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ARTICLE

New Dynamics of the "Post-COVID-19 Era": A Legal Conundrum

Arianna Vedaschi and Chiara Graziani

Bocconi University, Baffi Research Center, Milan, Italy
Corresponding author: Arianna Vedaschi; Email: arianna.vedaschi@unibocconi.it

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Abstract
In this Article we analyze whether and how the legal reactions to COVID-19 brought permanent changes to three main areas that are at the very basis of the study of comparative constitutional law: the horizontal separation of powers in different forms of government; the vertical separation of powers and its effects on forms of state; and the reviewability of limitations to human rights and personal freedoms by bodies exercising constitutional review. Rather than just examining and categorizing the reactions, we search for the political, institutional, factual, and sometimes even cultural rationales at the basis of each trend. Our claim is that COVID-19 was a driving force for relevant changes in the three analyzed areas, but we also recognize that these changes did not come "out of the blue," as they were already "latent" in considered legal systems. The analysis demonstrates that the traditional categories we use to classify the forms of government, forms of state, and the mechanisms of constitutional review, although being useful paradigms to study these topics, have in themselves the potential to be "stretched," and even unhinged, when global and long-lasting emergencies, as COVID-19, are in place.

Keywords: Pandemic; Comparative Constitutional Law; Horizontal Separation of Powers; Vertical Separation of Powers; Constitutional Review; Human Rights and Personal Freedoms; Emergency Powers

A. Introduction

The Sars-CoV-2 (COVID-19) pandemic has been an unprecedented public health emergency that shocked the world. Although, in the last 100 years, other epidemics—and even pandemics—have raged around the globe, none of them were as far-reaching, fast-spreading and long-lasting as COVID-19 has been, to the point that it brought the health systems of several countries close to collapse and caused their legal systems to undergo significant stress.

Against this serious and initially unknown threat, it was unavoidable for governments to take measures implying harsh limitations of human rights and personal freedoms, which lasted particularly long, significantly affecting legal frameworks.

In this Article, we take an *ex post* perspective—as this work is being finalized almost three years after the beginning of the pandemic—and analyze whether and how the legal reactions to COVID-19 brought changes to three main areas that are at the very basis of the study of comparative constitutional law. These areas are the horizontal separation of powers[1] in different forms of

[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* 11 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds., 1989).

government, with the inevitable impact on the principle of legality, addressed in Part B; the vertical separation of powers[2] and its effects on forms of state, which is the focus of Part C; and the reviewability of serious limitations of human rights and personal freedoms by bodies exercising constitutional review,[3] including its consequences on the functioning of these bodies, studied in Part D.

To give a more detailed idea of the main lines of research of this work, in Part B, horizontal separation of powers, we start from the observation that the strong limitations of rights and freedoms, which proved necessary in times of COVID-19, were frequently decided without any meaningful involvement of representative assemblies. This feature challenged the principle of legality and infringed upon the ordinary functioning of the mechanisms of checks and balances, to a lesser or higher extent depending on single countries and their own constitutional design and political scenarios. The enhancement of the Executive was a major tendency, but it took place according to different logics and with different effects on the "roots" of each legal system. In this regard, we seek to identify some common and diverging trends, and to understand why some of these trends emerged in certain specific countries and why other jurisdictions, instead, performed differently.

In Part C, vertical separation of powers, we perform an analysis with the same aim, but we focus only on those systems with a federal or regional structure. In these systems, belonging to the category of "decentralized forms of state," the sub-central entities—namely federated states, regions, etc.—have their own political autonomy, in addition to administrative. In other words, political power is distributed on the territory. As a matter of fact, these systems—more than those based on a unitary logic in the territorial allocation of political power—allow us to assess whether the ordinary relationship between the center, federation or central state, and the above-mentioned sub-central entities has been transformed, permanently or not, during the COVID-19 pandemic and which could be the reasons pushing these changes ahead.

In Part D, constitutional review, we examine the extent to which anti-COVID-19 measures were reviewable by constitutional courts or by other bodies. In this Article, we intend constitutional review as the activity of checking the 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 move from the assumption that, 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 human rights and personal freedoms come into play. Although there are several models of constitutional review and methods for checking the constitutionality of acts in the comparative scenario, constitutional review is a common trait of all mature democracies, regardless of the significant differences characterizing each model. In this Part of our work we do not aim to give a detailed assessment of *how* these bodies decided on anti-pandemic measures, whether or not they paid excessive deference to the Executive, how they applied the principle of proportionality, etc.; rather, we point out some models of action that can be featured in constitutional adjudication bodies of different countries during the pandemic. We address their rationales and, ultimately, how they affected both policy choices and the capability of each system to at least provide their citizens with a chance of review against acts of public powers.

[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 actually 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 (2016). 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. *See* Cheryl Saunders, *The Division of Powers in Federations*, Institute for Democracy and Electoral Assistance (Aug. 2019), https://www.idea.int/sites/default/files/publications/divisions-of-powers-in-federations.pdf.

[3]*See* Arianna Vedaschi, *La giustizia costituzionale* [Constitutional Justice], *in* Diritto costituzionale comparato [Comparative Constitutional Law] 405 (Paolo Carrozza, Alfonso Di Giovine & Giuseppe F. Ferrari eds., 2019).

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In terms of dataset, this work builds on previous research, published in the *University of Pennsylvania Journal of International Law*,[4] where we laid the basis for the present Article by surveying and "clustering" several types of reactions to the pandemic. Starting from these "clusters," we engage here in a further level of analysis by searching for the political, institutional, factual, and sometimes even cultural rationales at the basis of each trend highlighted in the three Parts.

From a methodological perspective, in order to carry out the three mentioned streams of analysis, we take into account the main Western, or Western-inspired,[5] "advanced"[6] democracies, whose legal dynamics we use to exemplify and demonstrate our findings within each Part.

Ultimately, our claim in this research is that COVID-19 worked as a driving force for changes in these three features, but we also recognize that these changes did not come "out of the blue," as they were already "latent" in each legal system, so the pandemic triggered them. The analysis demonstrates that the traditional categories we use to classify the forms of government, forms of state, and the mechanisms of constitutional review, although being useful standard paradigms to study these topics, have in themselves the potentials to be "stretched," and even unhinged, when global and long-lasting emergencies, as COVID-19 is, are in place. This consideration gains even more significance if we bear in mind that the world has been living in a situation of emergency for the last twenty years—from the international terrorist threat, to the financial crisis, to the recent outbreak of an energetic crisis following to the Russian-Ukrainian conflict—so emergency, and the consequent disruption of apparently consolidated legal categories, is likely to become the "new normal."

B. COVID-19 and the Principle of Separation of Powers: Horizontal Dimension

I. Hyper-Executivization of the Form of Government: A Common Trend, but with Different Features

Executives are usually "better equipped" to address stressful circumstances; consequently, from a theoretical perspective and even for democratic countries, the key role played by them is a "natural" feature during an emergency. In other words, the time of emergency is certainly not the "time for Parliaments."

A trend of hyper-executivization,[7] characterized by a strong role of governments and a weak role, if not a marginalization, of representative assemblies, has been overall confirmed during the pandemic. For over two years, almost everywhere, regardless of the form of government, Executives took a predominant lead, often in the absence of clear and well-defined acts of authorization and/or delegation by their respective Legislatures. This hyper-executivization approach could seem as nothing particularly weird nor worrying, especially considering the politically neutral origin of COVID-19 crisis, caused by a pathogen, specifically a virus. Nevertheless, its long-lasting action makes things much more complicated by distorting dynamics among state powers, as said with Executives "winning" over all the others, and disrupting checks and balances, meaning the real essence of any "mature" democratic system. The issue is that the pressure over the principle of separation of powers—and of legality as well—did not last for a limited time. Thus, ordinary relationships among powers and, ultimately, the regular dynamics of

[4]*See* Arianna Vedaschi & Chiara Graziani, *Post-Pandemic Constitutionalism: COVID-19 as a Game-Changer for "Common Principles"?*, 44 U. Penn. J. Int'l. L. 815 (2023).

[5]Meaning Australia and New Zealand, which have been colonized by the United Kingdom, and so are affected by its legal and cultural traditions.

[6]In this regard, we refer to the main democracies traditionally deemed as "stabilized" and that have been long based on the rule of law, as opposed to so-called illiberal or uncertain democracies. We are aware that also these "mature" democracies can be in "stressful" circumstances. *See* Mario Patrono & Arianna Vedaschi, Donald Trump and the Future of American Democracy: The Harbinger of a Storm? 8 (2023).

[7]The word "executivization" is used here in the meaning given by Kröger et al., i.e., a shift of competences (formally or informally attributed) in favour of bodies that can be considered as detaining the executive power. *See* Sandra Kröger et al., Political Representation in the European Union. Still Democratic in Times of Crisis? 32 (2014).

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the form of government could endure permanent changes, even in democracies, if "stretched" for too long. To put it in medical terms, these changes are likely to become endemic.

With regard to the exact impact on the form of government, the legal approach to contrast COVID-19 brought to the light that, in some cases, the enhancement of the powers of the Executives was greater than what could be foreseen based on the dynamics of the systems and/or the reactions of the countries to previous emergencies, while, in other cases, it could be somewhat expected and did not go so far beyond the "rails" of the regular functioning of the form of government. These different outcomes can be explained based on some factors, such as the peculiarity of their systems or their cultural traditions.

In Westminster systems, executive bodies usually play a strong role, even in non-emergency times, due to a model of separation of powers with members of the Executive who are necessarily also members of the Legislature. In particular, during the pandemic, in the United Kingdom, the overreach of Executive was undeniable. In this country, the Executive—more specifically, some Cabinet Ministers—such as the State Secretary for Health and Social Care and the Home Secretary—took a very strong lead through their regulations. Their powers were loosely justified by legislative authorizations—or, we would say, formally based on these tools, similar to the Italian situation[8]—and Parliament did not have any power of *ex ante* oversight of the content of the ministerial regulations.[9] Notably, the United Kingdom did not invoke a pre-existing emergency statute, the Civil Contingencies Act 2004,[10] which, according to some authors,[11] would have provided better guarantees. And here the statutory authorizations were represented by the Coronavirus Act 2020[12] combined with the Public Health (Control of Disease) Act 1984[13] (as amended by the Health and Social Care Act 2008[14]) the former specifically and hastily passed to tackle COVID-19. It was argued[15] that none of these statutory bases were clear and precise enough to authorize such relevant limitations of individual rights. Consequently, the regulations that were adopted to implement these statutes were labeled as discretionary and out of the scope of statutory authorization, to the detriment of the principle of legality.[16]

Actually, this Executive-oriented approach is even more patent if we consider another country based on Westminster parliamentarism, New Zealand. There, during the COVID-19 pandemic, the Executive, especially the Prime Minister, played a major role, often relying on the weak legal basis of the Health Act 1956, which many scholars considered too vague, if not implicit, to allow

[8]*See infra*.

[9]Yet there was some form of *ex post* check, insofar as a resolution of the House of Commons can annul the regulations after their adoption. *See* Public Health (Control of Disease) Act 1984, c. 22, § 45Q (Eng.).

[10]*See* Civil Contingencies Act 2004, c. 36 (UK), https://www.legislation.gov.uk/ukpga/2004/36/contents.

[11]*See* Andrew Blick & Clive Walker, *Why Did Government not Use the Civil Contingencies Act?*, The Law Society Gazette (Apr. 2, 2020), https://www.lawgazette.co.uk/legal-updates/why-did-government-not-use-the-civil-contingencies-act/5103742.article.

[12]*See* Coronavirus Act 2020, c. 7 (Eng.).

[13]*See* Public Health (Control of Disease) Act 1984, c. 22 (Eng.).

[14]*See* Health and Social Care Act 2008, c. 14 (UK), https://www.legislation.gov.uk/ukpga/2008/14/contents.

[15]*See* David Anderson QC, *Can We Be Forced to Stay at Home?*, DAQ (Mar. 26, 2020), https://www.daqc.co.uk/2020/03/26/can-we-be-forced-to-stay-at-home/#; Robert Craig, *Lockdown: A Response to Professor King*, UK Human Rights Blog (Apr. 6, 2020), https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/. *See also* Nicholas McBride, *Ill Fares the Land: Has COVID-19 Killed the Principle of Legality?*, SSRN (Feb. 2, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4023242. *But see* Hannah Wilberg, *Lockdowns, the Principle of Legality, and Reasonable Limits on Liberty*, UKCLA Blog (July 23, 2020), https://ukconstitutionallaw.org/2020/07/23/hanna-wilberg-lockdowns-the-principle-of-legality-and-reasonable-limits-on-liberty/.

[16]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 well-written and unambiguous statutory norms. *See* 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, 331 (2015). This principle of legality also has a so-called augmented form. This means that not only has Parliament to clearly set limitations to fundamental rights, but these limitations shall be interpreted in accordance with the principle of proportionality. *See* Pham v. Home Secretary [2015] 1 WLR 1591 (UKHL), [119] (opinion of Lord Reed).

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the limitation of people's individual rights by the Executive without infringing upon the principle of legality. In the light of this context, some commentators even qualified anti-COVID-19 measures as "a response personally led by the Prime Minister."[17]

Being the United Kingdom and New Zealand two Westminster parliamentarisms, where, already in ordinary times, the separation of powers is considered "weak" by many scholars,[18] the described hyper-executivization cannot be seen as a full-fledged element of transformation of the form of government since, as said, it was already entrenched in its characteristics.

Nevertheless, the fact that in Westminster models a focus on the Executive was considered "normal" does not exclude, even in these systems, some tricky issues potentially caused by this predominance due to the very fact that we are referring not to ordinary times, but to times of (long) crisis. As a matter of fact, when Executives of Westminster systems "overreach" in ordinary circumstances, there is normally the time to have a public debate on what is happening and, if necessary, adjust the measures, as they are usually not so "urgent." To the contrary, during an emergency, the situation is much more turbulent, measures enter into force immediately, including those seriously impacting rights and freedoms, and courts—that should be crucial in checking proportionality—are more likely to act deferentially. In this view, even in those systems, the torsion of the form of government, especially in times of crisis, cannot be simply overlooked, but effective mechanisms to make it more balanced should be framed.

