POST-PANDEMIC CONSTITUTIONALISM: COVID-19 AS A GAME-CHANGER FOR “COMMON PRINCIPLES”? 

ARIANNA VEDASCHI* & CHIARA GRAZIANI**

ABSTRACT

Will democratic countries ever be the same after COVID-19? By identifying common trends and issues in legal responses to COVID-19 at the comparative level, this Article tries to answer this crucial question by analyzing the long-term effects of the pandemic. In particular, this work examines whether (and how) institutional disruptions, new dynamics among government levels, and serious limitations of rights and freedoms will permanently affect some basic principles, considered as the “common” foundations of contemporary constitutionalism. These principles are the horizontal separation of powers, including the principle of legality, vertical separation of powers, entailing legal certainty, and constitutional reviewability, at the heart of the rule of law.

The claim of this Article is that COVID-19 was a “game-changer” for public law and, at the same time, it taught us some lessons that could be useful to tackle forthcoming global emergencies.

* Full Professor of Comparative Public Law, Bocconi University, Department of Legal Studies and Baffi Carefin Research Center. Email: arianna.vedaschi@unibocconi.it.
** Post-doc Researcher in Comparative Public Law, Bocconi University, Baffi Carefin Research Center. Email: chiara.graziani@unibocconi.it.
Chiara Graziani authored Part I; Arianna Vedaschi authored Parts II and III. The Introduction and Conclusion of this work result from shared thoughts of both Authors.

# Table of Contents

Introduction .................................................................................. 817  
I. COVID-19 and the Principle of Separation of Powers:  
   Horizontal Dimension ........................................................... 819  
      a. Cluster One: High-Level “Executivization” (or Hyper-  
         Executivization) of the Form of Government ................ 821  
      b. Cluster Two: Medium-Level “Executivization” of the Form  
         of Government ............................................................. 832  
      d. Cluster Four: Central Executives in the Background ...... 849  
      e. Remote Voting and the Legislature-Executive Relationship:  
         Do “Virtual Parliaments” Help Overcome the  
         Marginalization of Legislative Assemblies? ................. 855  
      f. Some Observations ..................................................... 858  
II. COVID-19 and the Principle of Separation of Powers:  
   Vertical Dimension ................................................................ 862  
      a. Cluster One: From (Initial) Centralization to (Different  
         Extents of) Decentralization ................................. 862  
      b. Cluster Two: COVID-19 as a Driver for Cooperation .... 870  
      c. Cluster Three: Decentralized Approaches ................... 876  
      d. Some Observations .................................................... 879  
III. COVID-19 and Constitutional Review ............................... 881  
      a. Cluster One: Non-Performing or Belated Constitutional  
         Review ................................................................. 882  
      b. Cluster Two: Performing Constitutional Review, Different  
         Patterns ................................................................. 885  
         i. Sub-Cluster One ..................................................... 886  
         ii. Sub-Cluster Two .................................................... 890  
      c. Cluster Three: Alternatives to Constitutional Review .... 894  
      d. Some Observations .................................................... 897  
Conclusion .................................................................................... 899  
Appendix ...................................................................................... 901
INTRODUCTION

The outbreak of the COVID-19 pandemic was an unexpected event that shocked the world, as nations were faced with an unknown infectious and potentially-deadly disease. In 2020, the number of cases dramatically increased in a few days, often bringing healthcare systems close to collapse, and death rates grew astronomically in the vast majority of countries. These factors, combined with uncertainties regarding the nature of the virus, its effects, transmission patterns, and possible treatments, caused several government levels to promptly adopt measures that led to unprecedented limitations (at least in times of peace) of rights and freedoms. Even after knowledge about the “new” coronavirus and vaccines were developed, the level of alert for this global public health emergency remained high, as COVID-19 kept hitting the globe with recurring waves.

Given the global dimension of the threat of COVID-19 and its long-lasting nature (at the time of writing, the pandemic has been raging for more than two years\(^1\)), it is necessary to lay aside the traditional analysis of legal responses—a line of research that has been extensively and deeply explored over these two years—and take a more forward-looking perspective. Our aim is to assess the implications of reactions to the COVID-19 crisis for the future of democratic countries by analyzing the responses of selected jurisdictions from an ex post perspective. In this Article, we seek to find common trends among measures adopted and investigate whether (and how) institutional disruptions, new dynamics among government levels, and serious limitations of rights and freedoms have a long-lasting impact on three macro-principles. These principles are the horizontal separation of powers, including the principle of legality (Part I), vertical separation of powers (Part II), and reviewability of serious limitations of individual rights and personal freedoms, especially by bodies exercising constitutional review (Part III). Ultimately, we examine the long-term impact of legal reactions to COVID-19 on some basic principles from a comparative perspective, which are generally considered the “common” foundations of Western constitutionalism as developed after the Second World War.

\(^1\) This Article is current through May 31, 2022.
In addition, we provide some insights into the principle of legal certainty, which crosscuts the previously mentioned principles. All of these principles have undoubtedly been put under stress during the COVID-19 pandemic (although to different extents, depending on individual countries), and new trends and approaches have arisen in each country. We aim to determine whether these tendencies already existed in the selected legal systems, such that COVID-19 worked only as a triggering force, or whether the pandemic served as a full-fledged transforming force whose effects will endure. This is the core of our research question, which has several facets for each macro-principle we investigate.

Methodologically, our analysis focuses on the main “advanced” democracies. Alongside Western European and North American countries, we make some references to Australia and New Zealand because these two jurisdictions closely resemble the previously mentioned jurisdictions due to their legal, cultural, and historical backgrounds. Another noteworthy approach to this crisis is that of Israel, which is commonly considered a unique example of a Jewish and democratic state. We address this case as well.

The wavelike nature of COVID-19 is also of methodological significance because countries faced waves of COVID-19 at different times, affecting each country’s response to the virus. This Article takes these differing timelines into account.

Finally, our aim is not to give an overall evaluation of how well or poorly each country reacted to the pandemic in terms of whether the response was “efficient” (i.e. “successful”) based on the number of infections or deaths. Although some references to statistics are provided in the Appendix of this Article, their purpose is not to imply a close link between each type of legal reaction and the practical “rate of success.” Rather, the “performance” of anti-COVID-19 reactions is a highly disputed concept that can be interpreted in many ways and, most of all, is highly dependent on some contingent or unpredictable factors (e.g. average age of the population, previously existing healthcare policies, and delay in getting people tested).

---

I. COVID-19 AND THE PRINCIPLE OF SEPARATION OF POWERS: HORIZONTAL DIMENSION

The principle of separation of powers, both in its horizontal and vertical dimensions, is at the very core of democracy. These dimensions were undoubtedly tested during the COVID-19 pandemic. On the horizontal dimension, strong limitations of rights and freedoms were frequently decided without any meaningful involvement of representative assemblies, thereby challenging the principle of legality and infringing upon the ordinary functioning of the mechanisms of checks and balances. With respect to the

---

1 In its horizontal dimension, separation of powers means that branches of the state have to be separate and independent, although several types of mutual checks and interactions balances do exist, depending on each single system of government. See Montesquieu, The Spirit of the Laws 157 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans., 1989) (describing how different combinations of the three branches of government affect political liberty).

2 The vertical dimension of the separation of powers refers to the arrangement of powers between central levels of government (be it the federation in federal systems or the central state in regional systems) and federated entities (in federalism system) or regions (in regional systems). Regions can have different names depending on single countries. For example, they are called regions in Italy and autonomous communities in Spain. On vertical separation of powers, see Richard Albert, The Separation of Higher Powers, 65 SMU L. REV. 3 (2012) (evaluating how vertical and horizontal theories of the separation of power can help interpret the Establishment Clause). It should be noted that, in the United States and in other English-speaking countries, vertical separation of powers is often referred to as “division” of powers. Cheryl Saunders, The Division of Powers in Federations, INSTITUTE OF DEMOCRACY & ELECTORAL ASSISTANCE (Aug. 2019), https://www.idea.int/sites/default/files/publications/divisions-of-powers-in-federations.pdf [https://perma.cc/VH3A-C8Y7].


4 In some jurisdictions, the constitutional framework provides that some rights and freedoms can only be restricted through acts of Parliaments or sources with the same legal values. See, e.g., Art. 13 COSTITUZIONE [COST.] (It.); Grundgesetz [GG] [Basic Law], art. 11 § 2 (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/4XLD-9W5W].

5 From the principle of separation of powers stems the idea of checks and balances, which historical roots are found in Rousseau’s political theories. See generally Jean-Jacques Rousseau, The Social Contract, in POLITICAL WRITINGS 3 (Fredrick Watkins trans., 1953) (developing a theory of social contract to resolve political problems). Checks and balances change, as to their structure and functioning, based on each form of government. For an explanation, see generally David L. Williams, Modern Theorist of Tyranny? Lessons from Rousseau’s Systems of
vertical dimension, the measures adopted by different government levels were often fragmented and incoherent, leading to serious issues in terms of legal certainty. In this Part, we highlight some trends concerning the horizontal separation of powers and determine whether pre-COVID-19 horizontal structures of powers have been permanently transformed (or at least significantly altered) in advanced democracies.

Our research question begins by recognizing that COVID-19 is a “long” emergency that has ravaged the world for more than two years (although, in almost all the case studies in this work, emergency regimes triggered due to the pandemic have ended, and many steps have been taken to return “back to normal life”). The long-lasting nature of the COVID-19 crisis is a pivotal element to bear in mind. Distorted dynamics among state powers, disruption of checks and balances, and pressure over the principle of legality are somewhat natural consequences of emergencies if they last for a limited time. However, when emergencies and emergency measures last for longer periods of time, several legal issues arise. Ordinary relationships among powers and, ultimately, the regular dynamics of the form of government in several democratic countries could endure permanent, endemic changes. In this light, we want to investigate whether legal reactions to COVID-19 have brought permanent transformations to the dynamics among powers in selected advanced democracies.

We first examine the extent to which the powers of executives were enhanced at the detriment of representative assemblies. Second, we determine whether these distorted dynamics persisted, thereby significantly affecting democratic dynamics, or whether some adjustments were made during the several COVID-19 waves, bringing “deviations” back into existing patterns.

Against this background, we identify four main trends regarding the expansion of executives’ powers to tackle the COVID-19 crisis by singling out four clusters of countries. In the first cluster, we include countries where the concentration of powers in the hands of executives was particularly evident and long-lasting, often without any specific authorization or detailed acts of delegation by the legislature (or with very vague delegation provisions). These

---

*Checks and Balances*, 37 POLITY 443 (2005) (examining Rousseau’s views on a system of checks and balances).

8 In some contexts, the collegial bodies of the executive took the lead, while in others its head or a single minister (e.g. the Minister of Health).
jurisdictions experienced the “hyper-executivization” of the form of government, with a strong impact on the principle of legality. In the second cluster, we include countries where most of the anti-pandemic measures were still taken by the executive but based on more precise acts of authorization or delegation (“medium-level executivization”). In some countries in this second cluster, this happened from the beginning, whereas in other countries there was a progression in the sense that they were “hyper-executivized” when the pandemic began but found ways, based on the nature of each jurisdiction, to mitigate the executive’s overreach. In the third cluster, we include a small number of countries which took a fairly balanced approach, indicating active coordination between the legislature and executive.

These three clusters focus on central powers, both when the executive was predominant, as in the first two clusters, and when coordination between the central executive and the central legislature stood out, as in the third cluster. Meanwhile, in the fourth cluster, this paradigm was reversed, as executives of lower government levels took the lead, whereas the central executives did not exercise much power to counter the spread of the virus. In other words, the fourth cluster includes countries that experienced hyper-executivization but were not placed in the first cluster because the executives with increased powers were not central executives, but rather those of federated entities (as all the countries in the fourth cluster are federal systems).

This Part analyzes each trend in detail and examines whether the observed features are likely to endure when the pandemic is totally eradicated.

a. Cluster One: High-Level “Executivization” (or Hyper-Executivization) of the Form of Government

The first cluster includes countries in which, although the form of government is not presidential, executives strongly took the lead in many cases in the absence of clear and well-defined acts of

---

9 The word “executivization” is used here in the meaning given by Pollack, i.e. a shift of competences (formally or informally attributed) in favor of bodies that can be considered as detaining the executive power. See Johannes Pollack, *Compounded Representation in the EU: Country for Old Parliaments, in Political Representation in the European Union: Still Democratic in Times of Crisis?* 19, 33-34 (Sandra Kröger ed., 2014).
authorization or delegation by legislatures. We determined that “hyper-executivization” existed in different forms among the parliamentary systems of Belgium, Ireland, Italy, and the United Kingdom. Additionally, new patterns of “hyper-executivization” have emerged in France, which has a semi-presidential system traditionally based on the strong role of the President of the Republic, with a reinforced role, during the pandemic, of the other “head” of the Executive: the Prime Minister (and the Minister of Health).

A common feature of this cluster is that several powers deployed by the executive during the pandemic do not have any specific form of authorization or delegation in the acts of its legislature. Although this does not always mean that no legal basis exists, these legal bases are vague when existent, and they essentially result in a “blank check” for the executive and the marginalization of the legislature.

Starting from parliamentary systems, one of the most relevant cases is Belgium, where the legal basis for some anti-pandemic powers was nonexistent, thereby significantly impairing the separation of powers and the principle of legality. A noteworthy example is the use of sweeping administrative police powers provided by ministerial decrees and arrêtés (most of which are adopted by the Minister of Health and the Minister of Home Affairs), which had a considerable impact on constitutional rights and personal freedoms of individuals. None of the legal bases

---

10 We have put Ireland in the list of parliamentary systems since, although being formally qualified as a semi-presidential system, it substantively works as a parliamentary one. The Irish Constitution provides for direct election of the head of state, combined with the existence of a confidence relationship between the lower House of the Oireachtas (i.e. the Irish Parliament) and the Executive. As widely known, the combination of these two elements is the typical feature of the semi-presidential form of government. See generally Maurice Duverger, A New Political-System Model: Semi-Presidential Government, 8 EUR. J. POL. RSCH. 165 (1980) (describing the features of semi-presidential regimes). However, in Ireland, the President of the Republic has very few political powers and usually does not step in to determine national politics. This is why Ireland is usually considered a de facto parliamentarism system. See Matthew Soberg Shugart, Semi-Presidential Systems: Dual Executive and Mixed Authority Patterns, 3 FRENCH POLS. 323, 324 (2005). According to some scholars, the Irish President would even have no constitutional power. See MATTHEW SOBERG SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 71 (1992). But see Robert Elgie, An Intellectual History of the Concepts of Premier-Presidentialism and President-Parliamentarism, 18 POL. ST. REV. 12, 16 (2020).

11 Among others, they prohibited cultural, recreational, and sport activities, with the exception of family activities; they imposed the shutdown of all non-necessary commercial activities, with the exception of essential services; they cancelled classes and closed schools. See Arrêté ministériel du 13 mars 2020 portant
deployed to fight the pandemic (pre-existing legislation,\textsuperscript{12} ad hoc set-up legislation,\textsuperscript{13} and acts of special powers\textsuperscript{14}) was sufficiently detailed to authorize the government (or, in many cases, the Minister) to take this kind of measures. In contrast, these legal bases contained vague clauses, implying that the Executive was empowered to take “civil protection measures”\textsuperscript{15} without further specifying their content. In this regard, Belgian scholars\textsuperscript{16} have highlighted that police powers\textsuperscript{17} mandated by the Minister of Home Affairs and broadly and discretionarily used during the pandemic did not have any legal basis. Therefore, the action of the Executive (rather, of one Minister) to curb the spread of COVID-19 had no meaningful legal constraints, inviting potential abuse and setting a dangerous precedent for future emergencies.

\begin{itemize}
\item \textsuperscript{13} Loi du 14 août 2021 relative aux mesures de police administrative lors d’une situation d’urgence épidémique, [Pandemic Act], M.B., Aug. 20, 2021.
\item \textsuperscript{14} 1994 CONST. (Belg.) art. 105. This article is considered to be the legal basis for the “acts of special powers” since it states that the King—and therefore the government, in a parliamentary monarchy—has powers (including the issuance of emergency measures) only if authorized by Parliament.
\item \textsuperscript{16} See Patricia Popelier, Catherine Van De Heyning & Sébastien Van Drooghenbroeck, National Report on Belgium, in GOVERNMENTAL POLICIES TO FIGHT PANDEMICS: THE BOUNDARIES OF LEGITIMATE LIMITATIONS ON FUNDAMENTAL FREEDOMS (Arianna Vedaschi ed., forthcoming 2023).
\item \textsuperscript{17} They consisted of generally prohibiting or restricting movements, banning gatherings as well as human contacts between citizens.
\end{itemize}
Italy provides another remarkable example. The main tools used to tackle the pandemic in Italy were the decrees of the President of the Council of Ministers (DPCMs), which are inferior sources of law to statutes. These DPCMs were loosely based on broad decree laws, i.e., primary sources adopted by the entire government (Council of Ministers) and then converted into statutes by both Houses of Parliament. The DPCMs, in addition to not having the same force as primary sources, are not submitted to Parliament before (or after) their enactment; thus, Parliament is completely outside of their deliberative process. Moreover, they are not issued by the President of the Republic, which is the case with other non-primary sources of Italian law, such as regulations adopted by the whole Council of Ministers. All of these features not only reveal the marginalization of Parliament—and other bodies, such as the President of the Republic, whose responsibility is to guarantee respect for the Constitution—but they also shed light on the concentration of powers in the hands of only one person, the President of the Council of Ministers, rather than the Executive as a collegial body (the Council of Ministers). Additionally, DPCMs limited some rights and freedoms that could only be restricted by statutory tools or acts with equal legal force according to the Italian Constitution, thereby threatening the principle of legality.

Throughout this period, there were strong attempts by the head of the Executive to mitigate this reaction by bringing the Houses of Parliament back into the decision-making process. First, although Italy rejected the possibility of resorting to remote voting or remote discussion in the Houses of Parliament, some adjustments were made to use all available spaces to allow as many members as possible to take part in parliamentary sittings. In other cases, heads of parliamentary groups made agreements to ensure that not all

---

18 Italy lacks a systematic and structured constitutional framework governing emergencies (so-called emergency constitution). The general framework Italy deployed to deal with the pandemic is Decreto legislativo 2 gennaio 2018 [Civil Protection Code], n. 1, G.U. Jan. 22, 2018, n. 17 (It.).
19 Art. 77 COSTITUZIONE [COST.] (It.).
20 In Italy, when the President of the Republic is enabled by the Constitution to issue an act, he is empowered to check its—lato sensu—constitutionality.
21 See, e.g., Art. 16 COSTITUZIONE [COST.] (It.). Article 16 of the Italian Constitution enshrines freedom of movement.
members were present in Parliament by guaranteeing that the proportions among political forces were respected. Second, with Decree Law No. 19/2020, the President of the Council of Ministers (or a delegated Minister) had to timely inform both Houses before issuing DPCMs, and each House could pass a resolution on the content of the decrees. Only in cases of “urgency,” determined by the President of the Council of Ministers, could the Houses be informed ex post (in this case, they could not vote a resolution but merely debate on the measures taken). Third, in February 2021, a new Government was sworn in, with Mario Draghi replacing Giuseppe Conte as President of the Council of Ministers. From that moment on, reliance on DPCMs decreased and most measures were taken directly by decree law.

In practice, these improvements were not particularly successful in enhancing the role of Parliament because they were more formal than substantive. First, the Houses often limited themselves to rubber-stamping the decisions of the Executive. For instance, the Houses could have amended the vague clauses in decree laws that give wide power to the President of the Council of Ministers, yet, they did not do so. Moreover, even when the Houses were allowed to pass resolutions on measures to be taken by the President of the Council of Ministers, two main aspects should be remembered. First, in the Italian legal system, a resolution is not a legally binding act but only a tool that each House can use to direct government action. In other words, it has a political rather than a strictly legal value. Second, the President of the Council often resorted to the “urgency” procedure; hence, the Houses only had an ex post debate on measures, voting on a resolution after the measure had already been taken. Finally, even when a decisive shift toward decree laws was

---

23 Id.
25 Id.
26 Among others, measures regarding vaccination, COVID-19 certificate, and changes in quarantine rules were all decided through decree laws. See, e.g., Decreto legge 13 marzo 2021, n.30, G.U. May 12, 2021, n.112 (It.). The decree law has the same legal force as statutes and implies the necessary check of the Houses of Parliament, which have sixty days to decide whether they want to convert the decree into a law or to let it drop its effect from the time of its adoption, as if it had never existed.
27 Vedaschi, supra note 22.
made by the Draghi Government, some DPCMs, though less frequently used, continued to regulate crucial issues.\footnote{For example, the COVID-19 certificate is regulated by D.L. No. 7/2022, but a subsequent DPCM established exemptions to rules contained therein. See Decreto legge 4 febbraio 2022, n. 5, G.U. Feb. 4, 2022, n. 29 (It.).}

Overall, such a strong concentration of powers in the hands of the President of the Council of Ministers had never been witnessed in the Italian Republic. It remains to be seen whether this situation is an isolated one or if a progressive transformation will occur in the Italian form of government in future crises, not only arising from public health emergencies but also from other situations, such as political or financial turmoil. Undoubtedly, political, economic, and even social scenarios at the international level will also play a crucial role in facilitating (or not) such a transformation.

