

# Constitutions and Contagion – European Constitutional Systems and the COVID-19 Pandemic

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## Abstract

The COVID-19 pandemic has posed an unprecedented challenge, with governments resorting to different legal strategies to respond to the health emergency. This article offers a cross-cutting comparative analysis of measures taken during the first six months of the pandemic (the “first wave”) in four European jurisdictions with significantly different constitutional settlements – namely France, Germany, Italy, and the United Kingdom. It explores the influence of specific constitutional features on the legal responses to the pandemic and how, in turn, these responses have the potential to reconfigure the institutional frameworks in place. The inquiry, which unfolds along the analytical categories of (i) legal basis, (ii) horizontal and (iii) vertical allocation of power, and (iv) the role of the judiciary, shows that both constitu-

tional contexts and legal traditions play a significant role in pandemic times and are, moreover, likely to continue shaping post-pandemic governance patterns.

## Keywords

comparative constitutional law – COVID-19 – coronavirus – state of emergency – parliamentary involvement – judicial review – contextual approach – legal basis

## I. Introduction

### 1. Aims

The measures adopted by most governments in the first half of 2020 to tackle the spread of the novel coronavirus greatly restricted a vast array of fundamental rights. From freedom of movement and assembly to religious rights, family rights, rights to privacy, free speech, and economic initiative, few domains were left untouched. What is more, many adopted measures were exceptional from at least two points of view: first, several governments resorted to novel or rarely-used legal instruments; secondly, these measures have (or have had) the potential to induce broader institutional change, including as regards constitutional arrangements.

The legal responses to the pandemic varied significantly across countries, a fact which has prompted numerous analyses. Indeed, a vast scholarly production has arisen, entailing national reports, case analyses, and various summaries of the measures adopted in different countries.<sup>1</sup> A new label of “Comparative Covid Law” has even been coined to denote a self-standing field of

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<sup>1</sup> See, among many others, Richard Youngs, *How the Coronavirus Tests European Democracy*, 23 June 2020, Carnegie Europe, via <<https://carnegieeurope.eu/>>; A Human Rights and Rule of Law Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 27 Jurisdictions, Bonavero Report No. 7/2020 (30 October 2020), via <<https://www.law.ox.ac.uk/>>; the Oxford COVID-19 Government Response Tracker (OxCGRT), created by the Blavatnik School of Government and the University of Oxford, via <<https://www.bsg.ox.ac.uk/>>; the periodically updated *Verfassungsblog* Country reports via <<https://verfassungsblog.de/>>; José M. Serna de la Garza, *Covid-19 and Constitutional Law. Covid-19 et droit constitutionnel* (Mexico City: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, Instituto Iberoamericano de Derecho Constitucional, International Association of Constitutional Law 2020), via <<https://biblio.juridicas.unam.mx/>>.

comparative legal studies dealing with the legal repercussions of the pandemic.<sup>2</sup> Further, several international bodies have compiled sets of principles or best-practice documents to protect fundamental rights amid the pandemic.<sup>3</sup>

As yet, however, few contributions have conducted cross-cutting comparative analyses of the impact of emergency measures on the structures and functioning of the systems involved.<sup>4</sup> In particular, three interrelated questions remain underexplored: 1) *To what extent have constitutional features shaped the legal responses of governments to the pandemic?* 2) *Which constitutional features have impacted significantly on the responses to the pandemic, and how important were rule of law considerations in this context?* 3) *And which of these features are likely to produce long-lasting institutional effects?*<sup>5</sup>

To respond to these questions we develop a comparative analysis of trends within four European constitutional systems, namely France, Germany, Italy, and the United Kingdom (UK). The primary goal of our analysis is to deepen the legal understanding<sup>6</sup> of the relationship between states of emergency, on one hand, and the structures and functioning of some specific forms of (constitutional) government and State, on the other.<sup>7</sup> Importantly, we pursue

<sup>2</sup> See the scholarly portal “Comparative Covid Law” at <<https://www.comparativecovidlaw.it/>>; and the Research Group established by the International Association of Constitutional Law (IACL) on 17 September 2020, via <<https://blog-iacl-aidc.org/>>.

<sup>3</sup> See among others the European Law Institute (ELI) Principles for the COVID-19 Crisis, 16 April 2020, via <<https://www.europeanlawinstitute.eu/>>; the multiple Reports of the Fundamental Rights Agency (FRA) of the European Union, via <<https://fra.europa.eu/>>; and COVID-19 Guidance of the UN High Commissioner for Human Rights, via <<https://www.ohchr.org/>>.

<sup>4</sup> See e.g. Tom Ginsburg and Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, Virginia Public Law and Legal Theory Research Paper No. 52 (2020); Magnus Lundgren, Mark Klamberg, Karin Sundström and Julia Dahlqvist, *Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness*, Faculty of Law, Stockholm University Research Paper No. 78; and Armin von Bogdandy, Jesús M. Casal and Mariela Morales-Antoniuzzi, *La resistencia del Estado democrático de Derecho en América Latina frente a la pandemia de COVID-19. Un enfoque desde el ius commune*, MPIL Research Paper No. 35 (2020); all available via <<https://papers.ssrn.com/>>.

<sup>5</sup> Giacomo Delledonne, ‘Crises, Emergencies and Constitutional Change’, forthcoming in: Xenophon Contiades and Alkeme Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Abingdon-on-Thames: Routledge 2020).

<sup>6</sup> See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, *Am. J. Comp. L.* 39 (1991), 1; Marie-Claire Ponthoreau, *Droit(s) Constitutionnel(s) Comparé(s)* (Paris: Economica 2010), 89-102; Giuseppe de Vergottini, *Diritto costituzionale comparato* (Padova: Cedam 2019), 46-49; Uwe Kischel, *Comparative Law* (Oxford: Oxford University Press 2019), 45-46.

<sup>7</sup> See generally David Dyzenhaus, ‘States of Emergency’ in: Michal Rosenfeld and Andrés Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press 2012), 442-462; David Dyzenhaus, *The Constitution of Law: Legality in Times of Emergency* (Cambridge: Cambridge University Press 2006); Naomi C. Lazar, *States of Emer-*

a contextually situated approach that allows us to assess the significance of specific institutional designs, in their historical, political, and social context, in their reaction to the pandemic.<sup>8</sup>

## 2. Methodology

For reasons of comparability and methodological coherence, we focus on four countries in the same regional area: France, Germany, Italy, and the UK. While the study countries are sufficiently similar to enable a sound comparison, they also exhibit institutional and constitutional differences; factors which permit the drawing of more general conclusions,<sup>9</sup> based on both analogy and contrast.<sup>10</sup>

In terms of constitutional fundamentals, there is significant common ground between the study countries. All belong to the core family of Western liberal-democracies; their effective constitutionalisation dates back to at least the post-World War Two era; and, more generally, they are united by a commitment to the constitutional principles of fundamental rights protection, rule of law, and separation of powers. Importantly, this is also reflected in their membership of regional systems of rights protection; the Council of Europe and European Union.<sup>11</sup> Further – a key point – they were among the first

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*gency in Liberal Democracies* (Cambridge: Cambridge University Press 2009); Christian Bjornskov and Stefan Voigt, 'The Architecture of Emergency Constitutions', *I CON* 16 (2018), 101-127; Giacomo Delledonne, 'History and Concepts of Emergency' in: Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *MPECCCL* (online edn, Oxford: Oxford University Press 2016).

<sup>8</sup> See András Jakáb, 'German Constitutional Law and Doctrine on State of Emergency. Paradigms and Dilemmas of a Traditional (Continental) Discourse', *GLJ* 7 (2006), 453-478, esp. 473-475; and Jonathan White, *Politics of Last Resort. Governing by Emergency in the European Union* (Oxford: University Press 2020), 67.

<sup>9</sup> Our inquiry falls into the category of "most similar" inference-oriented studies: see Ran Hirschl, 'Comparative Methodologies' in: Roger Masterman and Robert Schütze (eds), *Cambridge Companion to Comparative Constitutional Law* (Cambridge: Cambridge University Press 2019), 28-30. See also Catherine Valcke, 'Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems', *Am. J. Comp. L.* 52 (2004), 720-721.

<sup>10</sup> Pierre Legrand, 'Jameses at Play: A Tractation on the Comparison of Laws', *Am. J. Comp. L.* 65 (2017), 58; Vicki C. Jackson, 'Comparative Constitutional Law: Methodologies' in: Rosenfeld and Sajó (eds) (n. 7), 67.

<sup>11</sup> Notwithstanding the UK's withdrawal from the EU on 31 January 2020, it continued – as a matter of the Withdrawal Agreement – to be subject to EU law during the transition period, which covered the entirety of the study period: Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, signed 17 October 2019, in force 31 January 2020, Arts 126-7.

European countries to be hit by the pandemic. This is an essential unifying element, insofar as their respective governments, at the moment at which domestic cases were first identified, did not have well-established points of reference in the experience of other liberal-democratic countries, and therefore acted behind a sort-of “veil of ignorance” as regards both the epidemiological and legal tools to address this specific emergency.

Equally, however, the study countries differ in several important respects. They range from weakly (Italy) and strongly (Germany) rationalised forms of continental parliamentarism,<sup>12</sup> to British parliamentary sovereignty, up to French semi-presidentialism. In state form they range from the (*de facto*) centralised French Republic, to Italian regionalism, through the asymmetric devolution of the UK, to German cooperative federalism.<sup>13</sup> In judicial terms, the UK stands out for the absence of an institutional divide between ordinary and administrative courts, present in all three of the other systems. At the same time, the jurisdictions under scrutiny range from a system with only a “weak-form judicial review” (UK),<sup>14</sup> to a more deferential one (France), up to systems where judicial review is undertaken by centralised judicial bodies, though with different mechanisms of access (Italy and Germany).

While Germany and France have specific frameworks regulating emergency in their written constitutions, providing substantive and procedural constraints,<sup>15</sup> Italy knows no specific constitutional derogation regime for emergencies, and the related powers are granted only through ordinary legislation. In the UK, the regime concerning emergency powers is rooted in a combination of constitutional conventions governing the exercise by government ministers of the prerogative powers of the monarch, and ordinary legislation.<sup>16</sup> Other significant elements of differentiation concern the specific

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<sup>12</sup> Boris Mirkine-Guetzevich, ‘Les nouvelles tendances du droit constitutionnel : les problèmes de la rationalisation du pouvoir dans les constitutions de l’Europe d’après-guerre’, *Revue du droit public et de la science politique en France et à l’étranger* 45 (1928), 5-53.

<sup>13</sup> John Loughlin, John Kincaid and Wilfried Swenden (eds), *Routledge Handbook of Regionalism and Federalism* (Abingdon-on-Thames: Routledge 2013), 442-462; Anna Gamper, ‘A “Global Theory of Federalism”: The Nature and Challenges of a Federal State’, *GLJ* 6 (2005), 1297-1318.

<sup>14</sup> Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press 2013); Mark Tushnet, *Weak Court, Strong Rights* (Princeton: Princeton University Press 2009).

<sup>15</sup> Rainer Grote, ‘Regulating the State of Emergency – The German Example’, *Israel Yearbook on Human Rights* (2003), 151; Jakáb (n. 8); Pedro Villarreal, ‘Public Health Emergencies and Constitutionalism Before COVID-19: Between the International and the National’ in: Richard Albert and Yaniv Roznai (eds), *Constitutionalism Under Extreme Conditions* (London, Berlin, New York: Springer 2020), 220.

<sup>16</sup> Villarreal (n. 15), 220-21, in turn referring to Günter Frankenberg, *Political Technology and the Erosion of the Rule of Law* (Cheltenham: Elgar 2014), 25.

constitutional-normative culture, and the overall structure of the respective political parties systems.

The scope of the present analysis must be specified in two other respects. First, we limit our focus to those instruments adopted to stop or slow down the spread of the virus, with a more or less direct impact on institutional structures, rule of law, and rights protection. Similarly, we only focus on judicial decisions scrutinising measures or legislation aimed to address the pandemic. Secondly, the same factors explain why our analysis constitutes a form of macro-comparison,<sup>17</sup> privileging a contextual approach.<sup>18</sup> Rather than the (functions of) single legal institutes, doctrines, or constitutional organs, we compare different constitutional systems faced with the same health emergency, giving special attention to their specific context.<sup>19</sup>

Functionalist elements play a role only to narrow down the scope of the measures taken into consideration. In this regard, it is worth stressing that the primary focus of the present article is on *processes*, that is the *reactions* of the constitutional systems in terms of rule of law, rights protection, and separation of powers, not on outcomes, that is their respective track record in curbing the pandemic's medical, societal, or economic impact. For that reason, too, our focus is on the measures taken within each jurisdiction as an immediate response to the outbreak of the COVID-19 pandemic in each State, and the implications of those response measures for their constitutional environment. We thus focus on the first wave, a constitutionally highly salient period within the large scope of the ongoing pandemic, starting in January of 2020, and ending with the relaxation of the initial restrictions in the late Summer 2020.<sup>20</sup>

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<sup>17</sup> On the distinction between macro-comparison and micro-comparison see de Vergottini (n. 6).

<sup>18</sup> See Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', *Harv. Int'l. L.J.* 26 (1985), 411; Jacco Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law', *Hastings Int'l L. & Comp. L. Rev.* 31 (2008), 555; and again Jackson (n. 10), 66-67; and Hirschl (n. 9), 16-17.

<sup>19</sup> Rudolf Bernhardt, 'Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht', *HJIL* 24 (1964), 431; Günter Frankenberg, 'Comparing Constitutions: Ideas, Ideals and Ideology', *I CON* 4 (2006), 439; Mark van Hoecke, 'Deep Level Comparative Law' in: Mark van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Oxford: Hart 2004), 165-195.

<sup>20</sup> The relevant dates varied between the four States. Italy was the first European country to introduce significant restrictions, with a state of emergency declared on 31 January 2020 and adopting the first corona-related *decreto-legge* on 23 February 2020. Germany, the UK and France followed in the middle of March introducing measures on 22 March, 23 March, and 24 March, respectively. In all jurisdictions there was – and has been – no sharp end date. Rather restrictions have been gradually lifted, and in all cases some of the (less intrusive) aspects of the pandemic response remained in place long after the end of the first wave.

We identify and analyse four cross-cutting macro-issues, namely 1) the *legal bases* of the measures adopted; 2) the *horizontal allocation of power*, i. e. the relationship between branches of government at the national level; 3) the *vertical allocation of power*, i. e. the relationship between national/central and regional/local levels of government; and 4) the *role of the judiciary*, especially in terms of rights protection. Through these lenses it is possible better to identify the specific features and the main trends emerging in each system considered, and to draw more general conclusions concerning the relationship between states of emergency and constitutional systems in mature liberal-democracies. In this way, the present contribution is an attempt to use the COVID-19 pandemic to analyse the relationship between states of emergency and *specific* constitutional systems.<sup>21</sup>

### 3. General Overview

At this introductory stage, it is useful to highlight the general constitutional patterns which characterised the experience of the pandemic in the study countries.

In *Germany*, four main constitutional issues emerged: the federal system, the functioning of parliament under epidemic circumstances, the adequacy of the legal basis of the adopted measures, and their proportionality. Besides these specific issues, in the view of the authors the first weeks of the pandemic also revealed much about German constitutional culture as a whole. Debates regarding the COVID-19 measures were carried out in the major daily newspapers as well as on online platforms such as the “Verfassungsblog”. These public debates were conducted in a highly legalistic manner and employed the language of constitutional law.<sup>22</sup> Nevertheless, it is our impression that this mode of reflection was more than purely formalistic, and in fact contributed to the choice of concrete measures. Consequently, it seems plausible to conclude that the health crisis has also revealed the degree to which constitutional law guides political processes in Germany.<sup>23</sup>

Regarding *France*, it is fair to state that the emergency has reconfirmed some of the Republic’s most central constitutional patterns and legal tradi-

<sup>21</sup> Dyzenhaus (n. 7), 3. See also Hirschl (n. 9), 30.

<sup>22</sup> It is also worth stressing that German constitutional scholarship has traditionally put an unusually strong emphasis on the state of emergency, a relatively marginal area of constitutional law: see Jakáb (n. 8).

<sup>23</sup> Laura Hering, ‘COVID-19 and Constitutional Law: The Case of Germany’ in: Serna de la Garza (n. 1), 149-150.



tions.<sup>24</sup> First, the management of the pandemic has demonstrated the degree of centralisation within the French Republic, the political and law-making heart of which beats in Paris. Secondly, the French have a taste for emergency schemes to cope with exceptional situations.<sup>25</sup> Linked to this and thirdly, in case of crisis, there is a turn to executive governance with limited parliamentary involvement. And fourthly, administrative courts in particular prove to be the primary guardians of individual freedoms.

In *Italy*, the emergency has confirmed, and perhaps accelerated, some ongoing trends. Particularly notable was the unconventional use of conventional constitutional instruments in order to compensate for the executive's weakness and the lack of formal cooperation across different levels of government.<sup>26</sup> Indicative thereof was the extensive use of executive legislation, regulatory law, and administrative instruments by the Government, as well as the informal (mainly political) forms of cooperation among territorial levels. This seems to have strengthened the trend towards a *de facto* and admittedly rather weak presidentialisation at the national level and a quite disorderly decentralisation at the local level, both of which are at odds with the written Constitution and the centrality it accords to Parliament. Further, the overall unity of action among levels of government was mainly based on a (rather fragile) political truce among respective administrations and on the overall deference of administrative courts towards executive measures. Finally, the concrete management of the emergency was influenced only to a limited extent by constitutional law and categories, which did not significantly feature in the broader public debate.

The emergency in the *UK* has, in some respects, seemed to turn back the constitutional clock. Following a post-2016 period in which the Brexit withdrawal agreement was being negotiated, debated, and litigated – implying that the courts played an unusually active and prominent role as the mediators and defenders of the UK's constitutional settlement – the pandemic has seen a return to constitutional fundamentals, with a focus on parliamentary control of the executive. Part of the reason for this disparity may have been the reluc-

<sup>24</sup> Carolyn Moser, 'France', in: Bonavero Report No. 7/2020 (n. 1), 163-176.

<sup>25</sup> Olivier Beaud and Cécile Guérin-Bargues, *L'état d'urgence: Une étude constitutionnelle, historique et critique* (Paris: LGDJ 2018), 51-116; and Véronique Champeil-Desplats, Aspects théoriques: Ce que l'état d'urgence fait à l'Etat de droit in: Ce qui reste(ra) toujours de l'urgence, Rapport de recherche Convention n° 2016 DDD/CREDOFM, 2018, 10-33, at <<https://juridique.defenseurdesdroits.fr/>>.

<sup>26</sup> See Francesco Clementi, Il lascito della gestione normativa dell'emergenza: tre riforme ormai ineludibili in: Oss. AIC, n. 3/2020 7 April 2020, via <<https://www.osservatorioaic.it/>>; Erik Longo and Massimiliano Malvicini, Il decisionismo governativo: uso e abuso dei poteri normativi del Governo durante la crisi da COVID-19 in: Federalismi.it, 12 October 2020, via <[www.federalismi.it](http://www.federalismi.it)>.

tance of the Government to act. The UK, relative to the other countries in this study and to most European countries more broadly, introduced its first measures at a later stage in the spread of the virus. Perhaps as a result, the majority of the criticism that was levelled against the Government was that it should have done more and moved quicker. Similarly, the pandemic has further strengthened the growing calls for autonomy or independence in Scotland and (to a lesser extent) in Northern Ireland.

#### 4. Main Findings

Generally, emergency governance is regarded as essentially executive.<sup>27</sup> That is because of several, largely extra-legal, factors – notably prompt decision-making, expertise, and implementation capacities – and therefore is relatively independent from the specific form of government. Unsurprisingly, then, emergency executives arose as the main political and institutional actors in each system studied throughout the coronavirus pandemic. Our analysis suggests, however, that the form of government and its actual functioning did impact the way in which the constitutional system reacted to the shift to executive governance. One key factor that mattered significantly was the readiness of the specific system to absorb a sudden expansion of executive powers.

In Italy – a constitutional system characterised by weakly rationalised parliamentary governance – executive dominance in the COVID-19 management has confirmed and accelerated ongoing trends towards a *de facto* distancing from the constitutional design. This, in turn, creates problems in terms of bounds to the executive. By contrast, German rationalised parliamentarism could cope much better with the situation. Thanks to its constitutional culture, at both the political and societal level, and well-coordinated de-centralisation of powers, the German system had comparatively few difficulties in managing the emergency with a “business as usual” approach, where the executive played a fundamental role without exceeding the established confines of its powers. While the French Government did not overstep established confines of powers, COVID-19 revived and reinforced the long-standing French constitutional tradition of concentrating executive power in Paris-based executive institutions. Indeed, the French semi-presidential system reacted by (again) increasing the concentration of power within the

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<sup>27</sup> See, among a great many others, Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New Brunswick-London: Transaction 1948); and, *contra*, Ginsburg and Versteeg (n. 4).

executive, especially the Prime Minister who, however, was *de facto* sidelined by the President. Given the generally executive-friendly setting, it took parliamentarians comparatively little time to adapt to the exceptional circumstances and carry on their oversight work. Likewise, the Westminster parliamentary system normally displays a high degree of control by the Prime Minister over decision-making and law-making processes. Here, the health emergency seems to have turned back the constitutional clock, against recent tendencies towards an unusually active role for the judiciary, with primarily parliamentary oversight and control of government action.

In general terms, our assessment shows that across all four macro-categories analysed, constitutional and institutional factors significantly impacted the legal path taken and, importantly, reinforced pre-existing patterns of institutional shifts, or social and political tensions.<sup>28</sup> Indeed, emergencies and their governance do not occur in an institutional and political void. Therefore, evaluating the constitutional credentials of emergency governance is a highly context-dependent exercise. Whether a certain measure violates fundamental rights or is problematic in terms of checks and balances – even in times of emergency – depends chiefly on context which, in turn, is shaped by path-dependent social and institutional processes distinctive in each country. The institutional design and the actual functioning of the form of government are integral parts of that context.

More specifically, all studied systems needed to complete or clarify the legal framework of their emergency powers or emergency governance schemes. All tried – with different results – to create unequivocal legal bases for emergency measures. In this regard, our study confirms that when it comes to the exercise of emergency powers in mature liberal democracies, the main divide is not between bound or unbound executives. Rather, the more useful distinction lies between systems where the “compulsion to legality” triggers virtuous or vacuous circles, that is between the mere *appearance* and the *substance* of legality.<sup>29</sup> However, forms of government and the presence of pre-existing emergency schemes or legal doctrines influenced the speed, scope, and nature of legislative interventions, and consequently the actual functioning of checks and balances.

With regard to the role played by parliaments, legislatures predominantly performed an oversight function, while the primary responsibility for the emergency response fell on the executive branch. The extent to which this

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<sup>28</sup> For a recent study, based also on political science perspective and methods, highlighting the role of the institutional context in the pandemic response see Lundgren, Klamberg, Sundström and Dahlqvist (n. 4).

<sup>29</sup> Dyzenhaus, *States of Emergencies* (n. 7), 451.

represented a shift in the established constitutional order varied between the jurisdictions. In all four studied States, measures had to be taken to reorganise the work of the legislature in order to reduce its vulnerability and to protect the health and welfare of parliamentarians. These protective measures had at least the potential to impede the functioning of the legislative branch of government during the period in which they were in effect. However, certain measures entailed a significant redistribution of power between the branches of government, with the potential to create longitudinal effects. Overall our study suggests that in the different systems the impact of emergencies on horizontal allocation of powers is influenced by the overall functions of parliaments; deviation from constitutional conventions; previous emergency schemes in ordinary legislation; and vertical relationships.

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. Relatedly, the compliance of emergency governance with the rule of law and rights protection is not strictly related to any single constitutional model of (de-)centralisation. However, our study suggests that, when it comes to the vertical allocation of powers, emergency governance complies with the principles of rule of law to a greater extent where there is a higher degree of legal certainty about the institutional allocation and limits of emergency competences; ie. where authorities and citizens alike know who does what at which level. This feature – closely linked to the pre-existence of suitable emergency schemes in ordinary legislation recalled above – rewards either systems with fewer centres of political decision at sub-national level; or systems with well-structured, functioning, and cooperative models of (political) de-centralisation.

The pandemic put judicial institutions in a situation that required them to apply their standards of review, and in particular proportionality tests, in novel ways. Courts had to weigh *actual* restrictions to personal and economic freedoms against *potential* repercussions, continuously changing epidemic circumstances, and intangible future risks. The initial trend in the “COVID-19 case law” of the study countries was one of a lowered standard of scrutiny on executive and legislative measures. However, as the pandemic progressed the standards rose again. Our study suggests that the level of protection and the readiness of the courts to conduct substantial scrutiny was higher in the countries where courts of first instance were more easily accessible, and where there is a specific judicial circuit specialised in reviewing the acts of public authorities. The institutional self-perception of courts as guardians of rights also played a key role. Moreover, in times of emergency the level of protection by courts decreases with their expanding role as mediators be-

tween different levels of government: the more judicial actors become involved in dealing with institutional friction, the harder it seems for them to focus on fundamental rights protection of individuals. Finally, it could be observed that the capacity of courts to frame reliable standards of review throughout the emergency was particularly affected by continuously changing epidemic circumstances, measures with temporary or precarious legal efficacy, and piecemeal regulations.

## II. COVID-19 Impact: Timeline and Types of Measures Adopted

The timeline of the progression of the COVID-19 emergency and the related measures showed a high degree of symmetry across the four systems under scrutiny.

### 1. France

France was the first of the four jurisdictions under scrutiny officially to record an infection on European soil and, moreover, features among the European countries that were most severely hit by the first wave of the COVID-19 pandemic. By 31 August 2020, the French authorities counted more than 280,000 confirmed cases of infection with SARS-CoV-2 and more than 30,600 corona-related deaths.<sup>30</sup> Besides, the pandemic plunged the French economy into a deep recession with an estimated decrease of its GNP of 6 % in the first trimester of 2020 alone,<sup>31</sup> an historic low that was undercut only by the depression during the Second World War. The gravity of the situation prompted the French President Emmanuel Macron to engage in militaristic rhetoric; characterising the fight against COVID-19 as a “war” and admonishing the population that the outcome of the struggle against the virus depended chiefly on the nation staying strong and united.<sup>32</sup> Broadly speaking, three phases of pandemic management can be distinguished during the first wave: a pre-emergency phase (from 24 January to 23 March 2020), an emergency phase (from 24 March to 10 July 2020), and a so-called transi-

<sup>30</sup> Figures correct as of 31 August 2020. Source: *Agence nationale de santé publique*, also known as *Santé publique France*.

<sup>31</sup> *Banque de France*, Point sur la conjoncture française, 12 May 2020.

<sup>32</sup> Emmanuel Macron, Address to the Nation (*Adresse aux Français*) of 16 March 2020.

tional exit phase (from 10 July 2020 and continuing beyond the end of the study period).