Turning to countries where an alteration of the form of government was very impactful considering their traditional patterns, a relevant example is Italy. In the Italian parliamentarism, the concentration of powers in the hands of the President of the Council of Ministers during almost the whole first year of the COVID-19 pandemic was unprecedented and not in line with the usual functioning of the form of government. Suffice it to say that the main tools used to tackle the pandemic[19] were the decrees of the President of the Council of Ministers (DPCMs) which are ranked lower than statutes and were loosely based on decree laws[20]. Decree laws are primary sources adopted by the Government (the entire Council of Ministers) and then converted into statutes by both Houses of Parliament. However, the DPCMs, in addition to not having the same force as primary sources, are not submitted to Parliament before, nor after, their enactment; thus, Parliament is completely outside of their deliberative process. Moreover, they are not issued by the President of the Republic as other non-primary sources of Italian law (e.g. regulations adopted by the whole Council of Ministers) are.[21] Not only did all these features reveal the marginalization of Parliament—and of bodies such as the President of the Republic, who is responsible for guaranteeing respect for the Constitution—but also shed light on how powers were concentrated in the hands of *only one* person, the President of the Council of Ministers, rather than, at least, the Executive as a collegial body (the Council of Ministers). The absence of parliamentary oversight is a neither marginal nor irrelevant feature, since DPCMs limited some rights and freedoms that could only be restricted by statutory tools or acts with the same legal force according to the Italian

[17]John Hopkins, *National Report on New Zealand*, in Governmental Policies to Fight Pandemics: The Boundaries of Legitimate Limitations on Fundamental Freedoms (Arianna Vedaschi ed., forthcoming).

[18]*See, e.g.*, Alan Greene, *National Report on the United Kingdom*, Governmental Policies to Fight Pandemics: The Boundaries of Legitimate Limitations on Fundamental Freedoms (Arianna Vedaschi ed., forthcoming). The weakness of the separation of powers depends, among others, on the fact that, in the United Kingdom, all members of the Cabinet are also members of the House of Commons, hence there is a partial fusion between the Cabinet and the lower House of Parliament. The fusion between the Executive and Legislature is more evident than in the United Kingdom, as the Parliament of New Zealand is unicameral.

[19]Italy lacks a systematic and structured constitutional framework governing emergency (so-called emergency constitution). The general framework it 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.).

[20]On their genesis and use in the Italian legal system as an emergency tool, *see* Valeria Piergigli, Diritto costituzionale dell'emergenza [Constitutional Law of Emergency] 30 (2023).

[21]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.

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Constitution.[22] This aspect is troublesome since it threatens the principle of legality, at the very basis of the Italian constitutional design as far as the protection of rights is concerned.

Throughout the time, there were attempts by the head of the Italian Executive to mitigate the marginalization of MPs and bring the Houses of Parliament back into the decision-making process. In practice, although Italy rejected the possibility of resorting to remote voting or remote discussion, in the Houses of Parliament some adjustments were made to exploit all the spaces available to allow as many members as possible to take part in parliamentary sittings. In other cases, heads of parliamentary groups made agreements to ensure the fair proportions among political forces were even when not all members were present in Parliament due the risk of contagion. At the procedural level, 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 cases of "urgency"—determined by the President of the Council of Ministers—legitimized *ex post* information of the Houses. In these cases of urgency, the Houses could not vote a resolution, but merely debate on the measures taken. When, in February 2021, a new Government was sworn in, with Mario Draghi replacing Giuseppe Conte as President of the Council of Ministers, resort to DPCMs decreased, and most measures were taken directly by decree laws, which––as said––are primary sources that need to be converted by the Italian Parliament, issued by the President the Republic, as well being subject to judicial review by the Constitutional Court.[23]

However, from a substantive perspective, these improvements seeking a "parlamentarization" of COVID-19 countermeasures were not particularly successful. In other words, in the crisis management, the role of Parliament remained more formal than substantive. First of all, 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 gave wide power to the President of the Council of Ministers; yet, they did not do so. Moreover, even when resolutions could be passed by the Houses on measures to be taken by the President of the Council of Ministers, two main aspects should be recalled. The first aspect is that, in the Italian legal system, a resolution is not a legally binding act, but only a tool that each House can use to try to direct government action. In other words, it has a political rather than a strictly legal value. The second aspect is that the President of the Council often resorted to the "urgency" procedure; therefore, as said, the Houses only had an *ex post* debate on measures already issued. Lastly, even when a decisive shift toward—though still quite vaguely-drafted—decree laws was made by the Draghi Government, some DPCMs, though less frequently used, continued to regulate crucial issues.[24] Not to mention the vagueness of decree laws themselves.

Overall, such a strong concentration of powers in the hands of the President of the Council of Ministers for so long time had never been witnessed in the Italian Republic. As a parallel, this anomaly is also confirmed by a non-legal factor, that is, the very atypical relationship between the President of the Council of Ministers and the people, with a huge and direct exposure of the former through a blur of press conferences, something never experienced before in Italy.

From a general perspective, we cannot know yet whether or not these significant changes will be permanent in the Italian system, but they undoubtedly brought an unknown scenario, marking a functioning of the system that had not been written on paper by the Founding Fathers when the Constitution was written.

[22]*See, e.g.*, Art. 16, § 1 COSTITUZIONE (COST.) (It.). Article 16 of the Italian Constitution enshrines freedom of movement.

[23]Among others, measures regarding vaccination, COVID-19 certificate, changes in quarantine rules were all decided through decree laws. As already explained, 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.

[24]Let us just think of the COVID-19 certificate. This topic is regulated by Decree Law No. 7/2022, but exemptions to rules contained therein were established by a subsequent DPCM.

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Italy was not the only one to show this distortion of the parliamentary form of government, as something similar happened, among others, in Belgium and in Ireland—the latter, although being formally a semi-presidentialism, is considered a *de facto* parliamentarism.[25]

As a matter of fact, in Belgium, the legal basis for some anti-pandemic powers practically did not exist, with obvious negative consequences on the separation of powers and, specifically, once again, the principle of legality. The use of sweeping administrative police powers provided by ministerial decrees and *arrêtés* is a noteworthy example. Most of these legal tools are adopted by the Minister of Health and the Minister of Home Affairs, with a considerable impact on constitutional individual rights and personal freedoms.[26] Among the legal bases deployed in Belgium to fight the pandemic, neither pre-existing legislation[27] nor ad hoc set-up legislation[28] nor acts of special powers[29] were detailed enough to authorize the Government, or in many cases the Minister, to take these kind of measures. In contrast, these legal bases contained very vague clauses, empowering the Executive to take "civil protection measures,"[30] without further specifying their content. According to Belgian scholars,[31] police powers[32] mandated by the Minister of Home Affairs and broadly and discretionarily used during the pandemic lacked any legal basis. Therefore, the action of the Executive, rather of one Minister, to curb the spread of COVID-19 was not legally constrained, which entails a very tricky situation, potentially prone to abuses, and a dangerous precedent in case of future emergencies.

An analogous situation can be detected in Ireland; actually here, a single Minister, the Minister of Health and not the head of Government, was vested with the very relevant powers contained in the Health Act 2020.[33] This is quite unusual, in a system where most of the political scene is usually taken by the Prime Minister together with his Government.[34]

[25]As a matter of fact, 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* Maurice Duverger, *A New Political-System Model: Semi-Presidential Government*, 8 Eur. J. Pol. Res. 165 (1980). 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. *See* Matthew Søberg Shugart, *Semi-presidential Systems: Dual Executive and Mixed Authority Patterns*, 2005 French Politics 323 (2005). According to some scholars, the Irish President would even have *no* constitutional power. *See* Matthew Søberg Shugart & John M. Carey, Presidents and Assemblies: Constitutional Design and Electoral Dynamics (1992). *But see* Robert Elgie, *An Intellectual History of the Concepts of Premier-Presidentialism and President-Parliamentarism*, 18 Pol. St. Rev. 12(2020).

[26]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*, *e.g.*, Arrêté ministériel du 13 mars 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, http://ilo.org/dyn/natlex/natlex4.detail?p_lang=fr&p_isn=110371&p_country=BEL&p_count=3819 (Belg.); Arrêté ministériel du 18 mars 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=110377&p_lang=en(Belg.).

[27]*See* Loi du 31 décembre 1963 sur la protection civile [Civil Protection Act], M.B., Jan. 1, 1994 (Belg.); Loi du 5 août 1992 sur la fonction de police [Police Office Act], M.B., Dec. 22, 1992 (Belg.); Loi du 15 mai 2007 relative à la sécurité civile [Civil Security Act], M.B., Jan. 10, 2007 (Belg.).

[28]*See* 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 (Belg.).

[29]La Constitution (Const.) art. 105 (Belg.).

[30]Civil Protection Act (Belg.), art. 4.

[31]*See* Patricia Popelier, Catherine Van Den 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).

[32]They consisted of generally prohibiting or restricting movements, banning gatherings as well as human contacts between citizens and between couples.

[33]See 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.

[34]Gerard Hogan et al., Kelly: The Irish Constitution (2018).

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Until now, we have analyzed some—*de jure* or *de facto*—parliamentarisms, pointing out their "executivization" and discussing that in some cases it could be more expected, differently than in others. Nonetheless, even other forms of government underwent significant "stretches" of their usual frameworks. Let us think of France. As known, France is a semi-presidentialism traditionally based on a strong role of the President of the Republic, to the point that semi-presidential systems with strong presidents are often called *à la française*. This key role was confirmed and even reinforced in the fight against the pandemic. Since the very first days of the outbreak, Emmanuel Macron, backed by the Defense Council,[35] took decisions that he finally passed as decrees of the Council of Ministers—which in France is presided over by the same President of the Republic—as allowed by Art. L.3131-19 of the Code de la Santé Publique[36] amended by Law No. 2020-290.[37] Ultimately, the point was that other Ministers of the Council practically did not have any say on these measures, based on the fact that discussion within the Defense Council are secret.[38] This led scholars to talk about "monarchization" of France while COVID-19 was raging.[39]

However, the President of the Republic was not alone in "dominating the scene," because the Prime Minister and Minister of Health joined him, therefore enhancing both the "heads" of the French Executive. As a matter of fact, while the President of the Republic took relevant public health measures as reported above, the Prime Minister and Minister of Health were not far behind, acting through their own decrees or *arrêtés*, based on legislative provisions of the Code de la Santé Publique in the very first weeks of the pandemic and on Law No. 2020-290, establishing the new regime of the *état d'urgence sanitaire* after March 20, 2020. At first sight, this new tendency would seem to parliamentarize the management of the crisis, on the consideration that the Prime Minister must have the confidence of the Assemblée Nationale (the lower House of the French Parliament). Yet, it should be stressed that the *état d'urgence sanitaire*, a temporary regime, was extended month by month by the Houses of Parliament, legislating through a fast-track procedure; thus, existing measures were reiterated without meaningful parliamentary scrutiny. Additionally, under Law No. 2020-290, the Houses were called to decide whether on the extension of the *état d'urgence sanitaire* only once a month, while other emergency frameworks existing in France set a shorter delay in order to constrain the Executive.[40] Therefore, the rate of "executivization" was definitely not mitigated, not even indirectly, thanks to the involvement of the Prime Minister.

This scenario proves that, on the one hand, in times of COVID-19, the traditional trend of the French form of government was confirmed, 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 deemed "normal." It will be worthwhile to observe whether this pattern will be avowed in the near future, either in ordinary times or in handling new emergencies that may arise.

To synthesize, this first part of the analysis highlights that, while in Westminster parliamentary systems a strong concentration of powers in the hands of the Executive is—still tricky but—quite in line with the traditional dynamics of the system of government, so did not "twist" the form of

[35]An inter-ministerial body that responds directly to the President of the Republic and is made up of the Ministers of Defence, Home Affairs, Economy, Budget and Foreign Affairs.

[36]Providing for consultation with the Conseil Scientifique. The latter is composed by experts in medical sciences, epidemiology, biology, sociology, anthropology.

[37]*See* 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], Journal Officiel de la République Française [J.O.] [Official Gazette of France], March 24, 2020.

[38]*See* Sylvia Brunet, *The Hyper-Executive State of Emergency in France*, *in* Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19 201, 206 (Matthias C. Kettemann & Konrad Lachmayer eds., 2022).

[39]*See id.*

[40]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.

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government, there are other jurisdictions, non-Westminster and belonging to civil law families, where the "executivization" went well beyond normal or entailed significant changes of the features of government.

II. The Role of Political Actors and Courts in Mitigating the "Hyper-Executivization" as "Time Goes by"

The "hyper-executivized" approach was maintained quite steady over the long years of the pandemic in all countries addressed above, while in other countries, governments, which acted similarly at the very beginning of the pandemic, managed to mitigate the trend throughout the months of the crisis, by involving Legislatures, and so avoiding betraying the main features of their form of government. In several cases, this "re-involvement" of representative assemblies took place thanks to political dynamics while in only one case, among jurisdictions we examined, the Judiciary played a major role.

Germany is one of the main examples among countries where a re-involvement of representative assemblies depended on political interplay. Although displaying an undeniable initial prominence of the Executive—with useful coordination between central Executive and those of the *länders*—Germany was able to mitigate this dominance over time and reengage some parliamentary institutions, so keeping the main features of its parliamentary system.

In more detail, the main statutory tool deployed in Germany to tackle COVID-19 is the Law on Protection against Infections,[41] as Germany did not resort to its "emergency constitution," albeit having an articulated one.[42] The Law on Protection against Infections—whose original version dates back to 2000—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 to determine measures to protect public health, the Federation is vested with significant supervising powers. From a practical perspective, this statutory design indicated that most anti-COVID-19 measures were mainly 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 shared response ought to be developed.