Although the legal bases enjoyed more detail than in Belgium and Italy, the Irish reaction was characterized by a similar executive-driven approach. The Health Act 2020,\footnote{Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (Act. No. 1/2020) (Ir.), https://www.irishstatutebook.ie/eli/2020/act/1/section/10/enacted/en/html [https://perma.cc/F8FL-CJLL] [hereinafter Health Act 2020].} an ad hoc piece of legislation adopted to tackle COVID-19, vested the Minister of Health with significant powers which, although subjected to a sunset clause, were extended several times until June 9, 2021.\footnote{Health Act 2020 § 2(3)(b). See Eoin Carolan, Silvia Gagliardi, Seána Glennon & Ailbhe O’Neill, Ireland Legal Response to Covid-19, in OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octavio Ferraz eds., 2021), https://oxcon.ouplaw.com/display/10.1093/law-occ19/law-occ19-e19#law-occ19-e19-note-34 [https://perma.cc/53V8-QH6L]. On the use of sunset clauses, included during emergencies, see, for example, ANTONIOS E. KOUROUTAKIS, THE CONSTITUTIONAL VALUE OF SUNSET CLAUSES (2017).} The Act prescribed that the Minister of Health had the power to “designate areas as areas of infection of Covid-19 and to provide for related matters”\footnote{Health Act 2020 pmbl., § 6.} through regulations. This wording provided the Minister of Health with powers that are not circumscribed or well-defined by Parliament. Moreover, while ministerial regulations are usually subject to pre-enactment consultation or scrutiny from competent committees of the Houses of Parliament, the Health Act 2020 excluded this form of preventive oversight because changing factual circumstances over the course of the pandemic required
quick reactions. As a result, Parliament—both in its lawmaking and oversight roles—was marginalized from the crucial decision of how to balance public health with other individual rights and personal freedoms. This approach partially contradicts the de facto parliamentarism of the Irish system of government.

Notably, Belgium, Italy, and Ireland all lack a clear and well-structured constitutional framework to deal with emergencies. This feature might contribute to future “normalization” of this pattern of reaction to emergencies which is characterized by a significant concentration of powers in the hands of the executive (or some of its members) well beyond the normal dynamics of each system of government.

Among parliamentary systems, the United Kingdom deserves separate analysis. The United Kingdom is the prototype of Westminster-style parliamentarism, in which the separation of powers is defined as “weak” by many scholars. During the pandemic, the Executive—more specifically, some Cabinet Ministers, such as the State Secretary for Health and Social Care and the Home Secretary—took a strong lead through regulations. Their powers were loosely justified by legislative authorizations, and Parliament did not have any ex ante oversight of the ministerial regulations. The statutory authorizations included the Coronavirus Act 2020 combined with the Public Health (Control of Disease) Act 1984, c. 22, § 45Q (UK), https://www.legislation.gov.uk/ukpga/1984/22 [https://perma.cc/9VZN-7TRV].


See supra text accompanying note 10.

Yet there was some form of ex post check, insofar as a resolution of the Houses of Commons can annul the regulations after their adoption. Public Health (Control of Disease) Act 1984, c. 22, § 45Q (UK), https://www.legislation.gov.uk/ukpga/1984/22 [https://perma.cc/9VZN-7TRV].

Disease) Act 1984\textsuperscript{38} as amended by the Health and Social Care Act 2008.\textsuperscript{39} The former was specifically (and hastily) passed by the Parliament to address COVID-19. Notably, the United Kingdom did not invoke a pre-existing emergency statute, the Civil Contingencies Act 2004,\textsuperscript{40} which, according to some authors,\textsuperscript{41} would have provided better guarantees in terms of institutional balance of powers in limiting rights. It was argued that none of these statutory bases had the clear and precise language needed to authorize such limitations of individual rights.\textsuperscript{42} Consequently, the regulations that were adopted to implement these statutes were, according to the same view, excessively discretionary and beyond the scope of statutory authorization, impairing the principle of legality.\textsuperscript{43}

\textsuperscript{38} Public Health (Control of Disease) Act 1984, c. 22 (UK).


\textsuperscript{43} In common law countries, the principle of legality means that Parliament (or, more generally, the representative assembly vested with the legislative power) cannot modify or limit fundamental common law rights, freedoms and privileges unless through clear, well-written and unambiguous statutory norms. Jason N.E. Varuhas, The Principle of Legality, 79 CAMBRIDGE L.J. 578, 580 (2020); Bruce Chen, The Principle of Legality: Issues of Rationale and Application, 41 MONASH U. L. REV. 329, 330 (2015). This principle of legality also has a so-called “augmented” form. This means...
For example, under the Public Health (Control of Disease) Act 1984 (PHA 1984), “[r]egulations . . . may . . . include provision . . . imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things, or premises in the event of, or in response to, a threat to public health.” To implement this statute, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (2020 Regulations) were adopted. Based on section 6 of the 2020 Regulations, “[d]uring the emergency period, no person may leave the place where they are living without reasonable excuse.” Thus, section 6 of the 2020 Regulations restricts personal freedom, a well-established common law right. However, no direct reference to such impactful limitations was made in Part 2A of PHA 1984. Similar examples can be found in the Coronavirus Act 2020, which was rushed through Parliament and received royal assent in the midst of the pandemic.

Although the overreach of the Executive and the circumvention of the legality principle was undeniable, it is not particularly surprising in Westminster-style parliaments. The overlap between the Cabinet and some members of the House of Commons, characteristic of the U.K. system, entails that the Cabinet works almost as an operating committee of Parliament. This modus operandi directly flows from the features of Westminster

---

44 Public Health (Control of Disease) Act 1984, c. 45C(3)(c) (UK).
46 Cf. COLM O’CINNEIDE, HUMAN RIGHTS AND THE UK CONSTITUTION 17 (2012). Moreover, the drafting of the PHA suggests that restrictions can be placed on specific persons (e.g. those who are infected or had contact with infected persons) and not on the population as a whole.
47 Coronavirus Act 2020, c. 7 (UK); see also, e.g., id. c. 22 § 6. According to this clause, “[a] direction . . . may impose prohibitions, requirements or restrictions by reference to (among other things) – (a) the number of persons in the premises; (b) the size of the premises; (c) the purpose for which a person is in the premises; (d) the facilities in the premises; (e) a period of time.” Id. (emphasis added). The use of “among other things” clarifies that the list is not exhaustive and that the Executive is far from being restricted in its action.
parliamentary systems and has already occurred, even during "ordinary" times well before the COVID-19 outbreak.\textsuperscript{48}

This executive-oriented approach is even clearer when considering another Westminster system, New Zealand, where the fusion between the Executive and Legislature is more evident than in the United Kingdom because New Zealand’s Parliament is unicameral.\textsuperscript{49} During the COVID-19 pandemic, the Executive (especially the Prime Minister) played a major role, often relying on the Health Act 1956,\textsuperscript{50} which many scholars considered too vague to allow the limitation of people’s individual rights by the Executive without infringing upon the principle of legality.\textsuperscript{51} Some commentators even described COVID-19 measures as “a response personally led by the Prime Minister.”\textsuperscript{52} To highlight that “hyper-executivization” is more expected in Westminster parliaments than in non-Westminster parliaments, we want to remark that in Westminster systems, “hyper-executivization” cannot be seen as a full-fledged element of transformation of the form of government since it was already entrenched in its characteristics.

We now consider the only semi-presidential system—both de jure and de facto—in the first cluster, France. The President of the Republic, Prime Minister, and Minister of Health dominated the scene in the fight against the pandemic. Measures taken by the President of the Republic were based on Art. L.3131-19 of the Code de la Santé Publique,\textsuperscript{53} as amended by Law No. 2020-290.\textsuperscript{54}


\textsuperscript{49} Although it must be said that even in the British system, which is bicameral, the role of the House of Lords (not democratically elected) is much more different and limited than that of the House of Commons, to the extent that some scholars defined the United Kingdom a “de facto unicameralism,” especially during some historical periods. See Donald Shell, \textit{The Future of the Second Chamber}, 57 PARLIAMENTARY AFFS. 852, 855 (2004).

\textsuperscript{50} Health Act 1956 (N.Z.).


\textsuperscript{53} Providing for consultation with the Conseil Scientifique. The latter is composed by experts in medical sciences, epidemiology, biology, sociology, and anthropology.

\textsuperscript{54} Loi 2020-290 du 23 mars 2020 d’urgence pour faire face à l’épidémie de covid-19 [Law 2020-290 of March 23, 2020 to deal with the COVID-19 epidemic),
However, this statutory provision does not give the President any power to take all public health measures, which French President Emmanuel Macron nonetheless promptly exercised. Therefore, the powers of an already strong President—due to the traditional features of the French system—were enhanced through atypical acts without involvement from the Legislature or the Council of Ministers. In this regard, some French scholars have discussed the “monarchization” of the French system. At the same time, other initial measures were taken by the Prime Minister and Minister of Health through their own decrees (arrêtés) based on legislative provisions of the Code de la Santé Publique and Law No. 2020-290, establishing the new regime of the état d’urgence sanitaire. It should be stressed that the état d’urgence sanitaire, a temporary regime, was systematically extended each month by the Houses of Parliament using a fast-track procedure. Thus, existing measures were reiterated without meaningful scrutiny. Additionally, under Law No. 2020-290, the two Houses needed to decide whether to extend the état d’urgence sanitaire only once a month, while other emergency frameworks existing in France required more frequent review, making the Executive more constrained.

This scenario proves that, on the one hand, the French reaction to the pandemic confirmed the traditional trend of the form of government, highly focused on the President of the Republic as a powerful actor. On the other hand, the role of the Prime Minister and Minister of Health (not of the Council of Ministers as a whole) was enhanced well beyond what was normal. The enhanced role of the Prime Minister and Minister of Health (just one Minister of his Government) is a new feature that puts the “two heads” of the French Executive (the President of the Republic and the Prime

56 Loi 55-385 du 3 avril 1955 relative à l’état d’urgence [Law 55-385 of April 3, 1955 on the State of Emergency], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 7, 1955, p. 3479. Art. 3 of this law says that the “traditional” état d’urgence expires after twelve days, unless extended by the Houses. The delay is longer for the état d’urgence sanitaire, hence in the état d’urgence sanitaire parliamentary involvement is lower.
Minister) on almost the same level.\textsuperscript{57} It will be worthwhile to observe whether this pattern will be confirmed in the near future, either in “ordinary” times or in handling new emergencies that may arise. The fact that France chose to create a new emergency framework—enacted during an emergency—instead of relying on existing provisions reveals to us something about this point: the attempt to find new rules sheds light on the effort to change an established paradigm.

\textbf{b. Cluster Two: Medium-Level “Executivization” of the Form of Government}

In the second cluster, we identify jurisdictions where slightly more balanced measures were adopted after a “high executivization” phase and other jurisdictions where this balanced approach emerged from the beginning. Therefore, this cluster consists of “medium-level” executivization. Specifically, in the jurisdictions in this cluster, either legislative acts were slightly more precise in defining and circumscribing the powers of executive bodies or parliaments progressively managed to carve out a more prominent role for themselves in the decision-making process through different methods in the fight against the pandemic, a significant difference between countries in the first and second clusters. Examples of this “medium-level” approach can be found in Austria, Germany, Israel, the Netherlands, and Spain. In addition, along with the parliamentary systems of government—at least de facto,\textsuperscript{58} though with different features—we examine Switzerland, which instead has a directorial system.

To track this tendency, we consider the different jurisdictions using the “gradualist” method. Consequently, this Section begins by pointing out domestic experiences where the executive still had significant leeway, although more constrained than in countries examined in the first cluster, and ends with countries where the activities of executive bodies were better encapsulated in legislative

\textsuperscript{57} The characterization of the French Executive as a “double-headed” one has been theorized by Duverger. See MAURICE D\textsc{U}VERGER, B\textsc{R\textvi\textsc{E}VIAIRE DE LA COHABITATION} 7-20 (1986).

\textsuperscript{58} Similar to Ireland, although its Constitution provides for a semi-presidential system, Austria is a de facto parliamentary system. See DAVID J. \textsc{S}AMUELS \& MATTHEW S. \textsc{S}HUGART, PRESIDENTS, PARTIES, PRIME MINISTERS: HOW THE SEPARATION OF POWERS AFFECTS PARTY ORGANIZATION AND BEHAVIOR (2010).
provisions, almost reaching what we call a “balanced” approach, which we examine below in cluster three.

We begin our analysis with Switzerland. Based on the Swiss Constitution, when contagious diseases such as COVID-19 arise, competences belong to the Confederation. Nonetheless, in the Swiss federal system, competences of the Confederation are often considered “concurrent,” meaning that the Cantons can carry out these competences as long as the Confederation does not explicitly step in. To clarify the vertical separation of powers, at least in the field of public health, the Epidemics Act was passed in 2012. Based on this law, when an infectious disease reaches its highest degree of severity (an “extraordinary” situation), the Confederation—specifically, the Federal Council (the federal executive)—is vested with the authority to take all necessary measures. The COVID-19 crisis, after being considered “normal” and “particular,” was quickly elevated “extraordinary” on March 16, 2020. Consequently, the Federal Council swiftly stepped in and adopted “emergency ordinances,” as permitted by the Swiss Constitution.

Notably, at the federal level, and from the horizontal perspective of the principle of separation of powers, the Swiss Constitution does not give Parliament (the federal Assembly made up of two Houses: the National Council and the States Council) any competence to authorize the federal government to issue emergency ordinances. In other words, the federal government is free to determine when an emergency is in place without any obligation to involve the Parliament or the Cantons.

---

59 CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 118, para. 2(b) (Switz.).
60 Id. arts. 3, 49; see Vincent Martenet, IL COVID-19 E IL FEDERALISMO SVIZZERO [COVID-19 and Federalism in Switzerland], in FEDERALISMO, REGIONALISMO, PANDEMIA [Federalism, Regionalism, Pandemic] 7 (Paolo Bertoli, Federica De Rossa & Giorgio Grasso eds., 2022).
62 Id. art. 7.
65 As relevant, Article 185 reads: “[The Federal Council] may in direct application of this Article issue ordinances and rulings in order to counter existing or imminent threats of serious disruption to public order or internal or external security. Such ordinances must be limited in duration.” CONSTITUTION FÉDÉRALE [CST][CONSTITUTION], Apr. 18, 1999, RO 101, art. 185, para. 3 (Switz.).
As for the marginalization of Parliament, this turned out to be a serious issue in Switzerland when it became clear that the pandemic would last a long time. To redress the situation, an attempt was made to involve Parliament more substantively in deciding on countermeasures during the first year of COVID-19. In September 2020, the Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the Covid-19 Epidemic (COVID-19 Act)\(^\text{66}\) entered into force.\(^\text{67}\) The aim of the Act was to regulate the special powers of the Federal Council in fighting the COVID-19 pandemic, which could be exercised only “as long as necessary to deal with the COVID-19 disease”\(^\text{68}\) and “involving the Cantons in deciding on matters that touch upon their competences.”\(^\text{69}\)

From a symbolic point of view, the effort to introduce legislation to ensure more involvement of Parliament and the reinstatement of some cantonal roles is praiseworthy. However, as some Swiss scholars have noted,\(^\text{70}\) the Act mainly contains delegation norms in favor of the Executive, along with discretionary clauses, called “Kann-Vorschriften,” which enable the Executive to evaluate the gravity of the situation and consequently the intrusiveness of measures to be taken. Although the COVID-19 Act prescribes that the Executive has to timely inform Parliament before adopting ordinances pursuant to Article 185 of the Constitution, it does not vest Parliament with any veto power over the decisions of the Executive, weakening this provision.

During the pandemic, the COVID-19 Act was amended to enable the government to issue rules regarding the COVID-19 certificate.\(^\text{71}\)


\(^{67}\) This Act was also submitted twice to popular referendum in June and in November 2021 (after it had been modified to follow the evolution of the pandemic), being upheld both times by Swiss electors. Voluzione del 28 novembre 2021: Modifica della legge COVID-19, DIPARTIMENTO FEDERALE DELL’INTERNO (Nov. 22, 2021), https://www.edi.admin.ch/edi/it/home/dokumentation/abstimmungen/covid-19-gesetz.html [https://perma.cc/3XVL-M29Q].

\(^{68}\) COVID-19 Act, art. 1, para. 2 (translation by Authors).

\(^{69}\) Id. para. 3 (translation by Authors).


\(^{71}\) Laurent Gillieron, Il popolo svizzero dice “sì” al certificato Covid [The Swiss People Says “Yes” to the Covid Certificate], SWISSINFO.CH (Nov. 28, 2021),
Although the Act gave a legal basis to the Federal Council’s measures, it never specifically enabled the government to use the certificate as a means to restrict access to many public places and services, which the government did. Ultimately, the lack of parliamentary involvement and the significant overreach of the Executive at the beginning of the pandemic was perceived as a problem during the crisis, which was eventually remedied (at least formally).

Next, we explore the Dutch response. During the first few months of the pandemic, the existing legal basis for the initial Dutch reactions to the public health crisis led by the Minister of Health was inadequate. On March 12, 2020, the Minister of Health instructed regional security authorities to take measures based on an “emergency regulation” template made available by the central government to contain the spread of COVID-19. This strategy was grounded in the Public Health Act 2011, which states that the Minister of Health shall instruct and supervise the action of regional security authorities in combating infectious diseases. These powers were not intended to be used for extended periods of time, since they infringe upon the principle of legality. Thus, the legal basis provided by the Public Health Act became increasingly weak as the pandemic continued. Moreover, the democratic legitimacy of the measures taken was shaky, as measures were issued by mayors—who are accountable to the Minister of Health, who in turn is accountable to Parliament (the States General)—without approval from municipal councils, the democratically elected bodies within each municipality. This form of indirect political accountability was the only feature linking COVID-19 measures taken during the first months of the pandemic to a democratically elected institution.

Having considered the inadequacy of this mechanism and realizing that the pandemic would persist, the government

---


introduced a bill in July 2020 to guarantee better legitimacy of anti-COVID-19 rules. The bill became law in October 2020 as the Temporary COVID-19 Measures Act 2020, which was an amendment to the abovementioned Public Health Act. The Temporary COVID-19 Measures Act brought about three main changes. First, some of its provisions directly restricted citizens’ rights based on a statute rather than on executive authority. Second, it limited the action of the Executive to a specific list of restrictions (for example, prohibiting crowds, suspending commercial businesses, and mandating quarantine) if the sanitary situation required. Third, it explicitly stated that all measures should be taken only if necessary in light of the public health situation and that they should comply with both the principle of proportionality and, more generally, the rule of law. Before the enactment of the Temporary COVID-19 Measures Act, respect for the principle of proportionality was considered an implied consequence of the application of general constitutional law. The new Act reinforced this commitment as an essential and explicit requirement for limiting individual rights and personal freedoms during the pandemic. Although these measures were taken by governmental regulations, the Act provides a mechanism requiring each COVID-19 regulation to be reviewed by Parliament within two days of its adoption, and Parliament has one week to approve it. If approval is refused, the regulation is automatically repealed. This ex post check by Parliament follows an ex ante check by the Council of State, which advises the Executive on the constitutionality of its regulations. As a result, in the Netherlands, the marginalization of Parliament and lack of a legislative basis for executive action was a serious problem at the beginning of the pandemic, but the situation significantly improved in the summer of 2020 with the introduction of the Temporary COVID-19 Measures Act 2020. Parliament was, at least partially, brought back into the COVID-19 decision-making process.