On 24 January, the Ministry of Health announced that three individuals having recently travelled to France from China had tested positive for SARS-Cov-2 – the first officially-confirmed coronavirus infection in Europe. A month later, on 13 February the same ministry then triggered the ORSAN plan, an emergency healthcare scheme for exceptional public health situations.<sup>33</sup> Despite the increasingly restrictive measures adopted under the ORSAN plan – ranging from isolation and confinement of infected individual to the prohibition of social gatherings, school closures, and restrictions on movement<sup>34</sup> – the virus had begun to spread exponentially by mid-March, with the number of infected individuals reaching 4,500. On 16 March the Government ordered a nation-wide confinement by way of decree,<sup>35</sup> based on Article L313-1 of the Public Health Code (*Code de la santé publique*, CSP) and the doctrine of exceptional circumstances.<sup>36</sup>

A week later, on 23 March, an emergency bill was passed by accelerated legislative procedure according to Article 42(2) of the Constitution.<sup>37</sup> The bill's Title I instituted a new emergency regime under French law, namely the health-related state of emergency (*état d'urgence sanitaire*), and recast in legislative form the public health measures previously adopted by decrees and orders (which were abrogated).<sup>38</sup> Almost two months later, on 11 May, a relaxation of the nation-wide lockdown rang in the *déconfinement* phase. Although some restrictions were lifted, the *état d'urgence sanitaire* was prolonged until mid-July, and a centralised information system for COVID-19-related patient information was created.<sup>39</sup>

On 9 July, a new law was promulgated, which declared the end of the state of emergency (with effect of 10 July), except for French Guiana and Mayotte

<sup>33</sup> ORSAN is the French acronym for “*organisations de la réponse du système de santé en situation sanitaires exceptionnelles*”.

<sup>34</sup> See, for instance, Décret n° 2020-247 du 13 mars 2020 relatif aux réquisitions nécessaires dans le cadre de la lutte contre le virus covid-19; Arrêté du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19.

<sup>35</sup> Décret n° 2020-260 du 16 mars 2020 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19; Décret n° 2020-264 du 17 mars 2020 portant création d'une contravention réprimant la violation des mesures destinées à prévenir et limiter les conséquences des menaces sanitaires graves sur la santé de la population.

<sup>36</sup> See below, subsection III. 1.

<sup>37</sup> Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19.

<sup>38</sup> The emergency bill furthermore contained a number of socio-economic measures (Title II) and, importantly, clarified the situation concerning the municipal elections whose second round was still pending (Title III).

<sup>39</sup> Loi n° 2020-546 du 11 mai 2020 prorogeant l'état d'urgence sanitaire et complétant ses dispositions.

for which emergency conditions were prolonged until 30 October.<sup>40</sup> Notwithstanding that the law's denomination suggested a retreat from the *état d'urgence sanitaire*, a substantial part of the constraining measures remained in place. It would therefore be more accurate to talk about a "state of emergency lite",<sup>41</sup> which can be re-upgraded by a decision of the Council of ministers.<sup>42</sup>

## 2. Italy

From the outbreak of the COVID-19 pandemic in late February to the end of August 2020, Italy has been one of the hardest hit European countries. 269,214 infections and 35,483 deaths were reported in the study period.<sup>43</sup> The economic impact has also been devastating, with a 12.4 % GDP loss in the second trimester of 2020 and an expected full-year fall of 10.5 %.<sup>44</sup> After China, Italy was the first State to implement a national lockdown, with a major impact at all legal and institutional levels.

Faced with signs of the impending emergency, the first administrative measures were adopted by the Minister of Health on the 25 and 30 January respectively, first ordering the monitoring of passengers flying in from areas with confirmed cases of infection, and then blocking all flights from China. After the first case of domestic infection was identified on the 30 January, the Government declared a national state of emergency on the 31 January until the end of July 2020.<sup>45</sup> The Head of the Department for Civil Protection (DCP) was empowered to take, under direction of the Prime Minister (*Presidente del Consiglio dei Ministri*), extraordinary administrative measures. These latter were based on existing emergency legislation, and mostly focused on intensifying the procurement of resources for managing the crisis.

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<sup>40</sup> Loi n° 2020-856 du 9 juillet 2020 organisant la sortie de l'état d'urgence sanitaire; Décret n° 2020-860 du 10 juillet 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans les territoires sortis de l'état d'urgence sanitaire et dans ceux où il a été prorogé.

<sup>41</sup> In a similar vein, see Xavier Bioy, 'Le régime de sortie de l'état d'urgence sanitaire', 15 June 2020, via <<https://www.leclubdesjuristes.com/blog-du-coronavirus/>>.

<sup>42</sup> Art. 2.II Loi n° 2020-856 du 9 juillet 2020, making reference to Art. L3131-13 CSP.

<sup>43</sup> As of 31 August 2020. See <<https://www.corriere.it/>>.

<sup>44</sup> See <<http://www.oecd.org/newsroom/gdp-growth-second-quarter-2020-oecd.htm>>.

<sup>45</sup> A "statutory" state of emergency, now codified and regulated in the Code of Civil Protection (decreto legislativo 2 gennaio 2018, n. 1 (Codice della protezione civile)). The state of emergency was extended for the first time until 15 October 2020 by decreto-legge 30 luglio 2020, n. 83 (Misure urgenti connesse con la scadenza della dichiarazione di emergenza epidemiologica da COVID-19 deliberata il 31 gennaio 2020) (see below, subsection III. 1.).

In the following days, after the first quarantines were ordered by the Minister of Health, a lockdown was gradually implemented in the most-affected regions, and extended to the entire national territory on the 9 March.<sup>46</sup> The legal basis for these measures was provided by Decree-Law (*decreto-legge*) No. 6/2020, adopted on 23 February. A long series of administrative measures and other *decreti-legge* (especially *decreto-legge* No. 19/2020 of 25 March) followed.<sup>47</sup> These measures have gradually been relaxed since May. After a first administrative measure adopted on the 26 April and entered into force on the 4 May, several activities were allowed to reopen. On the 16 May *decreto-legge* No. 33/2020 set out the general framework of the so-called “Phase 2”, effective from the 18 May.

### 3. Germany

In Germany the first human case of infection with SARS-CoV-2 was signalled to Bavarian authorities on the 27 January 2020. The coronavirus was reported to have been brought to the greater Munich area by a person from Shanghai who had travelled to Germany for a business meeting.<sup>48</sup> By the end of August, there were approximately 240,000 confirmed infections and about 9,300 COVID-19-related deaths.<sup>49</sup> As reported by the Federal Statistical Office the gross domestic product shrank by 9.7 % in the second quarter of 2020, compared with the previous quarter.<sup>50</sup> With an overwhelming majority, on the 25 March the German *Bundestag* approved a stimulus package with a budget of EUR 156 billion to keep companies solvent and to pay for healthcare. In order to be able to approve the budget it suspended the constitutionally-enshrined “debt brake”.<sup>51</sup>

Initially, German authorities were reluctant to take action in relation to the novel virus. However, as the health crisis progressed and turned into probably the most serious health emergency since the establishment of the Federal Republic in 1949, far-reaching measures were enacted in mid-March that considerably affected public life and severely encroached on fundamen-

<sup>46</sup> Decreto del Presidente del Consiglio dei Ministri 9 marzo 2020.

<sup>47</sup> See the full list, in chronological order, at <<http://www.governo.it>>.

<sup>48</sup> Merle M. Böhmer et al., Investigation of a COVID-19 Outbreak in Germany Resulting from a Single Travel-Associated Primary Case: a Case Series, *Lancet Infect Dis* 2020, 920.

<sup>49</sup> As of 31 August 2020, see <<https://www.rki.de/>>.

<sup>50</sup> Deutsche Wirtschaft bricht weniger stark ein als befürchtet, 25 August 2020, *Süddeutsche Zeitung*.

<sup>51</sup> Michael Nienaber, German Parliament Suspends Debt Brake to Fight Coronavirus Outbreak, 25 March 2020, Reuters.



tal rights. They included contact restrictions; bans on leaving the house; the closure of schools, child-care facilities, universities, businesses, restaurants, and shops; and bans on events and assemblies, as well as restrictions on visits. However, no nationwide curfews were put in place. Compared to much of the rest of the world, in Germany the first wave of the crisis – including the response by governmental authorities – was comparatively mild.

#### 4. United Kingdom

The first cases of SARS-CoV-2 in the UK were identified at the end of January 2020.<sup>52</sup> In the initial stages, the virus seemed to be spreading slowly, and it was not until the 6 March that the first deaths were attributed to the pandemic.<sup>53</sup> Thereafter, however, the UK quickly emerged as one of the worst affected countries in Europe and the world. As of the 31 August, the UK had reported more than 41,000 confirmed deaths and over 339,000 confirmed cases.<sup>54</sup>

The UK has also been among the worst affected countries economically. In the second quarter of 2020, when lockdown restrictions reached their height, the UK's GDP suffered a 20.4 % drop, far outpacing the 12 % drop in the GDP of the Eurozone, and substantially the most significant fall among the G7 nations.<sup>55</sup> That figure dwarfs the decline in GDP growth in the 2008 financial crisis as well as that following the Second World War, both of which produced a drop of around 5 %.<sup>56</sup>

After initially pursuing a strategy of allowing the virus to spread in order to achieve herd immunity,<sup>57</sup> the UK Government announced a lockdown on the 23 March.<sup>58</sup> From this date, schools and universities were closed, public

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<sup>52</sup> New Scientist and Press Association, First Cases of New Coronavirus Confirmed in the UK as Disease Spreads, 31 January 2020, New Scientist.

<sup>53</sup> Sarah Marsh and Denis Campbell, Coronavirus: First UK Death Confirmed as Cases Surge to 116, 6 March 2020, The Guardian.

<sup>54</sup> UK Coronavirus Dashboard, <<https://coronavirus.data.gov.uk/>>.

<sup>55</sup> Richard Partington, Covid-19: UK Economy Plunges into Deepest Recession Since Records Began, 12 August 2020, The Guardian.

<sup>56</sup> Office of Budgetary Responsibility, Commentary on the OBR Coronavirus Reference Scenario, 14 April 2020, 8.

<sup>57</sup> Sarah Boseley, Herd Immunity: Will the UK's Coronavirus Strategy Work?, 13 March 2020, The Guardian; The Editor, The Guardian View on Herd Immunity: Yes It Was "Part of the Plan", 29 April 2020, The Guardian.

<sup>58</sup> Heather Stewart, Rowena Mason and Vikram Dodd, Boris Johnson Orders UK Lockdown to Be Enforced by Police, 23 March 2020, The Guardian.

gatherings were prohibited, a strong presumption in favour of working from home was introduced for those able to do so, and people were permitted to leave their homes only for daily exercise, shopping for essentials, and for medical and care needs.<sup>59</sup>

Significantly, however, the secondary legislation which provided Government and the Police with the powers to order and enforce a general quarantine was not brought into force until the 26 March. One significant – although as yet unexplored – constitutional issue associated with the coronavirus experience in the UK is therefore likely to be the three-day period between the ordering of a general quarantine and the availability of an explicit statutory basis for the measures imposed. Other key issues in this first wave period include widespread reports of the Police overstepping the boundaries of their authority, and the introduction – and then withdrawal – of electronic voting procedures in the House of Commons.

### III. The Quest for an Appropriate Legal Basis for Pandemic Management

When faced with the fast spread of the novel coronavirus, governments around the globe were under pressure to act both rapidly and effectively to avoid the worst outcomes. But on which legal bases could or should they base their measures, some of which would drastically limit fundamental rights? The answers to this question greatly varied between Berlin, London, Paris, and Rome.

Our analysis of the legal bases of the pandemic measures will unfold in three steps. Subsection III. 1. focuses on the type and nature of the legal bases, a question which essentially boils down to the existence (or absence) of a legal regime regulating specific or general emergency situations prior to the current coronavirus pandemic. Subsection III. 2. then examines the nature and extent of decision-making and implementation prerogatives set out by the respective legal bases, and the legal problems (potentially) deriving from the grant of extraordinary competences in times of pandemic. Subsection III. 3. finally, highlights four elements that impact the relationship between the nature of the legal framework and the level of executive governance.

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<sup>59</sup> Peter Walker, UK Lockdown: What Are the New Coronavirus Restrictions?, 23 March 2020, *The Guardian*.

## 1. Exceptional Circumstances Calling for Emergency Powers?

Given the exceptional circumstances calling for extraordinary measures, crisis or emergency modes of governance seemed *prima facie* to offer a suitable legal basis for pandemic management. But which were the constitutional or statutory emergency regimes governments could possibly rely on? And have governments actually activated these states of emergency when countering COVID-19?

In Germany, neither the Federal Government nor the *Länder* have made use of the constitutional rules of the emergency constitution to contain the pandemic, and no declaration of a state of emergency was made. To understand this reaction, one has to take a closer look at the constitutional framework for emergencies provided by the Basic Law, the so-called “emergency constitution”. Since the adoption of the 1968 Emergency Act, which was preceded by fierce civil society protests,<sup>60</sup> the German Basic Law (*Grundgesetz*, GG) has distinguished between an external and internal emergency. An external emergency is given in the event of a state of defence (*Verteidigungsfall*), regulated in Article 115 a para. 1 of the Basic Law. Its conditions are fulfilled if the federal territory is attacked by armed force or if such an attack is imminent. When the state of defence is triggered, competence shifts to the Federal Government, the legislative procedure is simplified, and basic rights are restricted. A small Joint Committee can take over the position of both chambers of Parliament – *Bundestag* and *Bundesrat* – according to Article 53 a of the Basic Law, which can act more effectively and flexibly. By contrast, according to Article 91 of the Basic Law, a state of internal emergency may be invoked in order to avert an imminent danger from within to the existence or the basic democratic order of the Federation or one of the *Länder*. According to Article 35 para. 2 sentence 1 of the Basic Law, a *Land* can request assistance from other *Länder* and the Federation in cases of threats to public safety and order “of particular importance”. According to Article 35 para. 2 sentence 2 of the Basic Law it can do the same in the event of natural disasters and particularly serious accidents. This is an expression of federal state solidarity. Paragraph 3 regulates cases in which such natural disasters or accidents affect the territories of several *Länder*.

The emergency provisions of the Basic Law are, however, rather ill-suited to the situation of a pandemic. It has been agreed that it would be too far-

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<sup>60</sup> Regarding the historical background of the provisions see Grote (n. 15), 153. For a comparison to the state of emergency provisions at the time of the Weimar Reichsverfassung see Jens Kersten and Stephan Rixen, *Der Verfassungsstaat in der Corona Krise* (Munich: Beck 2020), 33-36.

fetched to reason by analogy to the state of defence and classify a virus as a weapon with which the federal territory is attacked.<sup>61</sup> In the absence of an external emergency, however, there is no provision for the formation of a Joint Committee. Against this background, there were certain moves in Berlin to add an Article 53b to the Basic Law to enable the establishment of a Joint Committee within the meaning of Article 53 a of the Basic Law as an emergency committee to replace the *Bundestag*, even in peacetime, if an accident, disaster, or epidemic occurs.<sup>62</sup> The proposal was met with strong criticism in academia<sup>63</sup> as well as by Parliament itself.<sup>64</sup> It was argued that it should not be concluded prematurely that the constitutional organs are in a state of emergency, if it is only a matter of “extraordinary substantive challenges to politics”.<sup>65</sup>

During the first wave, Germany did not seek to establish an “emergency parliament” and instead chose to maintain parliament’s ability to work through “minimally invasive measures”,<sup>66</sup> which demonstrates the importance of the Federal Parliament not only as a technical legislator but also as a forum for critical public monitoring of the crisis measures.<sup>67</sup> Thus, Germany did not respond to the pandemic with a state of emergency or an emergency constitution. Rather, the crisis measures were based on the Infection Protection Act (*Infektionsschutzgesetz*, IfSG), the purpose of which is to prevent communicable diseases in humans, detect infections at an early stage, and prevent their further spread (§ 1 para. 1 IfSG). In March, however, the German legislature provided a legal basis for declaring for the first time an epidemic “situation” (or emergency) of national concern by revising

<sup>61</sup> See Macron (n. 32).

<sup>62</sup> Exemplary reports on such considerations by the *Bundestag* see “Überlegungen für Grundgesetzänderung”, 16 March 2020, Legal Tribune Online; “Bundestag erwägt Verfassungsänderung”, 16 March 2020, NTV; Christoph Schönberger and Sophie Schönberger, Regiert bald ein Notausschuss?, 26 March 2020, FAZ; Robert Roßmann and Georg Mascolo, Ein Rettungspaket für den Bundestag, 3 April 2020, Süddeutsche Zeitung. See also Alma Libal, Desperate Times, Desperate Measures? Zur Erhaltung der Arbeitsfähigkeit des Bundestags in Zeiten von COVID-19, JuWissBlog Nr. 26/2020, 18 March 2020, via <<https://www.juwiss.de/>>.

<sup>63</sup> Christoph Möllers, Über den Schutz der Parlamente vor sich selbst in der Krise, VerfBlog, 20 March 2020, via <<https://verfassungsblog.de/>>; Christoph Möllers interviewed by Nina Breher, Andrea Dernbach and Jost Müller-Neuhof, Wir leben in einem quasi grundrechtsfreien Zustand, 12 April 2020, Tagesspiegel; Schönberger and Schönberger (n. 62).

<sup>64</sup> Überlegungen für Grundgesetzänderung wegen Corona-Epidemie, 16 March 2020, Berliner Morgenpost.

<sup>65</sup> Matthias Friehe, Freiheit in höchsten Nöten: Warum die Corona-Krise nicht zum Verfassungsnotstand stilisiert werden darf, VerfBlog, 28 March 2020, via <<https://verfassungsblog.de/>>.

<sup>66</sup> Friehe (n. 65).

<sup>67</sup> See below, subsection III. 2.

§ 5 IfSG,<sup>68</sup> and it was declared so by the *Bundestag* when the amendment was passed.<sup>69</sup>

The management of COVID-19 in France revealed a strong taste for emergency governance. This taste is not new; it has been a steady companion of the Vth Republic which, prior to the coronavirus pandemic, counted no less than four emergency regimes<sup>70</sup> – and now is one (provisional) emergency regime for public health matters richer. There are two constitutionally enshrined emergency regimes, namely the state of siege (*état de siège*) and the so-called full powers scheme (*pleins pouvoirs*). The state of siege, the constitutional antecedents of which date back to the IIIrd Republic, is founded in Article 36 of the Constitution and (since 2014) codified in the Defence Code.<sup>71</sup> Additionally, there is the famous emergency clause contained in Article 16 of the Constitution, conferring “exceptional powers”<sup>72</sup> upon the President in times of acute crisis, which is vaguely described as a serious and immediate threat to the public institutions (or their functioning), the independence of the nation, the integrity of the French territory, or the fulfilment of international commitments. The constitutional state of emergency has only been activated once, namely in 1961 by Charles de Gaulle in response to the attempted *coup d’Etat* in Algeria.<sup>73</sup> Thirdly, there is a statutory state of emergency, based on an act adopted in 1955,<sup>74</sup> that confers extensive powers to the Minister of the Interior and prefects. This “ordinary” statutory state of emergency has been triggered several times in different contexts.<sup>75</sup> Fourthly, the jurisprudential doctrine of exceptional circumstances adds another layer to the already complex legal emergency edifice. The doctrine, which was coined during the first world war by two landmark decisions of the Council of State (*Heyriès* and *Dames Dol et Laurent*),<sup>76</sup> implies in essence that a

<sup>68</sup> Gesetzes zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, Federal Law Gazette I 2020, 587. In detail with regard to § 5 IfSG see below subsection IV. 2.

<sup>69</sup> BT-Plenarprotokoll 19/154, 19169C.

<sup>70</sup> For an overview, see Jacques-Henri Stahl, ‘Agir, juridiquement’, *Droit administratif* 5 (2020), 1; Sébastien Platon, From One State of Emergency to Another – Emergency Powers in France, *VerfBlog*, 09 April 2020, via <<https://verfassungsblog.de/>>; and again Beaud and Guérin-Bargues (n. 25).

<sup>71</sup> Art. L2121-1 Defence Code.

<sup>72</sup> CE, 2 March 1962, *Rubin de Servens*, para. 3.

<sup>73</sup> Décision du 22 avril 1961; Décision du 29 septembre 1961.

<sup>74</sup> Loi n° 55-385 du 3 avril 1955 relative à l’état d’urgence.

<sup>75</sup> Namely: during the war in Algeria (1955, 1958, 1961); in reaction to secessionist aspirations in New Caledonia (1984); in the wake of violent civil unrest in Parisian suburbs (2005); and most recently in response to the terrorist attacks in Paris in 2015, when it remained in place for two years until November 2017.

<sup>76</sup> CE, 28 June 1918, *Heyriès*, n° 63412, publié au recueil Lebon; CE, 28 February 1919, *Dames Dol et Laurent*, n° 61593, publié au recueil Lebon.

decision or action taken by the public administration which, under normal circumstances, would be illegal for formal or substantive reasons, can under exceptional circumstances be considered legal. This jurisprudential emergency regime, which does not substitute for, but rather complements the previously mentioned constitutional and statutory regimes, is intended temporarily to redraw the confines of legality to ensure the lawfulness of official decisions in times of crisis.

When faced with the COVID-19 pandemic, the French authorities first had recourse to the exceptional circumstances doctrine in conjunction with a statutory legal basis: the confinement ordered on 16 March was based on a mix of statutory and customary sources, namely the Public Health Code (*Code de la Santé publique*, CSP) and the exceptional circumstances doctrine. However, this piecemeal approach to regulating the coronavirus situation proved unsatisfactory,<sup>77</sup> and a specific regime was crafted for health crises or catastrophes. Hence, the emergency bill of 23 March introduced the state of *health* emergency (*état d'urgence sanitaire*). It has been speculated that the authorities were reluctant to have recourse to the “ordinary” state of emergency as this legal basis had been relied on in the wake of the terrorist attacks of 2015.<sup>78</sup> The constitutional emergency regime, for its part, seemed highly unsuitable given the nature of the threat – a virus – and the (legal) problems to be solved.<sup>79</sup> Moreover, a central part of the emergency bill (its Title III) was concerned with the (re)organisation of the second round of municipal elections that had to be deferred in light of the spread of the coronavirus. As there was no constitutional or legislative provision allowing for the postponement of the second round, a law had to be passed to legalize the adjournment. Until the emergency bill entered into force on 23 March, securing the results of the first round of the municipal elections and rescheduling the vote of the second round, the suspension of elections had rested on a decree that, in turn, had implicitly relied on the exceptional circumstances construction.<sup>80</sup>

The Italian decision-makers, in contrast, could not turn to any comprehensive emergency scheme. Indeed, the Italian Constitution does not foresee any

<sup>77</sup> CE, *Avis sur le projet de loi d'urgence pour faire face à l'épidémie de Covid-19*, para. 1.

<sup>78</sup> Aurore Gaillet and Maximilian Gerhold, *Etat d'urgence sanitaire. Wie Frankreich den Coronavirus bekämpft*, 27 March 2020, via <<https://verfassungsblog.de/>>.

<sup>79</sup> Olivier Beaud, *La surprenante invocation de l'article 16 dans le débat sur le report du second tour des élections municipales*, 23 March 2020, via <<http://blog.juspoliticum.com/>>.

<sup>80</sup> In its preamble, the pertinent decree read “given the emergency” (*vu l'urgence*). Décret n° 2020-267 du 17 mars 2020 portant report du second tour du renouvellement des conseillers municipaux et communautaires, des conseillers de Paris et des conseillers métropolitains de Lyon, initialement fixé au 22 mars 2020 par le décret n° 2019-928 du 4 septembre 2019; see for a further discussion Gaillet and Gerhold (n. 78).

“exceptional” emergency regime.<sup>81</sup> Regardless of their content, emergency instruments cannot derogate from constitutional provisions. In particular, emergency measures must meet the constitutional requirements explicitly or implicitly set for the restrictions of rights. However, several “ordinary” legislative and administrative instruments give the Government a broad range of emergency powers. The first is Article 77 of the Constitution, which makes provision for the *decreto-legge*, a form of primary-level legislation adopted by the Government and formally issued by the President of the Republic (PdR).<sup>82</sup> A *decreto-legge* must not derogate from the Constitution, and must be passed (“converted into law”) by both houses of Parliament within 60 days, otherwise it retroactively loses any legal effect.<sup>83</sup> Despite this expiration period of 60 days, it can be amended or repealed only by subsequent primary legislation, and the power of annulment rests exclusively with the Constitutional Court (*Corte costituzionale*). Importantly, institutional actors other than the executive are involved in the formation of *decreto-legge*, namely the PdR (when issuing) and the Parliament (when “converting” these instruments). Outwith “extraordinary circumstances of urgency and necessity” Article 77 para. 1 of the Constitution expressly provides that the Government may not issue decrees having force of law without previous authorisation by the Parliament.

For this reason, too, over time sectorial legislation has introduced different types of administrative emergency instruments. The main ones are the so-called *ordinanze contingibili e urgenti*, an umbrella-term indicating a wide range of administrative measures. These measures are mainly regulated by the legislation establishing the Department of Civil Protection (DPC),<sup>84</sup> the mandate of which focuses on disaster relief. While the DPC has a multi-level structure,<sup>85</sup> only the Prime Minister may mobilise the national system and adopt emergency orders. Any intervention of the DPC must be preceded by the formal declaration of a state of emergency (either national or local) by the Government, an administrative step triggering the potential adoption of *ordinanze*. Such instruments have no legislative value, and are adopted by national and local executive authorities. Non-compliance is punished as a criminal offence. Today, the *ordinanze* are regulated by a patchwork of

<sup>81</sup> With the exception of the war powers potentially conferred by the Parliament to the Government, following the declaration of war under Art. 78 Constitution.

<sup>82</sup> In the Italian constitutional system the President of the Republic is often a main rationalising factor in unstable political situations, but the present paper does not explore it in the context of the COVID-19 pandemic, as such role is mainly performed in extra-legal forms that can be better investigated by political scientists.

<sup>83</sup> See below, subsection IV. 2.

<sup>84</sup> Today consolidated in the already recalled *Codice della protezione civile* (n. 44).

<sup>85</sup> For further information, see below, subsection V. 2.

legislative acts<sup>86</sup> that, while not strictly pre-determining their content, allows the measures temporarily to derogate from primary legislation under certain substantive and procedural conditions.<sup>87</sup> Importantly, such conditions do not only determine the lawfulness of each *ordinanza*, but are also crucial for the legitimacy of the instrument as such,<sup>88</sup> not least because the *ordinanze* are adopted without the involvement of the Parliament and, escaping the Constitutional Court's radar, are subject to review only by ordinary and administrative courts.