Leaving behind for now the relationship between the Federation and the *länder*—which will be analyzed in Part C of this study—, from the viewpoint of the relationship between the Legislature and the Executive Section 32 of the Law on the Protection against Infections is relevant. Pursuant to it, the Governments of the *länder*, supervised by the federal Government, were empowered to issue regulations to implement all "necessary protective measures."[43] It is worth noting this was a weak legal basis that left a wide margin of discretion to the Executives. In November 2020, this provision was amended to make it more precise, and rebalance the federal Legislature-Executive relationship. This amendment was pushed quite compactly by the coalitional parliamentary forces that backed the federal Government, namely the Christlich Demokratische Union Deutschlands (CDU), the Christlich-Soziale Union in Bayern (CSU) and the Sozialdemokratische Partei Deutschlands (SPD). The fact that all the coalitional forces in the Bundestag—the lower House—supported this change without serious disagreements favored the smooth passage of the amendment. Also, the upper House, the Bundesrat—although having a more variegated composition insofar as it gathers representatives of the *länder*, where at that time political forces were more fragmented than in the Federation—did not strongly oppose the amendment, due to

[41]*See* Infektionsschutzgesetz [IfSG] [Law on the Protection Against Infections], July 20, 2000, (BGBl. I S. 1045).

[42]*See* Arianna Vedaschi, À la guerre comme À la guerre: La disciplina della guerra nel diritto costituzionale comparato 263 (2007).

[43]*See* Anna-Bettina Kaiser & Roman Hensel, *Federal Republic of Germany: Legal Response to Covid-19*, Oxford Compendium of National Legal Responses to Covid-19 (April 2021), https://oxcon.ouplaw.com/view/10.1093/law-occ19/law-occ19-e2.

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the fact that, up to that moment, no serious conflicts had raised in the "multilevel" management of the pandemic. The amendment consisted of the introduction of Section 28a to better specify the content of these regulations by enumerating the most important measures that could be adopted by the federal Executive. According to the same provision, the Executives of the *länder*, or the federal Executive when competent, can pass these regulations only if at least one of these two conditions is met: Either the federal Bundestag has declared an "epidemic emergency of national concerns," or the respective *land*'s legislative assembly has adopted a similar declaration for its own territory. In case the federal Bundestag repeals the declaration, federal Executive regulations, usually enacted by the federal Minister of Health, whose powers had in the meantime been expanded in March 2020, and the regulations approved by the *länder* Executives immediately lose their effect. Against this background, it can be said that since November 2020, the reinvolvement of German Legislatures, both at the federal and *länder* levels, has been significant.

The early, Executive-led Austrian reaction to the pandemic became more balanced over time, with Parliament regaining a meaningful role than at the beginning. In particular, the Austrian central Government—which, unlike in other federal states, holds several powers on health matters[44]—relied first on the Epidemics Act,[45] which dates back to 1913, to issue ordinances—most of them were adopted by the Minister of Health, but also other Ministers, such as the Ministers of Home Affairs, played a role as far as their competences were concerned—to contain the disease. Since the Epidemics Act is definitely an outdated statutory tool, it needed revision during the COVID-19 emergency. More specifically, scholars[46] observed that, from the outbreak of COVID-19 disease until the end of 2021, the Epidemics Act was amended more than 15 times. These amendments were made to introduce a larger set of measures that can be deployed to tackle the virus, such as traffic and travel restrictions, the involvement of police forces, and norms concerning data processing in the context of contact tracing. All amendments made to the Epidemics Act had the form of statutes adopted by the Austrian Parliament. Yet, the amendments in the first months of the pandemic, from March to July 2020, were different from those approved later. Early amendments were often rushed through Parliament, as the Government regularly resorted to fast-track procedures and every "shortcut" available to leave very little time for parliamentary discussion, making it almost impossible for the measures to be debated in the public opinion. In other words, at the outbreak of COVID-19, the bills had been pre-defined by the Government, which used the Parliament as its "sounding board" to formally sanction its decisions. This situation occurred as well when the Government decided to add a further new statute in March 2020, explicitly conceived as an anti-COVID-19 tool, to the existing, and severally amended, Epidemics Act. This was the COVID-19 Measures Act,[47] providing the Minister of Health with a further toolbox of powers to tackle the disease. Although the Act cannot be labeled as "vague" since provisions authorizing the Minister of Health are drafted in a specific and precise way, it was passed very quickly, as the Parliament approved the text in 48 hours.[48] The smooth passage of the act may have depended on the fact that the new Government—sworn in in January 2020 and led by Chancellor Sebastian Kurz—was based on a novel but relatively well-working coalition, formed by a major conservative party, the Österreichische Volkspartei (ÖVP), and the "green" party Die Grüne Alternative. This stability contributed to improve substantially the role of Parliament during the second COVID-19 wave, starting in autumn 2020. All amendments to the Epidemics Act approved after this time provided that the ordinances adopted by the Minister of

[44]*See* Bundes-Verfassungsgesetz [B-VG] [Constitution], art. 10(12) (Austria).

[45]*See* Gesetz von 14 April 1913, Enhalt No. 67 (Austria).

[46]*See* Konrad Lachmayer, *National Report on Austria*, in Governmental Policies to Fight Pandemics: The Boundaries of Legitimate Limitations on Fundamental Freedoms (Arianna Vedaschi ed., forthcoming).

[47]Gesamte Rechtsvorschrift für COVID-19-Maßnahmengesetz [COVID-19 Measures Act] Mar. 16, 2020, BGBl. I No. 12/2020 (Austria).

[48]*See* Lachmayer, *supra* note 46.

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Health shall be laid before a competent committee of the lower House before being adopted. Consequently, Parliament regained a meaningful *ex ante* role.

And even when, in October 2021, Chancellor Kurtz resigned due to a corruption scandal, the same coalition was nevertheless confirmed to back subsequent Austrian Governments, led by Alexander Schallenberg (October 2021-December 2021) and Karl Nehammer (December 2021 onwards). The stability of the coalition entailed that, when the COVID-19 Mandatory Vaccination Act[49] was enacted in February 2022 to ensure the regulation of vaccines, it followed the full parliamentary procedure, with proper debates and discussions both in committees and in the plenary. Indeed, the draft law was published on the website of the Austrian Parliament, and every Austrian citizen was allowed to submit his/her opinion. Therefore, the Austrian experience corroborates the importance of a stable political majority, albeit with a changing leadership, to favor the progressive reinvolvement of Legislatures.

The reinvolvement of Parliament followed a political dynamic and was made possible thanks to well working coalitions in the Netherlands as well. There, as in other contexts, the very first reaction was very executive-based and lacked democratic legitimacy. In fact, on March 12, 2020, pursuant to Article 7 of the Public Health Act 2011, the federal Minister of Health instructed mayors of municipalities (non-democratically elected bodies) to take measures based on an "emergency regulation template" made available by the central Government to contain the COVID-19 spread. Such a scheme, without any involvement of Legislatures, neither at the local nor at the central level, could not last long. This is why the central Government, led by Mark Rutte, introduced a bill in July 2020 to guarantee better legitimacy of anti-COVID-19 rules. The bill was smoothly passed in Parliament because the third Rutte Government, heading the Netherlands at that time, was backed by a very large coalition. It is true that such coalition involved parties with different views, but it was very well established and consolidated, since the exact same parties had joined to form other Governments (with the same Prime Minister) over the previous ten years, and this undoubtedly favored some stability or, at least, they already knew how to work together. 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, this statute directly restricted citizens' rights. Second, it limited the action of the Executive—competent Ministers—to a specific list of restrictions—prohibiting crowds, suspending commercial businesses, and mandating quarantine—if the sanitary situation made it necessary. 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 the principle of proportionality, and, more generally, with 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 it as an essential and explicit requirement to limit individual rights and personal freedoms during the pandemic. Although these measures are taken by governmental regulations, the Act provides a mechanism based on which each anti-COVID-19 regulation has to be laid out before central Parliament within two days of its adoption, and Parliament has a week to approve it. In case 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, the marginalization of the Parliament and lack of a legislative basis for executive action was a serious problem at the beginning of the pandemic; nevertheless, the situation got significantly better from summer 2020 with the introduction—in July—of the Temporary COVID-19 Measures Act 2020. Thanks to this act, Parliament was—at

[49]See Bundesgesetz über die Pflicht zur Impfung gegen COVID-19 (COVID-19-Impfpflichtgesetz - COVID-19-IG) [COVID-19 Mandatory Vaccination Act] Feb. 5, 2022, BUNDESGESETZBLATT I [BGBL. I] No. 4/2022 (Austria).

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least partially—brought back into the anti-COVID-19 decision-making process, although remote voting was never allowed in the Netherlands.[50]

A certain re-involvement of the parliamentary institution comes out from the Swiss experience as well. Switzerland started its fight against the pandemic with a significant overreach of the federal Executive, which was then perceived as a problem and some attempts to remedy the situation were made. In fact, based on the Epidemics Act 2012,[51] when an infectious disease reaches its highest degree of severity—"extraordinary" situation, as per Article 7 of the Act—the Confederation—and, specifically, the Federal Council, which is, the federal Executive—is vested with the authority to take all necessary measures. Therefore, on March 16, 2020, when the COVID-19 crisis was dubbed "extraordinary," the Federal Council swiftly stepped in and adopted "emergency ordinances," as allowed by Article 185, paragraph 3, of the Swiss Constitution.[52] This Article of the Swiss Constitution does not empower Parliament—the Federal Assembly made up of two Houses, the National Council and the States Council—to authorize the Government—by declaring a state of emergency or through other tools—to issue emergency ordinances. In other words, the federal Government can freely determine the existence of an emergency without any obligation to involve the Parliament—or the Cantons, whose competences remain constrained to areas—if any—that are not regulated by the Confederation.[53] Nonetheless, when it became clear that the pandemic would last long, this marginalization of Parliament was perceived as a real problem. To redress the situation, an attempt was made to involve Parliament more substantively in deciding on countermeasures during the last months of 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—hereinafter, the COVID-19 Act[54]—entered into force.[55] The aim of this Act was to regulate the special powers of the Federal Council in fighting the COVID-19 pandemic, which were in fact typified by Article 3 of the law; additionally, the Act mandated involvement of the Cantons and "in deciding on matters that touch upon their competences."[56]

The effort of Parliament to circumscribe emergency powers of the federal Government and reinstate some cantonal roles as well is undoubtedly praiseworthy.[57] The reason why the re-involvement of Parliaments worked in Switzerland can be retracted, again, in political dynamics

[50]*See infra*, Part B.VI.

[51]*See* Loi fédérale du 28 septembre 2012 sur la lutte contre les maladies transmissibles de l'homme [Federal Act on Controlling Communicable Diseases] Sept. 28, 2012, RS 818.101 (Switz.). Although it was approved in 2012, the Act entered into force only in 2016.

[52]This Article 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." *See* CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, art. 185 (Switz.).

[53]*See infra*, Part C on the principle of vertical separation of powers for more details.

[54]*See* Loi fédérale du 25 septembre 2020 sur les bases légales des ordonnances du Conseil fédéral visant à surmonter l'épidémie de COVID-19 [Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the Covid-19 Epidemic] [COVID-19 Act], Sept. 25, 2020, RO 2020 3835 (Switz.).

[55]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.

[56]*See* Art. 1, paragraph 2, COVID-19 Act. (translation by authors).

[57]However, as some Swiss scholars have noted, the Act mainly contains delegation norms in favor of the Executive, along with tricky discretionary clauses (i.e., clauses called "Kann-Vorschriften," enabling 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 the Parliament before adopting ordinances pursuant to Article 185 of the Constitution, it does not vest the Parliament with any veto power over the decisions of the Executive, which makes this provision weak. *See* Felix Uhlmann & Odile Amman, *Switzerland and the COVID-19 Pandemic: A Look Back and a Look Into the Future*, VERFASSUNGSBLOG (Mar. 1, 2021), https://verfassungsblog.de/switzerland-and-the-covid-19-pandemic-a-look-back-and-a-look-into-the-future/.

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based on some stability due to the "magic formula," a technique applied—with some adjustments over the time[58]—to split the seven seats of the Federal Council among major Swiss parties. The formula ensures that, overall, Swiss federal politics finds some stability, despite Switzerland is a country with relevant political, cultural, linguistic diversity. And this stability was crucial, on the one hand, in finding consensus to pass a law to restore at least a partial balance between the Legislature and the Executive, and, on the other hand, in allowing Cantons to regain a role as well.[59]

In addition to these politically-led re-involvements that we have discussed until this point, there is also a single case—among the systems that we are examining—where re-involvement of Parliament depended on the Judiciary, and, specifically, on the Supreme Court. This unique case is Israel.

At the beginning of the COVID- 19 crisis, the Israeli Government found it very easy to build on the state of emergency pre-existing in the country,[60] and adopted a number of anti-COVID-19 regulations, strongly restricting rights and freedoms in light of public health needs, imposing in parallel, surveillance measures to contain the virus. Moreover, the Government resorted to an ancient ordinance dating back to 1940, under the British Mandate—the Public Health Ordinance 1940[61]—and authorized the Minister of Health to enact all measures needed to protect the general population from infectious diseases. For instance, the Minister can unilaterally order isolation and quarantine measures, impose the wearing of masks, and restrict gatherings.