Furthermore, it is worthwhile to consider Israel, which has practiced a parliamentary system of government characterized by

---

75 Tijdelijke wet van 28 oktober 2020 COVID-19, Stb. 2020, 441 (Neth.).
76 Hoops, supra note 72.
an almost “endemic” political instability\textsuperscript{77} and a permanent state of emergency since its foundation in 1948.\textsuperscript{78}

At the beginning of the COVID-19 crisis, the government found it easy to build on the existing state of emergency and adopt a number of COVID-19 regulations, significantly restricting rights and freedoms in light of public health needs and imposing surveillance measures to contain the virus. Moreover, the government resorted to an ordinance dating back to 1940, when Israel was under the British Mandate, the Public Health Ordinance 1940.\textsuperscript{79} The Public Health Ordinance authorizes the Minister of Health to enact all measures needed to protect the general population from infectious diseases. For instance, the Minister can mandate isolation and quarantine measures, order the wearing of masks, and restrict gatherings.

\textsuperscript{77} After some years as a “neo-parliamentary” form of government (a system where the Prime Minister is directly elected by voters, but keeps a trust relationship with Parliament), Israel returned to parliamentarism, where the Prime Minister is not elected, but is the leader of the majority coalition in the Knesset. Traditionally, the Israeli party system has been complex, with party coalitions often changing, and the two historically major parties—Labour and Likud—facing continuous challenges by minor parties, and even new ones. This framework of political instability was particularly evident at the outbreak of COVID-19 and throughout its developments. In early March 2020, a third round of elections within only one year took place in Israel and a “Unity Government” was sworn in shortly thereafter. The new Government saw Benjamin Netanyahu (of the Likud party) as Prime Minister, but included Binyamin Gantz (leader of Kahol-Lavan, a centrist-liberal political alliance) as “alternative Prime Minister,” a previously unknown role. The agreement did not function well and led to the dissolution of the Knesset in December 2020 due to a failure to pass the budgetary law. After March 2021 Knesset elections, another Government was sworn in based on an agreement between Naftali Bennet (of the New Right party), who was to serve as Prime Minister for two years, and Yair Lapid (the leader of the opposition in the previous Netanyahu Government), who was to replace him for the following two years. At the time of writing, demonstrating the almost intrinsic instability of the Israeli system, Bennet has lost his majority in the Knesset and negotiations are ongoing to determine whether new elections of the Knesset are needed, or whether it is possible to form a new Government. See generally Shimon Shetreet & Walter Homolka, JEWISH AND ISRAELI LAW: AN INTRODUCTION (2d ed. 2021).

\textsuperscript{78} The state of emergency was declared by the Knesset pursuant to Article 39 of Basic Law: The Government, one of the four basic laws that the Knesset enacts on an ongoing basis which serve as constitutional norms and are hierarchically superior to statutes. The state of emergency was declared because of ongoing conflicts in Israel with the Palestinian population, and since 1948 it has been continuously extended. Based on Article 39, the government is authorized to issue emergency regulations without specific constraints, even suspending or amending existing legislation if deemed necessary.

\textsuperscript{79} Public Health Ordinance No. 1940 (1947) (Isr.).
This executive-led response was stopped, at least to some extent, by the Israeli Supreme Court. After many petitions were filed against several emergency regulations made by the government and measures enacted by the Minister of Health, the Supreme Court established the following principle: although the pandemic can justify restrictions to individual rights due to its seriousness and the risks it poses to citizens’ health, these restrictions can be imposed only through primary legislation.80

Consequently, the Knesset began to incorporate the measures already contained in regulations into laws. The most important piece of legislation was the Corona Law of July 23, 2020, which authorized the government to declare a state of emergency specifically for the Coronavirus crisis and independently of the previously-existing emergency regime.81 Thus, the Corona Law amended Basic Law: The Government. Pursuant to the amendment, when the government issues emergency regulations to fight COVID-19, there is a closed universe of measures it can adopt. Under the previous version of Basic Law: The Government, the Executive was free to determine the content of emergency regulations. In addition, the Corona Law provides for establishing a COVID-19 parliamentary committee that must review COVID-19 regulations after their enactment and repeal them if necessary. Although this committee was criticized because it only performed ex post review (not ex ante oversight) and the Corona Law was still considered too vague and in favor of the Executive,82 the overall framework established by the Corona Law can be seen as a step forward, especially compared to the previous situation in which the Executive was the undisputed commander of public health crises.

It is worth noting that, in Israel, improvements in terms of the executive-legislature relationship, although far from being a perfect scenario, have been possible because the emergency regulations made by the Executive were reviewed in a timely manner by the Israeli Supreme Court and, above all, the latter adopted an “activist”

80 See, e.g., HCJ 2109/20 Ben Meir v. Prime Minister (2020) (Isr.).
approach, reproaching the government for its excessively proactive role in managing the emergency. Thus, the Supreme Court partially took the handling of the emergency back to the ordinary routes of the parliamentary system of government and established useful precedents to stem the excessive role of the Executive in the case of future crises.

In the Spanish legal system, Parliament was involved to varying extents during the different COVID-19 waves. First, we need to bear in mind that Spain was one of the few Western democracies—together with Portugal—that resorted to constitutional emergency clauses to deal with the pandemic. On March 14, 2020, the Spanish Council of Ministers (constituting the entire Spanish government) adopted a decree to trigger the so-called estado de alarma (state of alarm), one of the emergency regimes provided by Article 116 of the Spanish Constitution and regulated in more detail by Ley Orgánica No. 4/1981. Based on the declaration of the state of alarm, the government could limit individual rights and personal freedoms by decree to preserve public health. According to the Constitution, there is no need for ex ante parliamentary authorization before declaring the state of alarm; however, ex ante authorization by the Congress of Deputies (the lower House of the Spanish Parliament) is required if the government seeks to extend the state of alarm beyond fifteen days. The length of each extension is not limited to fifteen days since the government can decide to request, and the Congress of Deputies can authorize, longer extensions.

Several extensions of the first state of alarm—characterized by strong centralization of competencies in the hands of the central government, as discussed below in Part II—were authorized by the Congress of Deputies from March 2020 to June 2020. All of these

---

83 Einat Albin et al., supra note 82.
85 Real Decreto 463/2020 (B.O.E. 2020, 67) (Spain) (declaring a state of alarm pursuant to the Spanish Constitution to handle the sanitary crisis in Spain caused by COVID-19).
86 The other two regimes provided by the Spanish Constitution are the state of exception and the state of siege. See Vedaschi, supra note 34, at 318.
extensions were granted for fifteen days each, meaning that every two weeks the Congress of Deputies was called (at least in theory) to debate and decide whether to continue applying the emergency measures.

Meanwhile, both Houses of Parliament resorted to procedures—already regulated by the standing orders of each House—that allowed the members to vote remotely to contain the spread of the virus. Based on these tools, the Houses also met to convert several royal decree laws approved by the government as part of the COVID-19 strategy and to question the President and other members of the government about anti-COVID-19 measures.

At the same time, strong opposition arose from minority parties concerning the congressional authorization of the fifth and sixth extensions (in May and June 2020, respectively) of the state of alarm. Political minorities engaged in filibustering strategies to prevent the majority from authorizing the extensions, but were ultimately unsuccessful.  

This political disagreement brought the government to a different approach when, after some months where COVID-19 cases decreased and no state of emergency was in place in Spain (June 2020 through October 2020), cases peaked again, and a second nationwide state of alarm was triggered on October 25, 2020. This second state of alarm, initially declared for fifteen days, was extended for six months until early May 2021. In this way, the government tried to silence parliamentary minorities by ensuring that they would not obstruct their COVID-19 policies during this period.

For several reasons, much criticism arose regarding the Spanish decision to resort to the state of alarm. Such criticisms were even upheld by the Spanish Tribunal Constitucional, which, in two

---


89 A few weeks before, a state of alarm had been declared only for the city of Madrid.

90 Real Decreto 926/2020 (B.O.E. 2020, 282) (Spain).

91 See Remedio Sánchez Ferriz, Reflexiones Constitucionales desde el Confinamiento [Constitutional Reflections from the Confinement], 12 ACTUALIDAD JURÍDICA IBEROAMERICANA 16 (2020) (describing the disadvantages of the government’s decision to declare a state of alarm).
judgments in July and October 2021, quashed both the first and second nationwide declarations of the state of alarm.\footnote{92} Hence, no further state of alarm was declared after May 2021.

Some peculiarities of the Spanish reaction regarding the executive-legislature relationship are worth highlighting. First, Spain apparently followed a reverse path compared to the other countries in the second cluster. In other jurisdictions, a more evident executivization was present at the beginning of COVID-19, which improved with higher involvement of the Legislature over subsequent months. In Spain, the involvement of Parliament was seemingly stronger at the beginning, with the state of alarm reauthorized by the Congress of Deputies every two weeks, than in later months when the Congress was “silenced” through a six-month extension of the state of alarm.

Second, since the Congress of Deputies was silenced, minorities voiced their opposition, which may indicate that the government merely intended to rubber-stamp its handling of the pandemic rather than have an involved lower House. When the government realized that this was no longer possible, or at least not easy, it decided to quell the Congress of Deputies with the approval of its parliamentary majority. This attitude is clearly at odds with the core parliamentary functions of control over executive action, which is typical of parliamentary systems, and is a dangerous pattern, especially if repeated over time, as noted by the Spanish Constitutional Court in October 2021.\footnote{93}

Moreover, it is worth highlighting that in its two decisions to quash the states of alarm, the Spanish Constitutional Tribunal held that this was the “wrong regime” to be applied during the pandemic, even though Ley Orgánica No. 4/1981 explicitly states that the state of alarm can be triggered to deal with “health crises.”\footnote{94} The Constitutional Tribunal maintained that the government should have applied the state of exception (estado de excepción), one of the three emergency regimes regulated by Article 16 of the Constitution and Ley Orgánica No. 4/1981 to cope with political crises and which allows for the suspension of rights. According to the Constitutional Tribunal’s decisions, to counter the COVID-19 effects, the Spanish government not only limited rights (which are allowed when a state

\footnote{92} T.C., July 14, 2021 (B.O.E., No. 148, p. 93561) (Spain); T.C., Oct. 27, 2021 (B.O.E., No. 183, p. 145362) (Spain).
\footnote{93} See infra note 175; see also infra Part II.a.
\footnote{94} Law on the States of Alarm, Exception, and Siege art. 4 (B.O.E. 1981, 134) (Spain).
of alarm is in place) but also suspended some of them. Based on Ley Orgánica No. 4/1981, suspension is allowed only when a state of exception has been declared.\footnote{T.C., July 14, 2021, (B.O.E., No. 148, p. 93561) (Spain).}

In addition to these noteworthy differences in terms of rights and freedoms, the state of exception implies different patterns of parliamentary involvement. First, states of exception are declared by the Council of Ministers after the Congress of Deputies has authorized them. Therefore, unlike the state of alarm, which involves the Congress only ex post authorization (and then only when extensions are required), Congress must authorize the government ex ante to trigger the state of exception. Also, the extension of the state of exception authorized by the Congress of Deputies cannot last for more than 30 days according to Article 116 of the Spanish Constitution. Consequently, if the state of exception had been triggered, it would not have been possible to silence the Congress of Deputies for six months. From this viewpoint, the state of exception might have ensured, at least formally, better parliamentary involvement.

In any event, the state of exception would not have necessarily guaranteed substantive involvement of the Congress of Deputies. There are several further reasons—unrelated to the executive-legislature relationship and thoroughly explained by the dissenting judges in the abovementioned decisions—that would have made the invocation of a state of exception difficult and not necessarily better, especially in terms of the protection of citizens’ rights and freedoms. Courts would have been unable to check the proportionality of COVID-19 measures since rights and freedoms would have been suspended and hence not applicable. Ultimately, if a state of exception had been declared, there would have been no certainty that Parliament would have been substantively involved; what is instead certain is that, in a state of exception, courts would have been cut off.

From a more general viewpoint, it appears that both the state of alarm and the state of exception are, for different reasons, inappropriate for dealing with such a long-lasting emergency as COVID-19, and a reform of the Spanish law of emergency seems desirable.

The German example reveals, as in other case studies, a prevalence of executives, both at the federal and state levels, in responding to the pandemic. Yet, while the COVID-19 was raging,
the legal basis on which the Executive relied was amended to become, at least in theory, more definite.

The main statutory tool deployed in Germany to tackle COVID-19 was the Law on Protection Against Infections, as Germany did not resort to its "emergency constitution." Originally enacted in 2000, the Law on Protection Against Infections is a federal statute that regulates legal reactions when an infectious disease spreads. According to this law, while the executives of the länder (the German federated states) are the main actors who determine measures to protect public health, the Federation is vested with significant supervising powers. From a practical perspective, this statutory design indicated that most COVID-19 measures were decided by the länder after the heads of the länder executives (the Minister-Presidents) and the head of the federal Executive (the Chancellor) had agreed on the main lines through which the response ought to be developed.

This scheme, which revealed active cooperation between the Federation and the länder, was applied throughout the first and second COVID-19 waves. Beginning in April 2021, some re-centralization of powers emerged with a set of procedures—introduced through amendments to the Law on Protection Against Infections—such as the "emergency brake." We observed that one of the most used provisions of the Law on Protection Against Infection in March 2020 was Section 32. Pursuant to this section, the länder, supervised by the Federation, were empowered to issue regulations to implement all “necessary protective measures.” However, this was a weak legal basis that left a wide margin of discretion to executives. In November 2020, this provision was

96 Infektionsschutzgesetz [IfSG] [Law on Protection Against Infections], July 20, 2000, BUNDESGESETZBLATT, Teil I [BGBl. I] at 1045 (Ger.).
97 Cf. VEDASCHI, supra note 34, at 318.
98 Infektionsschutzgesetz [IfSG] [Law on Protection Against Infections], July 20, 2000, BGBl. I at 1045 (Ger.).
99 Viertes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite [Fourth Law on the Protection of the Population of Epidemics of National Importance], Apr. 22, 2021, BGBl. I 2021 § 802 (Ger.). The federal emergency brake was a mechanism according to which the Federation could urge länder to take more restrictive measures, in case they eased their limitations too much.
amended to make it more precise. Section 28a was introduced to better specify the content of these regulations by enumerating the most important measures that could be adopted by executives. Even more remarkably, the November 2020 amendment provided that the executives of the länder or the federal Executive (when competent) could pass these regulations only if at least one of two conditions was met: either the federal Bundestag (the lower House of the German Parliament) had declared an “epidemic emergency of national concern” or the respective land’s legislative assembly had adopted a similar declaration for its own territory. If the federal Bundestag repealed the declaration, federal Executive regulations (usually enacted by the federal Minister of Health, whose powers were expanded in March 2020) and the regulations approved by the länder executives immediately lose their effects.

Against this background, it can be said that since November 2020, the involvement of German legislatures (both at the federal level and in the länder) has been significant.

The Austrian reaction to the pandemic began as an executive-led one and became more balanced over time, with Parliament regaining a more meaningful role than at the beginning. Thus, the Austrian response places this country in a “borderline” position between clusters two and three.

Although the Austrian Constitution contains rules regarding the state of emergency, they were not applied during the pandemic. Rather, the central government—which, unlike in other federal states, holds several powers on health matters—relied first on the Epidemics Act, which dates to 1913, to issue ordinances to contain the disease, most of which were adopted by the Minister of Health, though other Ministers, such as the Minister of Home Affairs, were also involved. Since the Epidemics Act is an ancient statutory tool, it was revised during the COVID-19 emergency. More specifically, scholars observed that, from the outbreak of COVID-19 disease until the end of 2021, the Epidemics Act was amended more than fifteen times.
times. These amendments were made to introduce a larger set of measures that could be deployed to tackle the disease, such as traffic and travel restrictions, the involvement of police forces, and norms concerning data processing for contact tracing.

All amendments made to the Epidemics Act had the form of statutes adopted by the Austrian Parliament, yet there was a difference between the amendments in the first months of the pandemic (from March to July 2020) and those approved later. Early amendments were often rushed through Parliament as the government regularly resorted to fast-track procedures and used every shortcut available to leave little time for parliamentary discussion, making it almost impossible for public debate. In other words, at the outbreak of COVID-19, the government coalition introduced predetermined bills and used Parliament as its sounding board to formally sanction its decisions. This situation also occurred when the government decided to add another statute in March 2020, specifically conceived as an anti-COVID-19 tool, to the existing Epidemics Act. This was the COVID-19 Measures Act which provided the Minister of Health with a further toolbox of powers to tackle the disease. Although the Act is not a vague statute—it’s provisions authorizing the Minister of Health are drafted in a specific and precise way—it was passed quickly.

The situation, as far as the role of Parliament was concerned, improved during the second COVID-19 wave, starting in autumn 2020. All amendments to the Epidemics Act approved after this time provided that the ordinances of the Minister of Health would be considered by a competent committee of the lower House before being adopted. Consequently, Parliament regained a meaningful ex ante role. Moreover, the COVID-19 Mandatory Vaccination Act was enacted to ensure the regulation of vaccines, which followed the full parliamentary procedure, with proper debates and discussions both in committees and in the plenary. Additionally, the draft law
was published on the website of the Austrian Parliament, and every Austrian citizen was allowed to submit his or her opinion.

The Austrian experience reveals at least two important features. First, as in many other jurisdictions, the initial months of the pandemic witnessed the marginalization of Parliament. However, different from many other contexts, the quality of legislation rushed through the Houses did not significantly decrease since the provisions were not overly vague. Second, as in other jurisdictions, Parliament had better involvement from the second wave of the pandemic when the virus started being “normalized” as something to coexist with for a longer period than what had been expected. This approach confirms a step back toward the parliamentary practice of the Austrian system.


The third cluster consists of jurisdictions in which the reactions of the legislature and the executive to the pandemic were somewhat “balanced.” This trend does not imply that prompt reactions were not taken by executive bodies; rather, executives were at the forefront of the pandemic, and parliaments either stepped in quickly or intervened in more meaningful ways than in the countries mentioned in clusters one and two.

Among the selected jurisdictions, Denmark and Finland are prime case studies. While the former has a parliamentary system, the latter adopts a semi-presidential system, though – different from the French paradigm and more similar to the Austrian and Irish contexts – the President of the Republic does not have a strong role. Consequently, according to scholars, Finland should be classified as a de facto parliamentarism.110

In the Danish case, the pandemic was managed through the Act on Communicable Diseases 1979 (amended twice in March 2020 at the outbreak of the pandemic) and the Act on Communicable Diseases 2021, which repealed and replaced the 1979 law. A “middle-ground” approach to the relationship between the Legislature and the Executive, already detected in the 1979 Act,

became more evident with the adoption of the new regime in 2021. From March 2020 to February 2021, the Danish response was grounded in the decrees of the Minister of Health, whose range of powers widened a few days after the outbreak of the pandemic.\textsuperscript{111} Meanwhile, the legal basis of these decrees was remarkably precise. For instance, the 1979 Act specified that the “major gatherings” that could be prohibited were “indoor, outdoor, public, and private gatherings”\textsuperscript{112} and that a gathering was “major” if it included more than ten people. While gatherings of fewer than ten people could also be prohibited, the law prescribed that the Minister could adopt this measure only on the advice of the health authorities.\textsuperscript{113} This number of people was reduced to three when the effects of the virus became more apparent. The framework for restrictions on gatherings is an example that explains that the legal basis of these powers was more precise compared to other case studies in the first and second clusters. In February 2021, the new version of the Act on Communicable Disease made parliamentary involvement stronger, as it was not limited to providing a legal basis because new oversight mechanisms were introduced. In fact, the 2021 Act provided that the Minister of Health could maintain his powers to make regulations to fight COVID-19, but each draft regulation would be reviewed by a competent committee of the Folketing (the Danish unicameral Parliament), which could stop its enactment if the committee did not agree with its contents.\textsuperscript{114}

In Finland, a balance between the powers of the Executive and the Legislature was more evident than in Denmark, which better guaranteed the principle of legality. To deal with the COVID-19 crisis, a state of emergency was declared twice by the government, based on the existing Emergency Powers Act.\textsuperscript{115} Under this statutory emergency regime, the Executive is enabled to adopt a number of measures through the decrees of competent ministers. However, the role of the Eduskunta (the Finnish unicameral Parliament) remains central to the extent that scholars commented that there was “no

\textsuperscript{111} The amendment dates to March 17, 2020.
\textsuperscript{112} The Act on Communicable Diseases 1979, § 6(1) (Den.).
\textsuperscript{113} In particular, the so-called Danish Health Authority—a public body made up of experts who counsel the Minister of Health—and the Serum State Institute—another group of experts, still established under the authority of the Minister of Health, which has the task to prevent infectious diseases and biological threats.
\textsuperscript{114} The Act on Communicable Diseases 2021, § 1 (Den.).
\textsuperscript{115} Valtioneuvoston Päätös [Government Decision] VNK/2020/31, Mar. 16, 2020 (Fin.).
recognizable marginalization of Parliament” during the COVID-19 emergency. In particular, at least three elements provide evidence that Parliament was not marginalized. First, the declaration of emergency pursuant to the Emergency Powers Act was issued by the government and had to be submitted to Parliament within a week of issuance. If Parliament did not approve it, its effects ceased. Parliamentary scrutiny was the only form of scrutiny on this decree that could not be otherwise reviewed (for example, by courts). Second, all decrees issued by the Executive during the emergency to restrict individual rights and personal freedoms enshrined in the Constitution had to be previously checked by Parliament, and these decrees were enacted only if Parliament agreed on their content. Third, at the height of the third COVID-19 wave in March 2021, a bill that would have granted broader and unsupervised powers to the Executive to restrict freedom of movement was promptly blocked by the parliamentary Constitutional Law Committee, which reviews the constitutionality of all bills before their entry into force, with powers almost comparable to those of a constitutional adjudication body performing ex ante review. It can be said that the Finnish trend—different from all other cases—is characterized by strong balancing mechanisms already contained in the existing legal framework and maintained during the pandemic.