In terms of legal strategy, the central Government in Italy also made significant use of executive law-making. Concretely, starting from the *decreto-legge* No. 6/2020, the Italian Government repeatedly had recourse to several *decreti-legge* to expand the derogation possibility of *ordinanze* and other administrative instruments. Significantly, the main instruments employed for that purpose were not the normal *ordinanze*, but the *decreti del Presidente del Consiglio dei Ministri* (dPCM). Normally generic administrative instruments without derogation power, these latter are usually adopted by the Prime Minister, with a varying degree of procedural participation of other Ministers but without specific procedural preconditions, and they may have any sort of content delegated by specific ordinary laws. However, the expanded scope and nature of the rules adopted with the "COVID-19 dPCMs" has deeply transformed their legal nature. Regional and local measures, on the other hand, were generally adopted within the existing framework concerning the *ordinanze*. Further, the initial framework put in place with *decreto-legge* No. 6/2020 neither established an exhaustive list of possible derogations to existing legislation; nor any time-limit to the same derogations to be made via either *ordinanze* or dPCMs.

Widespread criticism from the perspective of the principle of legality<sup>89</sup> together with the implementation problems that had emerged<sup>90</sup> pushed the

<sup>86</sup> Especially Art. 32 legge 23 dicembre 1978, n. 833 (Istituzione del servizio sanitario nazionale); Arts 50 and 54 decreto legislativo 18 agosto 2000, n. 267 (Testo unico delle leggi sull'ordinamento degli enti locali); and Art. 25 Codice della Protezione Civile (n. 44).

<sup>87</sup> Their adoption must be preceded by a declaration of national or local state of emergency by the Government, their efficacy must be limited in time, and in any case no longer than what strictly required by urgency/necessity; they must be adequately motivated; when not aimed at single persons, they must be published; they must comply with the general principles of domestic and EU law.

<sup>88</sup> The conditions of legitimacy of *ordinanze* as enshrined in primary legislation (see n. 84), have been primarily shaped by the case law of the Constitutional court: see e.g. sentenze nn. 8/1956; 26/1961; 4/1977; 127/1995; 115/2011.

<sup>89</sup> See e.g. Carlo Blengino, *Emergenze e diritti fondamentali*, 19 March 2020, *Il Post*; Angelo Panebianco, *Quando l'emergenza chiama meglio farsi trovare preparati*, 20 March 2020, *Il Corriere della Sera*.

<sup>90</sup> See subsection V. 3.



Government to modify, consolidate, and clarify the framework with *decreto-legge* No. 19/2020, adopted on the 25 March. Apart from fixing uncertainties concerning regional and local measures, the latter confirmed the legal basis for restrictions and provided new ones, made it possible to differentiate among territories, and contained an exhaustive list of possible restrictions. Further, it set a deadline to the derogation possibility of “COVID-19 dPCMs” and *ordinanze*, coincident with that of the “administrative” state of emergency declared on 31 January.<sup>91</sup> By these means, a sunset clause was *de facto* applied to the emergency derogations, the modification or extension of which requires a further intervention of Parliament, at least when it has to “convert” the *decreto-legge* postponing the deadline. Importantly, the Government was initially only bound to communicate the dPCMs to the Parliament *after* their adoption, and to give general reports every 15 days.<sup>92</sup> A preventive informative procedure, with no binding force upon the Government, was only established starting from 23 May, when the Parliament converted *decreto-legge* No. 19/2020 into law.<sup>93</sup>

The Government’s strategy was regarded as problematic for several reasons. Indeed, especially before their conversion into law by Parliament, the combination of *decreti-legge* and dPCMs results in the attribution to the Executive of a *de facto* primary legislative power which, even in the context of an emergency, is at odds with both the text<sup>94</sup> and the spirit of the 1948 Constitution. This situation is exacerbated by the fact that the Government chose neither to resort to *decreti-legge* – legislative-level instruments specifically designed to address emergencies – nor to normal *ordinanze*. Rather, the centre of gravity of the response measures was the use of “genetically modified” dPCMs, i. e. instruments originally not designed for emergencies, and not assisted by corresponding guarantees in existing laws. It was contested in Italian scholarship whether such use is compatible with the constitutional and legal framework.<sup>95</sup> However, most authors argue that the “COVID-19

<sup>91</sup> Initially set to 31 July 2020, then extended to 31 October 2020 by *decreto-legge* No. 83/2020, “converted” by *legge* No. 124 of 25.9.2020.

<sup>92</sup> See Art. 2 para. 5 *decreto-legge* 25 marzo 2020, n. 19 (Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19).

<sup>93</sup> See Art. 2 para. 1 *decreto-legge* n. 19/2020, as modified by *legge* 22 maggio 2020, n. 35 (Conversione in legge, con modificazioni, del *decreto-legge* 25 marzo 2020, n. 19, recante misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19).

<sup>94</sup> See again Art. 77 para. 1 Constitution.

<sup>95</sup> For positions arguing that the legal strategy is still within the constitutional framework see esp. Massimo Luciani, ‘Il sistema delle fonti del diritto alla prova dell'emergenza’, *Rivista AIC*, 10 April 2020, via <[www.rivistaaic.it](http://www.rivistaaic.it)>; and Michele Massa, ‘A General and Constitutional Outline of Italy’s Efforts Against COVID-19’ in: Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst and Fryderyk Zoll (eds), *Coronavirus and the Law in Europe. Examining Coronavirus-Related Legislation and Its Consequences*

dPCMs” are qualitatively no different from the *ordinanze* and must thus be subject to the same standards of legitimacy.<sup>96</sup>

The UK, like Italy, has no constitutionally-enshrined emergency regime. The management of emergency powers in the UK is thus somewhat less formalised and cohesive than in the other jurisdictions considered here. Indeed, understood as a set of procedures that permit the suspension or alteration of parts of the constitutional framework when triggered by factual and legal events, the notion of “emergency powers” is alien to the UK’s constitutional order.<sup>97</sup> Rather, in the UK the equivalent competences are best understood as normal, statutory powers of the executive, which may be exercised – as with all legislatively created powers – when the criteria of the relevant primary legislation apply. Nor are those powers, in the main, contained within a single instrument, but are generally established sector by sector in the legislation pertaining to different fields. In addition, certain powers – established mostly in the aftermath of the 9/11 terrorist attack in 2001 – were established in the Civil Contingencies Act 2004, which may be activated in a time of “emergency”, defined for the purposes of that Act as an event threatening “serious damage to human welfare” (including a threat to public health), “serious damage to the environment”, or in the event of war or a terrorist attack.<sup>98</sup> The 2004 Act makes provision for the passage of emergency legislation, and is intended to operate in circumstances where it would be impossible, for reasons of safety or urgency, to go through the normal parliamentary process. Those conditions did not apply in the study period,<sup>99</sup> and it was the sector-specific powers of the Ministers of the Crown

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in *European States* (Intersentia Online, 2020). For opposite views see e.g. Ludovico A. Mazzaroli, “Riserva di legge” e “principio di legalità” in tempo di emergenza nazionale, 23 March 2020, via <[www.federalismi.it](http://www.federalismi.it)>; and Alberto Lucarelli, ‘Costituzione, fonti del diritto ed emergenza sanitaria’, *Rivista AIC*, 11 June 2020, via <[www.rivistaaic.it](http://www.rivistaaic.it)>.

<sup>96</sup> See e.g. Edoardo Raffiotta, ‘Sulla legittimità dei provvedimenti del Governo a contrasto dell’emergenza virale da coronavirus’, *Forum di Biolaw Journal*, 18 March 2020, 4, via <<http://rivista.biodiritto.org>>; and Luciani (n. 95), 123. Alberto Arcuri, *Cose vecchie e cose nuove sui d. p. c. m. dal fronte [...] dell’emergenza coronavirus*, 12 October 2020, via <[www.federalismi.it](http://www.federalismi.it)> has however argued that such dPCMs should be framed as full-fledged sub-primary legislation (*regolamenti*).

<sup>97</sup> Note that the Civil Contingencies Act 2004 (c. 36), discussed below, superseded the Emergency Powers Act 1930 (c. 55). The argument here is not, therefore, that the UK lacks a regime of emergency powers, but that these serve a different function within the system to those in States with codified constitutions.

<sup>98</sup> Civil Contingencies Act 2004 (n. 97), ss. 1(1), 19(1).

<sup>99</sup> Though see, *contra*, Keith Ewing, who argues that the powers of the 2004 Act ought to have been used to respond to the coronavirus pandemic: Keith Ewing, ‘Covid-19: Government by Decree’ (2020) 31(1), *King’s Law Journal* 1-24, e.g. 5.

granted under normal legislative procedures which were, therefore, the basis of the measures used in the UK to respond to the pandemic.

Among the legislative measures introduced in the UK to contain the coronavirus, the most eye-catching was the Coronavirus Act 2020, which received Royal Assent on 25 March 2020 following accelerated passage through the House of Commons and the House of Lords.<sup>100</sup> The Act provides for a number of measures designed to assist the public health effort to constrain the spread of the SARS-CoV-2 virus, and applies only to infections with that pathogen as part of the COVID-19 pandemic.<sup>101</sup> The powers contained within the act are thus intended to be limited both in scope of application and in time: the Act will expire two years after the date of its passage, unless its application is extended by means of Statutory Instrument.<sup>102</sup> However, the Coronavirus Act does not provide a legal basis for the emergency measures employed in England and Wales: these were premised, rather, on the authority of the Public Health (Control of Disease) Act 1984,<sup>103</sup> the central statutory basis for the control of disease outbreaks in England and Wales.<sup>104</sup> The 1984 Act was amended by the 2008 Health and Social Care Act<sup>105</sup> passed in the years following the SARS epidemic of 2002-3, specifically in order to provide a statutory basis for measures needed to constrain a health emergency with pandemic potential.

To sum up, we can broadly distinguish two types of legal frameworks across the four countries under scrutiny. First, we find sectoral legal regimes of a statutory nature that allowed decision-makers to react swiftly and effectively to the first wave of the pandemic. Hence, in France and Germany, pre-existing laws on public health and disaster management – the *Code de la santé publique* and the *Infektionsschutzgesetz* – were amended to accommodate the unprecedented health situation and to provide for a legal umbrella under which different measures could be adopted and implemented, ranging from confinement to socio-economic measures. In France, however, the amendment of the sectoral legal framework came with an emergency label – that is the creation of the *état d'urgence sanitaire* – while the German legislative revision did not entail an emergency dimension properly so-called. In the UK, a new statutory legal basis – the Coronavirus Act – was instituted to deal with the pandemic, which complemented the pre-existing provisions

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<sup>100</sup> Coronavirus Act 2020 (c. 7).

<sup>101</sup> Coronavirus Act 2020 (n. 100), ss. 1(1-3).

<sup>102</sup> Coronavirus Act 2020 (n. 100), ss. 89-90, 93.

<sup>103</sup> Public Health (Control of Disease) Act 1984 (c. 22) (Hereinafter: the 1984 Act).

<sup>104</sup> Its provisions do not apply either to Scotland or to Northern Ireland, where health matters are among those devolved to the respective Parliaments.

<sup>105</sup> Health and Social Care Act 2008 (c. 14), ss. 129, 170.

for England and Wales deriving from the 1984 Public Health Act. The situation in Italy was quite different, however. Instead of amending the existing legal framework or crafting a new one, the Italian Government based its response to the pandemic on a variety of legislative and administrative instruments, which not only lacked a unitary or sector-specific legal framework but were also only retroactively transposed into law by Parliament. Hence, most measures were adopted in the form of decrees, in connection with the civil protection framework for disaster relief which, in itself, is regulated by a variety of legislative acts. Hence, while France, Germany and the UK patched their legal basis before adopting more constraining measures, Italy first decreed a number of drastic measures and then sought to adopt an *ad hoc* legal basis.

## 2. Nature, Limits, and Duration of Prerogatives Granted

This section delves deeper into the content of the specific provisions that served as the legal bases for pandemic measures. For our purposes it is of particular interest to ascertain which (types of) competences and actions the respective legal frameworks regulated and at which level of government, and whether there are or were temporal limits to pandemic management schemes.

As has been discussed above, the German pandemic response rested primarily on the provisions of the Infection Protection Act (IfSG). The IfSG empowers the competent authorities – as designated by the governments of the *Länder* (§ 54 Sentence 1 IfSG) – to adopt a number of different measures in order to prevent and control infectious diseases. The Act distinguishes between three orders of action: measures concerning the surveillance (§§ 6–15 IfSG), prevention (§§ 16–23 IfSG), and control (§§ 24–32 IfSG) of infectious diseases. The measures can address not only those who have fallen ill but also those suspected to be ill, namely persons who do not appear sick but whose exposure to pathogens can be assumed as well as persons who, without showing signs of illness, may be a source of infection for the general public. Moreover, some measures may be addressed to the general public: the authorities can order quarantines (§ 30 IfSG), ban professional activities (§ 31 IfSG), and shut down care facilities for minors (§ 33 IfSG).

One provision, which served as the basis for several restrictive measures and so became central during the pandemic and subject of much debate, was § 28 IfSG. It was particularly controversial whether this article could be used as a basis for bans on leaving the house (*Ausgangssperren*). According to the

previous version of § 28 para. 1 sentence 2 IfSG, the competent regional authorities could “restrict or prohibit events or other gatherings of a large number of people” and could also “oblige persons not to leave the place where they are located or enter designated places until necessary protective measures have been taken”. The majority of (German) legal scholars argued that this provision could not serve as a basis for bans on leaving the house.<sup>106</sup> They argued that the provision was intended to cover only short-term measures, such as an order not to leave an aircraft until the authorities have isolated potentially infected persons, as indicated by the wording “until the necessary protective measures have been taken”. The courts did not agree with this criticism, however, instead allowing the provision to be used as a legal basis.<sup>107</sup> § 28 para. 1 sentence 1 IfSG contains a general clause that allows the competent authorities to take “necessary measures”. When introducing the provision, the legislature argued that it was important to include a general basis of authorisation in the law so as “to be prepared for all eventualities”.<sup>108</sup> However, legal scholars were sceptical whether this general clause could act as an appropriate legal basis for measures as intrusive as the ban on leaving the house.<sup>109</sup> Furthermore, many doubted whether such a broad use of the provision was constitutionally appropriate, especially as regards the principle of legal certainty (*Bestimmtheitsgrundsatz*) and the theory of “legislative reservation” (*Wesentlichkeitstheorie*).<sup>110</sup> Finally, the *Ausgangssperre* interfered significantly with constitutionally-protected basic rights, particularly the freedom of the person (Article 2 para. 2 sentence 2 of the Basic Law) and the freedom of movement (Article 11 para. 1 of the Basic Law). Where a legislative provision is intended to permit an interference with constitutionally-protected rights, Article 19 of the Basic Law requires the provision explicitly to mention the rights from which derogation is permitted (*Zitiergebot*). However, § 28 para. 1 sentence 4 IfSG did in its pre-pandemic version not cite the Article 11 protection of free movement, indicating that no derogation from that protection was permissible.

Thus, in great haste, the *Bundestag* and *Bundesrat* passed the “Act for the Protection of the Population in the Event of an Epidemic Situation of

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<sup>106</sup> See e.g. Andrea Kießling, *Rechtssicherheit und Rechtsklarheit bei Ausgangssperren & Co?*, JuWissBlog Nr. 33/2020, 24 March 2020, via <<https://www.juwiss.de/>>.

<sup>107</sup> OVG Berlin-Brandenburg, 23 March 2020 – OVG 11 S 12/20, DVBl. 2020, 775, 776, para. 9; VG Freiburg, 25 March 2020, 4 K 1246/20, COVuR 2020, 156, para. 16-20.

<sup>108</sup> BT Drs. Nr. 8/2468, 27.

<sup>109</sup> Anika Klafki, *Corona-Pandemie: Ausgangssperre bald auch in Deutschland?*, JuWiss-Blog Nr. 27/2020, 18 March 2020, <<https://www.juwiss.de/>>.

<sup>110</sup> Andrea Edenharter, *Freiheitsrechte ade? Die Rechtswidrigkeit der Ausgangssperre in der oberpfälzischen Stadt Mitterteich*, VerfBlog 19 March 2020, via <<https://verfassungsblog.de/>>.

National Significance”, which amended § 28 para. 1 IfSG.<sup>111</sup> The general clause in § 28 para. 1 sentence 1 IfSG remained unaltered. However, a second part was added, enabling the competent authorities to oblige persons not to leave their current location. The elimination of the restriction “until the necessary protective measures have been taken” extended the norm’s scope of application to long-term measures, such as bans on leaving the house. Yet some observers held that also this new regulation was not sufficient to legitimise bans on leaving the house because it did not fulfil the requirements of the principle of legal certainty. Instead, legal scholars demanded that measures such as bans on leaving the house be explicitly governed by a separate provision.<sup>112</sup> Finally, § 28 para. 1 sentence 4 IfSG now also mentions Article 11 of the Basic Law as a derogable fundamental right, thus addressing the constitutional issues raised by the abovementioned *Zitiergebot*.

Quick legislative fixes to the law regulating public health issues were also on the agenda in France, where the new *état d’urgence sanitaire* was introduced by the emergency bill of 23 March. The emergency bill amended certain crucial provisions of the French Public Health Code (*Code de la santé publique*) with a view to providing for broader executive competences. Indicative of this executive flavour is, for instance, the fact that the novel statutory state of emergency is triggered by governmental action, that is a decree by the Council of Ministers upon a report by the Minister of Health (Article L. 3131-13 CSP). Once activated, it is to last for a duration of one month – thus roughly two weeks longer than under the “ordinary” statutory emergency regime – after which it can only be prorogued by a law (Articles L. 3131-13 and L. 3131-14 CSP). In other words, even though the Government can unilaterally decide to proclaim the *état d’urgence sanitaire*, Parliament has to be involved in its prolongation after one month (maximum) and each time the *état d’urgence sanitaire* is extended thereafter. As a second element of temporal limitation, the prolongation of the *état d’urgence sanitaire* by law must indicate an end day.

During the *état d’urgence sanitaire*, the Prime Minister is the key decision- and rule-maker: they are authorised to take a range of constraining actions, including measures restricting the freedom of movement, the freedom of

<sup>111</sup> Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, Federal Law Gazette 2020 I, 587.

<sup>112</sup> Anika Klafki, Neue Rechtsgrundlagen im Kampf gegen Covid-19: Der Gesetzesentwurf zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, VerfBlog, 25 March 2020, via <<https://verfassungsblog.de/>>. In November § 28a IfSG, a provision containing special rules to prevent the spread of Covid-19, was introduced by the Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, Federal Law Gazette 2020, I 2397.

commerce, and the freedom of assembly (Article L. 3131-15 CSP). By virtue of the same article, the Prime Minister is also entitled to requisition required goods and to impose price control measures if deemed necessary. Sanctions can be imposed in cases of non-compliance, ranging from fines to prison sentences under specific circumstances, in particular in cases of repeated non-compliance (Article L. 3136-1 CSP). The scholarly reception of these measures was mixed, with some authors highlighting the multiplication of emergency regimes under French law and others critically pointing to the far-reaching executive powers granted by the new regimes.<sup>113</sup>

In Italy, too, it was the central Government that directed the response to the pandemic, adopting a series of *decreti-legge*. *Decreto-legge* No. 6/2020 of 23 February, the first legislative-level instrument adopted specifically to address the COVID-19 emergency, mandated in its Article 1 para. 1 “competent authorities” to adopt “all measures of containment and management appropriate and proportionate to the evolution of the epidemiological situation”. Article 1 para. 2 contained a non-exhaustive list of possible restrictions to individual and collective freedoms, including restriction to the freedom of movement, assembly, and worship; suspension of work, meetings, events and teaching activities, and closing of businesses. Further, Article 2 contained a general clause allowing the same “competent authorities” to adopt “further containment and emergency management measures in order to prevent the spread of the epidemic”. Article 3 provided that such measures would be applied through dPCMs, adopted after consultation with the competent ministers and presidents of Regions only. Pending their adoption, the measures could also be anticipated through emergency administrative instruments based on other general provisions, i. e. the various types of *ordinanze*, in connection with the declaration of state of emergency of 31 January. Following its adoption, a long series of dPCMs and regional/local *ordinanze* were concluded, *de facto* becoming the primary source of law during the emergency.<sup>114</sup> Eventually, most limitations to movement, as well as the general prohibitions of events, meetings, and public religious ceremonies were dropped with *decreto-legge* No. 33/2020, but they may still be maintained, or reinstated, in specific areas if necessary. *Decreto-legge* No. 33/2020 was complemented by an extremely detailed dPCM adopted on 17 May, with a vast array of rules and guidelines to ensure health and safety during “Phase 2”.

<sup>113</sup> See, for instance, Beaud and Guérin-Bargues (n. 25); Vincent Sizaire, ‘Un colosse aux pieds d’argile. Les fondements juridiques fragiles de l’urgence sanitaire’, *La Revue des droits de l’homme* 2 (2020); and Anne Levade, ‘État d’urgence sanitaire: à nouveau peril, nouveau régime d’exception’, *J. C. P.*, Ed. G 13 (2020).

<sup>114</sup> On the disorderly sequence of measures at local level see below, subsection V. 3.

Yet, the strategy of the Italian Government to govern largely by means of law-decree, ordinances, and ministerial decrees raised considerable problems concerning the principle of legality of restrictions to constitutional rights. Article 16 para. 1 of the Constitution, for example, allows for restrictions to the freedom of movement for health or security reasons, but these must be “general” and “established by law”. Scholars generally disagree on whether this implies a complete primary-level regulation; or whether secondary legislation and administrative measures can also be used to complement the regulation. In either case, the “COVID-19 dPCMs”, far from being mere implementing measures, were only given a general, formal legal basis by the *decreti-legge*,<sup>115</sup> with no or weak substantive guidelines, and have therefore been considered to be at odds with the principle of substantive legality. What is more, the first measures adopted (*deretto-legge* No. 6/2020) lacked any temporal limitation. Only with the transposition of *decreto-legge* No. 19/2020 into law was a form of sunset clause introduced. However, the Government can postpone this deadline and prolong the conferral of powers by adopting yet another *decreto-legge* which, in turn, would again only need to be validated by Parliament *ex post facto* in the 60 days following its adoption.

In the UK, too, there was a reconfiguration of competences – shifting powers to the executive – via legislative means. The Coronavirus Act 2020, adopted through an accelerated procedure in March, grants a number of powers to the Government and to the public health authorities to combat the COVID-19 pandemic, including the emergency registration of health professionals,<sup>116</sup> the easing of certain administrative requirements normally incumbent on the National Health Service (NHS),<sup>117</sup> a relaxation of the rules surrounding cremations and the need for medical certification prior to cremation,<sup>118</sup> the temporary closure of schools,<sup>119</sup> the suspension of elections,<sup>120</sup> and makes certain provisions for emergency measures in the devolved regions.<sup>121</sup> The Coronavirus Act 2020 is valid for two years, after which it automatically expires, unless extended by Parliament. The additional compe-

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<sup>115</sup> Especially the already mentioned *decreto-legge* 23 febbraio 2020, n. 6 (Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19), which was “converted” with legge 5 marzo 2020, n. 13 (Conversione in legge, con modificazioni, del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19), and was in force from 23 February to 26 March 2020.

<sup>116</sup> Coronavirus Act 2020 (n. 100), ss. 2-5.

<sup>117</sup> Coronavirus Act 2020 (n. 100), s. 14.

<sup>118</sup> Coronavirus Act 2020 (n. 100), s. 19.

<sup>119</sup> Coronavirus Act 2020 (n. 100), s. 37.

<sup>120</sup> Coronavirus Act 2020 (n. 100), ss. 59-70.

<sup>121</sup> Coronavirus Act 2020 (n. 100), ss. 48-49.



tences which it conferred upon the Government are thus subject to a sunset clause.

As previously mentioned, however, the 2020 Act does not provide a legal basis for the emergency measures employed in England and Wales. Instead those measures were adopted under the 1984 Public Health Act, which contains provisions allowing the Minister for Health to issue orders with the force of law in order to contain disease outbreaks in England and Wales.<sup>122</sup> Under section 45C(1), the Minister for Health may make regulations to deal with health crises, by means of a statutory instrument.<sup>123</sup> There are two safeguards on the Minister's use of this authority. To begin with, the statutory instrument by which the Minister may make regulations will be concluded under one of two variants on the negative consent procedure. In the case of the regulations to tackle the spread of the pandemic, the emergency procedure was used, which dispenses with the need for consultation with Parliament prior to the creation of the instrument. Rather, Parliament must confirm the instrument *ex post facto*: although the instrument will come into effect immediately, it must be laid before Parliament within 28 days of being enacted, and will cease automatically to have effect at the expiry of that period unless it is confirmed by a resolution of both Houses of Parliament.<sup>124</sup> The action of the Minister is thus subject to a parliamentary control. An additional level of (legal) control is offered by the stipulation under section 6(1) of the Human Rights Act 1998 (HRA), that “[i]t is unlawful for a public authority” – which category would include a Minister of the Crown in the act of issuing a statutory instrument – “to act in a way which is incompatible with a Convention right.”<sup>125</sup> Any executive action which is not compatible with the European Convention on Human Rights (ECHR) may be challenged under section 7 of the HRA,<sup>126</sup> and may be struck down by the Courts.<sup>127</sup>

In the context of the legal basis, however, it is worth stressing that as early as 23 March 2020, UK Prime Minister Boris Johnson announced the Government's advice that individuals observe social distancing and that they remain at home where possible would be replaced with a legally enforceable lock-

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<sup>122</sup> 1984 Act (n. 103), 45A-45T. Note that an analogous set of powers were extended to the devolved governments in Northern Ireland and in Scotland by sections 48 and 49 of the Coronavirus Act 2020 (n. 100), respectively.

<sup>123</sup> 1984 Act (n. 103), 45C.

<sup>124</sup> 1984 Act (n. 103), ss. 45Q-45R. The non-emergency procedure, under s. 45Q(4) requires that a draft of the instrument be laid before Parliament for approval prior to its enactment, and thereafter may be annulled by Parliament, but will not be required to be voted upon post-enactment: see ss. 45(Q)(1), (4).

<sup>125</sup> Human Rights Act (HRA) 1998 (c. 42).

<sup>126</sup> HRA (n. 125), 7(1).

<sup>127</sup> HRA (n. 125), 8(1), 10(4).

down.<sup>128</sup> Although he seemed to announce restrictions carrying the force of law at the time of his address on 23 March, it was only on 26 March, as discussed above,<sup>129</sup> that a legal basis for the lockdown was provided, in section 6 of the 26 March Regulations. There are reports, however, that police officers begun to take action to enforce the new lockdown requirements as early as 24 March.<sup>130</sup> Absent the specific authority of the 26 March Regulations, it is not clear on what basis this action was taken. As no fines were issued by police prior to the entry into force of the 26 March Regulations, however, it is doubtful whether the legality of the actions undertaken by offices on 24 and 25 March will be brought before the courts. The legality and appropriateness of those actions is thus likely to remain untested.