At least to some extent, the Israeli Supreme Court stopped this Executive-led reaction. In response to many petitions filed against several emergency regulations made by the Government and measures enacted by the Minister of Health, the Supreme Court[62] established a key principle: Although the pandemic can justify restrictions to rights due to its seriousness and the risks it poses to citizens' health, these restrictions can be decided only through primary legislation. Consequently, the Knesset began to incorporate the measures already contained in the regulations into the laws. The most important piece of legislation is the Corona Law of July 23, 2020,[63] which authorizes the Government to declare a state of emergency specifically for the Coronavirus crisis. Thus, the Corona Law amended "Basic Law: The Government." According to the amendment, when the Government issues emergency regulations to fight COVID-19, there is a closed list of measures it can adopt. Instead, pursuant to the previous version of "Basic Law: The Government," the Executive was free to determine the content of emergency regulations. In addition, the Corona Law makes a provision for setting up 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—and not *ex ante* oversight—and the Corona Law was still considered too vague and in favor of the Executive,[64] the overall framework established by the 2020 Corona Law can be seen as a step forward, especially compared to the previous situation in which the Executive was the undisputed "master" of public health crises.

In this way, in Israel, the Supreme Court partially took the handling of the emergency back to the ordinary routes of the parliamentary system of government and settled a case law that provide useful precedents to stem the excessive role of the Executive in case of future crises. These

[58]*See* Karl-Henri Voizard, *Réflexions Autour de la Légitimité du Conseil Fédéral Suisse*, 93 Revue Française de Droit Constitutionnel 149 (2013).

[59]*See also infra*, Part B.III.

[60]Suzie Navot, The Constitution of Israel: A Contextual Analysis 250 (2014).

[61]Public Health Ordinance No. 40 (1940) (Isr.).

[62]*See, e.g.*, HCJ 2109/20 Ben Meir v. Prime Minister, (2020) (Isr.).

[63]*See* Law Granting Government Special Authorities to Combat Novel Coronavirus (Temporary Provision) (2020) (Isr.).

[64]*See* Tamar Hostovsky Brandes, *A Year in Review: COVID-19 in Israel. A Tale of Two Crises*, Verfassungsblog (Apr. 13, 2021), https://verfassungsblog.de/a-year-in-review-covid-19-in-israel/; Einat Albin, Ittai Bar-Siman-Tov, Aeyal Gross & Tamar Hostovsky-Brandes, *Israel: Legal Response to Covid-19*, Oxford Compendium of National Legal Responses to Covid-19 (Jeff King eds., 2021) https://oxcon.ouplaw.com/view/10.1093/law-occ19/law-occ19-e13.

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improvements in terms of the Executive-Legislature relationship, despite 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 this is a technical feature—and, above all, the latter adopted an "activist" approach—which is not a technical aspect, but a choice of the Court—, reproaching the Government for its excessively proactive role in managing the emergency.[65]

Opening our perspective and generalizing this comment, it could be said that courts able to "re-balance" the Legislature-Executive relationship during an emergency are desirable, but, in order to do so, they need both technical tools and "proactive" will.[66]

III. Political Instability as the Explanation of "Façade" Parliamentary Involvement

In the previous paragraph, we have addressed some cases where political stability fueled parliamentary re-involvement through the time, demonstrating that there is a link between such stability and the re-engagement of Legislatures. *A contrario*, if stability brought to re-involvement, instability hindered the role of Parliament during the pandemic. This is demonstrated by the example of Spain. As a matter of fact, in times of COVID-19, Spain was characterized by political instability and significant contrast between the political majority and opposition, as the Government, backed by a center-left coalition, needs also the external support of some independentist parties. At the same time, the opposition is made up of political forces that are on quite extreme ideological positions—such as far-right. This political scenario entailed that, in Spain, the involvement of the Legislature was only a façade.

Along with Portugal,[67] Spain was one of the few Western democracies that used constitutional emergency clauses in the pandemic. On March 14, 2020, the Spanish Council of Ministers—the whole Spanish Government—resorted, by its own decree,[68] to the so-called *estado de alarma* (state of alarm), one of the emergency regimes[69] provided by Article 116 of the Spanish Constitution and regulated in more detail by Ley Orgánica No. 4/1981.[70] Based on the declaration of the state of alarm, the Government can limit individual rights and personal freedoms by decrees—lower-ranked than statutes—with a view to preserving public health.

The Spanish Constitution does not impose any *ex ante* parliamentary authorization to declare 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 wants to extend the state of alarm over 15 days. The length of each extension is not mandatorily limited to 15 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—with strong centralization of competences in the hands of the central Government[71]—were authorized by the Congress of Deputies from March 2020 to June 2020. All these extensions lasted 15 days each, meaning that, every two weeks, the Congress of Deputies was called—at least in theory—to have a debate and decide whether—or not—the state of alarm had to be kept.

[65]*See* Albin et al., *supra* note 64.

[66]See *infra*, Part D.I.

[67]Constituição da República Portuguesa [Constitution], art. 19 (Port.).

[68]Real Decreto 463/2020 (B.O.E. 2020, 67) (Spain) (declaring the state of alarm to handle the sanitary crisis caused by COVID-19).

[69]The other two regimes, provided by the Spanish Constitution, are the state of exception and the state of siege. *See* Arianna Vedaschi, À la guerre comme À la guerre. La disciplina della guerra nel diritto costituzionale comparato 318 (2007).

[70]*See* Ley Orgánica de los estados de alarma, excepción y sitio [Law on the States of Alarm, Exception, and Siege] (B.O.E. 1981, 134) (Spain). This law explicitly provides that the state of alarm can be triggered in cases of public health crises.

[71]*See infra*, Part C for further details.

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Meanwhile, both Houses of Parliament—the Congress of Deputies and the Senate—resorted to procedures—already regulated by the standing orders of each House—to vote remotely and contain the spread of the coronavirus. Based on these tools, the Houses met to convert several royal decree laws approved by the Government as part of the anti-COVID-19 strategy and to question the President of the Government—the head of the Spanish Executive—and some Ministers about anti-COVID-19 measures.

This apparently ideal trend—considering that we were in an emergency—only lasted as long as members of Parliament showed full agreement with governmental anti-COVID-19 measures. As soon as they started disagreeing, the Government tried to "silence" the Congress of Deputies. As a matter of fact, on the one hand, minority parties initiated strong opposition concerning the congressional authorization of the fifth and sixth extensions –in May and June 2020, respectively—of the first state of alarm—declared in March 2020. On the other hand, at the institutional level, parliamentary minorities engaged in filibustering strategies to prevent the majority from authorizing the extensions—which they could not achieve because the majority eventually approved both extensions.[72] As a result, the Government put parliamentary involvement aside and practically placed the Congress of Deputies in stand-by when—after some months where COVID-19 cases decreased and no state of emergency was in place in Spain (from June 2020–October 2020)—the infection peaked again, and a second nationwide[73] state of alarm was triggered on October 25, 2020.

This second state of alarm, initially declared for 15 days—as imposed by the Constitution—and based on the principle of *cogobernanza* (a more decentralized approach with more competences left to the Spanish regions, called *comunidades autónomas*), was extended for six months—until early May 2021. In this way, the Government was sure that parliamentary minorities would not obstruct its anti-COVID-19 policies for at least half a year. In particular, since the Congress of Deputies was silenced as soon as minorities raised their voice, this may indicate that the Government merely intended to have a formal rubber-stamp on its decisions regarding the handling of the pandemic rather than an effectively 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. This attitude is at odds with the very core of parliamentary functions of control over governmental action, which is typical of parliamentary systems, and moreover is a dangerous pattern.

IV. "Atypical" Leaderships and Dynamics of the Form of Government in the Management of the COVID-19 Pandemic Relationships

In this research, we have also looked at some countries that, although not being necessarily politically instable, had very "atypical" political leaderships, at least at the beginning of the pandemic, with political leaders denying or mocking the existence of the pandemic. We have several examples in Latin-American countries[74] as well as in Eastern Europe,[75] but even the Western world has some cases of this kind, with the most evident being the United States.

As is well known, under Trump's presidency, the COVID-19 threat was underestimated, if not debunked. According to the President, 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—the Centers for Disease Control and

[72]*See* Javier García Roca, *El Control Parlamentario y Otros Contrapesos del Gobierno en el Estado de Alarma: La Experiencia del Coronavirus* [*Parliamentary Control and Other Government Counterweights in the State of Alarm: The Coronavirus Experience*], *in* COVID19 Y PARLAMENTARISMO. LOS PARLAMENTOS EN CUARENTENA [COVID-19 AND PARLIAMENTARIANISM: PARLIAMENTS IN QUARANTINE] 17, 25 (Daniel Barceló Rojas et al. eds., 2020)

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

[74]For instance, Brazil and, to some extent, Mexico.

[75]For example, Hungary.

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Prevention and the World Health Organization, respectively—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 federal legal tools against the emergency,[76] he did so belatedly and under pressure from his administration rather than on his genuine belief that they were necessary to protect the citizens. Since he was not convinced of the seriousness of the emergency, he did not make the best use of these tools as he did not resort to all the powers made available to him, as several scholars remarked.[77] In other words, the United States' federal approach to the pandemic during the first year can be defined as "Executive underreach,"[78] 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."[79]

The federal Executive's inaction was so serious and potentially dangerous that it had to be compensated by the activism of state Executives, as will be further explained later in this Article.[80]

From a general viewpoint, this weak role of the US federal Executive is quite odd, considering the traditional features of the United States presidential system, with the role of the federal President often interpreted either as "imperial"[81] or as the "servant of the Nation,"[82] whose task is to take care of the best interest of his people. Not to mention how previous emergencies have been handled in the country—for instance, international terrorism[83]—with the federal Executive as the main actor. During the pandemic, instead, the federal Executive neglected its responsibility in handling the emergency, a responsibility it should have taken, instead, pursuant to the National Emergencies Act. This inaction was based on populist and unfounded arguments, notwithstanding the calls, coming from political opposition, for it to take its responsibilities. In parallel, the Legislature worked separately, focusing on the social and economic aspects of the pandemic, since the United States system did not provide Congress with specific powers to "force" the President to make more efforts when an emergency is ongoing, nor to replace him in case of inaction.

This situation of federal Executive's inertia changed when a new president, Joseph Biden, was elected, so the federal Executive was enhanced again as the leader of the reaction against COVID-19. Yet, we cannot rule out that a similar approach will not be repeated in future emergencies, should a Trump-like president—or even Trump himself—retake office.[84]

V. "Balanced" Parliamentary Involvement: The Weight of the Cultural Factor

Given the peculiarity of the United States, where the federal Executive was "inhibited" as long as President Trump was in office, until this point, we have analyzed cases were, in a more or less evident way, Executives predominated. As a matter of fact, even in countries that managed to regain a certain re-involvement of Legislature, the overreach of the Executives to the detriment of Legislatures was undeniable for a certain period of time. Although this more or less strong role of

[76] *See* National Emergencies Act, 50 U.S.C. § 1601–1651 (1976); Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 et seq. (1988). *See* Kim L. Scheppele, *Underreaction in a Time of Emergency: America as a Nearly Failed State*, VERFASSUNGSBLOG (Apr. 9, 2020), https://verfassungsblog.de/underreaction-in-a-time-of-emergency-america-as-a-nearly-failed-state/.

[77] *See* Scheppele, *supra* note 76.

[78] *See* David E. Pozen & Kim L. Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. 608 (2020).

[79] *See id.* at 610.

[80] See *infra*, Part B.IV.

[81] *See* ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973).

[82] Reference is to the so-called stewardship theory.

[83] *See* ARIANNA VEDASCHI & KIM L. SCHEPPELE (eds.), 9/11 AND THE RISE OF GLOBAL ANTI-TERRORISM LAW: HOW THE UN SECURITY COUNCIL RULES THE WORLD (2021).

[84] *See* MARIO PATRONO & ARIANNA VEDASCHI, DONALD TRUMP AND THE FUTURE OF AMERICAN DEMOCRACY: THE HARBINGER OF A STORM? (2023).

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Executives and some marginalization of Parliaments was undoubtedly a majoritarian trend, some exceptions existed.

In a minority of jurisdictions, the approach was fairly more balanced in terms of the Legislature–Executive relationship, which was kept "healthy" without excessive marginalization of the Legislature, even in times of emergency. This happened especially in some Nordic countries, like Denmark and Finland.

In Denmark, the pandemic was managed through the Act on Communicable Diseases 1979—amended twice in March 2020 at the outbreak of the pandemic—then repealed and replaced—from February 2021—by the Act on Communicable Diseases 2021. This new regime paved the way for a "middle-ground" approach to the relationship between the Legislature and the Executive, already detected in the 1979 Act. 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[85]—but with a very precise legal basis. For instance, the 1979 Act, as amended in 2020, specified that the "major gatherings" that could be prohibited were "indoor, outdoor, public, and private gatherings"[86] 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.[87] This number of people became three when the effects of the virus became more severe. The framework for restrictions on gatherings is an example to explain that the legal basis of these powers was precise and clear. In February 2021, the new version of the Act on Communicable Disease reinforced parliamentary involvement, with the introduction of new measures. 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 should be laid before the competent committee of the Folketing—the Danish unicameral Parliament—which could stop its enactment if the committee did not agree with its contents. From this procedure, it turns out that the role of the Legislature became an effective and substantive one, and not mere façade.

In Finland, an even more evident balance than in Denmark was guaranteed between the powers of the Executive and the Legislature, and this was beneficial to the principle of legality. To deal with the COVID-19 crisis, a state of emergency was declared twice by the Government, based on an existing statutory framework, namely the Emergency Powers Act.[88] When this statutory emergency regime is in place, the Executive is enabled to adopt a number of measures through the decrees of competent Ministers. However, the Eduskunta (the Finnish unicameral Parliament) retains a central role, to the extent that scholars commented that there was "no recognizable marginalization of Parliament" during the COVID-19 emergency.[89] In particular, at least three elements provide evidence that Parliament was not marginalized. First, the declaration of emergency, pursuant to the Emergency Powers Act, is issued by the Government and has to be submitted to Parliament within a week of issuance. If Parliament does not approve it, its effects cease. It should be noted that parliamentary scrutiny is the only form of scrutiny on this decree that cannot 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 have to be previously checked by Parliament, and these decrees are enacted only if Parliament agrees on their content. Third, the parliamentary Constitutional Law Committee stepped up at the height of the third COVID-19 wave in March 2021 to block a bill that would

[85]The amendment dates back to March 17, 2020.