Among the Nordic countries, Sweden was not placed in this cluster because its approach to the pandemic was very peculiar, with most measures adopted through non-binding guidelines and recommendations issued by the Public Health Agency (an administrative authority) rather than through normative acts. A few exceptions existed insofar as some pieces of legislation were passed to cope with the virus; nevertheless, either these new powers vested in the Swedish government were never used or they were quite weak.

117 Id.
118 Id.
d. Cluster Four: Central Executives in the Background

Cluster four can be considered an “atypical” cluster, as it includes countries where the executive was predominant to the point that all these jurisdictions could have been placed in the first cluster. They were not placed in cluster one because the predominant executives were not the central (or federal) executives, but rather those at the sub-central (or sub-federal) level. Australia, Canada (two Westminster-style parliaments), and the United States (a paradigmatic example of a presidential system) can be placed in this cluster. In all these countries, the federal executives remained in the background to varying extents.

The details of how this approach has impacted the form of state are part of a wider analysis carried out below in Part II. Here, we emphasize the reasons why these federal executives did not take the lead and the extent to which state executives have marginalized state legislatures. This cluster approaches first the country where the federal executive retained a stronger role, and then examines those where, gradually, state executives stepped in more vigorously.

We begin our analysis with Australia, since its experience can be defined as “halfway” between those models focused on the central Executive, and those other paradigms in which non-central executives took the lead. In other words, according to some views, Australia can be classified as a country where coordinated responses among executives of different levels occurred; in other views, sub-federal executives were dominant. This “hybrid” pattern finds further support in declarations of the state of emergency adopted by its single states and territories under a wider intergovernmental “umbrella.” On March 13, 2020, a new intergovernmental body was established called the National Cabinet, which was made up of the Prime Minister, the Premiers of the six Australian states, and the Chief Ministers of the two territories. The National Cabinet was given the task of coordinating the responses of states and territories,


ensuring that no excessive fragmentation existed, and taking action as coherently as possible with the level of threat in each area. Under the coordination of the National Cabinet, all states and territories relied on their own emergency legislation in accordance with the constitutional allocation regarding public health regulation, which rests in the hands of states.123

All these pieces of emergency legislation, in addition to being activated by state executives alone (the Premier, Chief Minister, or Minister of Health, depending on particular cases), provided for a strong role for state executives to the detriment of state legislatures. For instance, under the Public Health Act 2016 of the state of Western Australia, the Minister of Health could issue regulations on the restrictions of movement and medical directions to individuals without any check from the state Legislature.124 Under the Public Health and Wellbeing Act 2008 of the state of Victoria, the Minister of Health could impose up to four stages of lockdown—stage four, the most severe, was invoked in August 2020 in Melbourne, given the rapid transmission of the virus in the city.125

Meanwhile, at the federal level, a similar marginalization of Parliament could be detected. The main legislative tool deployed to face the pandemic was the Biosecurity Act 2015, which delegates wide powers to the Minister of Health without any check from Parliament.126 Specifically, Section 477(1) authorizes the Minister “to prevent or control the spread of . . . disease to another country.”127 Based on this provision, quarantine, lockdowns, and other restrictive measures were mandated during the more severe COVID-19 waves, although it is unclear whether such vague drafting authorized the Executive to impose such measures. The Commonwealth Parliament held no sittings between March 23, 2020, and August 11, 2020. There were only two exceptions to this suspension of parliamentary business: on April 8, 2020, and on May 12 through 14, 2020, when the Houses gathered to adopt legislation to tackle the economic and social effects of the pandemic.128

123 Murphy & Arban, supra note 121, at 628-32.
124 Public Health Act 2016 (WA) s 128 (Austl).
125 Public Health and Wellbeing Act 2008 (Vic) s 165(A)(I) (Austl.).
126 Biosecurity Act 2015 (Cth) (Austl.).
127 Id. s 447(1).
Against this background, two aspects of the Australian reaction to COVID-19 deserve to be highlighted. First, the Australian response to the pandemic was coordinated as far as the federal-state relationship was concerned, although—consonant with the constitutional framework—states and territories took most of the pragmatic measures. Second, at both the federal and state levels, the marginalization of legislatures was particularly evident and long-lasting. Coordination involved only executives at different levels, with almost no involvement by legislatures. Yet, as in the cases of the United Kingdom and New Zealand (whose reaction was remarkably centralized), Australia adopted a Westminster parliamentarism system in which the prevalence of the executive is less surprising than in other systems.

We now analyze Canada with regard to the leading role of non-federal executives. In Canada, more provinces and territories took the lead in tackling the pandemic, although the Canadian constitutional law does not clearly allocate all competences regarding public health to provinces and territories. The constitutional framework is complex with regard to public health and depends on the context, resource allocation, and the measures to be combined with public health-related measures.129

Despite this blurred constitutional background, COVID-19 has been perceived as a matter to be dealt with mainly at the sub-federal level from the beginning. Consequently, all declarations of emergency were adopted by provinces and territories, while the Federation occupied a limited role. Unlike Australia, no coordinating body was specifically established. The only major step made by the Federation regarding the pandemic was to invoke the Quarantine Act of 2005.130 Based on this Act, the Minister of Health issued an emergency order that imposed isolation requirements on foreign nationals entering Canada from foreign countries. However, apart from that measure, the role of the Federation was marginal, with most powers exercised by provinces and territories.

Pieces of emergency legislation invoked by provinces and territories to deal with the pandemic were strongly focused on executive branches. Not only could executives declare an emergency without supervision by legislatures, but they can also decide all the

130 Quarantine Act, S.C. 2005, c. 20 (Can.).
consequent measures, which are approved by provincial or territorial Ministers of Health. Therefore, this framework is particularly executive-centered, although all the orders of provincial and territorial executives are reviewable in provincial and territorial courts.

Meanwhile, the federal Parliament was practically uninvolved despite some adjustments to allow online discussion in the Houses. Concerning COVID-19 responses, the Quarantine Act delegates all powers to the Minister of Health. Of the measures taken by the federal Executive to cope with the pandemic, most were the regulations of Ministers and unchecked by the Parliament. Parliament passed laws that facilitated federal spending to ease the financial losses experienced by individuals and businesses due to the pandemic.

In summary, the Canadian response to the virus was mostly left to provinces and territories through laws that considerably enhanced the powers of executives, while legislatures did not so much as try to overcome their own marginalization.

The third country to be analyzed is the United States, which is a very peculiar case. From a constitutional viewpoint, public health is considered a matter for states, but the federal government can step in when threats cannot be addressed by states. From a political perspective, the first and second COVID-19 waves overlapped with the last year of Donald Trump’s mandate as President of the United States. Under Trump’s presidency, the COVID-19 threat was underestimated, if not discredited. The President claimed that the virus was “fake news,” or, at least, a problem of foreigners rather than of United States citizens. Notwithstanding the several alerts launched both by domestic and international public health institutions, such as the Centers for Disease Control and Prevention and the World Health Organization, at the beginning of 2020, Trump attacked the legitimacy of these bodies and pushed people to ignore their advice. In mid-March 2020, although the President activated some

---

131 This was done through a change in the standing orders.


133 Remarks by President Donald Trump, Vice President Mike Pence, and Members of the Coronavirus Task Force in Press Briefing (Apr. 7, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-
federal legal tools to tackle the emergency, he did so belatedly and under pressure from his administration rather than on his genuine belief that they were necessary to protect citizens. Moreover, several scholars criticized the President, arguing that he did not make the best use of these tools as he did not use all the powers available to him. In other words, the United States’ federal approach to the pandemic during the first year can be defined as “executive underreach,” meaning the “executive branch’s willful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily legally required) to address.”

This attitude implied that the states had to tackle the COVID-19 outbreak on their own. Between March and April 2020, all the states triggered their emergency legislation, vesting state governors with broad powers. Most of these laws allowed governors to suspend statutes, seize personal property, issue stay-at-home orders, and close certain businesses, all without any kind of scrutiny by the state legislatures. These emergency powers were usually limited in time (most emergency statutes set a maximum timeframe of thirty days), even if extensions could be made unilaterally by the governors themselves. In this regard, an aspect that deserves to be highlighted is that, in the United States system, all orders adopted by governors under state emergency legislation can be reviewed by courts, and many lawsuits were brought before the courts of all levels. When stay-at-home orders or other restrictive measures were challenged before the courts, President Donald Trump—via Twitter and other social networks—did not miss any opportunity to criticize governors who kept restricting citizens’ freedoms in the name of public health, admonished United States citizens not to let COVID-


135 See Schepple, supra note 134.


137 Id. at 609.
19 rule their lives, and, more generally, downplayed the danger posed by the coronavirus.

This approach, with the federal government in the background, changed in January 2021, when President Joseph Biden took office. He made the fight against COVID-19 a central issue of his campaign and presidency but, again, without any meaningful involvement of Congress, at least in imposing limitations on rights and freedoms. President Biden issued executive orders to deal with the pandemic, ordered agencies to expand testing, and took steps to enhance workers’ health and safety, yet everything was achieved through his own acts and those of his administration. The role of the Congress—where proxy vote was used in the House of Representatives but not in the Senate—was confined, both under the Biden presidency and his predecessor’s, to the approval of some statutes to cope with the economic and financial effects of the pandemic.

Therefore, the United States’ reaction to the pandemic revealed a trend that was reversed after a new president took office and another that was confirmed after Biden’s takeover. The former was that the federal Executive remained in the background for almost one year but gained momentum with the start of Biden’s presidency. The latter, which remained steady throughout the pandemic, was that executives (either state or federal) never ceased to be the main actors in tackling COVID-19.

Considering the traditional features of the United States presidential system and how previous emergencies have been handled in the country (e.g. international terrorism), the strong role of executives does not come as a surprise. Instead, what is particularly worrying is that the federal government neglected its responsibility in handling the emergency for one year based on populist and unfounded arguments. Although the situation changed when a new president was elected, there is no guarantee that a similar approach will not be repeated in future emergencies should a president like Trump (or even Trump himself) take office.\footnote{See, e.g., Proclamation No. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021). \footnote{MARIO PATRONO & ARIANNA VEDASCHI, DONALD TRUMP AND THE FUTURE OF AMERICAN DEMOCRACY: THE HARBINGER OF A STORM? (2023).}}
e. Remote Voting and the Legislature-Executive Relationship: Do “Virtual Parliaments” Help Overcome the Marginalization of Legislative Assemblies?

The four analyzed clusters reveal a mixed scenario, from the evident marginalization of legislatures combined with the strong roles of executives to more “balanced” approaches. Undoubtedly, to those who criticize marginalization, one could argue that there were objective circumstances during the pandemic that made it difficult to convene legislatures. Admittedly, especially during the first months of COVID-19 when the effects and spread of the virus were hardly manageable, vaccines did not yet exist, and the virus was still largely unknown, gathering parliaments was above all a “practical” and not just a “legal” problem since it could have increased the risk of infection. However, over time, some jurisdictions found ways to mitigate this issue. Among others, remote voting, remote meetings, and other tools were used to convene “virtual parliaments.”

Against this background, one might think that in systems where “executivization” was higher, tools that allow parliaments to work remotely were weaker or nonexistent, while countries with a better balance between the legislature and executive resorted to more advanced tools. In other words, it could be assumed that a strong overreach of executives went hand-in-hand with the poor use of online tools in parliaments.

While such an assumption might stand to reason from a theoretical perspective, it proves wrong in actuality. Practical experiences did not highlight any direct relationship between better involvement of parliaments and greater adoption of remote voting or other digital procedures. There have been cases where, although remote voting was allowed, parliaments were significantly marginalized; the other way around, in some situations where the “digitalization” of parliaments was not as advanced as expected, still the legislature-executive balance was better (or, at least, improved over time).

In summary, the use of remote voting and other online procedures did not significantly impact parliaments’ actual engagement. Rather, the marginalization of parliaments depended more on political choices or on transformations that COVID-19 brought to particular systems of government. To demonstrate the validity of this statement, it is useful to consider whether and how virtual parliaments worked in the four clusters. In the first cluster,
which includes countries with a considerable marginalization of parliaments and a strong overreach of executives, we observed a mixed situation. Although online tools were not used in the Irish and Italian parliaments for several reasons, Belgium, France, the United Kingdom, and New Zealand adopted several mechanisms to ensure that parliamentary work was not interrupted during the pandemic. In some cases, digital tools were used to facilitate both parliamentary debates and voting. This happened in Belgium and the United Kingdom among the countries in the first cluster. In Belgium, the rules of the House of Representatives were changed to allow members to participate in sittings via Zoom and vote electronically, thus fully contributing to the quorum, even in their physical absence. The United Kingdom resorted to hybrid (i.e. a mix of members attending in person and others participating by video conference and voting by proxy or electronically) and virtual formats (where all members participated by video conference and voted electronically). These hybrid and virtual methods were made possible by some amendments to the standing orders of both Houses of Parliament.

In other cases, digital tools were not used for voting in parliament, although the technology that facilitated online meetings was adopted to enable discussions. This was the case in France, where, without any change in the standing orders, members of the Houses could participate remotely in parliamentary sittings because of the decisions taken by the Conference of Presidents in both Houses. At the same time, they could benefit from proxy votes.

---


141 *See Parliaments in Emergency Mode: Lessons Learnt After Two Years of Pandemic*, at 9 (Jan. 2022), https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698879/EPRS_BRI(2022)698879_EN.pdf [https://perma.cc/9QUU-8ZVL]. The Conference is made up of President and Vice-Presidents of the House (National Assembly or Senate), the presidents of the political groups, committee presidents, and the minister in charge of relations with Parliament.

142 Proxy vote was already provided for by the standing orders of both Houses of the French Parliament. During the COVID-19 pandemic, this possibility was extended, allowing a single member to cast the votes of all the members of the political group he/she belonged to. *See* Vedaschi, *supra* note 22.
Countries in the second cluster still featured a significant marginalization of parliaments, although this was mitigated over time or, at least, the acts of the executive were grounded on less vague legal bases. Even in this cluster, we noticed a mixed scenario as far as virtual parliaments are concerned. In some contexts, parliaments “went virtual.” This was the case in Switzerland, where remote discussion and voting were allowed in the National Council through an amendment to the Parliament Act. A similar case occurred in Spain, where both Houses of Parliament resorted to procedures—already regulated by the standing orders of each House—that allowed members to vote remotely to contain the spread of COVID-19. However, these mechanisms did not prevent executives from keeping parliaments marginalized to a significant extent.

In other countries of the second cluster, fully remote procedures were not permitted, but adjustments were made to better use all spaces available and respect social distancing, reduce quorum requirements, or allow a lower number of people to be present in parliament. This happened in Austria, Germany, the Netherlands, and Israel, where remote discussions were allowed with only the members of Parliament sitting in different rooms of the Knesset.

---

143 Bundesgesetz über die Bundesversammlung [Parlamentsgesetz, ParlG] [Federal Act on the Federal Assembly], Dec. 13, 2002, SR 171.10 (Switz.).
144 In Austria, the number of representatives to be present in the Houses was reduced, and this was possible thanks to informal and not legally binding agreements in the conference of presidents of political groups. See Country Compilation of Parliamentary Responses to the Pandemic, Interparliamentary Union (Oct. 16, 2020), https://www.ipu.org/country-compilation-parliamentary-responses-pandemic [https://perma.cc/K8YE-PACG].
145 In Germany, parliamentary groups reduced the number of persons who had to be present by a pairing agreement in order to keep physical distance. After some weeks, the standing orders of the Bundestag were amended in order to reduce the quorum of attendants for sittings to be valid and to introduce electronic meetings and voting procedures in committee (but not for the plenary). Id.
146 In the Netherlands, members of Parliament arranged the spaces available in the premises of the assembly so as to be able to respect social-distancing and, only for a limited amount of time when COVID-19 was raging and vaccination campaigns had not started yet, they resorted to remote debate. Id.
147 During COVID-19, the plenum and the committees continued to physically meet, with some adjustments aimed at respecting social-distancing. For example, committees were convened in different rooms with a video connection between them. Participation from remote was allowed only for members who were in quarantine or suffered from specific illnesses. Id.
To demonstrate that virtual parliament does not equal better involvement of parliament, we note that two countries in the third cluster (Denmark and Finland), where a good balance between the legislature and executive was reached, took divergent approaches to the use of digital tools in parliament. The Danish Parliament never resorted to digital vote, only making adjustments based on political agreements to reduce the number of members present in parliament while maintaining the representative ratio of different political groups. The Finnish Eduskunta, instead, amended its standing orders to allow both digital meetings and digital voting, ensuring its substantive presence in the decision-making process of COVID-19 strategies. Again, we see that the presence of remote voting is not a determinant element in ensuring parliamentary involvement.

Moreover, we can look to countries in the fourth cluster. They are more or less comparable to the countries in the first cluster, with the difference that overreaching executives were generally non-central ones. Such overreach took place, although some of the legislatures of Australia, Canada, and the United States (either at the federal or state level) resorted to online procedures. For example, in Australia, some states allowed remote discussion, but not remote voting. In Canada, the same happened in the parliaments of provinces and territories (although after particularly long suspensions). In the United States, the situation varied, with some states allowing these possibilities and others adopting a more conservative approach. However, the common scenario among all of these state legislatures is that lawmakers met mainly to discuss other legislation rather than to meaningfully contribute to the enactment of COVID-19 measures. At bottom, when there is a political will to enhance the powers of the executive at the expense of the legislature, technological tools, not even cutting-edge ones, cannot overcome this situation.

f. Some Observations

As far as the horizontal dimension of the principle of separation of powers is concerned, some of these trends were expected, while others were unexpected. As is well known, an overall concentration of powers in the hands of executive bodies is a common pattern in times of emergency. This typical trend was demonstrated by the countries in the first cluster and, to some extent, in the second cluster. The fourth cluster comprised countries that also embraced
the attitude of the first cluster, although the leading executives were non-federal executives. In some cases, the enhancement of the powers of the executives was beyond what could be foreseen, based on both the dynamics of the systems of government and the reactions of the countries to previous emergencies. Relevant examples include Italy, where the concentration of powers in the hands of the President of the Council of Ministers during nearly the entire first year of the pandemic was unprecedented, and France, where the roles of the Prime Minister and some other Ministers were as important as that of the President of the Republic, which is uncommon in French semi-presidentialism.

Meanwhile, in other jurisdictions, the significant concentration of powers in the hands of the executive was quite in line with the dynamics of the system of government. Consider Westminster systems, where executive bodies generally play a strong role even during non-emergency times due to a model of separation of powers with members of the executive also being members of the legislature. In the United Kingdom and New Zealand, the overreach of executives came as no surprise; hence, it is less likely to transform the system of government. Nevertheless, even in these systems, some issues potentially caused by the predominance of the executive still arose, e.g. in terms of the protection of rights and freedoms.