The above analysis of the grant of decision-making and implementation prerogatives brings three important controversies to the fore. First, what is the appropriate level of specificity that renders a legal basis sufficiently solid, without making it too inflexible? While the precise measures have to be decided ad hoc and depending on the given circumstances, it is important that the legal framework regulating the adoption of these measures specifies (a) which public authority is competent to (b) take which type of action to ensure legal certainty and clarity. In France, the newly created *état d'urgence sanitaire* clarified both who could act – primarily the central Government – and by which means as it introduced a catalogue of possible measures to be rolled out. In Germany, though, there was controversy concerning which exact measures could be taken under the existing (very general) legal basis. Indeed, given the presence of general clauses (*Generalklauseln*) offering the competent authorities broad room for manoeuvre to deal with exceptional circumstances, it was not clear how those competences could be circumscribed in pandemic times. An amendment to the legal framework hardly provided for more legal certainty, though it clarified the question of constitutional compatibility to an extent, and thus placed the measures on a firmer footing. A similar formula of executive action under a statutory framework was adopted in the UK. In Italy, though, the fact that numerous measures in the fight against the pandemic were unilateral governmental (regulatory) acts that were only retroactively endorsed by Parliament posed a serious question in terms of legal certainty and legitimacy.

This gives rise to the second issue: who can legitimately mandate whom to take action? In France, Germany, and the UK, the legal basis of the measures

<sup>128</sup> Stewart, Mason and Dodd (n. 58); Walker (n. 59).

<sup>129</sup> See above, subsection II. 4.

<sup>130</sup> Vikram Dodd, Police Leaders Say Enforcing UK Lockdown May Be Impossible, 24 March 2020, The Guardian.

was statutory. It seems that legal frameworks enacted by legislative procedure (France, Germany, UK) enjoyed a higher degree of clarity and stability than the quasi-unilateral executive rulemaking in Italy, which was confirmed *ex post facto* by Parliament.

Finally, a third intriguing question is the duration of conferred competences. Each of the study countries have adopted more or less stringent sunset clauses as regards the conferral of exceptional powers to the executive. In France, parliamentarians are called to intervene to prolong the application of the emergency regime and define its duration. In Germany, § 5 para. 4 IfSG provides that orders and regulations under this standard shall cease to have effect on the date of the repeal of the finding of an epidemic situation of national importance, but not later than the end of 31 March 2021. In the UK, the tailor-made Coronavirus Act expires automatically after 2 years. In Italy, the conferral of extraordinary powers is also limited in time, but the Government can extend the duration of the emergency phase by *decreto-legge* so that Parliament intervenes only *ex post facto* to give its approval to such a prolongation.

### 3. Executive Governance and Legal Frameworks: Lessons from the Study Countries

The above analysis of the legal framework of measures adopted underscores that specific constitutional and institutional features have an almost direct impact on the nature of emergency law-making, understood as the adherence to the principle of rule of law when addressing the health emergency. In this regard, our analysis further seems to confirm that, when it comes to the exercise of emergency powers in mature liberal democracies, the main divide is not between bound or unbound executives.<sup>131</sup> Instead, in analytical (and probably also normative) terms, it is the distinction between systems where the “compulsion to legality” triggers virtuous or vacuous circles that matters, that is the difference between the mere appearance and the substance of legality.<sup>132</sup>

Within this framework, three elements must be taken into consideration. First, the willingness of parliaments to give away their functions to executive actors, beyond or even outside the constitutional design or well-established

<sup>131</sup> See again Ginsburg and Versteeg (n. 4); and Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press 2011).

<sup>132</sup> Dyzenhaus, States of Emergency (n. 7).

constitutional conventions, plays an important role. This includes both their law-making and oversight functions. Important in this regard was whether parliaments – and the political forces within it – were both used and able to exercise oversight functions in effective ways (France, Germany, UK), so that governments did not need to avoid parliamentary proceedings as much as possible to implement their policies (as it was the case for Italy).

Secondly, the intensity and comprehensiveness of legislative interventions matters. In terms of respect of the rule of law and the separation of powers, the reaction to the emergency was less problematic in systems in which the response to the pandemic rested primarily on a single legal basis, namely a remodelled law on public health and infectious diseases. In contrast, Italy implemented a piecemeal approach – characterised by a cascade of sectorial interventions, short-term extensions, frequent and retroactive changes, and unclear administrative instruments – that affected legal certainty and, consequently, the separation of powers, the rule of law, and rights protection. It did hence not substantially matter whether the intervention was relatively narrow or technical (Germany), comprehensive and *una tantum* (France, UK, and also Italy), but whether it relied on a clear and single legal basis or not.

Thirdly, the relationship between the legal framework and the intensity of executive governance depended on whether there was a greater or lesser need to compensate vertical institutional conflicts due to political and legal decentralisation.<sup>133</sup> Here again, the systems responding better were those in which de-centralisation is a largely marginal issue (French *de facto* centralised State) or where it is well-established and does not give rise to particular conflicts (German cooperative federalism); whereas Italian disorderly regionalism and, to a lesser extent, British asymmetric devolution seem to be more problematic.

#### IV. Parliamentarism Under Pressure: The Role of the Legislature under Pandemic Conditions

In each of the study countries, as is to be expected under emergency conditions, the executive emerged as the major actor.<sup>134</sup> Both as decision-

<sup>133</sup> On this issue, see in more detail section V, in particular subsection V. 4.

<sup>134</sup> Alexis Fourmont and Basile Ridard, Parliamentary Oversight in the Health Crisis, Robert Schuman Foundation, European Issues no. 558, 12 May 2020; Elena Griglio, 'Parliamentary Oversight Under the Covid-19 Emergency: Striving Against Executive Dominance' Theory and Practice of Legislation 8(1-2) (2020), 49-50; Ginsburg and Versteeg (n. 4).

maker and policy-generator, one of the central characteristics of executive organs is that they are able to move swiftly to respond to the rapidly changing circumstances that characterise public emergencies.<sup>135</sup> In each of our study countries, too, the role of parliaments changed – and often diminished – as a result of measures which were taken to preserve the safety of the institution and its member in pandemic conditions. Although those measures impacted upon parliamentary effectiveness in various ways, and thus were significant for governance during the study period, it must be assumed that their long-term consequences will be few. Subsection IV. 1. examines these measures. However, certain changes seem to have at least the potential to affect the long-term constitutional settlement, either in themselves, or because they play into a wider constitutional trend (subsection IV. 2.). Here, marked differences can be seen between the study countries, as the concluding subsection IV. 3. highlights.

## 1. Measures to Preserve Parliaments

In all four jurisdictions, measures had to be taken to protect parliaments and parliamentarians. By their nature, parliaments across the world have tended to be vulnerable institutions in the face of the coronavirus pandemic, and for no more complex reason than that their members tend to be drawn disproportionately from older sectors of society. What is more, the core function of parliaments is to meet and debate in closed and often small spaces; this task evidently carries a hitherto unfamiliar risk in times of a pandemic the primary method of transmission of which is through aerosols in the air. Hence, it was necessary to take steps to protect the health and wellbeing of parliamentarians while ensuring, at least to some extent, that legislatures could continue to perform their functions.

In all of our study jurisdictions, those functions were significant, though perhaps to a greater extent in the UK and in Germany than in France or Italy. In the UK the continued and effective functioning of Parliament was rightly seen as crucial, both to enable the passage of new legal rules to deal with the pandemic and its impacts, but also to continue its task of holding the Government to account. Indeed, in a country without a codified constitution that task acquired a very significantly raised importance in the extraordinary circumstances of the pandemic. As discussed above,<sup>136</sup> although the delegated

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<sup>135</sup> Griglio (n. 134), 50.

<sup>136</sup> See above, subsection III. 2.

legislative powers of Government used to establish the lockdown rules are not, in constitutional terms, innovative, the extent of intrusion into daily life that secondary legislation was used to authorise is certainly unusual. Absent a defined regime of emergency powers, which delimits and constrains the action of the executive in extraordinary times, the negative consent function of Parliament – in which Parliament can annul measures taken by the Government using its delegated legislative power – is the dividing line between democratically permissible uses of extraordinary powers, and rule by discretion.

Parliamentary procedure is primarily based on convention and practice, rather than being formalised in law. Its processes are captured in *Erskine May*, a guide to the rules and working of the Commons. Originally compiled in 1844 by Thomas Erskine May, it has over time has acquired a quasi-constitutional status within the Commons,<sup>137</sup> though it remains the case that parliamentary rules can be changed by a simple majority of the chamber on any given day.<sup>138</sup> Nevertheless its procedures have tended to evolve only slowly over the years. The UK Parliament is an institution resistant to change – a matter which has been extensively discussed in recent years in particular in relation to, for example, the barriers which its procedures place on the participation of parents of young children, with a disproportionate impact on the participation of female MPs. The arcane procedure of “pairing” is the only way within the rules to account for the absence of an MP in the chamber, whether through illness, because the member is on maternity or paternity leave, or for any other reason.<sup>139</sup> When a Member – for the sake of the example, of the Opposition – cannot be present for a particular vote, they may speak to their party’s Chief Whip and request a “pair”. The Whip will then approach the Governing party’s Whips, and request that one of their Members agree to absent themselves from the Chamber for that vote. The two absences – one from the Government, and one from the Opposition – are thus expected to balance one another out, and parity is restored. The pairing procedure has a number of serious flaws, however, including that it takes no account of Members who may wish to vote against their party’s line: the system operates on the assumption that both Members concerned will follow the line advised by their Whips. Perhaps more importantly, although the system restores parity in voting between the parties, it does nothing to restore the ability of the paired Members to express themselves in debates or to participate in parliamentary questions. The pairing process was thus –

<sup>137</sup> For more information see <<https://erskinemay.parliament.uk/>>.

<sup>138</sup> Erskine May is now in its 25th updated edition.

<sup>139</sup> Erskine May (n. 137), para. 4.9, 20.87.

correctly – seen as unequal to the task of managing the absence of 93 per cent of MPs from the Chamber. It is doubtful even whether it would have been possible to restore parity in voting in this way, but certainly the ability of Parliament to hold the Government to account would have been compromised.

In Germany, too, there were significant practical obstacles to securing the continued effective functioning of the *Bundestag*. A number of changes to established ways of working were made, such as placing the ballot boxes at large distances from each other, marking the voting area with adhesive tape, extending the voting period, and cancelling visitor events.<sup>140</sup> More radical changes were, however, necessary, and these occurred in two main phases: first, the use of pairing procedures was discussed and, in contrast to the UK, in fact was implemented.<sup>141</sup> The procedure draws significantly from the British parliamentary tradition,<sup>142</sup> though is a familiar part of German parliamentary process.<sup>143</sup> As in the UK, pairing allows for a reduced presence in the *Bundestag*, in that for every absent Member of the governing coalition, one member of the opposition also stays away from the vote.<sup>144</sup> In this way, even with a minimal number of Members, the majority ratio can be maintained, but that a quorum is not achieved can *de facto* be ignored. The procedure has thus been described as ultimately nothing more than the “informal introduction of an emergency parliament”.<sup>145</sup> Pairing agreements also existed at state level. For example, the six parliamentary groups in the Bavarian parliament decided by mutual agreement to maintain the relative strength of the parliamentary groupings, but to meet with only one fifth of the delegates. Furthermore, the members of parliament agreed to refrain from challenging majorities.<sup>146</sup>

However, as at Westminster, the pairing procedure is accompanied by a number of difficulties. For example, this procedure presupposes the trustworthiness of all groups. If one group does not respect the agreement and

<sup>140</sup> For details see <<https://www.bundestag.de/dokumente/textarchiv/2020/kw11-schaeuble-brief-687478>>.

<sup>141</sup> Hasso Suliak, Von wegen zu Hause bleiben, LTO, 19 March 2020.

<sup>142</sup> For the origin of the pairing process see Marcus Schuldei, *Die Pairing-Vereinbarung*, 1997, 22–24.

<sup>143</sup> For general information on the pairing process see Schuldei (n. 142); Sandra Henkenötter, ‘Pairing im Deutschen Bundestag – Die Wiederbelebung eines alten Parlamentsbrauchs zur Mehrheitssicherung’, *Zeitschrift für Gesetzgebung* (1995), 328.

<sup>144</sup> Regarding this problem Pierre Thielbörger and Benedikt Behlert, COVID-19 und das Grundgesetz: Neue Gedanken vor dem Hintergrund neuer Gesetze, *VerfBlog* 30 March 2020, via <<https://verfassungsblog.de/>>.

<sup>145</sup> Jens Kersten and Stephan Rixen (n. 60), 102.

<sup>146</sup> Achim Wendler, Wie bleibt der Bundestag handlungsfähig?, 17 March 2020, via <<https://tagesschau.de>>.

all its Members vote, the decision is still valid. The pairing agreement has no legal effect<sup>147</sup> and there are no sanctions if the group or individual does not respect the agreement.<sup>148</sup> It was highly questionable whether such trust was justified in the first weeks of the coronavirus pandemic.<sup>149</sup> Reference was made to the incident in Thuringia, where the AfD – a far right political party – suddenly shifted its support to Thomas Kemmerich, a member of the FDP, instead of its own candidate.<sup>150</sup> Moreover, the agreement can be broken by a parliamentary group at any time by questioning the quorum of the *Bundestag*, which then has to be proved in the form of the so-called *Hammelsprung* (freely translated as “mutton jump”). If less than half of the Members of the *Bundestag* are present, it is formally not quorate. Despite these difficulties, the pairing procedure was largely able to maintain the parliament’s ability to act in the early days of the pandemic. The success of this informal practice highlights a high level of respect of the members of the *Bundestag* for their code of honour and parliamentary customs.

Later, the Rules of Procedure of the *Bundestag* were amended for a limited period. Under § 45 para. 1 of the Rules of Procedure of the *Bundestag* (*Geschäftsordnung des Deutschen Bundestags*, GOBT), the *Bundestag* is quorate if more than half of its Members are present in the chamber. On 25 March 2020, the *Bundestag* agreed to add § 126 a of the GOBT to its Rules of Procedure for a limited period until 30 September.<sup>151</sup> In its first paragraph, this provision reduces the proportion required for a quorum from half to a quarter of Members. As the *Bundestag* has 709 Members, 178 would thus be required for a quorum; a number still considered an infection risk in view of the size of the chamber.<sup>152</sup> Another option was that of holding *Bundestag* and *Landtag* debates online. However, the *Bundestag*’s scientific service came to the conclusion that virtual parliamentary sessions would only be possible after an amendment to the constitution, which would have to be measured against Article 79 para. 3 of the Basic Law. To this end, it proposed an

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<sup>147</sup> Helmut Schulze-Fielitz, ‘Parlamentsbrauch, Gewohnheitsrecht, Observanz’ in: Hans-Peter Schneider and Wolfgang Zeh, *Parlamentsrecht und Parlamentspraxis* (Berlin u. a.: De Gruyter 1989), para. 11, margin number 50; Winfried Kluth, ‘Art. 38’ in: Bruno Schmidt-Bleibtreu, Hans Hofmann and Hans-Günter Henneke, *Grundgesetz Kommentar* (2014), 77.

<sup>148</sup> Ludger-Anselm Versteyl, ‘Beginn und Ende der Wahlperiode, Erwerb und Verlust des Mandats’ in: Hans-Peter Schneider and Wolfgang Zeh (n. 147), para. 14, margin number 38.

<sup>149</sup> Thielbörger and Behlert (n. 144).

<sup>150</sup> Wendler (n. 146). See Michael Hein, Der Sinn der ganzen Strategie: Die AfD und eine offene Flanke der Thüringer Verfassung, *VerfBlog*, 14 February 2020, via <<https://verfassungsblog.de/>>.

<sup>151</sup> BT Drs. Nr. 19/18126.

<sup>152</sup> Thielbörger and Behlert, (n. 144).



amendment to Article 39 para. 3 of the Basic Law.<sup>153</sup> These demands for “virtual parliamentarism” have not yet been widely accepted, and the proposed amendment was thus not taken up during the study period. However, § 126 a para. 2 GOBT, which applies for a limited period, provides that participation in committee meetings is possible via electronic means.

By contrast, in the UK, significant digital innovation was seen as being the only recourse in order to enable Parliament to keep functioning effectively. With a safe limit of only 50 MPs imposed on the House of Commons chamber, the numerical reduction was simply too great to be compensable through traditional means. Instead, a bare-bones attendance in the Chamber continued, consisting of the Commons Speaker and his key staff; the Prime Minister and whichever Government Ministers were most relevant for the business at hand; the Leader of the House (a Government Minister with special responsibility for business in the House of Commons); the leaders of the other parties represented in the House; and a few MPs, generally from those constituencies close to London. Other Members participated via video link from their homes or constituency offices. Members were able to speak in the debates remotely, and procedures were put in place to enable votes to be counted electronically. The changes were effected by means of a resolution of the House, which had the effect of supplanting the rules as contained in *Erskine May*.<sup>154</sup>

In France and Italy, too, measures were taken to downsize parliaments. In France, parliamentary activity was reduced to the strict minimum. The lower chamber of Parliament (*Assemblée nationale*) decided to drastically confine its activities to (1) urgent legislative matters related to the management of the COVID-19 pandemic, with deliberations taking place in small groups (*petit comité*) and votes being channelled through the presidents of the parliamentary groups,<sup>155</sup> and (2) weekly question times (*questions d’actualité au gouvernement*) with only a limited number of individuals present in the Hemicycle (proportionally to the seats of each parliamentary groups).<sup>156</sup> A similar (but more restrictive) approach to limit both activities and access to meetings was chosen by the upper house, the Senate, probably also because many

<sup>153</sup> Wissenschaftlicher Dienst Deutscher Bundestag, Virtuelles Parlament. Verfassungsrechtliche Bewertung und mögliche Grundgesetzänderung, WD 3 – 3000 – 084/20, 4. See contra Kersten and Rixen (n. 60), 105, according to which an adaptation of the Rules of Procedure was sufficient.

<sup>154</sup> Hansard, House of Commons 675, col. 22; see further cols. 2–24.

<sup>155</sup> Assemblée nationale, Press release (presidency) of 17 March 2020. For a commentary of the new working methods, see Elina Lemaire, Le Parlement face à la crise du covid-19 (1/2), 2 April 2020, via <<http://blog.juspoliticum.com/>>.

<sup>156</sup> Assemblée nationale, Relevé de conclusions de la Conférence des présidents du mardi 21 avril 2020.

Senate members undoubtedly fall within the risk group (with an average age of almost 70). At the same time, both chambers of Parliament have put in place specific mechanisms to hold the Government to account during the ongoing pandemic.<sup>157</sup> While most of the reconfiguration of parliamentary activity has happened without the wider public (critically) taking notice, some scholars have argued that these investigation activities have been rather symbolic in nature given the broad consensus amongst MPs to help the Government to take and implement effective measures against (the spread of) the virus.<sup>158</sup> It is against this backdrop that Parliament ceded a range of otherwise shared law-making prerogatives to the executive branch: under Title II of the emergency bill of 23 March, Parliament endowed the government in more than 40 cases (budgetary matters excepted) with the power to govern by ordinance in line with Article 38 of the Constitution. Such a comprehensive delegation (*habilitation*) is unprecedented.<sup>159</sup> While French parliamentarians have not made full use of their legislative and oversight prerogatives with regard to COVID-19 measures, they have managed to continuously honour their parliamentary duties on other (pending) legislative dossiers, however.<sup>160</sup>

In Italy, meanwhile, multiple measures were implemented in order to safeguard the legislature when it had to examine *decreti-legge* and consult with the Government on the exercise of its administrative powers: social distancing; reduction of agenda items and a restriction of business to focus on emergency issues; proceedings moved to narrower committees and/or digitalised proceedings; the use of measures such as staggered roll calls to protect plenary parliamentary votes; and, just like in other countries, arrangements were made between majority and oppositions, fixing the respective number of absent members, to reduce the total number without altering the necessary proportions (so-called pairing procedures). Against this background, it could be said that the pandemic emergency had no major organisational impact on the Parliament. However, from a more substantive point of view, the pandemic seems to have increased – or at least made more apparent – the institutional marginalisation of the Parliament in Italy, and to a lesser extent also in France. It is to these developments that the next section turns.

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<sup>157</sup> See, further, Jean-Philippe Derosier and Gilles Toulemonde, *The French Parliament in the time of Covid-19: Parliament on Life Support*, 2020.

<sup>158</sup> See, for instance, Derosier and Toulemonde (n. 157), 7-8.

<sup>159</sup> Gaillet and Gerhold, (n. 78); Derosier and Toulemonde (n. 157), 5.

<sup>160</sup> Derosier and Toulemonde (n. 157), 6.

## 2. Changing Constitutional Balances

In Germany, the pandemic was often referred to as the “hour of the executive”. In particular in the early weeks of the pandemic response, there was talk of an “erosion of parliamentarianism”.<sup>161</sup> During the pandemic, § 5 IfSG, in particular as amended by the Epidemic Control Act of 27 March 2020, was said to have resulted in a loss of parliamentary power. While § 5 para. 1 of the version in place before 27 March stipulated that only the Federal Government, with the approval of the *Bundesrat*, could draw up a plan for mutual information between the Federal Government and the *Länder*, the new version put in place in late March enables the *Bundestag* to determine an “epidemic situation of national importance” (§ 5 para. 1 sentence 1).<sup>162</sup> Commentators referred to this as a new type of state of emergency, which – unlike the case of defence enshrined in the Basic Law – was regulated only by statutory law.<sup>163</sup>

This declaration had the effect of transferring regulatory competences and emergency functions to the Federal Ministry of Health, under § 5 para. 2 IfSG. For example, § 5 para. 2 sentence 1 no. 1 IfSG allowed the Federal Minister of Health to oblige persons who have been exposed to an increased risk of infection and wish to enter the Federal Republic of Germany or have entered the country to take various measures, such as revealing their identity, travel routes and contact details, and to have themselves examined by a doctor. § 5 para. 2 sentence 2 no. 2 IfSG authorised the Federal Ministry of Health, inter alia, to require companies which transport passengers across borders and operators of airports, ports, passenger train stations, and bus stations to, inter alia, refrain from transporting passengers from certain countries to Germany, to inform travellers of the dangers of communicable diseases, to transmit data, passenger lists and seating plans and much more in order to prevent or detect the introduction of threatening communicable diseases. § 5 para. 2 sentence 2 nos. 3 and 4 IfSG allowed the Federal Ministry of Health to allow exemptions from various legal regulations “by statutory order without the consent of the *Bundesrat*”. This provision therefore meant that the parliament has the task of taking the decision to declare a pandemic state of emergency. However, the governments at federal and state

<sup>161</sup> Daniel Hildebrand, ‘Aushöhlung des Parlamentarismus durch die Corona-Pandemie? Ein Zwischenruf zur Lage in Deutschland und Großbritannien’, *Zeitschrift für Parlamentsfragen* 2 (2020), 474.

<sup>162</sup> Note that after strong criticism § 5 IfSG was amended in May and again in November. Here we comment on the provision as it stood in March 2020, and the discussion thereto.

<sup>163</sup> Klaus F. Gärditz and Florian Meinel, *Unbegrenzte Ermächtigung?*, 26 March 2020, FAZ 73, 6; Thomas Mayen, ‘Der verordnete Ausnahmezustand’, *NVwZ* 2020, 828 (829).

level then take over the concrete measures. The Federal Minister of Health was given unprecedented powers.

This new regulation was perceived as highly problematic from a constitutional standpoint.<sup>164</sup> It was argued that § 5 para. 2 Nos. 1 and 2 IfSG violated Articles 83 and 84 of the Basic Law, since a competence of the *Länder* is transferred to the Federal Ministry of Health, an action beyond the scope of ordinary legislation.<sup>165</sup> § 5 para. 2 no. 3 IfSG was said to be incompatible with Article 80 para. 1 of the Basic Law, because the Federal Health Ministry may also derogate from legislative provisions and not only implement them.<sup>166</sup> This led observers to the insight that there had been a shift of parliamentary powers to the executive, which was no longer permissible under constitutional law.<sup>167</sup> Partly as a result of these criticisms, § 5 para. 2 IfSG was substantially amended in November 2020.<sup>168</sup>

Critics also accused the *Bundestag* – and the opposition in particular – of having fallen virtually silent during the early stages of the pandemic, which is all the more significant in the context of measures that are highly invasive of fundamental rights. Parliament participated only lightly in an otherwise lively debate on containment measures among political actors. It neglected, it was said, its task of taking the political lead in the formation of public opinion and its function of ensuring a permanent dialogue between the people and Parliament on the pandemic measures.<sup>169</sup> All this had been done under the guise of maintaining a supposed capacity to act.<sup>170</sup> Critics accused the opposi-

<sup>164</sup> See Christoph Möllers, *Parlamentarische Selbstentmächtigung im Zeichen des Virus*, *VerfBlog*, 26 March 2020, via <<https://verfassungsblog.de/>>; Gärditz and Meinel, (n. 163), 6; Thielbörger and Behlert (n. 144); Mayen, (n. 163), 828; somewhat more reserved Miriam Meßling, ‘Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite vom 27.3.2020’, *NZS* 2020, 321 (324). Even the Scientific Service of the German *Bundestag* had doubts with regards to the constitutionality of the provision, *Deutscher Bundestag – Wissenschaftliche Dienste, Ausarbeitung Staatsorganisation und para. 5 IfSG*, WD 3 – 3000 – 080/20, 2 April 2020, 4–10.

<sup>165</sup> Christoph Möllers (n. 164); Josef F. Lindner, ‘Öffentliches Recht’ in: Hubert Schmidt (ed.), *Rechtsfragen zur Corona-Krise* (München: C.H. Beck 2020), para. 17, margin number 28.

<sup>166</sup> Möllers (n. 164); Thielbörger and Behlert (n. 144); see also Gärditz and Meinel (n. 163), 6.

<sup>167</sup> Christoph Möllers called this a self-disempowerment of the Parliament: Möllers (n. 164); see also Sophie Schönberger, *Die Stunde der Politik*, *VerfBlog*, 29 March 2020, via <<https://verfassungsblog.de/>>; see also Mayen, (n. 163), 828.

<sup>168</sup> *Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite*, *Federal Law Gazette I* 2020, 2397; see in this regard André Sangs, ‘Das Dritte Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite und Gesetzgebung während der Pandemie’, *NVwZ* 2020, 1780 (1781).

<sup>169</sup> See Hildebrand (n. 161), 477; Wolfgang Zeh, ‘Zum ausnahmslosen Primat des Parlaments’, *Zeitschrift für Parlamentsfragen* (2020), 469 (471).

<sup>170</sup> Zeh (n. 169), 472.

tion in particular of hardly having fulfilled its task of controlling and limiting executive action. The Opposition neither prevented the adoption of laws, influenced the formulation of laws, nor demonstrated creative alternatives.<sup>171</sup> Instead, the Prime Ministers of the States (*Ministerpräsidenten*) – as part of the executive branch and representatives of *Länder* – were the principal actors who came to the fore in the debates. As strong government personalities, Armin Laschet and Markus Söder, in particular, the Prime Ministers of North Rhine-Westphalia and Bavaria, shaped events. Instead of in Parliament, the main debates took place in the conference of the Prime Ministers (*Ministerpräsidentenkonferenz*) or of specific ministries (*Fachministerkonferenzen*) of the *Länder*, bodies which are not even established by the Constitution.<sup>172</sup> Other places of effective discourse that supplanted Parliament as a forum for discussion were the daily newspapers, radio, and online platforms such as the “Verfassungsblog”.