[86]The Act on Communicable Diseases 1979, § 6(1) (Den.).

[87]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.

[88]*See* Valtioneuvoston Päätös [Government Decision] VNK/2020/31, Mar. 16, 2020 (Fin.).

[89]Janne Salminen, *National Report on Finland, in* Governmental Policies to Fight Pandemics: The Boundaries of Legitimate Limitations on Fundamental Freedoms (Arianna Vedaschi ed., forthcoming).

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have granted wider and unsupervised powers to the Executive to restrict freedom of movement. This committee 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[90] and its role proved to be a meaningful one even in times of emergency. From a general viewpoint, it can be said that the Finnish trend—even more than in Denmark—is characterized by strong balancing mechanisms already contained in the existing legal framework and maintained during the pandemic.

The possible explanation of this approach is—it must be said—a hardly "legal" element. Nordic countries are characterized by a culture that is very different from that of other Western democracies, and, more specifically, than all other countries we have surveyed. Particularly, their citizens are usually more willing to comply, even without strong imposition by public powers. Rather, severe impositions would be counterproductive, as it is not in their legal culture to comply with orders whose rationale they do not share.[91] Consequently, while the Parliament worked to enact binding measures to be shared by citizens, the citizens conformed to the non-binding guidelines of governmental and public health authorities. Reliance on recommendations and the "timing" issue is also connected, in these countries, to political stability. In fact, in Denmark, the Government was backed by the Social-Democratic party, holding a large majority in Parliament, and supported by the left-wing coalition, and together they held the absolute majority; in Finland, the Government was based on a consolidated political coalition, with parties that had worked together also in past years. Yet, these are not the only factors that allowed lower marginalization of representative assemblies, as both mentioned countries have preventive mechanisms, such as ombudsmen and ad hoc committees, that oversee governmental measures when they are binding, not only in times of emergency. These mechanisms were effective in avoiding the overreach of Executives and infringement of the principle of legality.

The importance of the cultural element is even more tangible if we consider Sweden, where recommendations were the major tool in tackling the pandemic. After an initial period where reaction was considered unnecessary, and "normal" life went ahead, the response to COVID-19 was primarily based on recommendations, while the Government took less power than expected. Swedish citizens complied with non-binding guidelines based on a shared belief that they should be followed independently of which bodies or authority adopted them.[92]

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, which is hardly "transplantable" to other jurisdictions—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.

VI. The Irrelevance of Technology Development on the Legislature-Executive Relationship in Times of Pandemic

Following the idea that in the "digital age" technology can strongly affect politics, this study wants also to verify whether this assertion proved truth in the case of COVID-19 and the Legislature-Executive relationship. In clearer words, it is interesting to assess whether a higher or lower degree of parliamentary marginalization depends on or is tied to all those tools that we could define as "virtual Parliament."

Practical experiences we surveyed did not highlight any direct relationship between better involvement of Parliaments and greater adoption of remote voting or other digital procedures.

[90] *See infra*, Part D on constitutional review.

[91] Anna Jonsson Cornell, *National Report on Sweden*, *in* Governmental Policies to Fight Pandemics: The Boundaries of Legitimate Limitations on Fundamental Freedoms (Arianna Vedaschi ed., forthcoming).

[92] *See* Cornell, *supra* note 91.

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There have been cases where remote voting was allowed, but Parliaments were strongly marginalized, and situations where the Legislature-Executive balance was better—or, at least, improved over time—although the "digitalization" of Parliaments was not as advanced as expected.

Among them, let us consider the case of the United Kingdom: A country with a strong marginalization of Parliament and, at the same time, a well-working system of e-voting. As a matter of fact, it resorted to "hybrid"—a mix of members in the Chamber and others participating by video conference and voting by proxy or electronically—and virtual formats—all members participating by video conference and voting electronically. These hybrid and virtual methods were made possible by some amendments to the standing orders of both the House of Commons and the House of Lords. Yet, they did not fuel real parliamentary voice, as explained above.

The fact that "virtual Parliaments" did not enhance effective Legislature-Executive balance is true even in civil law countries. Let us think of Spain, where both Houses of Parliament (the Congress of Deputies and the Senate) resorted to procedures that allowed members to vote remotely to contain the spread of COVID-19; still, we pointed it out as a country where parliamentary involvement was mere façade.[93]

A contrario, but again to demonstrate further that the equation "virtual Parliament = better involvement of Parliament" does not prove so true, we see that the countries where a good balance between the Legislature and Executive was reached since the beginning were not always the "champions" of virtual vote. For instance, the Danish Parliament has never resorted to digital vote, since it only made some adjustments based on political agreements to reduce the number of members in Parliament while maintaining the representative ratio of different political groups. Again, we see that the presence—or not—of remote voting is not a determinant element in ensuring parliamentary involvement.

If the use of remote voting and other online procedures did not significantly affect Parliaments' actual engagement, this means that the marginalization—or not—of Parliaments depended more on political choices and/or on transformations that COVID-19 brought to single systems of government.

In summary, when there is a political will to enhance the powers of the Executive at the expense of the Legislature, no possible technology tool, even the most cutting-edge ones, can overcome this situation.

C. COVID-19 and the Principle of Separation of Powers: Vertical Dimension

I. The COVID-19 Pandemic: A Win for Vertical Cooperation and a Change of Paradigm for (Some) Archetypes

From the perspective of the relationships between the central state and decentralized entities—federated states or regions[94]—the pandemic raised the issue of whether "centrally-driven" approach worked better, or sub-central entities had to be given a meaningful role.

From a general viewpoint, in an emergency, some concentration of powers in the hands of central bodies is usually expected, since extraordinary situations may intuitively call for unitary responses. Nevertheless, the centrally-driven approach could not be the best option in all cases, especially when the situation was territorially different. In other words, COVID-19 was

[93]Among the other countries, both of civil and common law, where virtual voting was allowed, but Parliament was not substantively involved, we can mention Belgium, France, New Zealand.

[94]What we refer here as "federated states" and "regions" take different names based on the different jurisdictions, e.g., Australian sub-federal entities are "states" and "territories," in Canada they are called "provinces" and "territories," "*länder*" in Germany, and so on; regarding the category of "regions," sub-central entities in regional states, among the countries that we address they are called "regions" in Italy, but "autonomous communities" in Spain. In Part C, every time we refer to these entities, we mention them with their own name and specify that they are the sub-federal or sub-central entities in a given jurisdiction.

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undoubtedly a "massive" threat; yet, the rise of infection and death rates diverged in different times and territories—even within the very same country. Consequently, the dilemma of whether and to what extent sub-central entities had to be involved, which role they should play in central bodies' decision-making procedures and what autonomy they needed in providing measures for their own territories was a serious one.

Looking at the comparative scenario, there have been examples of federal and regional countries that relied on strong centralization, especially at the beginning of the pandemic, but such approaches caused a significant number of issues, both of a practical and legal nature.

Among these centrally-driven countries, we can undoubtedly find Austria, where centralization was to some extent "constitutionally mandated," insofar as the Constitution mentions public health as a competence of the Federation to be enforced by the *länder*, according to the executive pattern of Austrian federalism.[95] Such centralization, however, brought significant disagreement, based on the fact that some *länder* considered the measures imposed by the center too strict for their own situation, and this led to some political clashes. For instance, in May 2020, the Bundesrat, which is the upper House representing the *länder*, exercised strong opposition and tried to veto some rights-limiting measures discussed by the Austrian Bundestag, the lower House, amending the Epidemics Act. Although the veto was then overridden by the absolute majority of the Bundestag, the very fact that the Bundesrat exercised its veto power is politically noteworthy, as it reveals the disagreement of the *länder* and their attempt to delay the governmental anti-COVID-19 action. Besides, when the *länder* could not raise their voice on the political or institutional scene to denounce their disagreement with the center and its decisions, they did so *de facto*. For example, in April 2021, Vorarlberg (a *land* in Western Austria) reopened most of its facilities, notwithstanding the partial lockdowns reinstated by the Federation, and without any legal basis to do so. As highlighted by scholars,[96] although these discrepancies were not brought before the Austrian Constitutional Court since they were settled at the political level, they give a sense of how a "top-down" approach to deal with such a long emergency may end up being disrespected by federated entities themselves, even in an executive federalism such as Austria.

Also in Italy—where the division of competences in health matters between the central state and the regions is very complex and not so straightforward[97]—the initial reaction to the first wave was centrally-driven. Similarly to Austria, some Italian regions—and even provinces or municipalities—started to "suffer" from this centralizing will and began passing measures that were not always consistent with the central ones.[98] This brought the central state to "remedy," e.g., with Decree Law No. 6/2020 and the following ones that replaced it, prescribing that any act of local levels of government contrasting with central measures should be considered deprived of any

[95]"Cooperative" federalism is usually defined as a model where central and sub-central authorities share competences in the same sphere and synergically works to implement them. In some cooperative federalisms, an "executive" component exists, meaning that the cooperation scheme implies that policy decisions are taken mainly by the center, with sub-central entities called to "execute" them, with some discretion. *See* Robert Schütze, From Dual to Cooperative Federalism: The Changing Structure of European Law 19 (2009).

[96]*See* Karl Kössler, *Managing the COVID-19 Pandemic in Austria: From National Unity to a De Fact Unitary State?*, *in* Comparative Federalism and COVID-19. Combating the Pandemic 70 (Nico Steytler ed., 2022).

[97]Article 117, para. 2, sec. m, of the Constitution guarantees the "determination of the basic level of civil and social rights to be guaranteed throughout the national territory" as an exclusive competence of the central state. There is no doubt that health can be considered a social right. *See* Art. 117 Costituzione [Cost.] (It.). Additionally, according to Article 117, para. 2, sec. q, "international prophylaxis" is also a central state competence. At the same time, Article 117, paragraph 3, of the Constitution sets "the protection of health" as a shared competence, i.e., a policy area where the central state has to fix general principles and the regions can pass more detailed legislation. *See* Art. 117 [Cost.] (It.). Concerning the statutory level, Law No. 833/1978 (regulating the National Health Systems) allows both the Minister of Health and the heads of regional Executives to enact measures in cases of health crises. Lastly, the piece of legislation that was the basis of the declaration of a state of emergency in Italy, i.e., Legislative Decree No. 1/2018, vests the Council of Ministers, the heads of regional Executives, and even the mayors of municipalities with powers to deal with health emergencies.

[98]For example, some regions barred the entry from other regions before the state prescribed so.

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effect, but, in general, the dynamics among state entities remained very unsettled during the whole duration pandemic, with continuous "tugs-of-war" between the center and the regions/local entities that certainly did not enhance a smooth and efficient management of the crisis. It is worth saying that, in Italy, this dilemma between centralization and decentralization was to some extent settled by the Italian Constitutional Court.[99] In responding to a constitutional challenge brought by the central Government against a law of the Region Valle d'Aosta, allowing certain businesses and restaurants to be reopened in the regional territory notwithstanding state law ordering their shutdown, the Constitutional Court held that all anti-COVID-19 measures fall within the subject matter of "international prophylaxis" and so are an exclusive competence of the central state, practically leaving no room to regional authorities—and, *a fortiori*, to those of local entities. This solution can seem a non-ideal one—since, as said before, the pandemic is an emergency that can require some sort of differentiation by territory or at least meaningful involvement of government levels—but it can be explained in the light of the traditional approach of the Italian Constitutional Court, often deciding in favor of the center when it comes to the allocation of competences. This stance contributes to confirm that, even though in 2001 a constitutional reform was passed to drive Italy towards (quasi-) *federalism* (without formally wiping out its *regional* nature), the time has not come yet for a full "federalization" of the country, and the pandemic remarked this more clearly.

There are even cases where centrally-driven strategies were tricky because they practically disrupted the constitutional allocation of competences. In this regard, Spain is illustrative. There, most competences in health matters are normally allocated to the *comunidades autónomas* (the Spanish regions); nonetheless, with the first declaration of the state of alarm, the central state took many of these competences, to the point that the Spanish institutional arrangements between the center and regional entities were ignored.[100] Actually, during the first state of alarm, all anti-pandemic measures were enforced by the central Government, without involving the *comunidades autónomas*, even when such measures touched upon their competences. Nevertheless, neither the Constitution nor Ley Orgánica 4/1981 explicitly allow such a strong and almost absolute centralization of regional competences during emergencies. Therefore, this centralization happened without any legal basis and in defiance of the Constitution. Additionally, said centralization brought significant practical problems. Think of territories alleging that their rate of infection did not require such strict measures;[101] at the political level, centralization triggered much criticism as well, especially by some independentist parties as Esquerra Republicana de Catalunya (ERC), which perceived not to be involved in the choices of the center and started threatening to vote against following extension of the state of alarm. Criticism about the first, very centralized, Spanish state of alarm entailed that, when it came to declaring the second state of alarm, central authorities relied on an "extreme" form of decentralization as a counterreaction, which also proved troublesome.[102]

We have now demonstrated that absolute centralization caused discontent and claims of unreasonableness by political parties and sub-central entities, so it has not been a "winning" approach. Time has now come to determine which strategies have instead worked better during the pandemic.

As we will explain, the successful choice has been cooperation. First and foremost, this is demonstrated by the fact that cooperation was carried out not just by countries normally relying on a pattern of cooperative federalism, where it was expectable, but even by those that,

[99]*See* Corte Cost., 24 febbraio 2021, n. 37, Giur. it. 2021 (It.).