Some countries could have also adhered to executivized approaches but instead found intermediate solutions, for instance, countries in the second cluster, especially the ones listed at the end of our gradual scheme. Among them is Germany, which, although displaying an undeniable prominence of the executive—with useful coordination between the central Executive and those of the länder — was able to mitigate this dominance due to the engagement of some parliamentary institutions. Thus, Germany managed to maintain the main features of its parliamentary system. Similar cases include Austria—which is a de facto parliamentary system and, over time, implemented strategies to ensure that the legislative assembly was not totally marginalized — and, to a lesser extent, Switzerland.

A more peculiar situation occurred in Spain. At the beginning of the COVID-19 crisis, the Congress of Deputies seemed involved in deciding whether to extend the state of alarm and the restrictive measures it entailed. Nevertheless, the government did not hesitate to silence the representative assembly’s voice when it became clear that it would have opposed some of its stances. Therefore, unlike the abovementioned countries, Spain shifted from formally involving
its Parliament to formally and substantively bypassing it. This approach stands in contrast to what happened in Germany and Austria, from marginalization in the first months of the COVID-19 crisis to better involvement in the following months. The political scenarios in these countries clarify these different approaches. In Germany and Austria, the governmental coalition was relatively more stable and cohesive than in Spain, and this feature allowed easier involvement of the legislative assembly over time. At bottom, the pandemic taught us that cohesive political majorities and pressure from sub-central entities played a role in “re-parliamentarizing” the crisis, whereas a lack of political cohesion contributed to diminishing the role of parliaments.

The relationship between political stability and the role of parliaments is further demonstrated by looking at countries in the third cluster. In these jurisdictions, the approach was more balanced in terms of the legislature-executive relationship, which remained healthy without excessive marginalization of the legislature, even in times of emergency. Along with political cohesion, which characterizes both countries in the third cluster—Denmark and Finland—another element played a less “legal” role. Nordic countries are characterized by a legal culture that is very different from that of other Western democracies and, more generally, than all other countries surveyed in this Article. Particularly, their citizens are usually more willing to comply, even without strong imposition by public powers. Consequently, while the parliaments took the necessary time to enact binding measures, the citizens conformed to the non-binding guidelines of governmental and public health authorities. Reliance on recommendations and the “timing” issue, combined with political stability, are not the only factors that allowed lower marginalization of representative assemblies. Both jurisdictions have preventive mechanisms, such as ombudsmen and ad hoc committees, that oversee governmental measures when they are binding. These mechanisms were effective in avoiding the overreach of executives and infringement of the principle of legality. It should be noted that the existence of these bodies is enshrined in the legal culture of these systems and would hardly be “transplantable” to other jurisdictions. The importance of the cultural element is even clearer if we consider Sweden, where reliance on recommendations was the major tool in tackling the pandemic. After an initial period where no reaction was considered necessary and “normal” life went ahead, the response to COVID-19 was primarily based on recommendations, while the government
took less power than expected. Moreover, people usually complied with non-binding guidelines based on a shared belief that they should be followed independently of which bodies or authority adopted them. This scenario confirms the differences in the legal culture that characterizes Nordic countries. This aspect of reliance on non-binding rules and acceptance of particular forms of oversight (such as ombudsmen), exemplified by Nordic countries, demonstrates that not only do purely “legal” elements play a role in determining the reactions of a legal system but “cultural” factors are also not indifferent in this regard.

Countries in the fourth cluster replicated almost identical patterns to the first cluster, but the leading executives were not the central (federal) executives, but those of federated states. This further confirms the idea that political instability fuels parliamentary marginalization insofar as the United States was characterized by a particularly controversial political scenario under the Trump presidency. Moreover, the fourth cluster points out that the dynamics of the form of state in dealing with emergencies can impact the system of government and vice versa. In fact, there were situations where the lead taken, for different reasons, by non-federal executives in enacting anti-pandemic measures also brought some changes to ordinary relationships among the executives of member states. For instance, in the United States, at least until President Biden took office, most COVID-19 policies were de facto led by state governors, giving rise to interesting and unexpected new trends in United States federalism (horizontal cooperation among states). For different reasons, the coordination among Australian executives may have also impacted the country’s federalism.

Finally, our study on the legislature-executive relationship during the pandemic led us to deal with so-called virtual parliaments, where we found that even state-of-the-art technologies, which, in some countries, allowed members of legislative assemblies to meet and vote remotely, did not always solve the issue of parliamentary marginalization. In other words, if political will or factual circumstances strongly favor the marginalization of parliaments, technology will not solve the problem. Thus, technology merely exists as a function of politics, and politics ultimately prevails over both legal and technical factors.

---

II. COVID-19 AND THE PRINCIPLE OF SEPARATION OF POWERS: VERTICAL DIMENSION

In this Part, we examine how COVID-19 impacted the vertical dimension of the principle of separation of powers. We consider federal and regional systems, i.e. systems where the sub-national entities, namely states, regions, and similar political subdivisions, have their political autonomy, in addition to administrative autonomy.\(^{149}\)

Continuing with the taxonomic effort in Part I, we similarly identify clusters in this Part. Specifically, the first cluster includes countries whose reactions were first centralized but became increasingly decentralized, though based on different patterns. The second cluster includes countries that adopted a coordinated approach between the central and sub-central government levels since the beginning, or at an early stage, to tackle the COVID-19 pandemic. The third cluster includes jurisdictions where the main decisions to tackle COVID-19 were made at the decentralized level, and they remained so for the entire duration or for substantial time during the pandemic.

This categorization is not rigid, as there are countries that adopted a mix of approaches by switching from centralization to decentralization or vice versa during the course of the COVID-19 crisis. In the following analysis, we highlight cases in which this mixed attitude occurred.

a. Cluster One: From (Initial) Centralization to (Different Extents of) Decentralization

A trend toward centralization at the beginning of the pandemic, which then reversed into different patterns and extents of

\(^{149}\) This Part does not address the Netherlands because, although on paper it is a federal system, its federal nature is more a formal label than an actual feature of its governmental system. At least at present, the Dutch system is defined as a “unitary decentralized state,” with regions that have less autonomy than regions of regional states. Likewise, this Part does not consider the Westminster system because its peculiarities make it hard to compare to regional and federal systems. See Frank Hendriks & Jurgen Goossens, The Netherlands, in EUROPEAN REGIONS, 1870-2020: A GEOGRAPHIC AND HISTORICAL INSIGHT INTO THE PROCESS OF EUROPEAN INTEGRATION 31, 34 (Jordi Martí-Henneberg ed., 2021); see also WILFRID SWENDEN, FEDERALISM AND REGIONALISM IN WESTERN EUROPE (2006).
decentralization, can be detected in three of the countries under analysis: Austria, Italy, and Spain. Among these countries, Austria is a federal system formally grounded in cooperation between the Federation and the states (the länder) according to an executive pattern. Although Italy and Spain are not usually classified as having full-fledged federal systems, they have very advanced forms of regionalism, which has prompted talk of federalizing momentum\textsuperscript{150} in Italy and quasi-federalism in Spain.\textsuperscript{151}

Beginning with Austria, the strong centralization in the first months of the COVID-19 pandemic was due to, among other things, the Constitution’s mention of public health as a competence of the Federation to be enforced by the länder, according to the executive pattern of Austrian federalism,\textsuperscript{152} meaning measures taken by the länder have to follow and implement the decisions of the federal Minister of Health, a pattern that Austrian scholars call indirect federal administration (the so-called executive pattern).\textsuperscript{153} As a consequence of this constitutional framework, the measures enacted, especially during the first wave and part of the second wave of the pandemic, were mostly decided at the central level by the federal Minister of Health and enforced at the länder level.

Some steps toward decentralization were taken in March 2021 when differentiated measures began to be adopted in several areas of the country. Specifically, Section 7 of the COVID-19 Measures Act allowed länder governors to take more restrictive measures than those imposed by the federal Executive if needed,\textsuperscript{154} but also

\textsuperscript{150} Franco Bassanini, Federalizing a Regionalised State: Constitutional Change in Italy, in CHANGING FEDERAL CONSTITUTIONS LESSONS FROM INTERNATIONAL COMPARISON (Arthur Benz & Felix Knüpling eds., 2012).


\textsuperscript{152} “Cooperative” federalism is usually defined as a model where central and sub-central authorities share competences in the same sphere and synergically work to implement them. In some cooperative federalisms, an “executive” component exists, as central bodies take a more active role in leadership, while sub-central entities “execute” tasks, retaining some discretion. See ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW 7 (2009).

\textsuperscript{153} BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl. No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl. I No. 2/2008, art. 16 (Austria).

prohibited them from adopting less restrictive measures, which otherwise occurred.\textsuperscript{155} In fact, in April 2021, Vorarlberg, a ländere in western Austria, reopened most of its facilities, while partial lockdowns were reinstated by the Federation due to an increase in the number of cases. However, these inconsistencies between the normative framework (with the Federation determining the minimum level of protection) and the actual practices (less restrictive measures) were generally not challenged in courts;\textsuperscript{156} indeed, they were quickly overcome. For instance, regarding decisions on vaccination policies, centralization resurfaced with the Compulsory Vaccination Act 2022, which was in force but never activated by the central government.\textsuperscript{157}

Ultimately, the Austrian approach to COVID-19 can be said to be particularly centralized at the beginning of the pandemic, although this did not strongly impact the functioning of Austrian federalism. Given the constitutional framework and the federal dynamic,\textsuperscript{158} Austrian authorities could hardly have acted in a different way, especially at the outbreak of the pandemic when the threat and appropriate measures to react were still largely unknown. Even when centralization was at its apex, no significant mechanism of substantive cooperation between the Federation and the länder was designed in Austria. This political choice—different from that taken by other federal countries, namely Germany—indicates that the Federation tried to push its powers beyond the usual dynamics of Austrian federalism.

Another element, potentially linked to the previous one, should be highlighted: although the länder generally implemented


\textsuperscript{156} The fact that these inconsistencies were not challenged was probably due to timing and the fact that they could be settled at the political levels by the Federation and the länder.

\textsuperscript{157} Based on this piece of legislation, mandatory vaccination is formally required, and it can be activated as long as a certain number of cases and certain pressures on ICUs occur in the country. See Lachmayer, supra note 105.

centrally-mandated measures, they did not seem to substantively agree on them, as evidenced by the resulting political clashes. For instance, in May 2020, while the Bundestag (the lower House) was discussing amendments to the Epidemics Act, the Bundesrat (the upper House, representing the länder) exercised strong opposition and tried to veto the measures. The veto was overridden by the absolute majority of the Bundestag, further proving the predominance of the Federation. Nevertheless, the fact that the Bundesrat exercised this veto power is politically noteworthy, as it reveals the disagreement of the länder and an attempt to delay the enactment of the new COVID-19 measures. Moreover, when some decentralization was enacted, it did not coincide with full cooperation. In other words, when the länder took greater leeway in deciding measures to be applied in their territories, they did not ground their action on agreements with the Federation, as happened, for instance, in Germany. Rather, they decided what they saw as more appropriate for their specific situations.

Therefore, the Austrian reaction to the pandemic was considerably polarized, both in its centralized and decentralized times.

Moving to Italy, the centralization of powers during the fight against COVID-19 seems to have invalidated the notion of the "federalizing momentum" attributed to it. At the beginning of the pandemic, centralization was the response to some early fragmented reactions that occurred during the first weeks of the COVID-19 pandemic. As a result, centralization predominated during the first wave. However, starting from the second wave, decree laws issued at the central level granted greater involvement to regions in determining measures. Unfortunately, this effort to share decisions between different government levels did not always work well.

The lack of success of the shared approach may depend on the complex criterion of the allocation of competences, especially those related to public health, in Italy. Article 117 of the Constitution guarantees the “determination of the basic level of civil and social rights to be guaranteed throughout the national territory” as an

---


160 For instance, during the first week of COVID-19, access to some territories of southern Italy was inhibited without any previous determination by the central state.
exclusive competence of the central state. There is no doubt that health can be considered a social right. Additionally, according to Article 117, “international prophylaxis” is also a central state competence. At the same time, the Constitution sets “the protection of health” as a shared competence—a policy area where the central state has to fix general principles and the regions can pass more detailed legislation. At the statutory level, Law No. 833/1978 allowed both the Minister of Health and the heads of regional executives to enact measures in cases of health crises. Lastly, Legislative Decree No. 1/2018, the piece of legislation that was the basis of the declaration of a state of emergency, vested the Council of Ministers, the heads of regional executives, and even the mayors of municipalities with powers to deal with health emergencies.

Against this complex background, when the central state began to react to COVID-19, some regions and municipalities adopted measures that were not always consistent with the central measures. To stem this situation as promptly as possible, Decree Law No. 6/2020 prescribed that any act of local levels of government, including municipalities, provinces, metropolitan cities, that contradicts central measures should be considered invalid. The issue was more difficult to settle with regions, since the tangled pieces of constitutional and statutory law mentioned above facilitated a tighter and unclear interrelation with the state authorities in deciding on emergency. Decree Law No. 19/2020 provided that before adopting new acts to deal with the pandemic, the President of the Council of Ministers had to consult with the heads of regional executives to involve the regions in a cooperation

161 Art. 117 para. 2(m) COSTITUZIONE [COST.] (It.).
162 Id. para. 2(q).
163 Id. para. 3.
Nevertheless, there were still cases in which the regions enacted divergent measures from those decided on based on the cooperation scheme. Emblematically, while Italy was in full lockdown, a law in the Valle d’Aosta region ordered certain businesses and restaurants to be reopened in the regional territory. The central government challenged the constitutionality of this regional law before the Constitutional Court, which declared the regional act invalid, holding that COVID-19 measures fall within the subject matter of “international prophylaxis” and are an exclusive competence of the central government, which leaves no room for regional authorities.

In summary, as a reaction to some initial fragmentation, Italy chose a centralized approach, albeit mitigated by some cooperative mechanisms. In theory, the cooperative mechanisms should have allowed better participation of regions, and so some indirect decentralization; however, they did not always work well in practice. The fact that the Constitutional Court intervened to strongly assert the leading role of the central state in the fight against the pandemic is a crucial element. On the one hand, this stance clarifies that, according to the constitutional judges, when an emergency is in place, centralization is to be preferred to decentralization. On the other hand, this stance contributes to the slowing down of the trend toward de facto federalism, which the drafters of the 2001 constitutional reform had in mind. Although this idea of reform was hindered by several factors since it was enacted long before the outbreak of the pandemic, the reaction to the COVID-19 pandemic confirmed once again that time has not yet come for a full “federalization” of Italy.

We now consider Spain. Among the three countries in this first group, Spain is situated on a “borderline” between centralization and decentralization, as the two nationwide regimes of alarm were characterized by very different approaches by the central state and the comunidades autónomas (the Spanish regions).

From a general viewpoint, notwithstanding its formal characterization as a regional state, Spain is commonly considered a quasi-federalism. The Spanish Constitution enumerates the

---

167 Decreto legge 19 maggio 2022, n. 52, G.U. 2022 n.119 (It.).
168 Corte Cost., 24 febbraio 2021, n. 37, Giur. it. 2021 n.11 (It.).
exclusive competences of the central state, lists other subject matters on which the comunidades autónomas can exercise their competence, and states that any other competence not mentioned by the Constitution and different from state-exclusive ones can be granted to the comunidades autónomas pursuant to their own estatutos. Thus, the comunidades have relevant chances of expanding their own competences. Moreover, different comunidades can have different numbers and degrees of competences (“differentiated” or “asymmetrical” regionalism).

In this scenario, the first declaration of the nationwide state of alarm and the following extensions was characterized by a relevant centralization of competences such that the Spanish institutional arrangements were “ignored.” All the measures during the first state of alarm were enforced by the central government without involving the comunidades, even when such measures touched upon their competences. Only at the end of the first COVID-19 wave, when it became possible to partially ease restrictive measures (the so-called desescalada), did the central government considerably involve the comunidades. In fact, the decree on the last extension of the first state of alarm provided that the Minister of Health had to consult the presidents of the comunidades autónomas during the process of desescalada. The presidents of the comunidades could decide whether to maintain or modify the measures of the state of alarm in their territories.

A shift of power from the central government to the comunidades based on the principle of cogobernanza (co-governance) became even more evident when a second nationwide state of alarm was declared in October 2020 to cope with the second wave of COVID-19. Cogobernanza means that once a state of alarm has been declared, the presidents of the comunidades are designated as “delegated authorities” to decide the measures to be applied in their territories. Consequently, restrictions on rights and freedoms were not uniform throughout Spain since the limitations were up to the comunidades. However, cogobernanza was declared unconstitutional by the

170 CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 311, art. 149, Dec. 29, 1978 (Spain).
172 Cebada Romero & Domínguez Redondo, supra note 151.
173 Real Decreto 555/2020 art. 4 (B.O.E. 2020, 159) (Spain).
174 Meanwhile, a non-nationwide state of alarm had previously been declared on October 9, 2020, only applying to Madrid and other territories that were more affected than the others by the pandemic.
Spanish Tribunal Constitucional in October 2021. The Tribunal held that *cogobernanza* created a constitutionally illegitimate separation between the declaration and potential extension of the state of alarm (decided at the central level) and the framing of concrete measures to apply (determined by the *comunidades*). Therefore, the constitutional judges held that the political check by the Congress of Deputies over the activity of the central government was reduced to a mere formality during the state of alarm. Given that the government does not substantively decide on the actions to be taken, Congress is not in a position to check its action. The Tribunal pointed out a short-circuit in the mechanism of political accountability.

While the Tribunal decided the issue of *cogobernanza*, the second state of alarm expired, and the transition to “normalcy” was left to the *comunidades*, thus contributing to further decentralization and, consequently, fragmentation. To put an end to this fragmented legal situation, the Spanish government partially restored centralization by adopting a royal decree law that allowed the Spanish Supreme Court (Tribunal Supremo) to hear appeals over the decisions of local courts on the authorization of restrictions, something controversial in terms of separation of powers.

In summary, the Spanish approach to the relationship between the central state and the *comunidades autónomas* during the pandemic can be described as a history of back and forth. At the beginning of the pandemic, centralization prevailed, with the Spanish government almost forgetting the very nature of Spanish “advanced” regionalism. The second state of alarm was characterized by an attempt to co-handle the pandemic, and so was the “back-to-normal” phase. Nevertheless, this co-managed approach was quashed by the Tribunal Constitucional. Meanwhile, some re-centralization was made necessary due to excessive fragmentation. This scenario questions the very identity of Spanish regionalism, which fluctuated during the COVID-19 pandemic. This situation may depend on a lack of clarity on how competences should be (re)allocated during emergencies in the Spanish

---

176 Id.
emergency framework.\textsuperscript{178} While it is clear that the Constitution allocates most health competences to comunidades in ordinary times, the situation is somewhat unclear in times of emergency, which is a pressing issue that should be considered in the future.

\textit{b. Cluster Two: COVID-19 as a Driver for Cooperation}

Countries in the second cluster are those where the majority of measures to counter COVID-19 were taken through a coordinated approach between different government levels from the beginning, or at least a very early stage, of the pandemic. Based on a decreasing degree of cooperation, we identify Germany, Belgium, and Switzerland, which adopt federal systems, as falling into this cluster. Germany is characterized by cooperative federalism and cooperation was very strong during the first and second waves. Belgium has dual (or competitive) federalism; although cooperation met some initial pushback, it was then resorted to throughout the country. In Switzerland, where, like in Germany, federalism is grounded in cooperation, the roles of the Confederation and Cantons varied based on the severity of the threat, but an underlying push toward cooperation (when possible) can be detected.

We begin our analysis with Germany, whose constitutional design (and practical functioning in ordinary times) is based on cooperative federalism, that is, a set of cooperation, negotiation, and consultation mechanisms among the Federation and the ländereven when a matter falls in the exclusive competence of the former. Pursuant to the constitutional framework, public health is a competence of the Federation only when infectious diseases need to be contained,\textsuperscript{179} while other health competences lie in the hands of the ländere. In exercising its competence in measures to contain infectious diseases, the federal Bundestag adopted the Law on Protection Against Infection in 2000. In March 2020, this piece of legislation was invoked to deal with the new virus.