However, it would be an exaggeration to see the executive branch as “over-dominant” in the pandemic or to portray the legislative branch as powerless in Germany – especially in comparison to the other countries studied.<sup>173</sup> Though significant debate was generated in Germany in which threats to parliamentarism were noted, still more significant trends of the transfer of powers to executives and the marginalisation of parliaments were visible elsewhere. The pandemic experience in France shows an institutional reconfiguration largely favourable to the executive branch of government. In this regard, it is worth mentioning that the centre of gravity of the French Vth Republic is the President, even though the Constitution formally sets out a parliamentary system in which the Prime Minister is the more dominant figure. But the direct election of the President, introduced in 1962, made the latter the central figure of French politics. This trend has been reinforced by the inversion of the electoral calendar in the early 2000s: while, initially, legislative elections took place before the presidential vote, presidential elections have preceded legislative elections since 2002.<sup>174</sup> The rationale behind this modification was to align the presidential and legislative majorities with a

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<sup>171</sup> Hildebrand (n. 169), 481; Stefan Marschall, ‘Parlamente in der Krise? Der deutsche Parlamentarismus und die Corona-Pandemie’, *Aus Politik und Zeitgeschichte* 38 (2020), 16; Zeh (n. 169), 471 demanded an “hour of the opposition.”

<sup>172</sup> Hildebrand (n. 169), 477.

<sup>173</sup> The opposition in the *Bundestag* was by no means silent in this process: on the contrary, it participated with constructive proposals and additions, see exemplary plenary minutes 19/154 of the 154th Session on 25 March 2020 on the debate on the multi-billion Euro rescue package to tackle the coronavirus-related crisis. As support from society faded and the public got increasingly critical, the opposition’s vigour also increased.

<sup>174</sup> This change happened on the basis of *Loi organique no 2001-419 du 15 mai 2001 modifiant la date d’expiration des pouvoirs de l’Assemblée nationale*.

view to avoiding a coalition government (*cohabitation*) and, indeed, since 2002 the President could count on a majority in the *Assemblée nationale*. This means that, nowadays, the French President simultaneously holds the powers (*de jure*) laid down in the Constitution and, additionally, *de facto* controls the majority in the National Assembly,<sup>175</sup> and hence has a strong influence on the Government, including the Prime Minister whom the President appoints. For a law to be adopted, both the lower and upper Chamber of Parliament in principle need to agree. However, if after two readings in each Chamber and meetings in a conciliatory committee no mutually acceptable solution has been found, the National Assembly can be asked to cast a final vote on the text (Article 45 of the Constitution). Even if the lower Chamber in theory has constitutional teeth *vis-à-vis* the government, in practice it often shies away from using them as a result of political considerations (that is, mostly party constraints).

While the French system features a Parliament that is, as a result of subsequent developments rather than the Constitution itself, weak by design, in Italy the 1948 Constitution and subsequent political conventions made the Italian bicameral Parliament the pillar of the institutional system for more than four decades (the so-called Ist Republic). It has generally been regarded as one of the most powerful Parliaments worldwide, especially as a legislature.<sup>176</sup> However, Italian parliamentarism is weakly rationalised and features a highly fragmented political landscape, both ideologically and geographically. Historically, the extremely conflicted party system has made Italian coalition governments highly unstable and short-lived, and jeopardised their capacity to implement ambitious political agendas in a consistent manner. Rather, these features leave them subject to fluctuating political alliances on single issues, which in turn increases vulnerability to clientelistic<sup>177</sup> practices by narrow minorities or even single parliamentary members.<sup>178</sup>

The relative continuity of Italian governments during the Ist Republic – based on the leading role of Christian-Democrats and the so-called *conventio ad excludendum* against the Communist Party in the formation of govern-

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<sup>175</sup> The National Assembly is, hence, also entitled to cast a vote of no-confidence (*motion de censure*) according to Art. 49 Constitution.

<sup>176</sup> Nelson W. Polsby, 'Legislatures' in: Fred I. Greenstein and Nelson W. Polsby (eds), *Handbook of Political Science* (Reading, Mass.: Addison-Wesley Publishing Company 1975), 257-319.

<sup>177</sup> In political science literature, "clientelism" is defined as "the combination of particularistic targeting and contingency-based exchange"; Allen Hicken, 'Clientelism', *Annual Review Political Science* 14 (2011), 289.

<sup>178</sup> Salvatore Vassallo, 'Government Under Berlusconi: The Functioning of the Core Institutions in Italy', *W. Eur. Pol.*, 30(4) (2007), 692-710 (692-694).

ment coalitions – compensated for this weakness to some extent. However, the collapse of Cold War ideological lines at the beginning of the 1990s dragged down with it the post-war party system, leading to a partial turn towards majoritarian schemes, and opened the gates to ever-increasing personalist and populist tendencies.<sup>179</sup> Importantly, and contrary to most systems where majoritarian political schemes are well-established, this turn has led opposition parties to interpret their institutional role as permanent saboteurs of the governing coalition, rather than full-fledged political alternatives or even co-governing forces. Moreover, the two houses of Parliament – often with slightly different majorities – exercise the same powers, and so cannot prevail over each other in case of disagreement. In addition, and as a matter of principle, there exists no formal fast-track legislative procedure for Government bills. Together with other socio-political factors common to liberal-democracies,<sup>180</sup> these circumstances combine to give rise to a “no-win” situation in which legislative deadlock and the breakdown of political processes are common, which in turn weakens the institutional position of the Parliament.

To overcome recurring legislative deadlocks and clientelistic “hijacking”, politically weak governments have increasingly circumvented the constitutional design, for example by using *decreti-legge* under Article 77 Constitution to legislate on ordinary matters. As recalled above, the *decreti-legge* are a form of executive legislation with the same force as the laws passed by the Parliament, but are supposed to be used only in “extraordinary circumstances of urgency and necessity.” Once adopted by the Government, *decreti-legge* must be passed (“converted into law”) by both houses of Parliament within 60 days, otherwise the measure retroactively loses any legal effect. This procedure thus involves a *political* re-assessment by the parliamentary majority of the Government – which often seeks to buttress the measure by treating the decision as a vote of confidence – under the pressure of a short deadline, while the *decreto-legge* is already in force. Together with other strategies, such (mis-)use of *decreti-legge* has in most recent years contributed to the establishment of a *de facto* “fast-track”, executive-dominated legislative procedure parallel to the ordinary one; and,

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<sup>179</sup> See generally Giacomo Delledonne, Giuseppe Martinico, Matteo Monti and Fabio Pacini (eds), *Italian Populism and Constitutional Law Strategies, Conflicts and Dilemmas* (Palgrave Macmillan 2020).

<sup>180</sup> Processes of globalisation and of supranational integration, establishment of independent technocratic institutions, of executive dominance and, lately, of the rise and strengthening of populist forces that tend to see Parliaments as unresponsive to the voters: see Cristina Fasone, ‘Is There a Populist Turn in the Italian Parliament? Continuity and Discontinuity in the Non-legislative Procedures’ in: Delledonne, Martinico, Monti and Pacini (n. 179), 41-74.

therefore, to the rise of the Government as main institutional actor of the law-making process and to the contextual marginalisation of the Parliament.<sup>181</sup>

Importantly, although there is a subsequent intervention of the Parliament, the use of *decreti-legge* cannot be considered equivalent to the normal legislative process. In terms of institutional design, it reverses the “normal” sequence of the legislative process; while the political legitimacy of the measure is doubtful, given that the room for deliberation is substantially reduced. While in the process of “conversion” the Parliament may and does amend the *decreto-legge*, here too its ability to exert an influence on the legislative process has been curtailed. In order to retain control, governments have increasingly made use of “maxi-amendments”, in which the text of the bill and those parliamentary amendments which it deems favourable are conglomerated into one article with manifold sub-clauses, coupled with a confidence vote. As a result, Parliament is usually faced with the choice to pass the *decreto-legge* as originally formulated (or with the amendments accepted by the Government) or place the Government into crisis. This element is even more important, considering that, for reasons both of the political culture of parties and longstanding procedural hurdles of internal regulations, the Italian Parliament has never been as effective as other legislatures as an oversight body.<sup>182</sup>

In particular in the first three months of the emergency, the Italian Parliament’s main task was the “conversion” of *decreti-legge* into ordinary laws, with a quite limited degree of substantive scrutiny.<sup>183</sup> This is especially problematic, considering that these instruments expanded executive powers in unprecedented ways, providing formal legal bases for regulatory law and administrative measures restricting constitutional rights, which came close to becoming *de facto* primary legislation.<sup>184</sup> Indeed, substantive decision-making mainly occurred *within* the Government, where a quite heated but hardly transparent bargaining among the coalition forces supporting it took place, with the influential – though notably opaque – contribution of *ad hoc* expert

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<sup>181</sup> See Fabio Pacini, ‘Populism and Law-Making Process’ in: Delledonne, Martinico, Monti and Pacini (n. 179), 119-134; and in foreign literature Armin von Bogdandy, *Gubernative Rechtsetzung* (Tübingen: Mohr Siebeck 2000), 139. Currently more than half of primary level legislation in Italy is adopted through Decree-Laws/Laws of conversion: see Nicola Lupo, *Così l'emergenza pandemica ha aggravato la crisi del procedimento legislativo in Italia*, LUISS Policy Brief No. 13 (2020), via <<https://sog.luiss.it/>>.

<sup>182</sup> See Fasone (n. 180), 56-69.

<sup>183</sup> In the period March-September 2020 the only laws passed by the Parliament were “laws of conversion” of *decreti-legge*: see Lupo (n. 181), 4.

<sup>184</sup> Whether this is compatible with the principle of legality is matter of heated discussion in Italian legal scholarship (see above subsection I. 1.).



committees established by the Government itself.<sup>185</sup> While preventive consultation with the Regions was established since the very beginning of the emergency by Article 3 para. 1 of *decreto-legge* No. 6/2020, it was not until three months after the start of the emergency that the Parliament introduced a preventive consultative step before the Chambers in the procedure established for the adoption of “COVID-19 dPCMs”,<sup>186</sup> but overall its oversight functions proved once more quite ineffective.<sup>187</sup>

Indeed, while emergencies typically bring out the role of executives as main decision-makers, the extent to which the Italian Parliament lost influence over substantive policies is striking, especially considering that Italy is designed as a “pure” parliamentary system where the executive – contrary to the French one – has no direct democratic legitimacy;<sup>188</sup> and the relationship of this trend with the principle of substantive legality.<sup>189</sup> Further, while this was a cause of serious concern in the academic and political environment – especially in March, i. e. in the period of validity of the first *decreto-legge* No. 6/2020 – the marginalisation of Parliament was not, as such, at the centre of the social debate. Certainly, the overall collaboration between majority and opposition within the Parliament was also exceptional,<sup>190</sup> and after the first

<sup>185</sup> See especially the *Comitato Tecnico Scientifico*, established with Art. 2 para. 1 ordinanza del Capo del Dipartimento della protezione civile 3 febbraio 2020, n. 630 and the subsequent decreto del Capo Dipartimento 5 febbraio 2020, n. 371 (see above subsection III. 1., and competent to ‘advise and support the coordination of the overcoming of the epidemiological emergency’. Such profile has been highlighted by Arcuri (n. 96), 248-249.

<sup>186</sup> See above section III.; legge 22 maggio 2020, n. 35 (Conversione in legge, con modificazioni, del decreto-legge 25 marzo 2020, n. 19, recante misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19).

<sup>187</sup> Griglio (n. 134), 58-59, especially margin number 58. The demands that *decreti-legge* be used instead of dPCMs to enact the emergency measures were more related to the fact that the former provide a more effective scrutiny by public opinion – both at the moment of the collegial adoption by the Government and at the moment of the “conversion” before the Chambers – rather than the actual possibility for the parliamentary forces to influence the substantive content of the measures. Significantly, a bipartisan motion passed on 19 May 2020 by the Chamber of Deputies, binding the Government to privilege the instrument of *decreto-legge* to restrict constitutional rights (Atto Camera Mozione 1/00348, via <<http://aic.camera.it/>>), was by and large not followed up.

<sup>188</sup> And, contrary to what generally happens in the Westminster system, electoral laws do not establish a direct and predictable link between the vote and the formation of the Government.

<sup>189</sup> See above subsection III. 1.

<sup>190</sup> The already recalled (see above subsection III. 1. and n. 91) *decreto-legge* 30 luglio 2020, n. 83, extending until 15 October the efficacy of the previous *decreti-legge* n. 19/2020 and n. 33/2020 (the primary legislation basis of the *ad hoc* emergency executive measures), was “converted” by legge 25 settembre 2020, n. 124 (conversione in legge, con modificazioni, del decreto-legge 30 luglio 2020, n. 83, recante misure urgenti connesse con la scadenza della dichiarazione di emergenza epidemiologica da COVID-19 deliberata il 31 gennaio 2020), passed by the Chamber of deputies on 2 September with a 276-194 vote, and by the Senate on

months the Parliament slowly restarted its “normal” functioning, but it remains to be seen how much of this institutional reconfiguration will survive the emergency, and if it has set a potentially dangerous precedent.<sup>191</sup>

The trend towards a powerful executive at the expense of the legislature was even more pronounced in France. Against the background of an already-weakened parliament, the emergency scheme put in place further shifted decisional and rule-making powers to the (central) Government, in particular the Prime Minister. With the full and informed consent of Parliament, as it is important to underline, the Prime Minister was mandated to take a variety of wide-ranging measures by subordinate law making: by virtue of the newly inserted Article L. 3131-15 CSP they can order a range of far-reaching restrictive measures by regulatory decree (*décret réglementaire*) upon input from the Minister of Health – who plays a supplementary regulatory role under Article L. 3131-16 CSP – and, importantly, adopt ordinances concerning a vast number of socio-economic matters to cope with COVID-19 (labour law, social security law, commercial law, insolvency law, tenancy law, etc.) under Article 11 of the emergency bill (Title II). The Prime Minister can, moreover, task the pertinent state representatives, that is prefects or mayors, to take implementing measures, which implies further executive law making by agents of the central state. Importantly, governmental decision-making is supported by scientific expertise that is channelled into the political process via two new bodies, namely (1) the COVID-19 Scientific Council that was put in place by the Minister of Health on 11 March and later codified (as *comité de scientifiques*) in the CSP via the emergency bill and whose members were appointed by decree;<sup>192</sup> and (2) the CARE Committee (*Comité analyse, recherche et expertise*) instituted by the President on 24 March.<sup>193</sup>

Though it, too, suffered significant difficulties as a result of the pandemic, the United Kingdom Parliament seemed, at least to some extent, to buck the trend seen in the other study jurisdictions. Though protective measures resulted in a decline in effectiveness, it suffered perhaps a lesser loss in competences and in constitutional position than did the legislatures in France

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23 September with 143-120 vote. In both cases the Government asked the majority a confidence vote. In a similar vein, on 6 October, on a resolution concerning the further extension of the state of emergency by the Government, opposition parties took advantage of the absences in the majority due to COVID-19 and questioned the quorum, leading to the postponement of the vote.

<sup>191</sup> DelleDonne (n. 5), 12.

<sup>192</sup> Ministry of Health, press release of 11 March 2020; as regards the council’s current legal basis, see Art. L. 3131-19 CSP; Décret du 3 avril 2020 portant nomination des membres du comité de scientifiques constitué au titre de l’état d’urgence sanitaire déclaré pour faire face à l’épidémie de covid-19.

<sup>193</sup> Ministry of Health, announcement of 24 March 2020.

and Italy, and perhaps also in Germany. Indeed, to some extent it seemed to recapture its position as the primary organ responsible for oversight of the Government, a position in which it has perhaps been challenged in recent years, as a result of an unusually high degree of judicial involvement in governance during the Brexit process. The electronic system for participation of MPs<sup>194</sup> – particularly in plenary debates – was well received across a broad swath of society and in the media, and was widely seen as a welcome modernisation of certain archaic aspects of the functioning of Parliament. It is clear that when those measures were introduced, as is apparent from the debate on the resolution, it was the maintenance of Parliament’s scrutiny function that was at the forefront of MPs minds.<sup>195</sup> By that standard, the measures were broadly successful. Indeed, some commentators remarked on what they saw as an improvement in the levels of political engagement and scrutiny.<sup>196</sup>

However, that remote participation in plenary debates and ministerial questions was largely maintained risks obscuring the negative effects of the pandemic and of protective measures on other parts of parliamentary business. In particular, the pandemic had a negative effect on the work of committees, and significant concerns were raised during this period of an overreliance on negative consent procedures for delegated legislation.<sup>197</sup> Under negative consent, delegated legislation is laid before Parliament only after its entry into force, and must receive an affirmative vote within 28 days in order to remain in effect. That regulations made in this way may be brought into effect without parliamentary involvement in the first instance thus results in a shift of legislative competence to the executive at the expense of parliament.<sup>198</sup> Perhaps the primary concern, however, concerned the withdrawal of the facility for remote voting by members. As early as 2 June, the House of Commons voted in favour of a Government motion to re-introduced the system of voting in person.<sup>199</sup> At that time, the requirement for

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<sup>194</sup> The system of electronic participation was established by Resolution of the House of 21 April 2020 (Proceedings During the Pandemic): Hansard, House of Commons, 21 April 2020, Col. 22-24; and further Cols. 1-24

<sup>195</sup> Hansard, House of Commons, 21 April 2020, Col. 22-24. See e.g. the remarks of Ian Paisley MP (at Col. 17): “If there were a catechism for Members of Parliament, the answer would be to hold the Government to account.”

<sup>196</sup> See e.g. Richard Power Sayeed, ‘The ‘Zoom Parliament’ Could Inspire a More Democratic Commons’, 26 April 2020, *The Guardian*.

<sup>197</sup> See e.g. Ewing (n. 99), 5.

<sup>198</sup> See e.g. Ewing (n. 99), 23-24.

<sup>199</sup> Hansard, House of Commons, 2 June 2020, Col. 753-760; Ailbhe Rea, ‘I’m being disenfranchised’: the MPs who Can’t Return to Westminster Today, 2 June 2020, *New Statesman*.

MPs (and others) to socially distance remained in force, however, meaning that in order for 650 MPs to trail through the House of Commons' Victorian-era voting lobbies required more than an hour on each occasion. The return to in-person voting also, as was pointed out by many of those affected, effectively excluded from Parliamentary processes those MPs who – either because they are themselves at high risk or because they bear caring responsibilities for a person in a risk group – could not physically travel to Westminster.<sup>200</sup>

Nevertheless, and despite this somewhat chaotic end to the period, Parliament has been regarded as having coped well with the exigencies of the situation on balance. Hybrid debates were effective and informative and indeed, as discussed above, were regarded in some circles as representing an improvement in argumentative quality and substance over pre-pandemic times. The opposition Labour Party, and its leader Sir Kier Starmer, in particular won plaudits for their handling of the COVID-19 situation. The party announced at an early stage in the pandemic that it would engage constructively with the Government, and actively seek to enable it to pass the primary legislation necessary to enable an effective response. Though the Party disagreed with certain aspects of the legislation brought forward – and won important concessions on certain points such as the sunset clauses in the powers delegated to the executive – the legislative response was generally smooth and swift; which speaks to the effective joint working of the two main Parties during this period. However, in debates and other non-legislative matters, the Labour Party continued strongly to criticise the Government on points of disagreement; and the (over-)use of negative consent processes continued to be a point of disagreement between the parties. In terms of its oversight role, however, Parliament is generally regarded as having performed its function of holding the executive to account well during this period, and in particular as having struck a good balance between rigorous critical challenge to Ministers while avoiding obstructionism or party-political delays to the primary legislation establishing the pandemic response measures.

### **3. The Role of Parliaments in Times of Pandemic: Lessons from the Study Countries**

Many features were shared across all four jurisdictions in terms of the governance of the pandemic. It is important to emphasise, first, that in all

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<sup>200</sup> Rajeev Syal, Commons Return Will 'Euthanise' MPs, Jacob Rees-Mogg Is Warned, 20 May 2020, *The Guardian*.

four cases, the legislature was the secondary actor. Executives, as is to be expected in emergency conditions, dominated. In all cases, too, measures were taken which at least had the potential to weaken parliamentary effectiveness, for the sake of the protection of the members of those bodies and the community at large. Here it is the experience of the United Kingdom's House of Commons which stood out: although the reduction in the number of MPs who could attend events and in the ability of members to travel certainly limited the effectiveness of Parliament in some areas (the work of Parliamentary committees, for example), the switch to a hybrid online/in person format for its plenary sessions was seen in some quarters as actually increasing parliamentary effectiveness, perhaps even to the point that the Government was discomforted by the increased level of scrutiny.<sup>201</sup>

A second common theme was the scope of the role each legislature played in the management of the pandemic. In all cases, the primary function of the parliament – the extent to which it also fulfilled other functions varied – was to provide oversight of the executive organs; that of a pandemic powers watchdog. However, the implications of its focus on that function differ widely between the systems. In systems such as France and the United Kingdom, processes are long adapted to executive dominance over the day-to-day business of the parliament. In both cases the membership of parliament is usually dominated by the party of the executive, and the constitutional centre of gravity usually sits with the executive branch of government in terms of policy-generation and decision-making. Here, the oversight functions of the legislatures are well adapted,<sup>202</sup> and although the assumption by the executives of greater decision-making powers was constitutionally innovative, it seems unlikely that it will prove to be constitutionally redistributive.

In Germany and, to an even greater extent, in Italy, however, the (further) shift of decision-making powers from the legislatures to the executives threatened an upset to the established constitutional order. In Germany, widely-raised concerns in the first weeks of the pandemic response that Parliament was being side-lined subsided to some extent over the course of the first wave. Although the role and functioning of Parliament was put under stress, the pre-existing framework proved in the main to be sufficient to cope with the exigencies of the situation. However, the *Bundestag* was shielded to some degree by an effective system of cooperative federalism, and it must be recalled that many of the most intrusive measures were introduced

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<sup>201</sup> Note that this goes against the general trend identified by Elena Griglio, in which she argues that in general the effectiveness of plenary oversight mechanisms was degraded by the restrictions on attendance as a result of the pandemic: Griglio (n. 134), 62.

<sup>202</sup> Our analysis here is consonant with Elena Griglio's findings in her assessment of the oversight capacities of legislatures during this period: Griglio (n. 134), 66.

at the *Land* rather than federal level. This, coupled with a general consensus against the use of emergency powers, meant that there was a relatively lower need for the federal executive to have a leading role, which in turn allowed broader room for manoeuvre for the *Bundestag*. Significant too, though, was what was demonstrated to be a strong constitutional culture, at both the societal level, and within the political party system.

In Italy, by contrast, the experience of the pandemic has continued, and perhaps reinforced, an ongoing trend towards the diminution of the once-powerful parliament in favour of the executive. This is a significant reconfiguration of the constitutional system, which was designed to have the legislature at its centre, and primarily in the character of a law-making body. Its oversight functions, by contrast, have never been particularly well developed, nor particularly effective. Nor, moreover, have the legislature's oversight capabilities developed in line with its diminishing legislative role: it has proved to be somewhat unprepared to be an effective watchdog, especially in an emergency situation where the government as a matter of fact stands out as main governance actor.

Another notable difference between the four jurisdictions concerns the extent to which the realignment of powers and competences between the branches of government – whether understood as temporary or as part of a wider trend – was the subject of discussion within the political system or in wider society. In Germany, as has been noted above, the early response to the pandemic prompted an active and wide-spread debate which penetrated all spheres of society. What is more, that debate was largely framed in constitutional terms, with academics, journalists, and the public engaged in a discussion of to what extent various distributions of competences were compliant with the constitutional order. By contrast, in the other study jurisdictions, little public or media attention was paid to the (temporary) institutional reconfigurations which occurred as a result of the pandemic, and these generated little debate outside of academic circles.

Going into deeper detail, the systems where the rise of executive emergency governance has led to a higher marginalisation of the parliament are probably France and Italy, i. e. a semi-presidentialism with presidential dominance and a weakly rationalised parliamentarism. However – and here lies an important point – this is *not* equally problematic in both systems. Indeed, following our contextual approach, we submit that the separation of powers works differently in each system *also* in normative terms: an intervention by a parliament does not necessarily mean that it has been substantially involved or that checks and balances worked effectively. Conversely, the relative non-involvement of representative bodies in the mode of emergency law-making is not, as such, an indicator of parliamentary marginalisation. Rather, our

analyses indicate that, in the context of an emergency, the involvement of parliaments and, relatedly, the operation of checks and balances is best evaluated according to five main elements.

First, the source of executive authority. While in representative democracies executive law-making cannot be fully equated to parliamentary law-making, the unprecedented conferral<sup>203</sup> of law-making powers upon executives proved to be less problematic and contested – both in legal and in political terms – in systems where institutional and legal mechanisms or political conventions establish a direct link between democratic choices and the executive. This means that, for example, within French semi-presidentialism, the *habilitation* accorded by the Parliament does not affect the overall institutional balance as much as do the combination of *decreti-legge* conferring broad regulatory powers and “COVID-19 dPCMS” in the Italian context. That the rebalancing seems to be more problematic in the Italian than in the French case is because of the constitutional context: while the pre-pandemic French constitutional settlement has evolved in such a way that it does not fundamentally depend on a parliamentary spirit, the Italian system still does.<sup>204</sup> Reducing the role of parliament is thus more significant in the latter case.

This ties in with a second point, namely deviation from the constitutional design, be it codified or uncodified. The legal response to the emergency in the UK and Germany did not depart from the basics of the respective constitutional systems. Similarly, the – admittedly significant – conferral of law-making powers by the French Parliament was coherent overall with the law and practice of the 1958 Constitution, although it pushed the trend towards the normalisation of emergencies one step further. In contrast, emergency governance in Italy gravitated around the Government and the Prime Minister, whose prevalence, while increasingly developing in recent decades, is still largely foreign to both the design and the spirit of the 1948 Constitution.

Thirdly, the overall functions performed by parliaments, i. e. both law-making and oversight. While all parliaments were side-lined to some extent with regard to law-making functions, some managed to regain relevance acting as oversight bodies.<sup>205</sup> In Germany in the first weeks of the health crisis, the Parliament – and especially the opposition – was not very visible in public debates. There was also a shift of power from the *Bundestag* to the

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<sup>203</sup> See above, subsection IV. 2.

<sup>204</sup> This point has been developed especially by Longo and Malvicini (n. 26), 227-228.

<sup>205</sup> For a broader classification/categorisation of the oversight functions performed by parliaments in the COVID emergency, see Griglio (n. 134).

Federal Ministry of Health (see § 5 IfSG). However, this cannot be equated with a lack of criticism or loss of power on the part of Parliament (or the opposition). By contrast, the Westminster Parliament, normally controlled quite strictly by the executive when it comes to law-making, has a well-established tradition as an oversight body, and as such it has retained a relevant role throughout the emergency. Similarly, the French legislative *habilitation* was accompanied by a rather effective oversight on the way the Government handled the crisis (via specifically created enquiry commissions in both chambers), while the Italian Parliament performed quite poorly in that regard. Importantly, this element was in turn influenced by the constitutional position and self-understanding of opposition parties' institutional role, with remarkable differences along the spectrum of the countries under scrutiny, and particularly between Italy and UK.