[100]Alicia Cebada Romero & Elvira Domínguez Redondo, *Spain: One Pandemic and Two Versions of the State of Alarm*, VERFASSUNGSBLOG (Feb. 26, 2021), https://verfassungsblog.de/spain-one-pandemic-and-two-versions-of-the-state-of-alarm/.

[101]This was especially the case in the Spanish islands but also in the Basque Country. *See* Juanma Romero, *Sánchez da a las CCAA la Gestión de la Fase 3 para Amarrar la Prórroga con ERC y PNV*, EL CONFIDENCIAL (May 30, 2020), https://www.elconfidencial.com/espana/2020-05-30/pedro-sanchez-ccaa-gestion-fase-desescalada-pnv-erc_2617955/.

[102]See *infra*, Part C.II.

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traditionally, are based on dualist federalism. Let us analyze cooperation both in "expected" and "unexpected" cases.

Among countries where it was "expected," the "champion" of cooperation during the pandemic was Germany, constitutionally designed—and practically functioning in ordinary times—as a cooperative federalism. The latter encompasses a set of cooperation, negotiation, and consultation mechanisms among the Federation and the *länder*, even when a matter falls in the exclusive competence of the former.

Based on the constitutional framework—according to which public health is a competence of the Federation only when infectious diseases need to be contained,[103] while other health competences lie in the hands of the *länder*—and on the Law on Protection Against Infection 2000, Germany managed the whole first and second wave of the pandemic through a well-working scheme of agreements between the Federation and the *länder*. Apart for some limited moments where some centralization was temporarily introduced if strictly necessary—such as with the mechanism of the so-called emergency brake[104]—Germany stuck to this pattern of cooperation, which worked well, as demonstrated by the fact that the German Constitutional Court, although being a very "active" court during COVID-19[105], never had to deal with a challenge on the allocation of competences between the Federation and the *länder*.[106]

A more "timid," though still existing form of cooperation was carried out by Switzerland, another traditionally cooperative system that tried to keep its nature during the pandemic. Actually, Switzerland was not as cooperative as Germany in the fight against the virus, but this can be explained from a legal viewpoint. As a matter of fact, the piece of legislation activated to fight COVID-19, the Epidemics Act, provides that, when the epidemic threat is "extraordinary" (level 3), the Confederation can take all necessary measures, even interfering with cantonal competences; instead, when it is "normal" (level 1) or "particular" (level 2), the Cantons still retain a wide margin of (re)action—which is more in line with the constitutional allocation of competences, labelling health competences as "shared" competences.[107] On March 16, 2020, the situation was deemed "extraordinary"—and hence the Confederation had to take the lead, while on June 19, 2020, the intensity of the virus decreased to "particular," so the Cantons regained a stronger role. Cooperation was further promoted thanks to the COVID-19 Act, entered into force in September 2020. This act required the Cantons to participate in the decision-making process when the Confederation decided on issues that fell within their area of competence in tackling COVID-19. Therefore, although some centralized measures were taken at the beginning of the pandemic—and this was inevitable, based on the piece of legislation that Switzerland used to react to COVID-19—the wider role of Cantons was re-established as soon as the situation allowed it, making its response overall consistent with the usual approach of Swiss federalism.

As highlighted, Germany and Switzerland's push towards cooperation is not staggering due to their ordinary nature as cooperative systems; the situation is different for other countries, historically characterized by a "dual logic" rather than a cooperative one. It is noteworthy that some of them underwent significant changes of pattern in times of pandemic, showing relevant elements of cooperation. It is probably too early to assess with a sufficient degree of certainty whether or not this is a permanent "change of shape" of these federalisms, meant to remain as a definitive transformation of the legal systems, but they are surely important ones, even in case it was demonstrated that they lasted only for the time of the pandemic. This importance is for two main reasons. First, the time of COVID-19 has been a quite long one, so even if these

[103] *See* GRUNDGESETZ [CONSTITUTION] art. 74, § 1, n. 19 (Ger.).

[104] Introduced in April 2021, it 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.

[105] *See infra*, Part D.I.

[106] *See* Jens Woelk, *I sistemi federali di Germania e Austria alla prova dell'emergenza pandemica*, 54 DPCE ONLINE 329, 330 (2022).

[107] Meaning that the Cantons are free to intervene, at least as long as the Confederation does not decide to step in.

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transformations do not end up being permanent, they would have had "the time" to impact in a meaningful way on how the form of state works. Second, these changes in the pattern of federalism, even if temporary, show that even dual federalisms can potentially turn into cooperative schemes, meaning that dualism may hide cooperation in itself, which is "activated" or "deactivated" depending on the contingent situation. And ultimately, the cooperation pattern proved better than the dual one to address stressful times as the pandemic is.

Among systems that "changed their shape" in times of pandemic to deal with such an emergency situation, we can mention two emblematic cases, Belgium and Australia. These are two countries with very significant differences, not just in obvious geographical terms, but also due to their history, legal family, origins of their federalism. Notwithstanding these differences, they are two federalisms based on dual logic, that is, systems where the federal Government and the federated entities work as separately as possible. In the case of Belgium, dualism is very pronounced if one looks at the constitutional design—according to some authors,[108] the Constitution not only discourages cooperation but also tries to *prevent* it—and this is because Belgium is a multinational, multilingual, and sometimes conflictual country, where cooperation, especially on some specific matters, could prove very difficult. In parallel, not only the Australian constitutional system provides for a dual framework, but also the consolidated case law of the High Court contributed to reinforce this trend, often deciding in favor of a centrally-driven dualism.[109]

Despite these legal frameworks, in order to face the pandemic both countries resorted to significant cooperation, and did so, thanks to the set-up of bodies that allowed dialogue among government levels. In Belgium, the Wilmès Government gathered together representatives of the Federation, regions, and communities in a body called National Security Council. This body already existed, but it had never been used so frequently and over such a long period of time, as it had been originally conceived to work only in case of imminent terrorist threats. During the pandemic, the right-limiting measures were debated by the National Security Council before adoption so that a certain level of inter-institutional agreement could be reached. Indeed, in October 2020, when a new Government led by Alexander De Croo was sworn in, cooperation was pushed further, as an ad hoc body for public health threat was created, the Inter-Ministerial Conference on Public Health was established. The decision to set up an ad hoc body is relevant in political terms, as the previous choice to rely on a pre-designed body may had conveyed the idea that cooperation was more by chance than a full-fledged choice, and the Inter-Ministerial Conference debunked this impression.

In a very similar vein, in Australia, the main driver for cooperation was the so-called National Cabinet, made up of the Prime Minister of Australia, the Premiers of the six Australian states, and the Chief Ministers of the two territories.[110] The National Cabinet coordinated the responses of states and territories to avoid excessive fragmentation, and so its measures had to be as coherent 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—which rests in the hands of states. Although some scholars defined the coordination provided by the National Cabinet as "loose,"[111]—meaning that it allowed states relevant "flexibility" as to how implement the decisions taken collegially—the COVID-19 decisional strategy taken by Australia represents a significant shift if considered in the

[108]Patricia Popelier, Catherine Van Den 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).

[109]*See* Bradley Selway & John M. Williams, *The High Court and Australian Federalism*, 35 Publius 467 (2005).

[110]Tamara Tulich, *The Australian Response to COVID-19: A Year in Review*, Verfassungsblog (Feb. 22, 2021), https://verfassungsblog.de/the-australian-response-to-covid-19-a-year-in-review/.

[111]*See* Alan Fenna, *Australian Federalism and the Covid-19 Crisis*, *in* Federalism and the Response to Covid-19 17 (Rupak Chattopadhyay et al. eds., 2022).

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light of the traditional features of its federalism. Moreover, this flexibility seems not necessarily a negative aspect of how Australian federalism worked during the pandemic, as it may have provided the necessary leeway to different states or territories to adapt the (previously coordinated) measures to their peculiar situation, giving rise to somewhat asymmetrical, but not uncoordinated responses. More in general, these experiences prove that asymmetry is not always incompatible with cooperation, and hence not by definition detrimental to an efficient response to a public health threat.

II. The Failure of Decentralization without (Vertical) Cooperation

It has been clarified from the paragraph above that the cooperative model was frequently adopted during the pandemic, probably as the most appropriate and well working choice. However, this statement comes with an important caveat: Cooperation in this context needs to be intended in the proper sense of the word, as involvement and participation of sub-central entities in the central choices—if necessary, even with some possibility of differentiating the measures applying to each territory based on the factual situation. As a matter of fact, practice taught us that when the role of sub-central entities was interpreted not as full-fledged cooperation, but as mere decentralization with no or poor coordination by central/federal Government, this strategy did not work well.

Spain during the second state of alarm demonstrates this statement. As said, on the one hand, the first state of alarm in Spain was characterized by a strong predominance of the central powers, even to the detriment of the constitutional allocation of competences.[112] On the other hand, when, in October 2020, a second nationwide state of alarm was declared, the approach of the Government was totally different: To avoid criticism[113] arisen from the strategy taken during the first state of alarm—and to avert from itself responsibility of unpopular measures—the new governmental action was grounded on the principle of the so-called *co-gobernanza*. It means that, once a state of alarm has been declared, the presidents of the *comunidades* are designated as "delegated authorities" and are free to decide the measures to be applied in their territories, without consulting with central authorities and without meaningfully coordinating among themselves as well. This approach went too far and turned out to be troublesome. From a practical viewpoint, it caused worrying unreasonable fragmentation resulting in inequality throughout the Spanish territory. From a legal angle, there is a very serious flaw, which was pointed out also by the Spanish Constitutional Court in October 2021:[114] *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 determined by the *comunidades*. As a consequence, there is no actual political check on emergency measures, because the Government does not substantively decide on the actions to be taken, and so the Legislature is not in a position to check anything. This situation created a short-circuit in the mechanism of political accountability, a major problem if one considers that Spain is a parliamentarism. Therefore, an element of the form of state—the lack of coordination between the levels of government—can potentially raise issues regarding the form of government.

From the experiences analyzed until now, a "general rule" comes out: Decentralization without cooperation is hazardous in times of pandemic; just think of the impact on equality principle. Nonetheless, one could counterargue that there is at least a country, among the ones we examined, that managed decentralization quite well, even without strictly-coordinating the response with the central power. Reference is to Canada, where, left along some limited measures taken by the

[112]*See* Lorenzo Cotino Hueso, *National Report on Spain*, *in* Governmental Policies to Fight Pandemics: The Boundaries of Legitimate Limitations on Fundamental Freedoms (Arianna Vedaschi ed., forthcoming).

[113]For criticism among scholars, *see* Remedio Sánchez Férriz, *Reflexiones Constitucionales desde el Confinamiento*, *in* Actualidad Jurídica Iberoamericana 16 (2020), regarding political parties, major criticism came from VOX and the Partido Popular.

[114]*See* T.C., B.O.E., n. 183, p. 145362, Oct. 27, 2021 (Spain).

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Federation, provinces were the main actors in the fight against the COVID-19 contagion. However, this does not contradict the general statement made before, because Canada can be seen as a peculiar situation, which amounts to an exception to the "general rule" hinted above, due to some specific factors. Among these factors, which allowed Canadian decentralization to exceptionally work well, is quite important the historically consolidated case law of courts, according to which there are no doubt that all health competences, even when it comes to situation of crisis, pertains to provinces. Another very relevant factor is a less legal and more material, and even "cultural" one: Canadian provincial healthcare systems and related facilities are considered particularly high-performing by citizens, thus, if the Federation had stepped in vigorously, for instance, invoking the Emergencies Act,[115] in the matter of public health, a "sacrosanct"[116] aspect of the Canadian political culture would have been disrupted. These two aspects explain why a very decentralized response worked well in Canada, something that could not have happened in countries where these two elements, a legal and a cultural one, are not so present and well-blended.

III. Horizontal Cooperation as a "Last Resort"

Up to this point, we have always considered the relationship between the central entity—the central state or the federation—and the sub-central entities—the regions or the federated states—and when we talked about cooperation, we always meant vertical cooperation. Nevertheless, the pandemic showed some interesting and unexpected patterns of horizontal cooperation, too, that, in some cases, definitely took the lion's share in the fight against the virus.

Cooperation was horizontal, rather than vertical, especially in those cases where the central power refused to step in due to reluctance to consider COVID-19 as a real threat or even took negationist stances. It is very easy to make examples with the United States, at least as long as President Donald Trump was in office, but also, in Latin America, among others,[117] Brazil, with President Bolsonaro's negationist approach.

The United States and Brazil, besides being both federal countries and having presidential forms of government, are normally considered to have little in common: The former is historically deemed as a fully democratic country, while the latter suffers from some very-well known troubles in terms of democratic decay; the first is the paradigm of the democratic implementation of the federal and presidential system, while the latter is usually considered a "degeneration" of both. The reckless denialist attitude towards the pandemic, common to both Trump and Bolsonaro—then Presidents of the United States and of Brazil respectively—brought to embarrassing federal inertia in those countries—and maybe this feature contributes to demonstrate that also the United States is not so "immune" to populist attitudes bringing democratic decay.[118] Against this background, in both cases, the governors of the federated states—in the United States, especially those with Democratic leaders[119]—relied on agreement and coordination to overcome the inertia of the Federation, which did not exercise its powers even to ensure the most basic supplies (respirators, etc.) to deal with the virus.

In some of these contexts, cooperation was then resumed in a vertical perspective when a change in the political scene took place, such as the United States and the election of Joseph Biden as the 46th President; in others, this horizontal cooperation was stifled, such as Brazil, insofar as

[115]On this act, *see* Kim L. Scheppele, *The Use of Emergency Powers in Canada and the United States*, 4 INT'L J. CONST. L. 213 (2006).

[116]David Dyzenhaus, *Canada the Good?*, VERFASSUNGSBLOG (Apr. 6, 2020), https://verfassungsblog.de/canada-the-good/.

[117]Reference is to cases as Mexico and Venezuela.

[118]*See* PATRONO & VEDASCHI, *supra* note 84.