The Law on Protection Against Infection vested the ländere with key powers. Nevertheless, during the COVID-19 pandemic, the Federation exercised a pivotal coordination role. From March 2020 to March 2021, then-federal Chancellor Angela Merkel held regular

\textsuperscript{178} C.E. art. 116, B.O.E n. 311, Dec. 29, 1978 (Spain); see also Ley Orgánica No. 4/1981 (B.O.E. 1981, 134) (Spain).

\textsuperscript{179} Grundgesetz [GG] [Basic Law], art. 74 § 1, para. 19 (Ger.).
meetings with Minister-Presidents of the länder to settle shared strategies embodied in informal agreements.\footnote{180} Although these agreements are not legally binding sources of law, they played a crucial role in decision-making.\footnote{181}

This pattern of cooperation worked well until April 2021, when some efforts toward centralization were detected. At that time, the number of COVID-19 cases was decreasing and there was a general trend toward lifting restrictions. Based on one of the many agreements adopted to deal with the pandemic, the Federation and the länder determined that the latter could decide how and to what extent to ease restrictions based on the COVID-19 infection rate in their territories. Nonetheless, some länder, under public pressure to return back to normal life, pushed ahead with re-opening beyond what they had agreed with the Federation. Consequently, in the more permissive länder, there was a worrying increase in the number of cases. To reverse this trend, the Federation stepped in with a bill that amended the Law on Protection Against Infection and introduced a procedure called a “federal emergency brake.” The bill became law at the end of April 2021.\footnote{182} The federal emergency brake was a mechanism through which the Federation could impose its mandatory measures without consulting the länder when certain infection numbers were exceeded in certain territories. The federal emergency brake was a short-lived measure and expired at the end of June 2021. The Federation, though, resorted to it several times in only two months.\footnote{183} Some measures imposed by the Federation pursuant to the federal emergency brake, including night curfew,
school closure, and restrictions on private gatherings, precipitated lawsuits filed by some länder before the federal Constitutional Court. This court upheld many measures, holding that they complied with the principle of proportionality, but it did not address the emergency brake itself in light of the relationship between the Federation and the länder, as this had not been a ground of complaint.184

Thus, we observe that Germany has applied very active cooperative schemes for more than one year. The introduction of the federal emergency brake marked a turn toward some centralization, yet for a limited time. Hence, the fight against COVID-19 demonstrated the strengths of German cooperation.

Shifting to the Belgian experience, Belgium is usually considered, at least on paper, a dual federalism—a system where the federal government and the federated entities work as separately as possible. According to some authors, the Constitution not only discourages cooperation but also tries to prevent it among different levels of government.185 This is because Belgium is a multinational, multilingual, and sometimes conflictual country, where cooperation, especially on some specific matters, could prove difficult.

However, if we consider the constitutional allocation of competences in the fields of social and health competences (specifically affected by the pandemic), we can observe significant fragmentation between the Federation and the communities and regions. For instance, the Federation has the exclusive competence to adopt general healthcare measures to prevent diseases, whereas communities have the power to enact ad hoc measures for single issues or those applicable in specific institutions, such as residential care centers.186 Furthermore, vaccine mandates can only be imposed by the Federation, whereas campaigns and vaccine supply are

185 Popelier et al., supra note 16.
186 1994 CONST. (Belg.) art. 35; see also Peter Bursens, Patricia Popelier & Petra Meier, Belgium’s Response to COVID-19, in FEDERALISM AND THE RESPONSE TO COVID-19: A COMPARATIVE ANALYSIS 39, 42 (Rupak Chattopadhyay, Felix Knüpling, Diana Chebenova, Phillip Gonzalez & Liam Whittington eds., 2022) (explaining that the Federation has competence in civil protection such as lockdown measures but the communities have competences in specific preventative measures such as track and trace procedures).
competences of the community. The Federation also has the power to restrict freedom of business and other economic freedoms, whereas the regions are empowered to take measures to mitigate the economic and financial effects of a crisis.\(^{187}\) This allocation of competences is partially in contrast with the idea of dual federalism since an unclear allocation of competences could make a dual approach particularly complex, and some cooperation between different levels of government could be required practically.

After some initial uncoordinated steps, the Belgian authorities engaged in several forms of cooperation under the lead of the Federation. Although there is no clear provision that either the Federation or the sub-federal entities are entitled to take the lead during a public health crisis, the Federation played a major role by, for example, mandating online education or movement restrictions. This approach impacted sub-federal competencies not by imposition but through cooperation schemes with communities and regions. Regions and communities were involved in the decision-making process—on the closure of schools, limitations on freedom of movement, and a set of other measures that the Federation deemed useful to tackle COVID-19—through various mechanisms. At first, the Wilmès Government resorted to the National Security Council, which includes representatives of the Federation, regions, and community, and was originally conceived as a body to generate counter-terrorism strategies.\(^ {188}\) During the pandemic, measures were debated by the National Security Council before adoption so that a certain level of agreement could be reached. In October 2020, when a new Government led by Alexander De Croo was sworn in, an Inter-Ministerial Conference on Public Health was established. The decision to set up this ad hoc body is relevant in political terms, as the previous choice to rely on a body designed to deal with terrorist threats might have implicitly conveyed the idea of an overlap between national security (a political emergency) and public health (a neutral emergency).

In the Belgian response to the pandemic, although the local levels (provinces and municipalities) played a role, they mainly

\(^{187}\) Bursens et al., supra note 186.

\(^{188}\) The National Security Council was set up in 2016, after the terrorist attack in Brussels. On the role of the National Security Council, see Patricia Popelier & Peter Bursens, Managing the COVID-19 Crisis in a Divided Belgian Federation, in COMPARATIVE FEDERALISM AND COVID-19: COMBATING THE PANDEMIC 88, 93 (Nico Steytler ed., 2022).
implemented measures decided by the Federation, regions, and communities.

To sum up, from a general perspective focused on the vertical dynamic of separation of powers, the pandemic contributed to mitigating the “dual” nature of Belgian federalism, if not pushed Belgian dual federalism toward a more cooperative system. This shift may have proved necessary in light of the lack of clarity in the Constitution about the competences of each entity. Undoubtedly, this cooperation is far from perfect; for example, some scholars reported that vaccination supply policies worked better in some regions and worse in others due to imperfect coordination.¹⁸⁹

To some extent, Swiss federalism can be compared to the German case, as both traditionally work within cooperative schemes. As highlighted in Part I, the fight against infectious diseases is a matter for the Confederation pursuant to the Swiss Constitution. Yet, in Switzerland, the competences of the Confederation can be freely regulated by the Cantons until the Confederation decides to step in.

Based on the Epidemics Act examined above, the strength of the powers of the Confederation and the Cantons depends on the intensity of the crisis. The severity of the threat is assessed at the federal level, specifically by the Federal Council. When the level of threat is “normal,” Cantons have a wide margin to handle the situation; when it is “particular,” the Confederation can exercise some specific powers provided by the Act after consulting with the Cantons; finally, when the threat is “extraordinary,” the Confederation can take all necessary measures, even interfering with cantonal competences.

On February 25, 2020, the pandemic was considered a “normal” threat, and the Cantons were free to take their own measures without specific interference from the Confederation. Only Ticino, which at that time was most impacted by the virus, enacted restrictions.¹⁹⁰ With the shift to the “particular” situation declared on February 28, 2020, the Confederation imposed limitations on gatherings of more than 1,000 persons, and some Cantons took even more restrictive measures, for example, by prohibiting gatherings with a smaller number of persons or shutting down some businesses and facilities.¹⁹¹ Therefore, at this stage, the Confederation fixed the

¹⁸⁹ See Popelier et al., supra note 16.
¹⁹⁰ See supra Part I.
¹⁹¹ Martenet, supra note 60, at 9-10.
basic level of restrictions and the Cantons were free to adapt them to their specific territorial situation. The outcome was a far more fragmented scenario.

On March 16, 2020, the crisis was deemed “extraordinary,” with the highest concentration of powers in the hands of the Confederation, and particularly the federal Executive. The Confederation adopted much more deterring strategies compared to those of the “normal” or “particular” level of threat, but some leeway was left to the Cantons to adapt such measures to their own situations. Moreover, the Cantons remained able, in theory, to intervene in areas not regulated by the Confederation. However, as scholars have noted, it was sometimes hard for Cantons to establish whether the Confederation was silent on certain matters because it had not regulated or because the Confederation wanted the Cantons to freely enact the most appropriate tools.\footnote{192} Courts generally upheld the enhancement of federal powers.\footnote{193}

As of May 27, 2020, the Federal Council, based on a reduction in the COVID-19 cases, decided that the situation was no longer “extraordinary” and that a step back to “particularity” was feasible. The “particular” situation lasted until January 2022, and it enabled the Cantons to regain significant competences. Meanwhile, the legislative procedure to enact the COVID-19 Act had begun. In this context, the Cantons were asked to be more engaged in framing COVID-19 strategies. This request was fulfilled since the COVID-19 Act required the Cantons to participate in the decision-making process when the Confederation regulated issues that fell within their area of competence in tackling COVID-19.\footnote{194}

This scenario shows that Swiss cooperative federalism had some setbacks during the COVID-19 pandemic partially due to the content of the Swiss Epidemics Act, which explicitly centralizes many competences in the hands of the Confederation.\footnote{195} Nonetheless, it would be incorrect to state that the Swiss response was not cooperative at all, especially after the enactment of the COVID-19 Act, which reinstated cooperation to the extent possible.

\footnote{192} Id.
\footnote{193} Bundesgericht [BGer] [Federal Supreme Court] Nov. 23, 2021, 2C_183/2021 (Switz.).
\footnote{194} See supra Part I.
\footnote{195} See id.
c. Cluster Three: Decentralized Approaches

The third cluster consists of countries where significant decentralization has been observed since the first wave of COVID-19. In Part I, we identified countries where executivization was more at the sub-federal level than at the federal level, and we provided some details on how intergovernmental relationships were framed during the COVID-19 outbreak. Here, we analyze the countries in the fourth cluster of Part I, focusing on the impact of the choice, or, in some cases, the need, to decentralize the traditional dynamics of federalism in each country.

The first country to be addressed is Australia. This is a “borderline” case in which measures were taken by states and territories but with the coordination efforts of federal authorities through the National Cabinet. This is a hybrid approach between coordination and high decentralization, and it changed many of the previous arrangements on the distribution of powers between the different levels of government compared to the traditional features of Australian federalism.

The Australian constitutional design has been conceived as dual federalism. However, as many scholars have remarked, the Commonwealth’s enumerated powers have significantly expanded in practice in the last century because of broad interpretations by the High Court of Australia. During the COVID-19 outbreak, a partially different trend was inaugurated with the National Cabinet, which had been preceded by less structured and more limited forms of intergovernmental cooperation, such as the Council of Australian Governments. The National Cabinet provided what scholars refer to as “loose coordination,” meaning that decisions were taken collegially and states and territories were free to implement them as they saw fit. The flexibility provided by the National Cabinet can be seen as an advantage because it recognizes states’ sovereignty and allows them to make the best decisions based on the levels of threat in their territories. Nonetheless, some commentators

196 See, e.g., Cheryl Saunders, A New Federalism?: The Role and Future of the National Cabinet, in GOVERNING DURING CRISES (Policy Brief No. 2, 2020).

197 See Bradley Selway & John M. Williams, The High Court and Australian Federalism, 35 PUBLIUS 467, 486 (2005).


199 See Fenna, supra note 120, at 21-22.
observed that this novel framework was weak, as it toned down the Federation and was a mere “menu” of possible measures among which states could freely choose without giving any account to the Commonwealth. Moving to the Canadian experience, we discussed in Part I that the role of federal power was considerably limited, whereas provinces and territories took the lead in tackling COVID-19. Unlike other countries, Canada did not react to the pandemic by centralization, since the Federation intervened only within the lines of its own competences, for example, by closing borders and managing budgetary issues.

The Canadian approach during the pandemic is not surprising, as Canada has always adopted a decentralized federal system. Even with respect to healthcare, a field where the constitutional framework is fragmented, courts traditionally tend to allocate this competence to the provinces rather than to the Federation. Furthermore, a cultural element should be taken into account, that is, Canadian provincial healthcare systems and related facilities are considered particularly high-performing; thus, if the Federation had stepped in vigorously—for instance, by invoking the Emergencies Act—in the matter of public health, the “sacrosanct” aspect of the Canadian political culture would have been disrupted. Ultimately, against this background, the Canadian response is not an unexpected one, and it did not have a considerable impact on the pattern of federalism that existed before the pandemic.

Lastly, the United States is a very peculiar case. In the first year of the pandemic, states (and specifically, governors) were the main actors who tackled the virus, with an almost-absent federal

---


government due to President Trump’s reluctance to consider COVID-19 a real threat.

Three observations deserve attention. First, in Australia and Canada, decentralization depended on specific choices and on preexisting features of the respective constitutional system. The situation was quite different in the United States. The proactivity of states in the United States and the inertia of the federal government mainly originated from President Trump’s claim that the virus did not exist or that, at least, it was not a threat. It is true that there is no explicit constitutional allocation of federal powers on public health; nevertheless, the federal government can intervene when a public health crisis cannot be handled by states alone. This is even clearer when Trump refrained from exercising all the powers he could have when he resorted to some federal pieces of emergency legislation. Failure to request additional waivers from Medicare and Medicaid, as well as refusal to supply masks and respirators to states in need, are some examples. Consequently, governors found themselves at the forefront of addressing these needs.

Second, states resorted to specific coordination and cooperation mechanisms among themselves as a result of the inactivity of the federal government. For instance, the governors of California, Connecticut, Delaware, New Jersey, Pennsylvania, and Rhode Island concluded agreements to collaboratively request medical supplies to benefit from lower prices and reciprocally help one another by pooling their resources. Considering the United States’ dual federalism, this horizontal cooperation is uncommon. It is true that, especially in some historical periods and policy areas, United States’ federalism evolved toward cooperative patterns. Yet even in these cases, cooperation was mainly vertical. As with COVID-19, vertical cooperation was made almost impossible by President Trump’s stance, leading to the emergence of horizontal trends. At least during the first year of the pandemic, United States’ federalism can be considered the system that underwent the most changes.

Third, when the Trump administration ended and Joseph Biden became President, the United States federalism dynamic reorganized according to an overall cooperative model, with the federal government addressing main issues such as vaccination campaigns, testing, work conditions, and the states implementing and customizing these measures.

In summary, the atypical trend followed by United States’ federalism during the first year of the pandemic went hand-in-hand
with the atypical features of its then-President, Donald Trump, and his populist politics.\textsuperscript{204}

d. Some Observations

Some interesting trends can be identified from the vertical dimension of the principle of separation of powers. First, we consider countries in the first cluster, where initial centralization was followed by different forms and extents of decentralization during several waves of the pandemic. In times of emergency, similar to the enhancement of the executive from the perspective of the relationship among powers, from the viewpoint of dynamics among different government levels, some concentration of powers in the hands of central bodies is usually expected. However, the nature of the COVID-19 crisis could have required differentiated approaches in dealing with rising infection and death rates in different territories. Thus, decentralization might have been a better way to deal with this specific crisis. Among other factors, the patchwork incidence of the virus explains the attitude of these countries, with centralization followed by decentralization and vice versa (as in Spain). In particular, the rationale behind this approach in Spain was more political than strategic. Specifically, central authorities may have preferred to leave most decisional powers in the hands of the comunidades (cogobernanza) to avoid dealing with discontent due to the restrictive measures needed to contain the spread of the virus. This flexibility of emergency powers may have easily brought serious issues of fragmented responses and, consequently, uncertainties among citizens. If the central authorities had retained a well-balanced coordinating role rather than delegating anti-pandemic measures to the comunidades, these issues could have been significantly mitigated.

Italy and Austria initially based their response on centralization but then introduced some elements of decentralization that, more than full-fledged cooperation, caused fragmentation and (especially in Italy) flaws in the response to the pandemic. The lesson learned from these cases is that decentralization without coordination implies a risk of fragmentation, since fragmented measures that are not always reasonable—or, at least, not perceived as such by citizens—can undermine the principle of legal certainty. To avoid

\textsuperscript{204} PATRONO & VEDASCHI, supra note 139.
this risk, decentralization should always be matched by actual cooperation among the government levels, or at least by some leadership by the central powers.

This assumption is further demonstrated by the findings in the second cluster, which comprised countries that adopted an overall cooperative approach. For instance, although some steps were taken toward centralization in specific circumstances, like the “federal emergency brake” mechanism, the German approach to COVID-19 was mainly based on cooperation between the different government levels, which is consistent with the traditional cooperative system of German federalism.

The case of Switzerland is not surprising in light of its traditionally cooperative nature, as well. Although some relevantly centralized measures were taken at the beginning of the pandemic, the greater role of cantons was reestablished as soon as the situation permitted, making its response consistent with the usual approach of Swiss federalism.

The Belgian experience followed more unusual patterns compared to the traditional Belgian federal dynamic. In Belgium, a dual federalism system, some pushes toward cooperation appeared during the pandemic. This is undoubtedly an element of mitigation of the classical dual paradigm of Belgium; nonetheless, this path had already been initiated during other crises where cooperative schemes were established, such as counterterrorism measures, and then accelerated by the pandemic.

These three experiences show that the cooperative model was frequently adopted during the pandemic, probably as the most appropriate choice. In fact, traditionally cooperative systems kept this approach, such as Germany, Switzerland, and even Belgium, where cooperation is very uncommon, introduced some elements to mitigate its dual nature.

The cooperation lesson is confirmed by findings from cluster three, which encompassed countries whose reactions to COVID-19 were mainly decentralized. The three jurisdictions in this cluster (Australia, Canada, and the United States) relied on decentralization for very different reasons. The Australian paradigm, a hybrid model between cooperation and decentralization, was due to specific political choices which may have brought some changes to the traditional view of Australia as a dual federalism. Again, this demonstrates that dual logics were not considered appropriate during the pandemic and were frequently pushed toward more cooperative attitudes.
Differently, in Canada, strong decentralization mostly depended on a combination of constitutional, legislative, and judicial frameworks, and on some cultural elements, for example, the health system is considered very functioning and “a matter of provinces” with which the Federation should not interfere. Therefore, the Canadian approach cannot be considered unexpected.

The most peculiar case was the United States. In the United States, strong decentralization and exceptional horizontal coordination with agreements among states were the consequence of a very peculiar political situation due to then-President Donald Trump assuming a negationist stance toward COVID-19. In effect, after Trump’s term ended and President Biden took office, the federal government stepped in regarding COVID-19 vaccines and other policies. Therefore, the change here seems temporary and based on specific political contingencies during that period.

III. COVID-19 AND CONSTITUTIONAL REVIEW

In this Part, we examine the extent to which COVID-19 measures were reviewable by constitutional courts or by other constitutional review bodies, and thereby measuring compliance of an act with the Constitution or with other “higher law” norms or fundamental principles and declaring the act invalid or not applicable in case of non-compliance. We do not intend to give a detailed assessment of how courts decided on anti-pandemic measures—whether they paid excessive deference to the executive, how they applied the principle of proportionality, etc.—although some reference to the merits of some rulings is essential in developing this analysis. Rather, our primary aim is to highlight the extent to which it was possible to challenge the constitutionality of measures taken to deal with COVID-19 from a procedural perspective. Ultimately, we evaluate the degree of access to constitutional adjudication bodies during the pandemic.

From a theoretical perspective, assessing whether an act is compliant with the constitutional framework is a key aspect of advanced democracies, especially when the limitations of individual rights and personal freedoms come into play. Although there are several models of constitutional review and methods for assessing the constitutionality of acts in the comparative scenario, constitutional review is a common trait of all mature democracies,
regardless of significant differences based on the idea of the supremacy of the Constitution or of some form of higher law.  

