the Federal Act on Safeguarding Democracy, the Rule of Law and the Capacity to Act in Extraordinary Situations of 17 December 2010.

In order to comply with the Constitution, **measures taken by the government as emergency law must be justified by the urgency of the situation and the necessity to deal with shortcomings in public order**. They must also be proportionate to the circumstances. The government must not violate the Constitution in any way, and must not take measures that contradict the legislation enacted by parliament.

The **measures taken by the government must also be temporary** (Art. 184 para. 3 Cst., in fine; Art. 185 para. 3 Cst.); if it is anticipated that the crisis will be prolonged, the measures taken by the government must be replaced by a formal act of parliament. This act will set out the maximum term of validity for the ordinances, which, depending on the circumstances, varies between six months and four years (Art. 7c para. 2; Art. 7e para. 2 let. a of the Government and Administration Organisation Act, GAOA).

Although the Federal Council is free to take its own decisions, the law and precedent provide **several mechanisms for consultation or for informing the parliamentary bodies**. In particular, the law provides that the Control Committees' Delegation, which comprises members of both parliamentary chambers and which is responsible for monitoring the government, must be informed within 24 hours of any 'decision intended to safeguard the

interests of the country or preserve internal or external security' (Art. 53 para. 3bis ParIA in conjunction with Art. 7e para. 2 GAOA).

The body consulted can ask the government questions, express its opinion and, if need be, make recommendations. The views of the parliamentary bodies consulted are not binding and do not give rise to any responsibility on the part of parliament. This process of consulting and providing information guarantees a form of parliamentary control over the acts of the government and creates a 'channel of dialogue' between the two powers of state.

If funds are urgently required, the government must first obtain consent from the Finance Delegation (Art. 28 para. 1 FBA; Art. 34 para. 1 FBA), which has oversight over the federal finances. The Finance Delegation is a mixed body with members from both chambers.

The Constitution and the law **allow parliament to decide retrospectively on certain urgent ordinances or decisions adopted by the government**, either on a mandatory or on a subsidiary basis:

- a. If the government adopts an ordinance intended to safeguard the interests of the country in terms of the Constitution, this ordinance is valid for a maximum term of four years, and can be extended on one occasion. Afterwards, the government must provide parliament with a legal basis for the ordinance (Art. 7c GAOA).
- b. If the government adopts an ordinance intended to preserve external or internal security, it must submit a bill to parliament for legislation to replace the ordinance within the following six months (Art. 7d GAOA). If it fails to do so, the ordinance becomes invalid.
- c. If the government commits financial resources in a situation of urgency, parliament must subsequently give its approval (Art. 28 para. 2 FBA; Art. 34 para. 2 and 3 FBA).
- d. If the financial commitment amounts to more than CHF 500 million, an extraordinary session of parliament can be requested (Art. 28 para. 3 FBA; Art. 34 para. 4 FBA).
- e. If the government mobilises more than 4,000 members of the armed forces on active service (national defence, public order service) or if deployment is expected to last for more than three weeks, parliament must be convened immediately (Art. 185 para. 4 Cst.; Art. 77 para. 3 Armed Forces Act, AFA).
- f. If the government deploys the armed forces to maintain peace or to support the civilian authorities, parliament must approve this decision in its next ordinary session, provided the number of troops deployed exceeds 2,000 or deployment is expected to last more than three weeks (Art. 70 para. 2 AFA). If the deployment ends before the next session, the government must submit a report to parliament.

Terminating the application of emergency law

Legal experts take the view that the powers assigned to the government under emergency law expire as soon as the extraordinary circumstances that justify them end and the situation returns to normal. **Democracy and the rule of law essentially require that parliament's regular powers should be restored as soon as is practicable.** The current law does not contain any specific provision limiting the length of time that the government can exercise its powers in times of crisis.

However, the government has always exercised caution when using its powers in crises. This is explained by the constraints imposed by the Constitution and law on using emergency law, by the numerous parliamentary safeguards and by the effectiveness – and indeed tenacity – of parliamentary oversight.