[119]It has been demonstrated that states with a Democratic lead had a significantly lower number of deaths than states with Republican lead, taking into account the first wave. *See The Changing Political Geography of COVID-19 Over the Last Two Years*, PEW RESEARCH CENTER (Mar. 3, 2022), https://www.pewresearch.org/politics/2022/03/03/the-changing-political-geography-of-covid-19-over-the-last-two-years/.

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President Bolsonaro approved decrees where he restricted as much as possible the power of the governors and enhanced his one.[120]

This scenario points out that horizontal cooperation—usually unexpected in times of emergency, or at least not conceived as the major tool—is deployed as a "last resort" when political circumstances are such that the central power is unable or unwilling to step in or to drive the cooperation among different levels of government. In other words, the "first choice" would have been, even for these countries, vertical cooperation as demonstrated by the several calls made by state governors to President Trump to step in by exercising the full range of powers that emergency legislation would have conferred to him.[121] Yet, when they realized that vertical cooperation was unfeasible, they re-organized in some other way, giving rise to cooperation schemes that had not been witnessed before.

This observation leads to a more general one: For these countries, federalism was definitely a "source of salvation" against the virus. As a matter of fact, had they had a unitary form of state, there would have been no chance for sub-central entities to contrast the negationist and dangerous policies of the central leaders. In this regard, federalism has provided, at least partially, a "way out" and a tool to bolster democracy.[122]

Another important aspect is peculiar of the United States. As the "cooperating" states were mainly the ones with Democratic leadership, this inevitably created a fragmentation with those states having a Republican leadership. For instance, while Democrat states had lockdowns, Republican ones took hardly any measure; while Democrat governors asked the Federation to impose restrictions, Republican governors praised Trump's "all-free" policies, and so on.[123] This overview confirms what is typical of the United States: Although being a symmetrical federalism, as federated states are given the same powers by the Constitution, states always manage to keep opposite and contrasting stance on "hot topic" issues. This is further evidence that labels attached to legal categories, such as "symmetrical federalism," are likely to be stretched and adapt to the historical, political, and contingent moment that a country is going through.

D. COVID-19 and Constitutional Review

I. "Pro-Active," "Active" and "Inactive" Courts in Times of COVID-19

During the first two years of COVID-19, some constitutional courts were very "active" as they stepped in early in time to review the constitutionality—or, anyway, compliance with some form of "higher law"—of acts limiting personal freedoms to contain the spread of the virus. Among these courts, some issued a very high number of decisions which can be referred to as active if not "proactive" courts. In parallel, other courts did not have the possibility to do so as timely and meaningfully as the others; we call them "inactive" courts.

On the assumption that the role of courts—especially those carrying out constitutional review functions—is essential for the proper functioning of the democratic dynamic, it is crucial in this analysis to examine the reasons why some courts performed well, at least in terms of possibility to timely step in, while other could not do so. We have identified at least three elements impacting on the degree of "proactivity" of courts.

The first element is the broadness of their review. In other words, in some jurisdictions, courts have limitations regarding the broadness of their constitutional review—because, for instance,

[120]*See* Francesco Palermo, *Principio di sistema o intralcio al decisore: l'asimmetria territoriale alla prova dell'emergenza*, 54 DPCE Online 47, 60 (2022).

[121]Jonathan Martin, *Trump to Governors on Ventilators: 'Try Getting It Yourselves'*, N.Y. Times (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/us/politics/trump-coronavirus-respirators.html.

[122]*See* Palermo, *supra* note 120, at 60.

[123]Tom Ginsburg, *National Report on the United States*, *in* Governmental Policies to Fight Pandemics: The Boundaries of Legitimate Limitations on Fundamental Freedoms (Arianna Vedaschi ed., forthcoming).

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they can only review certain types of acts—while this is not an issue in other jurisdictions. In general, limitations on acts to review are more frequent in civil law countries, where constitutional review is often limited to statutes, meaning primary sources, and acts having the same force of statutes in the hierarchy of legal sources.

To give some examples, among civil law countries, we can consider, first of all, Italy. Pursuant to Article 134 of the Italian Constitution,[124] the Italian Constitutional Court can only review national and regional statutes as well as decree laws and legislative decree—having the same legal force of statutes in the Italian legal system. If we bear in mind that much of the Italian response to the pandemic has been grounded on decrees of the President of the Council of Ministers (DPCMs), which are lower-ranked than statutes—secondary sources or, according to some scholars, even lower-positioned—we immediately understand why in Italy constitutional review did not perform well, and the Constitutional Court had the possibility to rule on anti-COVID-19 measures only more than one year after the start of the pandemic, when a decree law on which some DPCMs had been based was challenged.[125]

A very similar situation took place in Belgium and in France: As most of the response of these countries was based on acts issued by the Executive, the respective constitutional adjudication bodies—the Cour Constitutionnelle for Belgium and the Conseil Constitutionnel for France—did not have many chances to rule.[126]

In these three countries, where the Executive-led reactions to COVID-19 hindered the possibility for constitutional adjudication bodies to have a say, the result was that administrative courts ended up being very busy in times of pandemic. In some contexts, as France, administrative courts provided prompt and careful check, to the point that we can consider French administrative judges to have "replaced" constitutional review during the hardest waves of the virus. Yet this is an exception, as, in the majority of cases, administrative courts were hindered by procedural issues and/or only superficially scrutinized the measures (as in most cases in Italy and in Belgium)[127], so proving incapable of ensuring a meaningful review.

Differently from civil law ones, where a more rigorous and formalistic approach to the hierarchy of sources of law exists, in common law jurisdictions, this paradigm is not so granitic and review is generally allowed on all acts of public powers, without giving too much consideration to their hierarchical positioning. As a matter of fact, in many common law countries, a possibility existed, at least *in abstracto*, to promptly submit anti-COVID-19 measures to courts to check whether they complied with "higher law." In these jurisdictions, courts of all types and instances are able to exercise their task with regard to any act, or even behaviour, of public power, as common law countries usually adhere to what is called a "diffuse" or

[124]*See* Art. 134. Costituzione [Cost.] (It.).

[125]*See* Corte Cost., 23 Settembre 2021, n. 198, Giur. it. 2021, n.43 (It.). 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 (It.). This decision addressed 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 (It.) when the Constitutional Court adjudicated some issues related to remote hearings in ordinary courts.

[126]The Belgian Constitutional Court actually issued some rulings on anti-COVID-19 measures, but they were limited to aspects such as the re-organization of nursing activities and the digitalization of some judicial hearings (enshrined in regional provisions). *See* Patricia Popelier, Catherine Van Den Heyning, and 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). The Conseil Constitutionnel, instead, provided some limited (and deferential) rulings on the law the *état d'urgence sanitaire* and on other pieces of legislation determining the extension of the state of emergency.

[127]For Italy, *see* Arianna Vedaschi, *Il Covid-19, l'ultimo stress test per gli ordinamenti democratici: uno sguardo comparato* [COVID-19, the Latest Stress Test for Democratic Systems: A Comparative Look], 43 DPCE Online 1453 (2020). For Belgium, *see* Patricia Popelier et al., *National Report on Belgium*, *in* Governmental Policies to Fight Pandemics: The Boundaries of Legitimate Limitations on Fundamental Freedoms (Arianna Vedaschi ed., forthcoming).

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"decentralized" model of constitutional adjudication.[128] Therefore, countries as Australia, Canada, Ireland, New Zealand, the United Kingdom and the United States had all the *theoretical* possibility of benefitting from strong review. *In practice*, however, not all of these jurisdictions made use of this *theoretical* chance. While in Canada and the United States the number of challenges before courts of any level was high,[129] we cannot say the same regarding the other four mentioned countries, which did not fully exploit the possibility to file complaints.

This divergence can be explained if we take into account the context of each single country. In particular, in Canada, the large number of challenges is because, in that country, there is a strong culture of the Judiciary,[130] seen as the sole and only "arbitrator" in cases public powers do wrong or are perceived to do wrong. Consequently, courts ruled on lots of matters, especially the supreme jurisdictions of provinces, although, looking at the merit, they generally paid deference to the Executives of provinces, holding quite compactly that the courts could quash measures only when such measures were manifestly irrational.[131]

In the United States, lots of challenges were brought, so U.S. courts can be defined as very "proactive" ones. This judicial dynamism was due to a deep political split between Democrats and Republicans—in particular, President Trump's loyalists. As known, the country was very divided (if not polarized) around the reactions to COVID-19[132] with disagreements even on whether (or not) the pandemic was a serious, if not a real, threat.

A few U.S. cases even reached the U.S. Supreme Court, which took divergent stances over the time, explained by a change in the balance of the Court taking place in fall 2020, when Justice Amy Coney Barrett replaced the late Justice Ruth Bader Ginsburg.[133]

Coming to jurisdictions that did not make use of the technical possibility to submit anit-COVID-19 measures to the scrutiny of courts, in Australia, Ireland, and the United Kingdom this can be explained because, in all of these countries, there was one or a couple of landmark cases that may have discouraged citizens to bring other challenges, since courts proved very deferential to the Executive's choices.

In Australia, the few cases that reached the High Court (*Gerner* and *Palmer*) were decided without any doubt in favor of the Executive, and this is coherent with Australian judicial culture, according to which there is a strong distinction between politics and law,[134] and so judges should not interfere with what has been decided by the political power, especially in times of crisis.

In the United Kingdom, the "discouraging" landmark case is *Dolan v. Secretary of State for Health and Social Care*, where 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

[128]*See* Arianna Vedaschi, *La giustizia costituzionale* [Constitutional Justice], *in* DIRITTO COSTITUZIONALE COMPARATO [Comparative Constitutional Law] 405(Paolo Carrozza et al. eds., 2019).

[129]*See infra*.

[130]*See* Ian Binnie, Judicial Independence in Canada, submitted on behalf of the Supreme Court of Canada to the World Conference on Constitutional Justice (2016), https://www.venice.coe.int/WCCJ/Rio/Papers/CAN_Binnie_E.pdf.

[131]*See* Taylor v. Newfoundland and Labrador, 2020 NLSC 125 [2020] (Can.). A few challenges also regarded the (few) federal measures. *See* Spencer v. Canada, [2021] F.C. 361 (Can.).

[132]See *supra*, Part B.IV.

[133]In this regard, the *South Bay v. California* case, decided in May 2020, is significant, as supreme justices upheld restrictions imposed by the governor of California. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). 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 quashed a number of orders taken by governors to guarantee public health by limiting other individual rights and freedoms. Judgments in the *Roman Catholic Diocese of Brooklyn v. New York* and *Tandon v. California* are indicative of this new stance. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

[134]Nicholas Aroney & Benjamin B. Saunders, *On Judicial Rascals and Self-Appointed Monarchs: The Rise of Judicial Powers in Australia*, 36 U. QUEENSL. L. J. 221, 224 (2017).

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judgments were a strong and absolute win for the Government, reinforced by the fact that the Supreme Court refused to hear the case.[135]

In Ireland, a similar role was played by *Doherty v. Minister of Health*,[136] where it appeared that the High Court was rejecting the complaint on procedural grounds as it did not want to dig into what it may have considered a "political question."

To close up on the first element, namely the link between the type of acts that courts can review and their possibility to intervene timely on anti-COVID-19 measures, we need to cite the unique example of Israel, to be classified among those systems where the list of acts reviewable by the Supreme Court is very wide. In fact, in 1995, with the *United Mizrahi Bank*[137] decision, the Israeli Supreme Court declared its power to review *both* primary legislation and executive action in light of the Basic Laws.[138] Thanks to this wide jurisdiction, the Israeli Supreme Court released a number of judgments in times of COVID-19. In the first year of the pandemic, rather than specifically intervening on the balance between public health and other competing rights and freedoms, they dealt with procedural safeguards and governmental accountability before the Knesset.[139] Instead, starting from the first months of 2021, the Court began to focus on substantive grounds, striking down some COVID-19 measures, for example, as far as surveillance is concerned.[140]

The second relevant element that we have found to have an impact on courts' level of "activeness" is the list of courts' competences. Therefore, we move away from types of acts can be reviewed and focus on procedures available to courts. In the analyzed jurisdictions, there are some courts where individual complaints[141] and/or urgency procedures are allowed, and this undoubtedly favored that they promptly stepped in. In other jurisdictions, such procedures are not provided by the constitutional text—or other sources regulating constitutional review—and this hindered the change for these courts to have a strong say during the pandemic.

The most blatant example where the existence of individual complaint[142] enhanced a pivotal role of courts in assessing the proportionality of anti-COVID-19 measures since the very first weeks of the pandemic is Germany, with a very active federal Constitutional Court. In that country, individual constitutional complaints can be lodged by any natural or legal person claiming that their fundamental rights have been violated by public powers. At the same time, the German federal Constitutional Court can grant preliminary injunctions, suspending challenged measures when it has been demonstrated that they might bring significant harm in the immediate future—so-called urgency procedure. 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—meaning during the first months of the pandemic. All these cases related to the issuance of measures by the *länder*—or even by local government levels, such as municipalities—for various alleged violations, from personal freedom, to freedom of worship, to economic freedoms, and many others. The Court's approach varied based on different practical situations in terms of infection rate. Specifically, the Court was more deferent to the political

[135]Dolan v. Sec'y of State for Health and Soc. Care [2020] EWHC (Admin) 1786 (U.K.); Dolan v. Sec'y of State for Health and Soc. Care [2020] EWCA (Civ) 1605 (U.K.).

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

[137]*See* CivA 6821/93 United Mizrahi Bank v. Migdal Collective Village, 49(4) P.D., 221 (1995) (Isr.).

[138]This is true despite its "hybrid" nature between a civil law and common law system—this is why we say it is "unique" and could not be addressed together with other examples.

[139]*See generally* HCJ 2705/20 Smadar v. Prime Minister (2020) (Isr.); HCJ 2435/20 Loewenthal v. Prime Minister (2020) (Isr.); HCJ 2491/20 Ramot Elon Community Council v. Government (2020) (Isr.).