Once again, we identify clusters of the constitutional reviewability of anti-COVID-19 measures by bodies that assess the compliance of acts of public power with the Constitution. In the first cluster, we analyze cases in which constitutional adjudication bodies were faced with issues that delayed or totally prevented them from ruling. The second cluster encompasses jurisdictions in which mechanisms for checking the compatibility of norms with hierarchically superior provisions performed well in terms of the time and scope of scrutiny. Stating that some courts “performed well” does not necessarily mean that they made balanced, appropriate, or fair decisions, but that they had the chance to review COVID-19 measures in a timely manner. In the third cluster, we consider countries where, in addition to, or even instead of, “traditional” actors assessing the constitutionality of norms (namely supreme or constitutional courts), other bodies assessed whether constitutional provisions were respected by acts adopted by public authorities to tackle COVID-19.

a. Cluster One: Non-Performing or Belated Constitutional Review

In some of the case studies, acts taken by executives were hardly reviewable by courts exercising constitutional jurisdiction, or, at least, their decisions were not timely, but issued well after the enactment of the anti-COVID-19 measures. In this respect, the Italian case is paradigmatic. The Italian Constitutional Court could not review early COVID-19 measures that restricted basic freedoms, such as freedom of movement and religious freedom, because most of these measures were approved through DPCMs. As these decrees are not primary sources of law, they are excluded from constitutional review under the Italian Constitution. Moreover, the Italian system does not provide citizens with the possibility of


206 Art. 134 § 1 COSTITUZIONE [COST.] (It.).
bringing individual constitutional complaints, which is possible in other European jurisdictions, such as Germany and Spain.

In this context, the first ruling of the Italian Constitutional Court that addressed the handling of the pandemic by state authorities and, even though indirectly, the mechanism of DPCMs, was issued in September 2021. The Court was called upon to rule on the constitutionality of two decree laws that deferred the enactment of restrictive measures to DPCMs. Among the grounds of complaint, issues concerning the excessively broad “delegation” made by the decree law in favor of the President of the Council of Ministers, as well as non-compliance with the principle of legality, were raised. Yet, the Constitutional Court, in a highly debated judgment, did not find any violation of the Italian Constitution, but held that the DPCMs only implemented what had been required by decree laws. Moreover, in February 2021, the Court decided an application filed by the Italian state against a Valle d’Aosta law pursuant to which some businesses that were shut down based on state law could re-open. While the latter is a landmark judgment from the perspective of the state-region relationship in times of emergency, it still did not address the DPCM mechanism, which is one of the most controversial aspects of the legal reaction to the pandemic in Italy.

Similarly in Belgium, the Cour Constitutionnelle is not vested with the power to rule on the constitutionality of the many decrees issued by the Executive in tackling the pandemic. The Belgian Constitutional Court did issue some rulings on COVID-19 measures, but they were limited to aspects such as the reorganization of nursing activities and the digitalization of judicial hearings adopted in regional provisions. Regarding the decrees of the central Executive, which set the main substantive rules on the

---

207 Corte Cost., 23 settembre 2021, n. 198, Giur. it. 2021, n. 43 (It.).
208 Before this ruling, the Court had issued a few decisions on anti-COVID-19 measures but without addressing the use of DPCMs and focusing on procedural issues related to court hearings during the pandemic. See Corte Cost., 18 novembre 2020, n. 278, Giur. it. 2020, n. 53 (It.) (addressing the suspension of statute of limitation in criminal proceedings due to the COVID-19 emergency); see also Corte Cost., 15 aprile 2021, n. 96, Giur. it. 2021, n. 19 (It.) (adjudicating issues related to remote hearings in ordinary courts).
209 In particular, the central state is represented, in this type of proceedings, by the President of the Council of Ministers, who can file the complaint against a law of one region after a deliberation of the whole Council of Ministers.
210 Corte Cost. 24 febbraio 2021, n. 37, Giur. it. 2021, n.11 (It.).
211 See Popelier et al., supra note 16.
handling of the virus, only administrative courts exercised their jurisdiction over them, as in Italy. In fact, both Italian and Belgian administrative courts (including the Councils of State of the two countries) issued several rulings on COVID-19 measures, generally showing deference to executive power and refraining from invalidating acts.\(^\text{212}\)

A comparable occurrence happened in France, where the many decrees of the Executive could not be reviewed either ex ante or ex post by the French Constitutional Council (Conseil Constitutionnel); thus, only administrative courts could make decisions on their legitimacy. Nonetheless, the French case is peculiar since the Council of State took de facto control through some specific tools available in French administrative procedures, and, to some extent, counterbalanced the lack of a meaningful constitutional review. Consequently, the French experience is better placed in cluster three and will be analyzed in that context.

Switzerland is among the countries which faced issues checking the executive branch’s acts. It should be noted that the Swiss case is partially different from the Italian and Belgian cases in terms of constitutional review. In Switzerland, there is no specific court mandated with constitutional review; rather, the Federal Tribunal, which is the highest federal judicial authority, performs this function according to unique rules.\(^\text{213}\) Moreover, emergency ordinances of the Federal Council cannot be challenged directly before the Federal Tribunal, but only when a concrete case arises in lower courts, which is then appealable to the Federal Tribunal. These challenges were rare during COVID-19 and, in the few cases on which it ruled, the Federal Tribunal generally upheld the measures.\(^\text{214}\)

Against this background, two aspects need to be highlighted. First, it is true that even in cases where constitutional review was met with technical hurdles, administrative courts could always exercise their jurisdiction and review the acts of the Executive. While

\(^{212}\) There were, though, a few exceptions. See, e.g., C.E. [Council of State] (General Assembly), Oct. 30, 2020, n°248.819.


\(^{214}\) See, e.g., Tribunale fédérale [TF] Dec. 22, 2020, 1C_169/2020 (Switz.).
this is not constitutional review, at least some form of scrutiny of the Executive is guaranteed as long as these courts do not pay excessive deference to the Executive. However, independent of how well or poorly administrative courts performed during the pandemic, the exclusion of constitutional courts from having a say on acts limiting individual rights and personal freedoms itself leads to serious concerns. In fact, preventing measures that greatly impact rights and freedoms from being the object of constitutional review results in the denial of the very meaning of constitutional jurisdiction in advanced democracies. The twentieth century was characterized by increasing reliance on constitutional adjudication bodies, as well as by the relevant enhancement of their functions. This is because constitutional adjudication bodies are considered guardians of democracy and they assess whether public powers are exercised within their limits, especially when they act to restrict rights and freedoms, above all, in emergency times. When these bodies cannot perform their functions on key acts that limit rights during a crisis, such as the COVID-19 pandemic, the foundations of democracy become unstable. Second, some constitutional courts—that were outsiders in the review of anti-pandemic acts lack, due to constitutional rules, competence to adjudicate non-primary sources of law and hear individual complaints. This is a crucial element for the remainder of our analysis, as some of the “successful” courts in this context are endowed with both these possibilities.

b. Cluster Two: Performing Constitutional Review, Different Patterns

Cluster two encompasses countries in which the courts performing constitutional review managed to rule on the measures enacted to cope with the pandemic in an effective and/or timely manner. As anticipated, the fact that courts could review the measures does not necessarily mean that they took well-balanced approaches and carefully weighed public health over other rights and freedoms. Nevertheless, the chance of having COVID-19

---

215 Vedaschi, supra note 148.
measures reviewed by a constitutional adjudication body is a first step toward preserving basic democratic standards in times of emergency.

This cluster can be further divided into two sub-clusters. Sub-cluster one includes the constitutional adjudication bodies of some civil law jurisdictions (Austria, Germany, and Spain) that perform better owing to technical elements, such as individual complaints, expedited procedures, preliminary injunctions, or review of non-primary acts—or a combination thereof. Sub-cluster two comprises countries where a quicker review of COVID-19 tools was enabled by the features of the legal system. Most of them are common law countries; in fact, in these systems, the compliance of any norm or act of public power—indeed independent of whether it is a primary or lower source and regardless of the body that adopted it—can be reviewed by any court (decentralized review). Thus, supreme courts or their analogues have the last say on constitutional issues if the cases reach them. In this sub-cluster, we have also placed Israel, which, despite it not being a pure common law system, has a supreme court that works based on similar patterns to those of common law countries.

i. Sub-Cluster One

Austria, Germany, and Spain are three countries where constitutional adjudication bodies performed relatively well in terms of reviewing COVID-19 measures. In these countries, individuals are allowed to file complaints with constitutional adjudication bodies. In Austria, the Constitutional Court was involved early, although, in some cases, its decisions took a number of weeks to be issued and published. The achievements of the Austrian Constitutional Court are mainly due to the fact that if a natural or legal person alleges that a statute or ordinance affects them immediately, they can file a constitutional complaint directly. 217 This often happened during the pandemic, with individual complaints starting to be brought in March 2020. These applications alleged a broad range of rights violations, from freedom to conduct business, to personal freedoms, to political

rights, and so on. In most cases, the Austrian Constitutional Court upheld COVID-19 measures, stating that they complied with the principle of proportionality in the limitation of rights, but there have also been judgments that quashed some provisions due to violations of principles such as equality and reasonableness.

Although the Austrian Constitutional Court performed well in terms of reviewing COVID-19 measures, some scholars claimed that the decisions of the Court—especially those invalidating provisions—often arrived too late to be useful, such as when the act at issue had already expired. This is due to the length of procedures before the Austrian Constitutional Court and the Court choosing not to use fast-track procedures available by its rules that would have expedited the process. Timing is definitely an issue, and it would have been better if the Austrian Constitutional Court had timely made its decisions to guarantee the effectiveness of its review. Nonetheless, these rulings played an important role as they highlighted issues of COVID-19 measures, giving public authorities the chance to remedy these flaws.

In Germany, the Federal Constitutional Tribunal issued many rulings on the legal reactions to COVID-19 taken by both the Federation and the länder. During the first months of the pandemic, this was made possible because, in Germany, constitutional complaints can be lodged by any natural or legal person claiming that their fundamental rights have been violated. At the same time, the German Constitutional Court can grant preliminary injunctions, that is, suspend challenged measures when it has been demonstrated that they might bring significant harm in the immediate future. The combination of these two technical features of the German system allowed the federal Constitutional Court to hear a number of cases between March 2020 and August 2020, all related to the issuance of measures by the länder for various alleged violations, from personal freedom, to freedom of worship, to

---

218 See, e.g., Verfassungsgerichtshof [VfGH] [Constitutional Court], July 14, 2020, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VfSG] No. 202/2020 (Austria).

219 See, e.g., Verfassungsgerichtshof [VfGH] [Constitutional Court], July 14, 2020, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VfSG] No. 363/2020 (Austria).


221 See Lachmayer, supra note 105.
economic freedoms, and many others. The Court’s approach varied based on different practical situations. The Court was more deferential to political power when the rate of COVID-19 spread was higher, and showed less deference when it was lower.\footnote{Compare BVerfG, 1 BvR 755/20, Apr. 7, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/rk20200407_1bvr075520.html [https://perma.cc/3PAH-CJXZ], and BVerfG, 1 BvQ 29/20, Apr. 9, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200409_1bvq002920.html [https://perma.cc/7LSF-D7ZW] (more deferential), with BVerfG, 1 BvQ 37/20, Apr. 17, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200417_1bvq003720.html [https://perma.cc/Q8DC-CYCM], and BVerfG, 1 BvQ 44/20, Apr. 29, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429_1bvq004420.html [https://perma.cc/4D74-F4QX] (less deferential).} In the last months of 2020 and throughout 2021, the Court began to hear cases brought through further proceedings, different from individual complaints. For instance, when the emergency brake was enacted, complaints against federal measures were filed by some länder against the Federation, giving rise to a so-called “principal proceeding,” permitting the länder to challenge the constitutionality of federal legislation, and vice versa.

Therefore, the German Constitutional Court was one of the most active courts during the COVID-19 pandemic. Independent of the merits of its judgments, an active constitutional adjudication body is an essential element to indicate that public powers (especially executives) are not left unbound, even in an emergency.

Shifting to Spain, the Constitutional Tribunal was also provided with the tools to have a voice in pandemic measures. In this case, the possibility of challenging the COVID-19 legal reaction was mainly due to two factors. First, individual complaints (recurso de amparo) are allowed in Spain, although this tool was mainly used at the very beginning of the pandemic, with decreasing use in the following months.\footnote{C.E. art. 53 § 2, B.O.E. n. 311, Dec. 29, 1978 (Spain).} Second, the decrees issued by the government to declare the state of alarm are considered primary sources and could be reviewed by the Constitutional Tribunal through a procedure called recurso de inconstitucionalidad.

Spanish constitutional case law on COVID-19 measures includes crucial decisions, though they are few in number. The first ruling issued by the Spanish Constitutional Tribunal followed individual complaints filed by members of a Spanish trade union during the
first wave of the pandemic. They challenged the prohibition, set by the local authority of a Galician town, on gatherings in public places, which resulted in the ban on demonstrations that had been organized to celebrate Labor Day on May 1, 2020. The Tribunal upheld the prohibition, holding that although the organizers had provided for a set of precautions to prevent the spread of the virus (the demonstrations had to take place by car, with just one person per car wearing masks and gloves), it was impossible to ensure their enforcement. Moreover, the demonstrations could have blocked the streets and prevented access to hospitals, which is crucial during a pandemic.\textsuperscript{224}

Another important decision by the Spanish Constitutional Tribunal, also in response to an \textit{amparo}, this time filed by a group of politicians, dealt with the brief suspension of the activity of the Congress of Deputies during the very first weeks of the pandemic before the use of electronic voting. Although the suspension was short, the Constitutional Tribunal declared it illegitimate because it infringed upon the principle of political accountability of the Executive before Parliament.\textsuperscript{225}

Subsequently, the Tribunal issued two important decisions on the two declarations of the state of alarm in July 2021 and October 2021, where it found both declarations illegitimate.\textsuperscript{226} These decisions did not follow a \textit{recurso de amparo}, but a \textit{recurso de inconstitucionalidad} against the two decrees declaring the state of alarm. The decree on the first state of alarm was declared invalid, holding that it was the “wrong” regime to be invoked and that a state of exception would have been appropriate, as governmental measures amounted to full-fledged suspension and not a mere limitation of some rights and freedoms.\textsuperscript{227} Moreover, the decree on the second state of alarm was declared partially illegitimate.\textsuperscript{228} Some measures, such as curfews, were not invalidated, as they were deemed to constitute limitations, and not suspensions, of rights, meaning the correct regime had been invoked in this case. However, other aspects were quashed, such as the long duration of the second state of alarm (six months) and the delegation of the decision on how

\textsuperscript{224} T.C., Apr. 30, 2020, No. Auto 40/2020 (Spain).
\textsuperscript{225} T.C., Oct. 5, 2021 (B.O.E. No. 168, p. 138530) (Spain).
\textsuperscript{226} T.C., Oct. 27, 2021 (B.O.E., No. 183, p. 145362) (Spain); T.C., July 14, 2021 (B.O.E., No. 148, p. 93561) (Spain).
\textsuperscript{227} T.C., Oct. 27, 2021 (B.O.E., No. 183, p. 145362) (Spain).
\textsuperscript{228} T.C., July 14, 2021 (B.O.E., No. 148, p. 93561) (Spain).
to frame anti-pandemic measures in the territory to the Presidents of the comunidades.\textsuperscript{229}

Compared to the number of decisions taken by the German Constitutional Court, the Spanish Constitutional Tribunal did not make a wide range of rulings on legal reactions to COVID-19, yet existing judgments addressed key aspects of the pandemic, including the choice of the emergency regime to be invoked, political participation during the pandemic, and restrictions on freedom of assembly. Regardless of whether one agrees with the merits of the rulings—the two decisions on the state of alarm were highly criticized by some scholars\textsuperscript{230}—it should be recognized that the Spanish system was endowed with significant tools to ensure constitutional review of acts that were issued to tackle COVID-19.

\textit{ii. Sub-Cluster Two}

This sub-cluster includes common law jurisdictions, and Israel, where, at least from a formal point of view, the possibility of checking anti-pandemic measures was less burdensome than in other systems. In common law countries, although there are no courts specifically mandated with constitutional review, all courts can rule that any act of public power does not comply with the constitution or with fundamental principles.

In the United States and Canada, the number of challenges to anti-pandemic measures was particularly high. Among the selected countries, the United States had the highest number of complaints against COVID-19 measures filed, heard, and adjudicated. From a general perspective, U.S. courts play a vital role in the system of checks and balances. They may declare the legislation or acts of the Executive unconstitutional under both federal and state constitutions, and assess whether executive action is consistent with legislative authorization. During the COVID-19 crisis, cases were heard by both state and federal courts; thus, almost all the orders of

\textsuperscript{229} \textit{Id.}

the governors of each state were reviewed by a court. A few cases even reached the U.S. Supreme Court, which took divergent approaches over time. During the first months of the pandemic, the Supreme Court tended to uphold governors’ orders imposing the closure of businesses, schools, churches, and other places of worship. In this regard, the South Bay v. Newsom case,\(^{231}\) decided in May 2020, is significant, as the justices upheld restrictions imposed by the governor of California. Starting in November 2020, when the balance of justices in the Supreme Court had changed, with Amy Coney Barrett replacing the late Ruth Bader Ginsburg, the Supreme Court modified its approach and invalidated a number of orders taken by governors to guarantee public health by limiting other individual rights and freedoms. Judgments in Roman Catholic Diocese of Brooklyn v. New York\(^{232}\) and Tandon v. Newsom\(^{233}\) are indicative of this new stance.

Furthermore, in Canada there have been a large number of cases, especially before supreme courts of provinces, almost all of which embrace a deferential attitude and highlight that public health is a sensitive issue better left in the hands of elected officials. In other words, they held that the courts could quash measures only when they were manifestly irrational.\(^{234}\) Some applications were filed against federal measures—in particular, the quarantine requirements imposed on returning international air travelers enacted under the Quarantine Act. The Supreme Court, in Spencer v. Canada, joined the applications and upheld quarantine orders, maintaining that they complied with the principle of proportionality since no alternative was available to the federal government to protect citizens from the spread of COVID-19.\(^{235}\)

Australian and New Zealand courts played instead a more limited role in terms of the number of cases. In Australia, the cases decided were of crucial importance, although the responses of the courts were different. Three cases were particularly important and reached state or federal supreme courts. The first case was brought to the High Court (the highest federal judicial authority in Australia) by an individual who challenged interstate border closure on the grounds that it violated the constitutional provision protecting

\(^{231}\) S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).


\(^{234}\) See, e.g., Taylor v. Newfoundland and Labrador, 2020 NLSC 125 [2020].

\(^{235}\) Spencer v. Canada, [2021] F.C. 361 (Can.).
interstate commerce and relations.\textsuperscript{236} The High Court dismissed the claim on November 6, 2020, holding that public health needs during an emergency outweigh freedom of interstate commerce and business, even though the latter is protected by the Constitution.\textsuperscript{237} The second and third cases both regarded measures applied by the government of Victoria. One of the challenges was the limitation of the movement of individuals to twenty-five kilometers from their home, and the other challenge involved the curfew applied in August 2020. In both cases, the Supreme Court of Victoria held that the text and structure of the Australian Constitution did not frame personal freedom or freedom of movement as absolute rights and, consequently, the outbreak of an unprecedented health emergency may allow the government to restrict them.\textsuperscript{238} The proportionality of the restrictions was not thoroughly reviewed in these two judgments.

Similarly, in New Zealand, the possibility of reviewing the acts of the Executive existed in theory, but the role of courts was marginal in practice. A few issues were decided by lower courts,\textsuperscript{239} and only one major challenge was heard by the High Court. This challenge was \textit{Borrowdale v. Director General}, where the High Court upheld the legitimacy of measures taken by the Executive, rejecting the claim that they lacked a legal basis.\textsuperscript{240} Commentators highlighted that this lack of resort to courts, in spite of the existing review mechanism, is a sign of New Zealand’s constitutional culture, characterized by citizens having a high degree of trust in public authority and by the idea that governmental policies should be contested through political rather than judicial tools.\textsuperscript{241}

A similar trend appeared in the United Kingdom and Ireland. The United Kingdom’s judicial review is, in theory, a powerful mechanism since any individual can challenge any act of public powers (even mere practices) before a competent court. The most

\textsuperscript{236} \textit{Palmer v. Western Australia} (2021) 95 ALJR 868 (Austl.); \textit{Australian Constitution} s 92.

\textsuperscript{237} \textit{Id.}


\textsuperscript{240} \textit{Borrowdale v. Director-General of Health} [2020] NZHC 2090 (N.Z.).

important judgment of the United Kingdom courts on legal measures regarding COVID-19 was Dolan v. Secretary of State for Health and Social Care. In this case, the High Court and Court of Appeal (whose decisions were handed down in July 2020 and November 2020, respectively) focused on the compliance of lockdown regimes with human rights under the Human Rights Act 1998, and on its statutory basis. Both judgments were a win for the government, which may have discouraged further challenges against anti-pandemic provisions in the United Kingdom.