That finding offers a number of significant implications for future comparative analyses. In particular, it suggests that any typology of states of emergency in relation to forms of government should incorporate the role of political party dynamics. Adding this dimension to the study of the institutional structures promises to add important nuance and a deeper understanding of how constitutional systems function within their situated contexts.<sup>206</sup> It also creates an immediate link between states of emergency and comparative literature on populism.<sup>207</sup> Indeed, that element is particularly salient, as the political landscape during states of emergency can also be assessed prospectively, i. e. with a view to future impacts on the form of government. For example, in the case of the countries under scrutiny, emergency governance has strengthened long-standing and ongoing trends towards personalisation of politics (especially in Italy, but also in France, and the UK) and could possibly weaken precarious power balances, rooted in political culture and party system, for example in France, UK, and even Germany.<sup>208</sup>

A fourth element concerns the previous presence of relatively well-established or clear emergency schemes and constraints in ordinary legislation (or judicial doctrines). Indeed, the constitutional deviation does not seem to depend so much on whether the legal instruments employed were constitutional or not, nor on the presence of constitutional provisions dedicated to

<sup>206</sup> Anthony Giddens, *The Constitution of Society* (Berkeley and Los Angeles: University of California Press 1984), 2.

<sup>207</sup> In this regard see White (n. 8), 106-126.

<sup>208</sup> See the Thuringia episode, where the right wing AfD suddenly elected Thomas Kemmerich, who belongs to the liberal FDP, instead of its own candidate. For discussion see Michael Hein (n. 150). In fact, this incident had few or no consequences for the handling of the 2020 pandemic. It is, however, important to ask to what extent the system could continue to function if the loss of faith between political groupings that was seen in Thuringia were to continue or accelerate.



emergencies (so-called “emergency constitutions” or “emergency regimes”). France’s legal landscape is rich in different types of emergency regimes (constitutional, legislative, jurisprudential), Germany has a codified state of emergency, and the UK has in place a set of sector-specific powers enshrined in ordinary legislation. Italy, however, lacks any of these provisions. This of course relates also to the intensity of parliamentary involvement: our analysis suggests that parliaments are involved in a more substantial way when only marginal or narrow legislative interventions are needed to cope with the emergency. When, on the contrary, broader legislative interventions establishing comprehensive emergency schemes are needed, parliaments seem less able to influence the substance of the law-making process. Once again, the specific form of government is not neutral in that regard, as it affects how political bargaining features into emergency governance – as the case of Italy illustrated. In more general terms, with a view to assessing constitutional deviation it is important to take into account the pre-existence of suitable emergency schemes as they at least partially relativise categorisations based on the triad of model-archetypes to which Pedro Villarreal (for example) makes reference: constitutional dictatorship, the rule of law, and rule by extra-legal means.<sup>209</sup>

A fifth and final element is the role of parliaments in defining the type of vertical relationships among governmental levels. Although those vertical relationships themselves are discussed in the next section, it is important to recall that parliaments and legislative processes play a crucial role in defining the terms on which those vertical interactions take place and – as was seen in some contexts in the course of the pandemic – in altering them. While such element is often neglected in comparative studies concerning states of emergency, our analysis suggests that it must also be incorporated analytically to evaluate the role played by representative bodies. It was a common theme in the countries under scrutiny that national parliaments were involved when it was deemed necessary or desirable to adjust in some way the powers and functions of sub-national units. This trend can take different and even opposite directions (towards centralisation or de-centralisation), as parliaments can be involved to either reclaim authority from (Italy), or assert some limited coordination powers over (Germany), or give more powers to (UK) sub-national political units. What matters here is that central executives must involve parliaments, using their constitutionally assigned functions and, even more, their political surplus in terms of democratic legitimation. It is striking that in all four contexts, and despite their divergences, national parliaments remained, in this sense, the mediators of the constitutional settlement.

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<sup>209</sup> Villarreal (n. 15); Bjornskov and Voigt (n. 7).

In sum, our study suggests that in comparable systems the impact of emergencies on horizontal allocation of powers is influenced by political legitimization of executives; overall functions of parliaments and self-understanding of political parties; deviation from constitutional design and conventions; previous emergency schemes in ordinary legislation; and vertical relationships. The various combinations of such elements, in turn, have a more general impact on whether the circle triggered by the “compulsion to legality” is more or less “virtuous”.<sup>210</sup> Indeed, eschewing the substantive involvement of the parliament or from pre-existing schemes has high chances to increase political fragmentation, legal uncertainty, and vertical conflicts, thus opening more to the possibility of rights abuses and violation of the separation of powers principle, and even undermining the response to the emergency.

## **V. Vertical Allocation of Power: The Role of Centralisation and De-Centralisation in the Fight Against the Pandemic**

One of the constitutional areas not only severely affected by the pandemic but also of essential importance in the management of the fight against it, is that of the vertical division of powers. After a brief outline of the organisational systems of the study countries (subsection V. 1.), subsection V. 2. outlines the fundamental differences in the fight against Covid-19 between centralised and de-centralised government models. Subsection V. 3. then sheds light on the difficulties and criticism that emerged with regard to the vertical separation of powers in the countries under scrutiny. Subsection V. 4. finally, provides concluding insights as to the relation between emergency governance and constitutional models of (de-)centralisation and on the importance of a high degree of legal certainty about the institutional allocation and limits as well as procedures regarding emergency competences.

### **1. Organisational Systems of the Countries Under Scrutiny: a Brief Outline**

The form of State organisation in the systems under study ranges between the “extreme” of a (hyper-)centralisation of decision and rule-making in

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<sup>210</sup> See Dyzenhaus, *States of Emergency* (n. 7).

France, to cooperative federalism in Germany. France is a centralised system, a fact which holds true despite regionalisation attempts undertaken since the 1980s as well as the more recent reform banning the simultaneous exercise of Paris-based and local elected mandates,<sup>211</sup> and notwithstanding the first Article of the Constitution that declares that the French State “shall be organised on a decentralised basis”.

The Italian system is one of informal centralisation and cooperation. The 1948 Italian Constitution has been the first to experiment a mild form of de-centralisation that has come to be conceptualised as “regional State”. However, even during the first five decades, and to an even greater extent after the 2001 constitutional reform, Italian regionalism has proved to be rather conflictual and ineffective. Several factors have negatively affected the capacity to implement structural reforms or coherent political agendas: uncertainties concerning legislative and administrative competences; weak institutional cooperation among different levels of government; weak capacity of local political forces authentically to represent their constituencies; absence at local level of political parties with clear political/ideological agendas; and the highly uneven geographical distribution of the core constituencies of national parties. For these reasons, too, the central Government has been relatively reluctant to make extensive use of the substitution powers.

The system of vertical separation of powers in the UK is again different: the UK’s devolution settlement, established in 1998, is highly asymmetrical. It is in Scotland that UK devolution has reached its greatest extent, but devolved institutions, albeit of different scopes, are present also in Wales and Northern Ireland. Despite an active debate concerning the balance of powers between Scotland and the Westminster Government, which largely centres around the independence question, the devolution settlement has changed little since its original enactment. Devolution differs from federalism in that the UK legally remains a unitary State, as the devolved powers of the subnational authorities rest with the central government.

Germany, finally, has a strong tradition of regional government. It can be seen as a model of cooperative federalism, where an institutional culture of consensus-seeking and multilateral bargaining stands in the foreground.<sup>212</sup> The division of labour between the federal and *Länder*-level is marked by a high degree of administrative decentralisation and legislative centralisation:

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<sup>211</sup> Carolyn Moser, *Frankreichs Verfassungsrat setzt Ämterhäufung bei Parlamentariern ein Ende*, *VerfBlog*, 12 March 2014, via <<https://verfassungsblog.de/>>.

<sup>212</sup> Tanja A. Börzel, *States and Regions in the European Union, Institutional Adaptation in Germany and Spain* (Cambridge: Cambridge University Press 2002,) 45-52.

the 16 German federal States are entrusted with the administration and execution of federal laws. Legislation is bundled at the federal level, but the *Länder* enjoy considerable influence over federal law-making through their representation in the second chamber of the German Parliament, the *Bundesrat*. Cooperative federalism is closely linked to the so called “*Politikverflechtung*”, a theory which Fritz Scharpf used to describe joint decision making and extensive interlocking of decision-making between the federal and *Länder* governments.<sup>213</sup>

## 2. Centralised vs. De-Centralised Management in the Fight Against the Pandemic

Far from displaying a uniform tendency towards the centralisation of decision-making at the national level, the systems reacted differently with regard to the challenges posed by the management of the COVID-19 pandemic, in accordance with their different vertical allocations of powers.

The management of the COVID-19 pandemic underscored that the French Republic is an essentially centralised one. As in previous times of emergency or crisis, the French authorities reacted by bundling executive prerogatives in Paris, in particular with the Prime Minister. Some decisional and operational leeway at the municipal, regional, or departmental level remained, but only to the extent that it was channelled through the representatives of the central state – that is prefects (in regions or departments) or mayors (in municipalities). This tilt to centralised government becomes evident when looking at the incremental development of the pandemic management scheme. The first restraining decision – a decree ordering a general confinement – was adopted (on the 16 March) by the Minister of Health, who was seconded by the Prime Minister, on the basis of Article L313-1 CSP. Then, the emergency bill of 23 March was passed, shifting decisional and even regulatory powers to the central Government and particularly to the Prime Minister (with some support from the Minister of Health).

Although the involvement of local authorities increased over the course of the first wave,<sup>214</sup> the central Government in Paris has remained the pivotal decisional and rule-making locus. Moreover, the President, who is not offi-

<sup>213</sup> Fritz W. Scharpf, Bernd Reissert and Fritz Schnabel, *Politikverflechtung: Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik* (Kronberg/Ts.: Scriptor Verlag 1976).

<sup>214</sup> An indicator for the intensification of communal, regional, and departmental executive governance is the drastic increase in releases orders (*arrêtés*).

cially a member of Government but the Head of State, also had a key role to play in the management of the pandemic. In line with his warfare approach to fighting COVID-19,<sup>215</sup> the President has repeatedly convened (certain) ministers in the configuration of the Defence Council – in charge of military and defence matters and the management of major crises<sup>216</sup> – before the weekly government meeting in the Council of Ministers. The hyper-centralisation in the wake of the coronavirus would thus not stop short of the presidency.

In Italy, the framework normally in place for addressing emergencies is designed to face natural disasters rather than health crises, and this is reflected in the overall overlap of functions. Indeed, uncertainties concerning legislative and administrative competences concern the specific matters of healthcare, civil protection, and disaster relief. Health emergency powers are shared between the Minister of Health, presidents of Regions, and mayors. At least since 1992, the Italian healthcare system has been regionally-organised as the related agencies and facilities have been part of regional administrations. The central State and Regions also share primary legislative competence on healthcare, although the former retains the competence to set the basic legislative principles. Municipalities are responsible for delivering social services, while mayors retain the role of local health authorities as representatives of the central State, particularly in case of emergencies.<sup>217</sup> Besides healthcare, emergency powers are mainly regulated by the legislation establishing the Department of Civil Protection. The DPC also has a multi-level structure: the authority at the national level is the Prime Minister, who appoints the Chief of the DPC; Regions and municipalities are part of the system and participate in the elaboration of general policies. In this field, too, regions share legislative competence with the State. As mentioned, any intervention of the DPC must be preceded by the formal declaration of the state of emergency by the Government, an administrative step triggering the potential adoption of *ordinanze*.<sup>218</sup>

The German approach to the management of the COVID-19 pandemic has been considerably shaped by federalism. The Infection Protection Act (*Infektionsschutzgesetz*, IfSG) provides the ordinary legislative basis in the

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<sup>215</sup> Macron (n. 32).

<sup>216</sup> Art. R\*1122-1 Defence Code.

<sup>217</sup> Art. 50 paras. 4-5 decreto legislativo 18 agosto 2000, n. 267 (Testo unico delle leggi sull'ordinamento degli enti locali); see also Art. 117 decreto legislativo 31 marzo 1998, n. 112 (Conferimento di funzioni e compiti amministrativi dello Stato alle regioni ed agli enti locali, in attuazione del capo I della legge 15 marzo 1997, n. 59).

<sup>218</sup> In the case of the COVID-19 pandemic such declaration was adopted on 31 January 2020, see above, subsection III. 1.

field of contagious diseases.<sup>219</sup> As prescribed by the German federal system, this Act is a federal law that is executed by the States (*Länder*). The federal Government did not (and does not) have the power to issue directives, but can only make recommendations to the *Länder*. Although Article 35 para. 3 of the German Basic Law grants the federal Government emergency powers in the event of a natural disaster or accident that involves the territory of several States this rule (which has never been applied to date) presupposes that the States are unable to cope with the situation and does not give the federal Government a substitute power. However, § 5 IfSG was revised in March to allow the federal authorities more coordinating powers during epidemics. This revision entailed a centralisation of powers under the Federal Ministry of Health in the event that the *Bundestag* declares a national epidemic emergency. The Ministry of Health, acting on advice from the Robert Koch Institute, can then make recommendations to enable a coordinated approach within the Federal Republic. This power is not linked to an inability on the part of the States to deal with the emergency, as is provided in Article 35 of the Basic Law in case of a natural disaster.

However, critics considered it highly problematic that the Federal Minister of Health could now deviate from legal regulations by means of a statutory instrument, arguing that this change shifted parliamentary powers to the executive beyond what is constitutionally permissible.<sup>220</sup> Moreover, the State governments showed a willingness to cooperate and worked in concert with the federal Government. As early as 12 March 2020, the Federal Chancellor and the heads of government of the *Länder* agreed on a joint resolution.<sup>221</sup> Shortly afterwards, on 16 March, they agreed comprehensive packages of measures to combat the virus, which was a remarkable political achievement. As a result of the crisis summit, they agreed “Guidelines for joint action by the Federal Government and the *Länder*”.<sup>222</sup> In a video conference, the Federal Chancellor and the Prime Ministers of the *Länder* agreed to extend the measures adopted on 12 March to restrict social contacts.<sup>223</sup> In addition, the Infection Protection Act was amended swiftly at the end of March 2020.<sup>224</sup>

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<sup>219</sup> Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen, Federal Law Gazette I 2000, 1045.

<sup>220</sup> Möllers (n. 164); see also Schönberger (n. 167). See above, subsection IV. 2.

<sup>221</sup> Bundesregierung, Besprechung der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder am 12. März 2020.

<sup>222</sup> Bundesregierung, Leitlinien zum Kampf gegen die Corona-Epidemie, 16 March 2020.

<sup>223</sup> Bundesregierung, Besprechung der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder, 12 March 2020.

<sup>224</sup> Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, Federal Law Gazette 2020 I, 587.

The coronavirus experience in the UK on the other hand did not raise significant questions concerning the division of powers between Westminster and the devolved administrations. Health is a devolved matter in the UK, with Scotland and Northern Ireland having full control over their health and social care systems, and with partial competences over health devolved to Wales. The missing link in this devolution scheme was a set of powers to deal with health emergencies – emergency powers in general remain reserved to the Westminster government – which were created by the 1984 Public Health Act. That Act does not, however, extend to Scotland or Northern Ireland. This gap in the statutory scheme was (partially and temporarily) remedied by the Coronavirus Act 2020, sections 48 and 49 of which grant the Northern Irish and Scottish Ministers (respectively) the power to make regulations in response to public health threats on the same terms as those applying in England and Wales. The powers and processes, set out in schedule 19 of the Coronavirus Act,<sup>225</sup> follow (broadly) the same pattern as those under sections 45A-45T of the 1984 Act.<sup>226</sup>

### 3. Vertical Allocation Power and Challenges for Pandemic Management

Regardless of the type or organisation of the vertical separation of powers, the management of the pandemic between the different governance levels has led to difficulties, tensions, and considerable criticism in all the countries studied – sometimes to a greater and sometimes to a lesser extent.

In Italy, the pandemic made the disorderly features of the Italian decentralised State evident. Different Regions followed different organisational approaches in their respective healthcare systems, and this was reflected in the overall ineffectiveness of the response in the initial stages of the pandemic. At the outset of the emergency, regional and municipal measures of various kinds mushroomed, often outside respective spheres of competence, causing uncertainty and overlaps with national measures. In particular, the indeterminate wording of some provisions of *decreto-legge* No. 6/2020 opened the gates to a flood of measures that variously raised or lowered the bar of restrictions, often without a proper basis in existing legislation. In this last regard, the activism of regional executives in this phase must be placed in the broader context of Italian populist trends, whereby several local governors tried to

<sup>225</sup> 2020 Act (n. 100), schedule 19, ss. 1-4. Schedule 19 makes provision for powers in Scotland. The respective provisions concerning Northern Ireland are contained in schedule 18.

<sup>226</sup> See above, subsection III. 2.

meet the immediate sentiment of their constituencies in favour or against restrictive measures.<sup>227</sup> Against this background, the decision of the central Government not to resort to its substitution powers under Article 120 Constitution is highly significant in seeking to understand Italian regionalism, especially considering the difficulties in the management of the pandemic experienced by the Government of the richest Italian Region, Lombardia,<sup>228</sup> renowned for the high quality of its healthcare system. The subsequent *decreto-legge* No. 19/2020, adopted also under the pressure of uncertainty and disorder that had arisen, clarified that regional authorities could adopt restrictive orders only until the adoption of corresponding measures by the central Government, which would also terminate the validity of the former. At the same time, it provided that local authorities could not impose measures stricter than the national ones, once adopted. However, and quite significantly, the same *decreto-legge* No. 19/2020 retroactively validated regional and local measures adopted under *decreto-legge* No. 6/2020. If one adds the overall avoidance of juridification of vertical conflicts by the Government and the Regions,<sup>229</sup> and the merely consultative role accorded to Regions in defining national emergency measures,<sup>230</sup> the need for a coherent response to the pandemic triggered a process of executive stabilisation and centralisation. However, rather than a well-established constitutional framework, this process seems the result of an informal political truce between central and regional governments, subject to instability, retrogression, and uncertainty.<sup>231</sup>

In the UK, although the COVID-19 pandemic resulted in the creation of significant new powers both for the administrations at Holyrood (Scotland)

<sup>227</sup> See e.g. the case of the governor of the Region of Sicily, who on 23 August 2020 adopted an *ordinanza* to close the immigrants' reception centres in the Region, with the declared intent to protect the local population from the supposedly increased health risks brought by migrants. The *ordinanza* was challenged by the Government before the administrative courts and suspended by TAR Sicilia, sez. III, 27 August 2020, decreto n. 842.

<sup>228</sup> Despite some calls by civil society: see Zita Dazzi, "Salviamo la Lombardia": in piazza la maxi protesta sulla gestione dell'emergenza, 20 June 2020, La Repubblica.

<sup>229</sup> See Alfonso Vuolo, Il sindacato di legittimità sulle misure di contrasto all'epidemia in: *Diritti regionali 2* (2020), 9. As for August 2020, regional measures were challenged by the central government before administrative courts only in three instances. All cases were decided in favour of the central government: see TAR Marche, sez. I, 27 February 2020, decreto n. 56 (confirmed by *ordinanza* 5 marzo 2020, n. 63); TAR Calabria, Catanzaro, sez. I, 8 May 2020, n. 841; and TAR Sicilia, sez. III, 27 August 2020, decreto n. 842.

<sup>230</sup> See Art. 3 para. 1 of *decreto legge* No. 6/2020 and Art. 2 para. 1 *decreto legge* No. 19/2020.

<sup>231</sup> See e.g. Andrea Romano, I rapporti tra ordinanze sanitarie regionali e atti statali normativi e regolamentari al tempo del Covid-19, 20 May 2020, *Federalismi.it*, via <<https://www.federalismi.it>>. Interestingly, Regions and sub-national units with legislative power chose not to make their own laws, except for the province of Bolzano and the Region of Valle d'Aosta. The latter has been challenged by the central government.



and Stormont (Northern Ireland),<sup>232</sup> certain of the powers associated with the lockdown remained solely with the Westminster Government, in particular those associated with financial aspects.<sup>233</sup> This occasioned conflict, in particular between Holyrood and Westminster, in that Holyrood complained that the absence of the power to make financial provision for workers and businesses meant that it could not exercise its competence to maintain restrictions in Scotland, despite that the Scottish Ministers regarded the relaxing of lockdown conditions in England as premature. In general, however, these constitutional conflicts took second place to general political tensions. While the messaging surrounding coronavirus from the Scottish Government was widely regarded as being clear, informative and to the point, the UK Government was criticised for lack of clarity, mixed messaging, and frequent changes of position.<sup>234</sup> Together with the fact that Scotland did not have all of the powers necessary to put in place an independent response, these unfavourable comparisons have likely further weakened the Union. Those tensions reached their peak in April, when the Scottish Premier, Nicola Sturgeon, refused to rule out closing the English/Scottish border if the UK Government sought to lift the lockdown prematurely.<sup>235</sup> The legality of a move to close the border is unclear. Certainly, the Scottish Ministers have no explicit power to close the border, but though England and Scotland are not separate territories in international terms, they are separate territories within the devolution settlement from the point of view of health. It is uncontroversial that different restrictions can apply north and south of the border.<sup>236</sup> Whether those different restrictions could extend to refusing access to those travelling from outwith the territory but within the State is a matter which would, in the event, no doubt need to be resolved by the Supreme Court. The matter was not put to the test – the border remained open – and the question is thus likely to remain moot and unanswered.

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<sup>232</sup> The most significant change to the devolution settlement in recent years was the transfer, in 2016, of certain tax powers from Westminster to Holyrood: Scotland Act 2016 c. 11.

<sup>233</sup> It is the UK Treasury, and not the Scottish Government, which was empowered to put in place the furlough scheme for workers unable to travel to work, for example.

<sup>234</sup> George Parker and Chris Giles, Boris Johnson Struggles for Clear Message on Lockdown Easing, *Financial Times*, 10 May 2020; Rowena Mason and Harron Siddique, Nicola Sturgeon Leads Chorus of Dissapproval over Johnson's 'Stay Alert' Message, *The Guardian*, 10 May 2020; Ailbhe Rea, What Went Wrong with the Government's Communications Strategy Over the Weekend?, *New Statesman*, 13 May 2020.

<sup>235</sup> Severin Carrell, Sturgeon refuses to rule out Scotland screening visitors from England, *The Guardian*, 29 June 2020; Philip Sim, Coronavirus: Can Scotland Close the Border with England?, 13 July 2020, *BBC News*.

<sup>236</sup> This position is explicitly recognised in the 2020 Act (n. 100), ss. 48-48 and schedules 18-19.

In Germany critics identified the decentralised nature of the competences as the weak link of the health crisis management. An anti-federal mood emerged in the first weeks of the coronavirus pandemic, in part spurred by the political and media discourse. Federalism was repeatedly identified in public opinion as a weak point of German crisis management, on the grounds that the reactions of the *Länder* were too diverse – especially with regard to restrictions on fundamental rights. “Federalism-bashing” was widespread: a recurring pejorative opinion expressed concern about a “federal patchwork rug” (*föderaler Flickenteppich*)<sup>237</sup> of different rules in the various regions, which created the impression of chaos. There was a strong desire for uniform rules and a streamlined political leadership based with the federal Government.<sup>238</sup> This one-sided criticism did not stop weeks later when it came to easing measures.<sup>239</sup> The fact that the *Länder* were responsible for many areas of easing and that the Chancellor had to give the *Länder* a free hand, prompted commentators to declare that “the end of chancellor democracy” was in sight. The Chancellor’s constitutional role was described as “unworthy” and “embarrassing”.<sup>240</sup> This criticism of the way in which the state is organised is evidence of a growing scepticism about pluralism and a growing “unitary culture” in Germany, which advocates centralised regulations.<sup>241</sup> In the first phase of the pandemic, however, German cooperative federalism seems not to have been detrimental to the fight against COVID-19.<sup>242</sup> The federal and state governments worked well together and were able to agree comprehensive measures to combat the virus.<sup>243</sup> The

<sup>237</sup> See e.g. Rebecca Beerheide, *Pandemie und Föderalismus: Gemeinsamer Flickenteppich*, *Deutsches Ärzteblatt* 117 (2020); Frank Bräutigam, *Stresstest für den „Flickenteppich“*, 13 March 2020, *Tagesschau*; Thomas Holl, *Geschlossen handeln im Kampf gegen das Virus*, 10 March 2020, *FAZ.net*; Christian Rath, *Flickenteppich Deutschland*, 11 March 2020, *TAZ*; see also Matthias Bartsch et al., *Inside Germany’s Piecemeal Response to Corona*, 13 March 2020, *Spiegel International*.

<sup>238</sup> See e.g. Sebastian Heinrich, *Föderaler Flickenteppich: Muss Deutschland mehr Zentralstaat wagen?*, 3 May 2020, *Schwäbische*.

<sup>239</sup> *Deutschland ist ein föderaler Flickenteppich*, 20 April 2020, *RP online*.

<sup>240</sup> Dirk Kurbjuweit, *Das Ende der Kanzlerindemokratie*, 10 May 2020, *Der Spiegel*.

<sup>241</sup> On the latter point, see Sabine Kropp, *Zerreißprobe für den Flickenteppich?: Der deutsche Föderalismus in Zeiten von Covid-19*, *VerfBlog*, 26 May 2020, via <<https://verfassungsblog.de/>> referring to Charlie Jeffery and Niccole M. Pamphilis, ‘Myth and Paradox of Uniform Living Conditions in the German Federal System’, *German Politics* 25 (2) (2016), 176-192.

<sup>242</sup> According to Hubert Meyer, local self-administration and cooperative federalism even proved to be a “stabilising anchor” in the crisis, ‘COVID-19: Verantwortung in der Krise – Zwischenruf aus der Praxis’, *NVwZ* (2020), 609 (611).

<sup>243</sup> See above subsection V. 2. For an empirical study of the success of the German federalist system see Nathalie Behnke, ‘Föderalismus in der (Corona-)Krise? Föderale Funktionen, Kompetenzen und Entscheidungsprozesse’, *Aus Politik und Zeitgeschichte* (2020) 9.

criticism that federal structures delayed decisions did not hold true.<sup>244</sup> In March, the *Länder* went into the “lockdown” homogeneously and closed all schools within one day, and within one week facilities such as nursing and care homes.<sup>245</sup> It must be admitted, though, that there was (and still is) considerable legal fragmentation across the *Länder*, especially with regard to curfews, distancing rules, and fine regulations. However, the resulting lack of clarity was only partly due to the different regulations of the *Länder*, but could also be seen in the fact that the regulations within the *Länder* were frequently changed.<sup>246</sup> Furthermore, federal power sharing was able to have a highly individual freedom-securing effect by enabling regionally specific regulations to be adopted both in the phase of “lockdown” and the relaxation of measures and thus to react flexibly to the situation in each individual case, which was necessary as the pandemic took very different courses locally and regionally. The political decision-makers were under a heavy burden of justification for their measures precisely because of the “competition” between the countries.<sup>247</sup> The diversity of opinions favoured the search for milder measures, and this alone helped to increase the protection of fundamental rights.<sup>248</sup>

In France, there was (initially) little resistance to a heavily centralised pandemic management, even when the *état d'urgence sanitaire* was decreed. But while some critics rightly pointed to the fact the Paris was dominating the agenda to the detriment of regional and local actors, others even asked for stricter centrally-decided measures.<sup>249</sup> Yet, once the general – quite drastic – first confinement was lifted, calls for more regional or local measures that would allow for tailor-made solutions multiplied. The Paris-based Government accommodated these calls by granting regional and local authorities more decisional and executive leeway. Consequently, cities and urban agglomerations could, for instance, introduce local measures regarding the wearing of face-masks in public spaces, as was the case in Paris, Toulouse, Lyon, or Strasbourg.