In Ireland, although many courts ruled on ancillary aspects of the pandemic, such as the handling of care facilities, and the possibility of accepting visitors, the judicial review of major lockdown and quarantine measures was sought in a couple of cases. Nevertheless, all these cases were rejected by the first-instance court on procedural grounds—the applicants did not have standing or the case had become moot.

This analysis proves that the United Kingdom and Ireland are two significant examples of cases where conditions are ideal for judicial review to be powerful and functioning. Nonetheless, a different outcome was revealed, at least during the COVID-19 crisis.

The Israeli experience deserves separate analysis for several reasons. First, Israel does not practice a purely common law system, but incorporates some facets of civil law. Second, its constitutional review system is idiosyncratic; only in 1995, with the United Mizrahi Bank decision, did the Israeli Supreme Court declare its power to review both primary legislation and executive action in light of the Basic Laws. Constitutional challenges can be brought to the Supreme Court either following the ordinary judiciary path with appellate review or independently of any proceeding with the Supreme Court sitting in the first instance as the High Court of Justice. In the latter case, any individual can bring a constitutional case to the Supreme Court. During the pandemic, the ability of the Supreme Court to sit as the High Court of Justice was not limited.

242 Dolan v. Sec’y State for Health & Social Care [2020] EWHC 1786 (Admin) (U.K.); Dolan v. Sec’y State for Health & Social Care [2021] 1 WLR 2326 (EWCA (Civ)) (U.K.). The Supreme Court declined to hear the case.


244 Doherty v. Minister for Health [2020] IECH 209 (H. Ct.) (Ir.).


due to the spread of the virus, whereas its ability as a court of appeal was restricted to urgent matters for the first weeks of the pandemic. Hence, the Israeli Supreme Court continued constitutional review in an effective manner. Throughout the first year of the pandemic, the Court issued a number of decisions that, more than specifically intervening on the balance between public health and other rights and freedoms, dealt with procedural safeguards and governmental accountability before the Knesset. Since the beginning of 2021, the Court began to focus on substantive grounds, striking down some COVID-19 measures, for example, related to surveillance. Therefore, Israel can be seen as a successful model from the perspective of access to constitutional review, and the role of the Supreme Court was crucial in remedying flaws of initial COVID-19 measures.

c. Cluster Three: Alternatives to Constitutional Review

The third cluster encompasses countries where, despite the lack of a strong constitutional review, COVID-19 measures were scrutinized in a timely and effective manner by bodies other than constitutional adjudication bodies. Such “alternative” bodies can be other courts (as in the French and Dutch cases), the Council of State and ordinary or administrative courts, parliamentary committees, or offices of the ombudsman (as in Denmark and Finland).

Starting from the French case, the Constitutional Council is not empowered to rule on acts of executive power, either ex ante or ex post. Instead, ex ante and ex post rulings are allowed on primary sources of law. However, because there were few primary sources to address the pandemic, review was only exercised a few times by the Conseil Constitutionnel, and usually in a deferential way. Consequently, the main acts containing substantive provisions for

---


248 HCJ 6939/20 Idan Mercaz Dimona Ltd. v. Government (2021) (Isr.).

249 See generally Conseil constitutionnel [CC] [Constitutional Court] decision No. 2020-800 DC, May 11, 2020 (Fr.) (decision issued by the Constitutional Court ex ante); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2020-846/847/848 QFC, June 26, 2020 (Fr.) (decision issued by the Constitutional Court ex post).
tackling COVID-19 (measures taken by the Executive) did not undergo scrutiny by the Constitutional Council. Nevertheless, administrative courts, especially the Council of State (Conseil d’État), can be said to have served as a constitutional adjudication body in scrutinizing emergency measures. Prompt review was made possible because of a specific proceeding, called référé-liberté, under French administrative procedures. Référé liberté permits individuals, associations, and legal entities to file a complaint alleging that an act of a central or local executive authority brings a serious violation of one or more of their “fundamental freedoms.”

The competent courts of the first instance are the Council of State for the acts of the central Executive and local administrative tribunals for the acts of local authorities. In these latter cases, the Council of State has appellate jurisdiction. The competent court is bound to rule on the case within forty-eight hours of the complaint. This mechanism was effective during the pandemic, and both local courts and the Council of State issued weekly decisions on the management of the pandemic by political authorities. In general, they took a balanced approach, not limiting themselves to a mere scrutiny of reasonableness, but thoroughly assessing each measure and its proportionality. In summary, administrative courts ensured unexpected and prompt scrutiny through the référé available under French law, partially mitigating both the weaknesses of constitutional review and the prevalence of executive authority over the Legislature.

In the Netherlands, ordinary and administrative courts also played important roles. This is because the Dutch system is unusual as far as constitutional review is concerned. Ordinary courts can review the lawfulness of all regulations and award compensation to individuals, and administrative courts can review administrative decisions without checking the constitutionality of the regulations’ legal basis. But Article 120 of the Dutch Constitution explicitly prohibits courts from reviewing the constitutionality of laws. Therefore, the situation is reversed compared to other country case studies we have examined so far. In the Netherlands, whereas the


251 Id.

252 Just to give some examples: Conseil d’État [Council of State], order nos. 440846, 440856, 441015, June 13, 2020; Conseil d’État [Council of State], order nos. 440566, 440580, 440410, 440531, 440550, 440562, 440563, 440590.
lawfulness (including the constitutionality) of secondary sources can be reviewed, it is not possible to assess whether primary legislation complies with the Constitution.\footnote{This is a specific feature of the Dutch legal system, which refers to all pieces of legislation, so it does not apply only to anti-COVID-19 measures. The so-called “ban on constitutional review” contained in the Dutch Constitution does not mean, according to most scholars, that no constitutional review at all exists; rather, this is a ban on ex post review, since all draft pieces of legislation are submitted to the Council of State for this kind of check before they enter into forces, so exercising ex ante constitutional review.} The review of anti-pandemic measures was constantly ensured by ordinary and administrative courts, albeit in a less thorough way than in France, given that Dutch courts generally showed a more deferent approach compared to French administrative courts.\footnote{See Rechtbank Den Haag 7 april 2021, ECLI:NL:RBDHA:2021:3352, ¶¶ 4.8-4.9 (Wateringen/Ministerie van Volksgezondheid, Welzijn en Sport) (Neth.).}

We now consider cases in which non-judicial actors provided an “alternative” to review by constitutional or supreme courts. Denmark and Finland provide good examples. In these countries, there is no strong culture of judicial review, as the compatibility of norms with higher law is usually ensured through different means. In Denmark, a constant check on COVID-19 measures, including their compatibility with the Constitution, was provided ex ante by the Folketing committees,\footnote{The Folketing is the Danish unicameral Parliament. See supra Section I.c.} which regularly scrutinized legislation, and even ministerial regulations, pursuant to the Act on Communicable Diseases 2021. Moreover, the Danish Ombudsman heard ex post a number of cases directly brought by citizens and always provided remedies when single measures were found to be disproportionate.\footnote{The Parliamentary Ombudsman of Finland, Summary of the Annual Report to the Office of the High Commissioner of Human Rights 205-06 (2020).}

Similarly, in Finland, the Constitutional Law Committee of the Eduskunta (the Finnish Parliament) reviewed all pandemic bills introduced by the government. At the same time, the Chancellor of Justice,\footnote{The Chancellor of Justice is an independent authority, appointed by the President of the Republic, in charge of overseeing the decisions and measures taken by the government.} based on competences that preexisted the pandemic, reviewed all acts of the government pursuant to Article 108 of the Finnish Constitution. Meanwhile, the Ombudsman heard a number of cases dealing with specific limitations of rights during

\footnote{\texttt{https://scholarship.law.upenn.edu/jil/vol44/iss4/1}}
lockdowns. In addition to these mechanisms, some constitutional challenges were heard by Finnish ordinary courts, consistent with the decentralized system of judicial review that exists—even if uncommonly used—in Finland.

In summary, in Denmark, and even more in Finland, other guardians of the constitution and higher laws performed their functions effectively during the pandemic, guaranteeing rights and freedoms by reviewing the constitutionality and legality of measures. In particular, the existence of ombudsmen seemed to provide a significant alternative to constitutional review, performing, to some extent, similarly to individual constitutional complaints before constitutional adjudication bodies.

d. Some Observations

This Part identified that constitutional review—exercised in different forms and models—is a key feature of contemporary democracies. Indeed, since the end of the Second World War, it has been commonly considered one of the most powerful tools against possible abuses perpetrated by political powers. Ultimately, by testing the reasonableness and proportionality of measures regarding the limitation of rights, courts guarantee the rule of law.

More extensively, reviewability is a cross-cutting principle since the activity of constitutional adjudication bodies should stem potential abuses and reinstate the correct functioning of both horizontal and vertical separation of powers when disrupted. In the long run, this type of review should work—sometimes according to counter-majoritarian logic—as a counter-limit to potential violations of (among others) the abovementioned principles.

Our analysis has revealed that constitutional review did not always perform well during the pandemic. This was particularly evident in countries in the first cluster, where obstacles were mainly of a technical or procedural nature and resulted in non-performing or belated constitutional review.

In some countries in the second cluster, constitutional review was timely and effective. In these countries, individual complaints or urgency procedures are permitted, including in Austria,

---

258 The Ombudsman is an independent authority, elected by the Parliament of Finland, in charge of overseeing the decisions and measures taken by the government.
Germany, and Spain. Although there are pros and cons regarding the introduction of these kinds of mechanisms into the procedural rules of constitutional adjudication bodies in ordinary times,\textsuperscript{259} it is undeniable that at least in times of emergency they proved an essential bulwark in maintaining the rule of law.

Meanwhile, even in some countries in the second cluster (especially common law ones), where constitutional review was not technically or procedurally hindered, decisions were limited and sometimes deferential. Against this background, the Israeli Supreme Court, which played a considerable role in fixing the flaws of some COVID-19 measures, is a relevant exception. Although in this Article we have not dealt with the merits of rulings, a small number of decisions in countries where, in theory, this review could have been performed is a significant piece of information to be considered. This might hide either a certain lack of confidence by people in court review or a strong confidence in governmental policies, as in the case of New Zealand, where resorting to courts is uncommon as a matter of constitutional culture characterized by high reliance on the policy choices of public powers.

The third cluster shows an element that can be subject to different readings. In these countries, constitutional review was successfully replaced by other mechanisms that helped mitigate its unsuccessful performance. In some cases, these mitigating factors were judicial mechanisms, especially administrative courts, as in the French and Dutch contexts. In other cases, alternative bodies were non-judicial, such as ombudsmen or ad hoc parliamentary committees. On the one hand, the proactive stance of some administrative courts, made possible by technical or procedural features, should certainly be praised, as it at least guaranteed constant oversight of limitations of rights and freedoms. On the other hand, these forms cannot be seen as full-fledged and definitive replacements of constitutional review, which has a different, stronger, and even symbolically more significant role than administrative justice. This is another lesson from the pandemic. Additionally, regarding non-judicial bodies, the cultural element appears once again. In the systems where this trend was observed (Denmark and Finland), these “alternative guardians” of the

\textsuperscript{259} For an in-depth study on individual complaint from a comparative perspective, see Rolando Tarchi, \textit{Il ricorso diretto di costituzionalità} [The Direct Constitutional Complaint], \textit{in PATRIMONIO COSTITUZIONALE EUROPEO E TUTELA DEI DIRITTI FONDAMENTALI [EUROPEAN CONSTITUTIONAL HERITAGE AND PROTECTION OF FUNDAMENTAL RIGHTS]} 3 (Rolando Tarchi ed., 2012).
Constitution were effective and ensured an appropriate check on COVID-19 measures. However, in other contexts where, culturally, people and institutions do not accept these bodies (especially ombudsmen) and their functions as an integral part of the legal system, the rate of success might not be as high as in these jurisdictions. Once again, the importance of non-legal factors arises, as the pandemic contributed to revealing the real nature of legal systems, whose identity is grounded not only in legal features but is also affected by cultural and social elements.

CONCLUSION

This Article highlights a strong mutual relationship between the horizontal and vertical separation of powers, or, from another perspective, form of government and form of state, respectively. For instance, in Austria, Germany, and Switzerland, the federal dynamic (vertical level) contributed—along with relatively cohesive political majorities—to rebalancing the excessive executivization of reactions to the pandemic (horizontal level). In parallel, some trends at the horizontal level impacted the vertical level, as in the case of Australia, where “executivized” reactions brought the heads of federal and sub-federal executives to cooperate with each other (vertical cooperation), introducing novelties in the patterns of that country’s federalism. The United States, despite its peculiarities regarding its early reactions to the pandemic, also strongly evinces the inextricable relationship between the form of state and the form of government. The “atypical” presidency of Donald Trump brought a dysfunctional approach to the federal response, which in turn led to unexpected horizontal cooperation among state governors.

Against the background of mutual links between the horizontal and vertical dimensions of separation of powers put under stress by the pandemic, constitutional review should have worked as an ultimate test, taking all “pathological” elements and bringing them back to a “physiologic dimension” in each legal system. The several unsuccessful experiences we have surveyed demonstrate that more efforts should be made to sustain the “era of courts” and reinforce the role of constitutional review in emergencies. Even effective alternatives to constitutional review do not have the same strength in terms of being a bulwark for rights and freedoms in times of crises. This claim is not to maintain that courts (especially
constitutional and supreme courts) should always decide against emergency measures; rather, they should be enabled to perform their review in a timely manner and scrutinize proportionality.

Finally, elements such as changes in the ordinary relationships among public powers and the consequent impact on the principle of legality, fragmentation among different government levels, and unclear chances of constitutional review put the principle of legal certainty under pressure. From a theoretical viewpoint, this principle can be defined as a “leitmotif for the entire legal system” and “a central tenet of the rule of law.” There were several situations in which the principle of legal certainty was at risk during the pandemic. For instance, when anti-pandemic provisions were likely to undermine the horizontal separation of powers and did not have a clear legal basis, citizens were not certain about how measures could be challenged in the case of alleged violations of their rights and freedoms. Various responses from different territories of the same country could be appropriate to tackle the differentiated incidences of the virus; however, this is effective only if there is effective central coordination, with excessive fragmentation and unjustified inconsistencies being avoided (yet this coordination is lacking, for example, in Spain). In general, uncertainties, whatever their cause, are highly undesirable, especially in times of crises.

There is no doubt that the pandemic brought new patterns to the interpretation, implementation, and compliance with all the principles we analyzed. Not all of these approaches are surprising or long-lasting; while some probably will endure, others might just have been the outcome of the combination of the sanitary, political, and sometimes even social or cultural contexts. Moreover, when

262 It should be added—although it is not the main focus of this Article—that the use of recommendations can perform well in certain countries, such as Finland and Denmark; nonetheless, there are still doubts as to whether these “norms” can be placed in the legal hierarchy, the consequences in case of non-compliance, and many others.
263 For a further analysis of the political, cultural, social, and, above all, institutional and components of COVID-19 legal reactions, see Arianna Vedaschi &
these patterns became dangerous—for example through excessive marginalization of legislative assemblies and disproportionate limitations of rights and freedoms—there were not always prompt, efficient, and reliable recalibrating forces, such as courts. Within the comparative scenario, this could be seen as the most serious sign of alarm, from which we should draw lessons to face future emergencies.

APPENDIX

This Table offers an overview of the relationship between infection and death rates, on the one hand, and placement into clusters, on the other hand.

<table>
<thead>
<tr>
<th></th>
<th>Confirmed Cases (WHO Data)</th>
<th>Deaths (WHO Data)</th>
<th>Population (World Bank Data 2020)</th>
<th>Horizontal SoP</th>
<th>Vertical SoP</th>
<th>Constitutional Review</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Austria</strong></td>
<td>1,325,627 confirmed cases</td>
<td>16,924 deaths</td>
<td>Population: 8,916,864</td>
<td>Cluster 2</td>
<td>Cluster 1</td>
<td>Sub-Cluster 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td>850,653 confirmed cases</td>
<td>2,345 deaths</td>
<td></td>
<td>Cluster 4</td>
<td>Cluster 3</td>
<td>Sub-Cluster 2</td>
</tr>
</tbody>
</table>


264 WHO data is current as of May 31, 2022.
<table>
<thead>
<tr>
<th>Country</th>
<th>Population: 25,693,267</th>
<th>Cluster 1</th>
<th>Cluster 2</th>
<th>Cluster 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>2,283,651 confirmed cases&lt;br&gt;28,551 deaths</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>Population: 11,544,241</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Canada</td>
<td>2,482,142 confirmed cases&lt;br&gt;30,363 deaths</td>
<td>Cluster 4</td>
<td>Cluster 3</td>
<td>Sub-Cluster 2</td>
</tr>
<tr>
<td>Canada</td>
<td>Population: 38,037,204</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Denmark</td>
<td>950,237 confirmed cases&lt;br&gt;3,387 deaths</td>
<td>Cluster 3</td>
<td>--</td>
<td>Cluster 3</td>
</tr>
<tr>
<td>Denmark</td>
<td>Population: 5,831,404</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>11,528,232 confirmed cases&lt;br&gt;122,735 deaths</td>
<td>Cluster 1</td>
<td>--</td>
<td>Cluster (1 and) 3</td>
</tr>
<tr>
<td>France</td>
<td>Population: 67,379,908</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>7,539,047 confirmed cases&lt;br&gt;118,763 deaths</td>
<td>Cluster 2</td>
<td>Cluster 2</td>
<td>Sub-Cluster 1</td>
</tr>
<tr>
<td>Germany</td>
<td>Population: 83,209,456</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Country</td>
<td>Population</td>
<td>Confirmed Cases</td>
<td>Deaths</td>
<td>Cluster 1</td>
</tr>
<tr>
<td>-----------</td>
<td>------------</td>
<td>-----------------</td>
<td>--------</td>
<td>-----------</td>
</tr>
<tr>
<td>Finland</td>
<td>83,160,861</td>
<td>339,081</td>
<td>1,886</td>
<td>Cluster 3</td>
</tr>
<tr>
<td>Ireland</td>
<td>5,529,543</td>
<td>969,209</td>
<td>6,173</td>
<td>Cluster 1</td>
</tr>
<tr>
<td>Israel</td>
<td>9,215,100</td>
<td>1,504,073</td>
<td>8,285</td>
<td>Cluster 2</td>
</tr>
<tr>
<td>Italy</td>
<td>59,449,527</td>
<td>7,281,297</td>
<td>138,881</td>
<td>Cluster 1</td>
</tr>
<tr>
<td>Netherlands</td>
<td>17,441,500</td>
<td>3,309,245</td>
<td>21,067</td>
<td>Cluster 2</td>
</tr>
<tr>
<td>Country</td>
<td>Confirmed Cases</td>
<td>Deaths</td>
<td>Population</td>
<td>Cluster 1</td>
</tr>
<tr>
<td>-------------</td>
<td>-----------------</td>
<td>--------</td>
<td>------------</td>
<td>-----------</td>
</tr>
<tr>
<td>New Zealand</td>
<td>14,298</td>
<td>51</td>
<td>5,084,300</td>
<td>Cluster 1</td>
</tr>
<tr>
<td>Spain</td>
<td>16,116,282</td>
<td>45,302</td>
<td>47,363,419</td>
<td>Cluster 2</td>
</tr>
<tr>
<td>Sweden</td>
<td>1,436,784</td>
<td>15,499</td>
<td>10,353,442</td>
<td>Cluster 3</td>
</tr>
<tr>
<td>Switzerland</td>
<td>1,540,713</td>
<td>12,051</td>
<td>8,636,561</td>
<td>Cluster 2</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>15,090,172</td>
<td>151,629</td>
<td>67,215,293</td>
<td>Cluster 1</td>
</tr>
<tr>
<td>United States</td>
<td>59,274,689 confirmed cases</td>
<td>Cluster 4</td>
<td>Cluster 3</td>
<td>Sub-Cluster 2</td>
</tr>
<tr>
<td>---------------</td>
<td>-----------------------------</td>
<td>-----------</td>
<td>-----------</td>
<td>---------------</td>
</tr>
<tr>
<td></td>
<td>833,199 deaths</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Population: 331,501,080</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>