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<sup>244</sup> Empirical evidence in Behnke (n. 243), 12-15.

<sup>245</sup> Astrid Ludwig, Corona-Wunder “made in Germany”, 8 September 2020, FAZ.net.

<sup>246</sup> Behnke (n. 243), 13.

<sup>247</sup> Behnke (n. 243), 14.

<sup>248</sup> Oliver Lepsius, Vom Niedergang grundrechtlicher Denkkategorien in der Corona-Pandemie, *VerfBlog*, 6 April 2020; see also Lino Munaretto, Die Wiederentdeckung des Möglichkeitshorizonts, *VerfBlog*, 30 March 2020; both via <<https://verfassungsblog.de/>>.

<sup>249</sup> CE, ord. réf., 22 March 2020, *Syndicat des jeunes médecins*, n° 439674.

#### 4. Vertical Division of Labour in Times of Pandemic: Lessons from the Study Countries

As regards the vertical allocation of power, the emergency did not trigger a single common trend, either towards centralisation of emergency governance at the national level or towards de-centralisation towards sub-national units. Relatedly, the rule of law and legal protection credentials of emergency governance were not strictly related to any single constitutional model of (de-) centralisation. In other words, rule of law and rights protection are not affected unidirectionally by specific models of vertical allocation of powers. As the comparison between Germany and Italy shows in particular, de-centralisation as such does not tilt the balance in any specific direction. A relatively higher involvement of sub-national units does not necessarily mean that emergency governance is more respectful of fundamental rights and the rule of law. In some cases, de-centralised models may serve individual freedom well. As the German case shows in particular, competition between sub-national units may increase the pressure on political decision-makers to justify themselves and their decisions, and thus ultimately foster the transparency of measures taken.<sup>250</sup> In other cases (first and foremost Italy), rights violations, unconstitutional practices, and unlawful enforcement may well result from the actions of sub-national units and their executives, especially if they use the emergency as an opportunity to present themselves as central decision-makers.<sup>251</sup>

Furthermore, our study suggests that when it comes to the vertical allocation of powers emergency governance overall complies more with the principles of rule of law when a higher degree of legal certainty about the institutional allocation and limits as well as procedures regarding emergency competences is present – though the substance to which those competences will be applied cannot, in a state of emergency, but remain underdetermined. This feature – closely linked to the pre-existence of suitable emergency schemes in ordinary legislation recalled above – rewards either systems (for example France) with fewer centres of political decision at sub-national level; or systems (for example Germany and, to a lesser extent, the UK) with well-structured, functioning, and cooperative models of (political) de-centralisation. In other words, in order for emergency governance to be successful *also* in terms of rule of law it should be based on systems where authorities and citizens alike know who does what at which level. For future comparative studies on states of emergency in liberal democracies, this would also mean switching the focus from emergency powers – the range of authoritative

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<sup>250</sup> See Behnke (n. 243), 14.

<sup>251</sup> See Dazzi (n. 229).

measures allowed by a constitutional system to address an emergency – to emergency competences – the allocation of the authority to adopt emergency measures among different branches and levels of government.

## VI. Role of Judiciaries: Between Protection of Rights and Arbitration of Institutional Conflicts

How did judicial systems respond to the health emergency, and how did they perform their role of rights protection? These questions are of utmost importance to understand the function played by pre-existing institutional structures in the management of the crisis and, relatedly, their potential – either temporary or longitudinal – transformations. Importantly, in assessing the role of judiciaries, the present analysis does not focus on the operation of the civil and criminal justice systems (restricted caseload, online proceedings, etc.) but rather on the judicial application of general public law principles to the state's response to the pandemic.

After a brief outline of the judicial systems of the study countries (subsection VI. 1.), subsection VI. 2. sheds light on the French and German experiences, marked by a comparatively more reactive stance by their judiciaries and the key role played by apex courts in the course of the emergency. Subsection VI. 3. focuses on Italy and the shortcomings deriving from the institutional and procedural features of its system of constitutional adjudication; before subsection VI. 4. turns to the UK, highlighting the specificities of a system where judicial scrutiny focused on secondary legislation. Subsection VI. 5. concludes by highlighting four general elements of the relationship between judicial protection of rights and governance of the health crisis which emerge from the comparative analysis.

### 1. Judicial Systems of the Countries Under Scrutiny: a Brief Outline

Among the countries under scrutiny, Germany and Italy feature relatively similar, strong constitutional review systems, and a judiciary structured around a distinction between ordinary and administrative courts. Indeed, the German *Bundesverfassungsgericht* (BVerfG) is today one of the most influential constitutional courts in the world,<sup>252</sup> both inside and outside national

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<sup>252</sup> See e.g. the contributions to the VerfBlog Online Symposium “German Legal Hegemony?”, Armin von Bogdandy (ed.), via <<http://verfassungsblog.de/>>.

borders. Germany has also a quite efficient judicial system, structured around the federal chain linking the *Länder* and the *Bund*. At the federal level, the BVerfG is responsible for the review of administrative and judicial decisions and legislation and for deciding whether these are in accordance with the Basic Law. Although all German courts may review the constitutionality of governmental action, only the BVerfG is empowered to declare a statute unconstitutional under the Basic Law. It functions as a trial court that has first and final competence. A lower court is obliged to stay its proceedings and submit a question to the BVerfG if it has doubts as to the constitutionality of a law. Further, any individual can bring a constitutional complaint to the BVerfG if they think that their basic rights have been infringed. The legislatures on federal and *Länder*-level, as well as all courts, are bound by its decisions.

Like Germany, Italy has a semi-centralised system of judicial review in which primary-level legislation can be annulled only by the *Corte costituzionale*. Any court, at any level of the judicial system, can raise a question of constitutionality without further filters. Such “networked” setting of the system of constitutional adjudication has made the *Corte* an extremely influential actor in the Italian system and, to a lesser extent, in the European multi-level system of adjudication.<sup>253</sup> However, the *Corte* cannot be accessed directly by single individuals, and direct complaints can only be raised by institutional actors, such as the Regions, within a limited time after the entry into force of a law. Furthermore, review of regulatory law and administrative measures falls within the competence of ordinary and administrative courts, depending on the type of dispute and claim raised. Indeed, the Italian judicial system is also built on the separation between ordinary and administrative courts, featuring different competences, procedures, remedies, and, above all, different stances towards executive measures. These elements put the *Corte* in a position of at least potential weakness compared to its German counterpart, as its actual capacity to rule on violations of rights or power allocation depends heavily on the readiness of ordinary courts to refer questions to it.<sup>254</sup> In turn, the overall effectiveness of the Italian judicial system is affected negatively by longstanding problems (i. e. its huge caseload, making proceed-

<sup>253</sup> See generally Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia and Andrea Simoncini (eds), *Italian Constitutional Justice in Global Context* (Oxford, New York: Oxford University Press, 2015); and Armin von Bogdandy and Davide Paris, ‘Power is Perfected in Weakness: on the Authority of the Italian Constitutional Court’ in: Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia and Andrea Simoncini (eds), *Dialogues on Italian Constitutional Justice – A Comparative Perspective* (Abingdon-on-Thames: Routledge, 2020), 263–280.

<sup>254</sup> Such potential weakness has somehow emerged in recent years, when the increasing resort by ordinary judges to interpretive techniques such as consistent interpretation and disapplication of primary law in favour of EU law has led to a substantial decrease of referrals to the *Corte*.

ings extremely long), which has led the European Court of Human Rights repeatedly to condemn Italy for violations of the right to a fair trial (and reasonable time) under Article 6 ECHR.<sup>255</sup>

It was in France that the division between ordinary and administrative jurisdiction was first established, and it remains extremely relevant to the overall functioning of the judicial system. Constitutional adjudication is, however, relatively weaker. The Constitutional Council (*Conseil constitutionnel*) is in charge of examining the constitutional conformity of legislative bills (*a priori* constitutionality control) and – since the constitutional reforms of 2008/9 – of legislative provisions already enacted (*question prioritaire de constitutionnalité*, QPC).<sup>256</sup> Unlike in Germany and Italy, however, a filtering mechanism is in place. Where the constitutionality of a law in force is questioned, the competent judge(s) may neither decide on the issue, nor refer it directly to the *Conseil*. Rather, questions of constitutional salience must be referred to the Court of Cassation (*Cour de Cassation*) or the highest administrative court, i. e. the Council of State (*Conseil d'Etat*). Hence, these apex courts are in a position to filter the *a posteriori* complaints actually reaching the *Conseil constitutionnel*, and thus maintain an institutional prevalence over the latter. The French *Conseil constitutionnel* also stands out (and has been traditionally criticised) for its very concise opinions that are short of detailed arguments or reasoning. This feature, together with the rules governing its membership, is considered to make this body relatively more permeable to political impulses coming from the Government.<sup>257</sup> The *Conseil d'Etat*, for its part, has traditionally had a central role in the French judicial system. Indeed, it acts as the supreme administrative court and advises the Government on specific legislative proposals. It has, for many years, played the role of a French Supreme Court. Importantly to our purposes, since the 2000 reform of interim proceedings, it is the administrative jurisdiction which is responsible for ensuring interim legal protection via urgent injunctions,<sup>258</sup>

<sup>255</sup> Among the most recent rulings, see ECtHR, *Panetta v. Italy*, judgement of 15 July 2014, no. 38624/07.

<sup>256</sup> *Question prioritaire de constitutionnalité* (QPC). See Arts 61-1, 62 Constitution, loi organique n° 2009-1523 du 10 décembre 2009.

<sup>257</sup> Appointed by either the sitting Head of State or the Presidents of the Parliament's Houses, the wise (*les sages*), as the members are generally called, do not necessarily need to have a legal training and, in principle, include former Heads of State by right and for life (with many of them leaving their mandate dormant). On the limits of the reason-giving of the *Conseil constitutionnel* see e. g. Denis Baranger, 'French Constitutional Law' in: Masterman and Schütze (eds) (n. 9), 107; and Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, I CON 5 (2020), 69-92.

<sup>258</sup> Loi no 2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives.

and this has strengthened the role (and self-perception) of administrative courts as rights protectors.

The UK, finally, features what has been described as a weak form of constitutional review.<sup>259</sup> Indeed, it is well known that, despite its strong tradition of judicial protection of rights and the comparatively significant social trust in courts, the British judicial system performs its functions in the absence of a codified constitution and, unlike in its continental counterparts, courts cannot strike down parliamentary legislation. This holds true despite the introduction in 1998 of the Human Rights Act (HRA), section 4 of which allows any Court to make a “declaration of incompatibility”, noting that a particular (provision of) domestic law violates the ECHR. A section 4 declaration has no direct effect on the validity of the provision concerned, though it activates a fast-track legislative procedure which may – at Parliament’s discretion – be used to amend or repeal the law concerned. Pending action by Parliament, or if Parliament chooses not to act, the Courts remain under an obligation fully to apply and enforce legislation declared “incompatible”. Equally significantly, section 3 of the HRA gives the courts both the power and the responsibility to interpret legislation in such a way as to make it compatible with the ECHR, where possible. Moreover, the UK does not feature the strict institutional division between ordinary and administrative jurisdiction present in France, Italy, and Germany. Instead the Administrative Court sits within the Queen’s Bench Division of the High Court as the Court of first instance in judicial review cases, which thereafter may be appealed to the Civil Division of the Court of Appeals, and ultimately to the United Kingdom Supreme Court. This means that there is no independent or separate judicial circuit specialised in reviewing acts of public authorities as such. Rather, the majority of the judges of the Queen’s Bench Division regularly sit both in judicial review applications and in other civil law matters, as do the Lord and Lady Justices of Appeal.

## 2. France and Germany: Proportionality, Reactive Rights Protection, and Timely Decisions

A significant first wave case law arose in France, Germany, and Italy, where competent (mainly administrative) courts generally applied proportionality or balancing-like reasoning techniques. This was understandable given that emergency measures often had intense impacts on fundamental rights, in some cases even completely suspending their exercise to a hitherto

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<sup>259</sup> See again Gardbaum (n. 14).



unknown extent. Furthermore, the question of proportionality gained considerable importance as emergency regulations often provided for the possibility of taking measures against persons not presenting a threat to the public and because violations could be punished as an administrative or even criminal offence. Within the overall adherence to proportionality and balancing reasoning, competent courts also shared the tendency to adjust their scrutiny over time, based on the (perceived) seriousness of the emergency. Indeed, at the initial stages of the pandemic, French, German, and Italian courts generally proved quite deferential towards emergency measures, and then applied a stricter standard of scrutiny as the study period progressed, striking down emergency measures more often.

Here, however, first main difference can be identified. In the French and German case this arc of changing scrutiny standards was more pronounced, as courts proved generally more reactive to the changing factual situation. By contrast, the Italian courts remained comparatively more deferential towards emergency (especially national executive) measures. In Germany, the courts initially recognised the pandemic's serious, sometimes even irreversible impact on fundamental rights for a large number of people. After balanced consideration, they decided in favour of the right to life and physical integrity.<sup>260</sup> They argued that this was possible because the measures were only temporary.<sup>261</sup> The reversal of the trend, however, was particularly evident with regard to the freedom of assembly and freedom of religion. Overall, courts gave *a priori* precedence to the protection of human life and health over the right of assembly,<sup>262</sup> even concerning an assembly of only two persons.<sup>263</sup> They generally argued that other forms of protest were possible, for example through social media channels.<sup>264</sup> However, in a highly symbolic decision on 15 April 2020, the BVerfG lifted a ban on assembly and underlined the freedom of assembly as an outstanding feature in a democracy – even in times of a pandemic.<sup>265</sup> This heralded a new phase in which more and

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<sup>260</sup> See e.g. BVerfG, 7 April 2020, 1 BvR 755/20, margin number 11 with regard to the *Ausgangssperre*.

<sup>261</sup> With regard to the freedom of assembly VG Hannover, 27 March 2020, 15 B 1968/20, juris, para. 19; VG Dresden, 30 March 2020, 6 L 212/20, 12; with regard to the freedom of religion BVerfG, 10 April 2020, 1 BvQ 28/20, para. 14.

<sup>262</sup> VG Hannover, 27 March 2020, 15 B 1968/20, juris, para. 19; VG Dresden, 30 March 2020, 6 L 212/20, 12; VG Hamburg, 2 April 2020, 2 E 1550/20, 6–15.

<sup>263</sup> VG Neustadt (Weinstraße), 2 April 2020, 5 L 333/20.NW, juris.

<sup>264</sup> VG Dresden, 30 March 2020, 6 L 212/20, 13.

<sup>265</sup> BVerfG, 15 April 2020, 1 BvR 828/20; see Mathias Hong, *Coronaresistenz der Versammlungsfreiheit?: Das Bundesverfassungsgericht ermöglicht eine Versammlung in Gießen*, VerfBlog, 17 April 2020, via <<https://verfassungsblog.de/>>; Michael Sachs, 'Grundrechte: Versammlungsverbot (Covid-19)', JuS 2020, 474.

more administrative court decisions allowed assemblies.<sup>266</sup> The situation was similar in the area of freedom of religion. Initially, the courts had affirmed the proportionality of prohibitions of worship and rejected the applications of religious associations and churchgoers against these prohibitions,<sup>267</sup> arguing that there were other possibilities to exercise the freedom of religion, such as church services broadcast on radio or television.<sup>268</sup> On 29 April 2020, however, this trend was reversed when the BVerfG ruled that the exercise of fundamental rights could be permitted despite the pandemic, provided that certain contextually adequate conditions were met.<sup>269</sup> Of course, a direct causal link between the decisions of the BVerfG and the overall case law cannot be drawn, and other reasons could be found either in the gradual relaxation of the measures from 20 April onwards, or in the emphatic warning of the National Academy of Sciences, Leopoldina, on 13 April to observe the principle of proportionality,<sup>270</sup> or perhaps in the growing pressure from the public to withdraw the restrictions. In any case, the BVerfG proved its closeness to the citizens with its judgements, as the coronavirus-related measures not only considerably impacted everyday life, but also had side effects on economic policy. The German courts recognised that the legal proportionality test had to be brought into line with scientific findings and thus acted as a corrective to the extensive restrictions imposed by the executive. The proposal for an “accompanying verification of justification” (“*begleitende Rechtfertigungskontrolle*”) was intended to address the problem of uncertainty and the ever-changing epidemic circumstances. The measures would have to meet “new standards as time passes and the depth of the interventions in fundamental rights increases, on the one hand, and the breadth and validity of scientific findings changes, on the other.”<sup>271</sup>

A similar trend, and a similar role of apex courts, could be witnessed in France. Here, as the *état d'urgence sanitaire* enabled subordinate law-making

<sup>266</sup> VG Hamburg, 16 April 2020, 17 E 1648/20; VG Halle, 17 April 2020, 5 B 190/20 HAL; OVG Sachsen-Anhalt, 18 April 2020, 3 M 60/20; VG Hannover, 16 April 2020, 10 B 2232/20.

<sup>267</sup> See e.g. BayVGH, 9 April 2020, 20 NE 20.704, juris; BayVGH, 9 April 2020, 20 NE 20.738, juris; OVG Thüringen, 9 April 2020, 3 EN 238/20, juris; BVerfG, 10 April 2020, 1 BvQ 28/20, para. 14.

<sup>268</sup> VG Berlin, 7 April 2020, 14 L 32/20, juris, para. 22; confirmed by OVG Berlin-Brandenburg, 8 April 2020, OVG 11 S 21/20, juris, para. 12.

<sup>269</sup> BVerfG, 29 April 2020, 1 BvQ 44/20, para. 9 and 14–15. That case concerned a mosque in Lower Saxony, which was allowed to reopen on the basis of a commitment made by the community to respect certain strict hygiene measures.

<sup>270</sup> Leopoldina, Coronavirus-Pandemie – Die Krise nachhaltig überwinden, 13 April 2020.

<sup>271</sup> Constitutional Court of the Saarland, Order of 28 April 2020 – Lv 7/20 –, juris, para. 32. See also BayVGH, order of 30 March 2020, 20 NE 20.632, para. 63. See also, more generally, Moshe Cohen-Eliya and Iddo Porat, ‘Proportionality and the Culture of Justification’, Am. J. Comp. L. 59 (2011), 463–490.

by the executive by means of decree or ordinance, judicial review of administrative acts became highly salient – conferring upon the *Conseil d'Etat* once more the role of the guardian of fundamental rights.<sup>272</sup> On the other hand, the constitutionality control function of the *Conseil constitutionnel* was considerably reduced, which led some observers to conclude that both the constitutional and statutory states of emergency better safeguard the role of the *Conseil constitutionnel* (and the Parliament) than the newly created health emergency regime.<sup>273</sup> That said, the pandemic underlined the key judicial role of the *Conseil d'Etat* as the task of providing preliminary legal protection via injunctions also rests with the administrative judge (*juge des référés*), as recalled above. Hence, judicial review of corona-related measures, including those potentially infringing on individual freedoms, was above all ensured by administrative courts, as set out by the emergency bill (Article L. 3131-18 CSP). Indeed, the *juges des référés* issued five times more injunctions in the first months of 2020 than in equivalent periods in previous years, with more than 150 urgent (first instance) procedures for preliminary injunctions being lodged with administrative courts against different COVID-19-related measures.<sup>274</sup> Time and again, the administrative courts had to weigh the right to life against (the drastic restriction of) other fundamental freedoms. Early on, the *Conseil d'Etat* held that the Government was to take all measures to prevent or limit the impact of the pandemic, while ensuring that these measures were appropriate, necessary, and proportional.<sup>275</sup> In the majority of cases, the application of this threefold benchmark of appropriateness, necessity, and proportionality led the administrative judges to conclude that the applications were unfounded.<sup>276</sup> Yet, on a handful of topics – i. e. individual freedom, asylum demands, religious freedom, privacy rights and data protection, and right to assembly – there are noteworthy exceptions to this deferential (as it has been characterised)<sup>277</sup> jurisprudential stance: the *Conseil d'Etat* (1) refused to mandate a total confinement;<sup>278</sup> (2) ordered the reopen-

<sup>272</sup> Jacques Ziller, 'Verwaltungsgerichtsbarkeit in Frankreich' in: Armin von Bogdandy, Peter M. Huber and Lena Marcussen (eds), *Ius Publicum Europaeum*, Vol. VIII (Heidelberg: C. F. Müller 2019), 199.

<sup>273</sup> See 'C'est en temps de crise que le respect des droits fondamentaux est encore plus important' selon Dominique Rousseau, interview published on Public Sénat, via <<https://www.publicsenat.fr/>>; Platon (n. 70).

<sup>274</sup> CE, Report n° 60, La justice administrative pendant la crise sanitaire, July 2020.

<sup>275</sup> Sébastien Hourson, 'Aux confins du confinement', *Droit administratif* 5 (2020), 62-63.

<sup>276</sup> Hourson (n. 275).

<sup>277</sup> Edouard Dubout, La fin du droit? Droit, politique, et expertise scientifique en période de crise sanitaire, 21 April 2020; for a less critical stance, see Claire Saunier, 'La position délicate du juge des référés face à la crise sanitaire: entre interventionnisme ambigu et déférence nécessaire', 11 April 2020; both via <<http://blog.juspoliticum.com/>>.

<sup>278</sup> CE, ord. réf., 22 March 2020, *Syndicat des jeunes médecins*, n° 439674.

ing of the desks for registering asylum demands in the Île-de-France region,<sup>279</sup> and held that appeals before the administrative court in charge of appeals against asylum decisions (*Cour nationale du droit d'asile*) could in light of the *déconfinement* no longer be taken by a single judge, but needed to rest on a collegial decision;<sup>280</sup> (3) put an end to the general ban of gatherings in places of worship;<sup>281</sup> (4) stopped the surveillance of the population of Paris by drones,<sup>282</sup> prohibited the use of thermal cameras in schools (in the absence of appropriate personal data management measures);<sup>283</sup> and, lastly, (5) held that demonstrations with more than ten (but less than 5,000) participants were legal as long as certain organisation requirements were met (i. e. prior notification to the public authorities) and public health measures respected.<sup>284</sup> In a more recent case the *Conseil d'Etat* also found that organisers of demonstrations were not obliged to file for a special permission to demonstrate as long as they had duly notified their demonstration (and respected the public health requirements).<sup>285</sup>

Although it had a more marginal role, the *Conseil constitutionnel*, of which the time limit for delivering rulings on questions of constitutionality concerning enacted laws (*question prioritaire de constitutionnalité*, QPC) had been suspended with its own approval in view of the pandemic,<sup>286</sup> also contributed to the protection of fundamental rights, by means of legislative constitutionality control. It is noteworthy that the *Conseil constitutionnel* declared that health protection (by the State) enjoyed a constitutional status in light of the preamble of the 1946 Constitution,<sup>287</sup> which forms part of the current constitutional framework given the *bloc de constitutionnalité* doctrine forged by its own jurisprudence.<sup>288</sup> When asked by the President and members of Parliament to rule on the constitutionality of the bill of 9 July – ringing in the transitional emergency period – the body declared that two

<sup>279</sup> CE, ord. réf., 30 April 2020, *Ministre de l'Intérieur et Office français de l'immigration et de l'intégration*, n°s 440250 et 440253, B.

<sup>280</sup> CE, ord. réf., 8 June 2020, *Association ELENA France et autres; GISTI et autre; Conseil national des barreaux*, n°s 440717, 440812, 440867.

<sup>281</sup> CE, ord. réf., 18 May 2020, *Association Civitas*, n°s 440361, 440511, inédite.

<sup>282</sup> CE, ord. réf., 18 May 2020, *Association de la quadrature du net, Ligue des droits de l'homme*, n°s 440442, 440445.

<sup>283</sup> CE, ord. réf., 26 June 2020, *Ligue des droits de l'homme*, n° 441065.

<sup>284</sup> CE, ord. réf., 13 June 2020, *Ligue des droits de l'homme, CGT-Travail et autres*, n°s 440846, 440856, 441015.

<sup>285</sup> CE, ord. réf., 6 July 2020, *CGT-Travail et autres, Association SOS Racisme*, n°s 441257, 441263, 441384.

<sup>286</sup> Loi organique n° 2020-365 du 30 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 ; CC, décision n° 2020-799 DC, 26.3.2020.

<sup>287</sup> CC, décision n° 2020-799 DC, 26 March 2020, para. 16.

<sup>288</sup> CC, décision n° 71-44 DC, 16 July 1971.

provisions of the proposed law infringed on fundamental rights and were hence unconstitutional. On the one hand, the *Conseil constitutionnel* found that the personal (patient) data collected in the fight against COVID-19 was accessible to too large a circle of public authorities according to the proposed bill – notably the inclusion of social security bodies posed a problem – and hence violated the right to privacy.<sup>289</sup> On the other hand, the *Conseil constitutionnel* held that individuals could not be required to observe preventive quarantine (i. e. depriving an individual from its right to liberty for more than 12 hours a day) for more than 14 days without the prior authorisation of a judge, as this would violate the individual’s right to liberty.<sup>290</sup> In a similar vein, the *Conseil constitutionnel* found that individuals could not be kept in isolation in a psychiatric institution for a longer period of time on the basis of an expert opinion only, but that this equally required the authorisation of a judge.<sup>291</sup> Importantly, the *Conseil* also ruled that the postponement of the second round of municipal elections was constitutional.<sup>292</sup>

### 3. Italy: a Side-lined Constitutional Court and the Persistent Deference of Administrative Courts

There is a striking contrast between this experience in Germany and France, and that in Italy: other than the indirect influence of its case law on emergency measures, in the period under scrutiny the *Corte costituzionale* did not have the chance to play any direct role.<sup>293</sup> As mentioned above,<sup>294</sup> Government and Regions chose to avoid the juridification of their conflicts, and most substantive measures were adopted via administrative instruments, falling outside the competence of the *Corte*. However, several questions of constitutionality concerning emergency laws have been raised in the context of private litigation.<sup>295</sup>

<sup>289</sup> CC, décision n° 71-44 DC, 16 July 1971, para. 70.

<sup>290</sup> CC, décision n° 2020-800 DC, 11 May 2020, para. 43.

<sup>291</sup> CC, Décision n° 2020-844 QPC, 19 June 2020, paras 8-9.

<sup>292</sup> CC, Décision n° 2020-849 QPC, 17 June 2020.

<sup>293</sup> Apart from the “manifest inadmissibility” of a “conflict of powers” complaint raised by the Association of Environmentalists and Consumers (CODACONS) against the Government’s measures, declared with Order No. 175 of 25 June 2020.

<sup>294</sup> See above subsection V. 3.

<sup>295</sup> For example, as part of substantive criminal law, the extension *ex post facto* of the statute of limitations was suspected of violating the “no punishment without law” principle. Therefore, several tribunals questioned Art. 83 of decreto-legge 17 marzo 2020, n. 18 which, following the postponement of hearings, suspended the statute of limitations for crimes whose proceedings were already pending: see Tribunale di Siena, ord. 21 May 2020; and Tribunale di Spoleto, ord.

In matters before ordinary and administrative courts, judicial circuits have generally applied proportionality and adequacy tests, giving prevalence to the precautionary principle as regards public health protection.<sup>296</sup> Before ordinary courts the most significant case law emerged in the matter of reunification between minor children and non-custodial parents. Such rulings generally found that the child's best interest – including psycho-physical health and risks linked to the pandemic – ran contrary to (or at least did not require) reunification.<sup>297</sup> However, the role of ordinary courts has been relatively marginal, as most of the litigation has taken place before administrative courts. Significantly, in the period under scrutiny administrative courts have rejected litigants' arguments to raise questions of constitutionality.<sup>298</sup> This attitude emerged especially in cases concerning restrictions to business openings<sup>299</sup> and obligations to use masks.<sup>300</sup> However, in some instances administrative courts

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27.5.2020. However, the Supreme Court rejected similar arguments and did not raise questions of constitutionality (Cassazione pen., sez. III, sent. 17 July 2020, n. 21367). The Constitutional Court eventually rejected the questions of constitutionality with sent. 23 October 2020, n. 278. Similarly, after many inmates were put in home detention, Art. 2 decreto-legge 10 maggio 2020, n. 29 mandated immediate and frequent revisions of release orders for convicts of organised crime, terrorism and drug trafficking. A judge challenged the related procedure for violation of the right to defence and due process, as the defendant has no access to the information collected for the revision: see Magistrato di Sorveglianza di Spoleto, 26.5.2020, ord. n. 1380/2020. In light of the *jus superveniens* enacted with legge 25 giugno 2020, n. 70, the Constitutional Court provisionally rejected the complaint, inviting the referring judge to reconsider whether the question was still relevant in the pending dispute (ordinanza 22 July 2020, n. 185).

<sup>296</sup> Both proportionality and precaution are recalled in Art. 1 para. 2 decreto-legge n. 19/2020 and Art. 1 paras. 3, 4 and 14 decreto-legge n. 33/2020; see discussion in Vuolo (n. 229).

<sup>297</sup> See Tribunale di Milano, 11 March 2020; Tribunale di Matera, 12 March 2020; Tribunale di Bari 26 March 2020; Tribunale di Torre Annunziata, 6 April 2020. See Federica Novello, "Diritto alla bigenitorialità e interesse del minore ai tempi del Covid-19", 19 May 2020, via <<https://www.altalex.com/>>. Interestingly, though, in a case concerning the infringement of movement restrictions, a lower civil court even ruled that the initial declaration of national state of emergency (31 January) and the subsequent measures were illegitimate, annulling the related fine (Giudice di Pace di Frosinone, sent. 15-29 July 2020, n. 516). Being adopted by an ordinary court, the ruling deploys its effects only *inter partes*.

<sup>298</sup> See e.g. TAR Calabria, Catanzaro, sez. I, 8 May 2020, n. 841, annulling a regional measure relaxing restrictions on restaurant openings, and finding that its own competence did not overlap with a potential "conflict of powers" procedure before the Constitutional Court; and TAR Campania, Napoli, sent. 29 May 2020, n. 2074, finding "manifestly unfounded" the question of the constitutionality of Art. 84 para. 5 of decreto-legge 17 marzo 2020, n. 18 (Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19) providing that, in the period from 15 April 2020 to 31 July 2020, the disputes set for the hearing are decided directly, without oral discussion, on the basis of the brief already submitted.

<sup>299</sup> See TAR Friuli-Venezia Giulia, Trieste, sez. I, decreto 10 April 2020, n. 31; TAR Lazio, sez. II-Ter, ordinanza 27 May 2020, n. 4098; TAR Napoli, sez. V, ordinanza 8 June 2020.

<sup>300</sup> See TAR Liguria, Genova, sez. I, decreto 23 May 2020, n. 147.

have reviewed the proportionality of sanctions, lowering the fines.<sup>301</sup> Overall – and this element is of extreme relevance – it seems that administrative courts have ruled based on the assumption that the measures adopted at the national level constituted the *minimum* standard of protection,<sup>302</sup> and local measures were annulled only when they either lowered the national standards,<sup>303</sup> or clearly compromised some essential conditions of survival.<sup>304</sup> Significantly, no particular standing has been accorded to religious rights, normally considered “fundamental and inviolable” in the Italian constitutional system: the Administrative tribunal of Lazio succinctly ruled that the “protection of public health prevailed” and, echoing similar arguments of its German counterparts, found that restrictions imposed on physical gatherings may well be compensated by “several alternative channels available through informatic instruments”.<sup>305</sup>

However, many local administrative measures have not been challenged because they hardly allowed (or in any case discouraged) effective judicial action given their limited duration and continuous modification. Indeed, Article 84 of *decreto-legge* No. 18/2020<sup>306</sup> provisionally re-organised the judicial procedure before administrative courts, so that the only real remedy were urgency provisional decrees issued by the single Chairs of administrative courts’ chambers. Especially if the latter rejected the challenge, appealing to collegial hearing was generally useless, since by the time the appeal could be heard most of the challenged measures would have ceased their effects, such as with measures mandating home quarantine were subsequently removed from the register.<sup>307</sup> In other cases, delays rendered even provisional review proceedings ineffective, as conclusions were adopted only days before the end of the period of isolation.<sup>308</sup>

<sup>301</sup> See e.g. TAR Campania, Napoli, sez. V, decreto 21 March 2020, n. 436.

<sup>302</sup> See again TAR Calabria, Catanzaro, sez. I, 9 May 2020, n. 841; and TAR Sicilia, Palermo, sez. I, decreto 17 April 2020, n. 458, which did not suspend a regional *ordinanza* prohibiting individual outdoor activity, as Art. 3 para. 2 decreto-legge n. 19/2020, prohibited only local authorities and not regional ones ‘to adopt measures in contrast with national ones.’

<sup>303</sup> See TAR Lombardia, Milano, sez. I, decreto 23 April 2020, n. 634, suspending a regional *ordinanza* which, derogating from a dPCM, authorised home delivery for all food categories (confirmed by TAR Lombardia, Milano, sez. I, decreto 27 April 2020, n. 651).

<sup>304</sup> That was the case, e.g., in TAR Sardegna, sez. I, decreto 10 April 2020, n. 133, annulling a local *ordinanza* closing an automatic food vendor that constituted the only income for the complainant and his family.

<sup>305</sup> TAR Lazio, Roma, sez. I, decreto 19 April 2020, n. 3453.

<sup>306</sup> Decreto-legge 17 marzo 2020, n. 18 (Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19).

<sup>307</sup> See e.g. TAR Campania, Napoli, r. g. 1048/2020 and r. g. 1120/2020.

<sup>308</sup> Consiglio di Stato, sez. III, decreto 30 March 2020, n. 1553; TAR Calabria, Catanzaro, sez. I, decreto 19 April 2020, n. 221; TAR Calabria, Catanzaro, sez. I, decreto 24 April 2020, n. 270; TAR Veneto, sez. II, decreto 21 April 2020, n. 205, ruling that a local *ordinanza* of

#### 4. The UK: Judicial Review of Secondary Legislation

The British case is something of an outlier and needs to be assessed in deeper detail. Here the main, striking feature is the absence of more than a handful of judicial decisions related to the COVID-19 pandemic to date. This is even more remarkable, since – as recalled above – by means of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 of 26 March,<sup>309</sup> the Minister for Health exercised his authority under section 45C of the 1984 Public Health Act to impose a full, society-wide lockdown in England (with similar measures being taken in the devolved regions on the authority of the Coronavirus Act 2020). The orders under the 1984 Act have the very real potential to infringe upon individual human rights when issued. The terms of sections 45C(3)(c) – “restrictions or requirement on or in relation to persons” – and 45C(4)(d) – “a special restriction or requirement” – give a broad power to the Minister for Health. At the time of the conclusion of the 26 March Regulations, the scope of that power had not been judicially determined, and it was thus unclear where the boundaries of the Minister’s authority lie. Although it could be argued that the Act imposes an implied limitation on the powers of the minister through the divide between political and judicial functions, and although it would be in line with the logic of the rule of law to impose such a restriction on the discretionary powers of the executive, such an argument has not been found to be convincing.<sup>310</sup> The explicitly broad terms of 45C (3)(c) and (4)(d) provide a basis for the exercise of powers by the Minister beyond those specifically enumerated, while the restrictions on the use of those power contained in section 45D(3) are not principles-based, but instead specifically enumerate only four categories of order which the Minister cannot make.

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closure of a cemetery should not be suspended, as the damage had already largely (30 days) occurred, and the remaining period (13 days) did not appear to be “of such temporal importance as to significantly aggravate the damage already suffered”; and TAR Sardegna, sez. I, decreto 20 April 2020, n. 141, finding that, as the challenged *ordinanza*, concerning the closure of bookshops, was effective until 26 April 2020, for a limited number of working days, in the assessment of the opposing interests, in the current emergency situation, priority had to be given to measures designed to protect public health.

<sup>309</sup> The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020 No. 350. (Hereinafter: 26 March Regulations).

<sup>310</sup> Jeff King, The Lockdown is Lawful: Part I, UK Constitutional Law Association Blog, 1 April 2020; see further Jeff King, The Lockdown is Lawful: Part II, UK Constitutional Law Association Blog, 2 April 2020; both via <<https://ukconstitutionalallaw.org/>>.



These questions were at the heart of *R. (on the application of Dolan) v. Secretary of State for Health*.<sup>311</sup> The case was filed on 21 May 2020 in order to challenge the validity of the 26 March regulations, and by the time the first instance hearing in the case opened, on 2 July, the primary measures at issue were no longer in force. Nevertheless, the Court of Appeal, upholding the decision on this point at first instance,<sup>312</sup> accepted that there was sufficient public interest in ascertaining whether the 26 March Regulations fell within the scope of the Secretary of State's powers ("the *vires* issue") that it should be addressed, notwithstanding that its character was now "academic".<sup>313</sup> The Court of Appeal held that the Minister is granted a broad power by sections 45C(1-4) of the 1984 Act. Subsections (3) and (4), it decided, do not present an exhaustive list of the types of regulations which may be made by the Secretary of State; rather "[t]he words of subsection (1) could not be broader."<sup>314</sup> It then confirmed that finding by reference to the purpose of the Statute, and the principles of statutory construction,<sup>315</sup> and further considered and rejected an argument by the appellant that the Regulations were void for irrationality.<sup>316</sup>

An additional question concerns the compatibility of the 26 March Regulations with human rights law; the HRA and the ECHR. This is even more relevant, in the context of a system where – as recalled above – the mechanisms of judicial review do not allow courts to strike down primary legislation. It is clear that the human rights impact of the 26 March Regulations was significant. Although the lockdown imposed under section 6(1) was not absolute,<sup>317</sup> the impact on the freedom of movement, of association, of religion, and other matters was undoubtedly considerable. The ECHR permits interference with certain of its enumerated rights, however, where those interferences are 'prescribed by law and are necessary in a democratic society',<sup>318</sup> and it seems to be the case that the UK Government considered

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<sup>311</sup> *R. (on the Application of Dolan) v. Secretary of State for Health* [2020] EWHC 1786 (Admin) (Queen's Bench Division); *R. (on the Application of Dolan) v. Secretary of State for Health* [2020] EWCA Civ 1605 (Court of Appeal). Leave to appeal to the Supreme Court was refused.

<sup>312</sup> *Dolan* (Queen's Bench) (n. 311), 35-46.

<sup>313</sup> *Dolan* (Court of Appeal) (n. 311), 36-42.

<sup>314</sup> *Dolan* (Court of Appeal) (n. 311), 62.

<sup>315</sup> *Dolan* (Court of Appeal) (n. 311), 63-71.

<sup>316</sup> *Dolan* (Court of Appeal) (n. 311), 72-90.

<sup>317</sup> As discussed, section 6(2) of the 26 March Regulations enumerated certain "reasonable excuses" which allow individuals to leave their homes: see n. 309.

<sup>318</sup> Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights], signed 20 March 1952, in force 18 May 1954, Council of Europe Treaty Series no. 005, Art. 11(2). (Hereinafter: ECHR).

that its actions fell within the permitted sphere of action.<sup>319</sup> In *Dolan*, the applicant invited the Court to find, *inter alia*, that the 26 March regulations were in violation of the right to liberty (Article 5 ECHR), to private and family life (Article 8), and to religion (Article 9).<sup>320</sup> The Court of Appeal found that the Regulations were in conformity with the Human Rights Act in relation to each of the rights at issue, though on differing grounds. In relation to the Article 5 right to liberty, it found that the restrictions on movement imposed as a result of the Regulations did not amount to a deprivation of liberty, given that the obligation to stay at home remained incomplete and was subject to numerous exceptions.<sup>321</sup> It found an interference with Article 8, but judged that interference to be authorised by law, to pursue the legitimate aim of safeguarding public health, and found that “the interference was unarguably proportionate”. In that regard it held that “a wide margin of judgment must be afforded to the Government and to Parliament”, in light of the swiftly developing state of scientific knowledge in relation to the virus and measures to control it.<sup>322</sup> Finally, it declined to reach a ruling in relation to the Article 9 freedom of religion, both on the grounds that the point was now “academic”, and that other cases were before the courts which addressed that topic.<sup>323</sup>

The Court referred in particular to *R. (Hussain) v. Secretary of State*, pending at the time of the decision in *Dolan*. Subsequently, however, an interim injunction was denied on the grounds that the interference with Article 9 was justified as proportionate to the exceptional circumstances of the pandemic.<sup>324</sup> Notably, the claimant referred the High Court to the BVerfG judgment of 29 April as a persuasive precedent,<sup>325</sup> but the High Court declined to follow the German Court’s approach both on the grounds that the factual circumstances between the two States may have been different, and that the decision of how to address the novel and exceptional circumstances of the pandemic was one in which a margin of appreciation must be accorded to the decision-makers.<sup>326</sup>

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<sup>319</sup> The preamble to the 26 March Regulations expresses the opinion of the Minister that the “restrictions and requirements imposed by these Regulations are proportionate to what they seek to achieve, which is a public health response to [the threat posed by the SARS-CoV-2 virus]”: 26 March Regulations (n. 309), preamble.

<sup>320</sup> *Dolan* (Court of Appeal) (n. 311), 91-100.

<sup>321</sup> *Dolan* (Court of Appeal) (n. 311), 93.

<sup>322</sup> *Dolan* (Court of Appeal) (n. 311), 96-97.

<sup>323</sup> *Dolan* (Court of Appeal) (n. 311), 99-100.

<sup>324</sup> *R. (on the Application of Hussain) v. Secretary of State for Health and Social Care* (2020), EWHC 1392 (Admin), 18-24.

<sup>325</sup> See BVerfG, 29 April 2020, 1 BvQ 44/20.

<sup>326</sup> *Hussain* (n. 324), 25.

Academic opinion is divided on the propriety of the Regulations under the HRA and ECHR. Some scholars argue that the measures, though doubtless amounting to interferences with the rights in question, are acceptable for the reason of being necessary, proportionate, prescribed by law, and in service of the right of others.<sup>327</sup> Others take the view that, rather than assessing the actions in terms of proportionality, there is virtue in recognizing that societal lockdowns of the kind imposed in the UK cannot be human rights-compatible.<sup>328</sup> A finding that no violation of the ECHR took place as a result of a societal lockdown which encompassed a great many more healthy individuals than those infected would be to recognise for the first time that healthy individuals can have their freedom of movement restricted on health grounds. To do so would be, Greene argues, “to recalibrate the protection afforded by Article 5 downwards.”<sup>329</sup> Therefore, he concludes, it would have been appropriate for the governments of Europe – and the UK Government among them – to derogate from the ECHR under Article 15, to the extent that it was necessary to impose restrictions of these kinds.<sup>330</sup>

In this context, the case of *BP v. Surrey County Council, RP* is particularly relevant. There the Court was asked to consider the human rights impact of the lockdown requirements on BP, a highly vulnerable individual who, as a result of the rules imposed at his care home, was unable to have any contact with his family.<sup>331</sup> The Court did not consider a necessity and proportionality analysis equal to the task of assessing the interference with the rights of BP. Instead, the Court considered that a derogation from the ECHR was the only way to encompass both the scope of the rights violation he was subject to, and the enormity of the situation as a whole. The Court recalled that “[i]t requires powerful reasons to justify any derogation”, but nevertheless opined that “the spread of this insidious viral pandemic particularly, though not uniquely, threatening to the elderly with underlying comorbidity, establishes a solid foundation upon which a derogation becomes not merely justified but essential”.<sup>332</sup> As a result, Mr Justice Hayden, sitting as the sole judge in the

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<sup>327</sup> King, Part II (n. 310); Kanstantsin Dzehtsiarou, ‘Art. 15 Derogations: Are They Really Necessary During the COVID-19 Pandemic?’, EHRLR 4 (2020), 359-371.

<sup>328</sup> Alan Greene, ‘Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If Not Now, When?’, EHRLR 3 (2020), 262-276.

<sup>329</sup> Greene (n. 328), 269. (Original emphasis). Greene points out that previous cases have exclusively concerned restrictions on persons known to be infected: see ECtHR, *Enhorn v. Sweden*, judgement of 25 January 2005, no. 56529/00. See also, *contra*, Dzehtsiarou (n. 327).

<sup>330</sup> Greene (n. 328).

<sup>331</sup> *BP v. Surrey County Council, RP* (2020) EWCOP 17. Here, the Court of Protection (a court of first instance) made a ruling highly consonant with Greene’s analysis: See Greene (n. 328).

<sup>332</sup> *BP v. Surrey County Council* (n. 331), 27.

case and acting on his own authority, notified the Council of Europe of a derogation from the Convention under Article 15 on behalf of the United Kingdom, insofar as it applies to the situation of BP. In his view, the scale of the interference with BP's rights could be legitimated in no other way.

## 5. Judicial Systems and Rights Protection: Lessons from the Study Countries

Regarding judicial systems and rights protection, the general common trend in the countries under scrutiny gives rise to a sense of *déjà-vu*. When access to judicial remedies was effectively available and a “COVID-19” case law emerged, courts lowered the strictness of scrutiny on executive and legislative measures at the peak of the health crisis and then progressively raised it again once the feeling of crisis containment spread. This “before/after” phenomenon is well-known in the literature.<sup>333</sup> However, within this general trend, there were quite significant differences. Courts seemed more effective in protecting rights in Germany and France than in Italy and the UK. In Italy, administrative courts overall were deferential towards national executive measures throughout the entire unfolding of the health emergency, while in UK the main problem was access to courts, which explains the almost non-existent number of judicial rulings. In Germany, after a short period of hesitation, courts again played their traditional role of fundamental rights protectors. And in France, too, (administrative) courts proved increasingly less deferential to executive governance the longer the first wave of the pandemic lasted.

Such differences point to some more general elements. Our study indeed suggests that, contrary to established assumptions in the literature on the matter,<sup>334</sup> the presence of an ad hoc administrative jurisdiction does not mean, as such, a lower level of protection against executive measures, even in times of emergency.<sup>335</sup> Likewise, “judicial management” of the emergency does not seem to have been particularly influenced by specific models of judicial reasoning, whether they presented themselves under the guise of the propor-

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<sup>333</sup> Posner and Vermeule (n. 131).

<sup>334</sup> See e.g. Leonardo Ferrara, ‘Attualità del giudice amministrativo e unificazione delle giurisdizioni: annotazioni brevi’, *Questione giustizia* 3 (2015), via <<https://www.questionegiustizia.it/>>; and Thérèse Renault, ‘Quelle critique des juges administratifs ?’, *Délibérée* 1 (2017), 33, via <<https://www.cairn.info/>>

<sup>335</sup> On this point see in comparative law literature Guobin Zhu (ed.), *Deference to the Administration in Judicial Review. Comparative Perspectives*, 2019.

tionality test or not. Rather, the level of protection and the degree or readiness of substantial scrutiny seems to depend more on the following elements.

First and foremost, the timing of (access to) judicial remedies. The effectiveness of judicial protection in the countries under scrutiny was higher in the systems where the courts with “first-line” competence to review the measures were more easily accessible and ready to deliver rulings. Further, the time element has a particular relevance when it comes to constitutional jurisdiction. This element rewards judicial systems where there is a specific judicial circuit specialised in reviewing the acts of public authorities, whether such acts result in the violation of any specific subjective right or not. The most effective systems were the French and German ones, where judicial procedures were not particularly affected by emergency measures, and the respective constitutional courts could issue rulings at a relatively early stage of the emergency, so as to perform a decisive guidance role towards other judicial bodies. By contrast, in Italy judicial procedure before administrative courts was *specifically* re-organised to allow speedier but *prima facie* rulings, thus lowering the level of substantive protection. Furthermore, the system of access to the Italian Constitutional Court prevented the latter to issue any significant judgement in the early stage of the pandemic. However, the different attitude of (administrative) courts does not seem to be linked only to timing and judicial procedure.

Indeed, a second key element emerging is the institutional self-perception of – especially administrative – courts as guardians of rights. Here, a paradoxical feature emerged, especially in the comparison between France and Italy. Since the 2000 judicial reform,<sup>336</sup> in the French system administrative courts have been increasingly acting as rights protectors, also as a consequence of the relative institutional weakness of the *Conseil constitutionnel*. In contrast, Italian administrative courts seem to have consistently maintained their long-standing deferential attitude towards the executive, also as a consequence of the presence of the institutionally “stronger” *Corte costituzionale*. In other words, in times of emergency the presence of an institutionally influent constitutional jurisdiction does not necessarily mean a more effective protection of rights but – especially if does not have the possibility to intervene in a timely manner – may paradoxically prove detrimental to rights protection.

However, a third crucial element emerging from the comparison of different judicial attitudes is the – again, quite overlooked – impact of vertical relationship and de-centralisation issues on the emergency case law. For opposite reasons, French and German courts did not have to resolve issues related to the overlap of competences among different levels of government.

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<sup>336</sup> See above, subsection VI. 1.

In France, local and regional units hardly played any role in the management of the first wave of the pandemic, while in Germany the primary responsibility for pandemic management clearly rested with the *Länder*, despite the need to strengthen the coordination role of the *Bund*. In Italy, courts not only had to review emergency measures, but also needed to manage potentially delicate normative and regulatory conflicts arising from private complaints among the central Government and the Regions. Quite unsurprisingly, in order to ensure the efficacy of the emergency response, courts used national executive measures as a gold standard against which to measure other measures, thus strengthening their deferential attitude towards the (national) executive. In other words, our study suggests that in times of emergency the level of protection by courts may be inversely proportional to their “arbitration role” among levels of government.

A fourth element relates to the novelty of legal instruments to review and, relatedly, to the standards of adjudication. More broadly, our study suggests that judicial protection was influenced by the extent to which emergency measures required new adjudicative approaches. This element, in turn, unfolded in two ways, concerning the parameter and the object of the review respectively. Firstly, new interventions adopted under continuously changing epidemic circumstances, measures of temporary legal effect, and piecemeal regulations affected the capacity of courts to frame reliable standards of review throughout the emergency. Once again, then, legal certainty played a crucial role. Secondly, at least in this specific emergency courts had to apply their standards of review, and in particular proportionality tests, in a quite asymmetrical way. Here, the main difficulty of the proceeding was that judges needed to take into consideration the inter-temporal and qualitatively different dimension of the (violation of) rights. Indeed, courts had to balance rights to life and health against, among others, family and privacy rights, as well as economic freedoms in light of the inter-temporal dimension of the measures. In other words, in each specific case the courts were called to weight *actual* restrictions to personal and economic freedoms against only *potential* repercussions and an assessment of *future* risks. This scenario – it is worth stressing – has often put younger and older generations against each other. This was certainly a new decision-making context. Overall, this difficulty in applying the proportionality test potentially opened the door to increased judicial discretion and negatively affected legal certainty. In other words, the eminently asymmetric character of the risks, together with continuously and rapidly changing epidemic circumstances, turned the proportionality exercise and balancing reasoning into little more than a formality. Rather than centring around the elements of the cases at stake, judicial decisions were substantially impacted by larger normative and policy con-

siderations which, in turn, depended much on (their perception of) the stage of the emergency.

## VII. Final Remarks

This article has used the so-called first wave of the COVID-19 pandemic to shed light on the constitutional patterns that have characterised the emergency response in France, Italy, Germany, and the UK. Though the coronavirus pandemic is still ongoing, it is fair to conclude at this stage that during the first wave the Western European democracies studied – albeit to different degrees – have maintained the essential democratic bases of their constitutional orders at this moment of extreme strain. The fear that the pandemic would plunge States into a “health dictatorship”<sup>337</sup> has not come to pass. Nor, however, have these democratic systems escaped with a completely clean bill of health: pandemic measures impacted heavily on fundamental rights, in certain cases without sufficient parliamentary involvement or judicial redress.

This, in turn, underscores that further legal research into these increasingly salient issues is needed. To face the challenges posed by current and future crises, comparative constitutional lawyers in particular are called upon to investigate the links between constitutional structures and processes on the one hand, and states of emergency on the other. Such endeavours should be pursued in a cross-cutting, critical, and contextual manner, and, importantly, should not shy away from shedding light on the negative repercussions of emergency governance.

As the health emergency progresses, the study countries continue to struggle with challenges old and new, both from a medical but also from institutional and constitutional standpoints. In Germany a heated debate has (re-)emerged regarding the effectiveness of the federalist system and the involvement of the *Bundestag*. In Italy and the UK regionalism is, too, coming under pressure, with conflicts between different levels of government. And there are growing concerns over what are being seen as overly authoritarian responses by an ever stronger central executive in France. As we write, these stresses are becoming ever more aggravated, as Europe sinks deeper into another wave of the virus.

What is more, the outlook remains uncertain as awareness grows that further waves of the pandemic are probable – despite ongoing vaccination campaigns throughout the world. Moreover, although the pandemic experi-

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<sup>337</sup> Michael Fuchs, Corona, “Gesundheitsdiktatur“ und “Legislativ“, DÖV 73 (2020), 653.

ence was novel to at least some extent, it is highly unlikely to be unique. Other emergencies can be seen on the horizon – perhaps the impending climate emergency foremost among them – which have similar asymmetric elements, and similar potential for constitutional impacts. It is thus vital to reflect on the policy and processes associated with the response to asymmetric emergencies, which are likely to occur across the world with ever-increasing frequency, urgency, and import in the coming years and decades.