[140]*See* HCJ 6939/20 Idan Mercaz Dimona Ltd. v. Government (2021) (Isr.).

[141]For some comparative analysis on the different success of systems with and without individual complaints, during the first months of the pandemic, *see* Paolo Passaglia, *Emergenza sanitaria e diritti. Una prospettiva comparata. Introduzione*, 44 DPCE Online 4277 (2020).

[142]See, for an in-depth study on individual complaint from a comparative perspective, Rolando Tarchi, *Il ricorso diretto di costituzionalità*, *in* Patrimonio costituzionale europeo e tutela dei diritti fondamentali 3 (Rolando Tarchi ed., 2012).

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power when the rate of COVID-19 spread was higher, instead showing less deference when it was lower.[143] Anyway, the Court kept ensuring review for the whole duration of the pandemic.

The existence of individual complaint made also the Austrian constitutional judges quite active, but not as timely as their German colleagues. In clearer words, the Austrian Constitutional Court heard a number of cases and did so starting very early in time (March 2020); however, what scholars[144] "reproach" to the Court is that it was slow at deciding, as some decisions arrived too late to be useful, when the act at issue had already expired. Actually, it should be remarked that this is also due, at least in part, to the quick change of political will regarding COVID-19 measures based on evolving rate of infection, which consequently entailed rapid amendment of measures.

An exception to this empirical observation we have made, that the individual constitutional complaint procedure played a key role in ensuring prompt constitutional review, is Spain. There, *recurso de amparo* exists,[145] but it was not the "main actor" leading the Constitutional Court to rule on anti-COVID-19 restrictions. In fact, although the Court issued a ruling following to an *amparo* at the very beginning of the pandemic,[146] the most important decisions, namely those addressing the two states of alarm and the consequent limitations on human rights and personal freedoms,[147] followed to a different procedure, called *recurso de inconstitucionalidad* that allows—among others—members of political groups sitting in Parliament to challenge the constitutionality of acts. The predominance of this kind of procedure over individual complaint can be explained on two grounds. Firstly, per the case law of the Spanish Constitutional Tribunal, the declaration of the state of alarm, despite being formally a decree of the Council of Ministers—so a non-primary source—is exceptionally considered as a *materially* primary source.[148] This was an *escamotage* found by the Constitutional Tribunal to make sure to be the only court enabled to review such declaration. Being the decree considered as a primary source, it was easy to challenge it through *recurso de inconstitucionalidad*—which in Spain, as in many civil law countries, can only be brought against primary sources. Secondly, from a political viewpoint, in Spain there was a sharp political division regarding the type of emergency regime to trigger. In particular, political parties of the opposition—especially VOX (far-right party)—did not agree with the declaration of the state of alarm and, as a result, they challenged the constitutionality of the decree triggering the state of alarm thanks to the *recurso de inconstitucionalidad*.

From a general perspective, what can be stated with a sufficient degree of certainty is that the more competences constitutional adjudication bodies had, the more likely it was that anti-COVID-19 measures received scrutiny. This is further proved through *a contrario* evidence. Let us think of Switzerland, where 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 very peculiar rules.[149] Moreover, emergency ordinances of the Federal Council, the Swiss Government, are exempted from being challenged directly before the Federal Tribunal, as they can only be reviewed when a concrete case arises in lower courts and then reaches the Federal Tribunal following the ordinary judiciary path. These hurdles that made constitutional review practically impossible—because courts have very few competences to rule on it—entailed that

[143] *See* Verfassungsgerichtshof [VfGH] [Constitutional Court] (Austria).

[144] *See* Konrad Lachmayer, *National Report on Austria*, *in* Governmental Policies to Fight Pandemics: The Boundaries of Legitimate Limitations on Fundamental Freedoms (Arianna Vedaschi ed., forthcoming).

[145] Constitución Española [C.E.], B.O.E n. 311, art. 53, § 2, Dec. 29, 1978 (Spain).

[146] T.C., Apr. 30, 2020 (B.O.E., No. 2054, p. 40) (Spain).

[147] T.C., Oct. 27, 2021 (B.O.E., No. 183, p. 145259) (Spain); T.C., July 14, 2021 (B.O.E., No. 148, p. 93561) (Spain).

[148] T.C., Apr. 18, 2016 (B.O.E., No. 83, p. 35848) (Spain).

[149] *See* Sophie Weerts, *Le rôle du Tribunal Fédéral au Regard de la Séparation des Pouvoirs : Premiers Jalons Historiques pour une Étude Critique des Juridictions Suprêmes*, 27 LesGes 393 (2016).

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challenges were rare during the COVID-19 and, in the few cases on which it ruled, the Federal Tribunal generally upheld most of the measures[150]—with limited exceptions.[151]

The third element that played a role in determining the level of courts "proactivity" is actually an "external" one. We mean that, unlike the former two, it does not depend on the functioning of single courts, but rather on how the response to COVID-19 was framed. This element—at which we have already hinted—is the rapidity of change of anti-COVID-19 measures. In fact, when COVID-19 measures changed very rapidly, with one measure quickly replacing another, prompt and meaningful review was definitely not favored, even in jurisdictions where there would have been the preconditions to do so. The Austrian case, examined above, is illustrative. Yet also in Italy something similar happened, although not exactly regarding constitutional review, but concerning review by administrative courts. As said, this kind of review is technically possible on DPCMs, and in fact complaints were filed before the Administrative Tribunal for the Lazio Region—the administrative court competent to rule on administrative acts of the central Government. Nevertheless, these judges often did not have enough time to review the challenged DPCM, as it was quickly replaced by another, given that the Government deemed it necessary to change or adjust needed measures. In this regard, where the threat is ever-changing and so countermeasures need to be modified as well, it would be necessary to provide for some kind of tools or procedures not to "loose" the challenge on the previous act, and guarantee that the court goes ahead examining it, for instance, through a "transferral" mechanism.[152] This would be essential especially if the following acts has similar features to the challenged ones, basically "reiterating" them.

II. "Alternative Mechanisms" to Constitutional Review

The comparative analysis showed that, in some cases, 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 ("judicial alternatives"), on the one side, and/or offices of the ombudsmen ("non-judicial alternatives"), on the other side.

When we talk about "other courts" as alternatives to constitutional review, we mean administrative judges, and do not refer to all cases where they had a role[153] but only those contexts where they worked particularly effectively and timely.

The paradigmatic example is France. Given the impossibility of the Constitutional Council to rule on acts of executive power, neither *ex ante* nor *ex post*, administrative courts, especially the Council of State (Conseil d'État) was called to review. Up to this point, there is nothing different compared to other civil law legal systems, where, due to an Executive-led response, constitutional courts were practically cut-off. Yet, what characterizes France is that administrative review was really prompt and effective during pandemic. This liveliness is due to the circumstance that there is a specific tool in French administrative procedure, called *référé-liberté*.[154] It permits individuals, associations, and legal entities to file a complaint if they allege that an act of a central or local executive authority brings a serious violation to one or more of their fundamental freedoms.[155] In the first instance, the competent courts are the Council of State for the acts of the central Executive and local administrative tribunals for the acts of local authorities, e.g., the prefects—in these cases, the Council of State acts as the appeal jurisdiction. The courts are bound to rule on the case within

[150]*See* Tribunal fédéral [TF], Dec. 22, 2020, 1C_169/2929 (Switz).

[151]*See* Tribunal fédéral [TF], Mar. 24, 2021, 2D_32/2020 (Switz).

[152]Arianna Vedaschi, *Il Covid-19, l'ultimo stress test per gli ordinamenti democratici: uno sguardo comparato*, 43 DPCE Online 1453 (2020).

[153]*See supra*, Part D.I.

[154]Loi 2000-597 du 30 juin 2000 [Law 2000-597 of 30 June 2000], Journal Officiel de la République Francaise [J.O.] [Official Gazette of France], June 30, 2000, art. L 521-2.

[155]*Id.*

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48 hours of the complaint. Thanks to this mechanism, both lower administrative courts and the French Council of State issued countless weekly decisions on the management of the pandemic by political authorities.[156] In general, their approach was quite balanced, as they did not limit themselves to a mere scrutiny of reasonableness but thoroughly assessing whether each measure meets the proportionality test. As a result, *référé-liberté* partially mitigated both the weaknesses of constitutional review and the prevalence of executive authorities over the Legislature.

A pivotal role of ordinary and administrative court can be remarked also in the Netherlands. There, this happened from different reasons than France. It was because the Dutch system is very peculiar 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, since Article 120 of the Dutch Constitution explicitly prohibits courts from reviewing the constitutionality of laws. Therefore, there is a reversed situation if compared to other country case studies. In the Netherlands, the lawfulness—including respect for the Constitution—of secondary sources can be checked, whilst it is not possible to assess whether primary legislation complies with the Constitution.[157] 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 the approach of Dutch courts was generally more deferent approach in comparison with French administrative judges.[158]

Looking at cases in which non-judicial actors provided an "alternative" to the review by constitutional or supreme courts, Denmark and Finland are good examples. In these countries, there is no strong culture of judicial review, and rather, in their legal culture, they take for granted that the compatibility of norms with higher law is usually ensured through different means.

In Denmark, a constant check on anti-COVID-19 measures, including their constitutionality, was carried out *ex ante* by the Folketing[159] committees, which regularly scrutinized legislation and even ministerial regulations—pursuant to the Act on Communicable Diseases 2021. Moreover, the Danish Ombudsman decided a number of cases directly brought by citizens and always provided remedies when single measures were found to be disproportionate—therefore performing *ex post* review.[160]

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[161]—based on his competences that preexisted with respect to the pandemic—checked 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 lockdowns.[162] In addition to these mechanisms, some challenges were brought before Finnish ordinary courts, consistent with the decentralized system of judicial review that exists—even if it is hardly used—in Finland.

[156]Just to make some examples: Conseil d'État [Council of State], order nos. 440846, 440856, 441015, June 13, 2020; Conseil d'État [Council of State], order nos. 40366, 440380, 440410, 440531, 440550, 440562, 440563, 440590, July 22, 2020.

[157]This is a specific feature of the Dutch legal system, which refers to all pieces of legislation, so 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.

[158]*See* Rechtbank Den Haag 7 April 2021, ECLI:NL:RBDHA:2021:3352 (Wateringen/Ministerie van Volksgezondheid, Welzijn en Sport) (Neth.).

[159]The Folketing is the Danish unicameral Parliament.

[160]The Parliamentary Ombudsman of Finland, Summary of the Annual Report 205 (2020).

[161]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.

[162]Janne Salminen, *National Report on Finland*, *in* Governmental Policies to Fight Pandemics: The Boundaries of Legitimate Limitations on Fundamental Freedoms (Arianna Vedaschi ed., forthcoming).

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In summary, in these two countries, Denmark and Finland, "alternative guardians" of the Constitution and, in general, of higher laws worked effectively during the pandemic, safeguarding rights and freedoms by reviewing the constitutionality and legality of anti-COVID-19 measures. In particular, and at least at these latitudes, the existence of ombudsmen seemed to provide a valuable alternative to constitutional review, as they performed, to some extent, very similarly to constitutional adjudication bodies when individual constitutional complaints are lodged before them.

The analysis of these "alternative mechanisms," be they judicial or non-judicial, leads to multifaceted observations. On the one hand, it is praiseworthy that it was possible to guarantee constant oversight over limitations of rights and freedoms, albeit not through constitutional adjudication bodies. On the other hand, these forms cannot be seen as full-fledged and definitive replacements of constitutional review, especially in these countries—let us think about France—where a constitutional adjudication body does exist. As a matter of fact, constitutional review is a key feature of most advanced democracies, we could say one of the components of their "DNAs," and has a stronger, and even symbolically more significant role than administrative justice. Additionally, regarding non-judicial bodies, the *lato sensu* cultural element appears once again. In the systems where ombudsmen and parliamentary committees carried out some sort of constitutional scrutiny, these "alternative guardians" were effective and ensured an appropriate check over anti-COVID-19 measures because, culturally, people and institutions are ready to accept these bodies—especially ombudsmen—and their functions as an integral part of the legal system. Yet, let us think of countries—most of the non-North European ones—that are not so culturally prepared to have them as part of their legal system: Introducing them, and asserting that they should replace constitutional adjudication bodies, would almost surely result in failure. Therefore, once again, the importance of non-legal factors arises, as the pandemic contributes to revealing the real nature of legal systems, whose identity is grounded not only on legal features but is also affected by cultural and social elements.

E. Conclusion

This analysis has pointed out several interesting findings regarding three examined key areas: The horizontal separation of powers, the vertical separation of powers and constitutional review.

Concerning how the different forms of government, and hence the horizontal separation of powers, worked in times of pandemic, in Part B we highlighted the generalized overreach of Executives. This overreach "stretched" some systems of government to the point that some of their "genetic" features became very blurred. As seen, this happened in France, a semi-presidential system, where, in reacting to COVID-19, the head of state was sided by other powerful actors, the Prime Minister and the Minister of Health, who acted as *primi super pares* if compared to the rest of the Council of Ministers, not to mention their climbing over the legislative assembly. This dynamic enhanced the two "heads" of the French Executive well beyond the traditional trend of that form of government, mainly based on a very strong President of the Republic.

Indeed, an undeniable blur of the classic paradigms looks evident in parliamentary systems; it is enough to mention the Italian one. The Italian form of government was never as "executivized" (with the enhancement of the President of the Council) as it was in times of COVID-19, and this might have been favored by the fact that, in the Italian constitutional system, the rules about the Legislature-Executive relationships are not tightly detailed. This lack of details makes the Legislature-Executive dynamics adaptable to contingent needs without any formal amendment, provided that the basic principles of the Italian institutional framework are respected.

The supremacy of Executives, however, was not always as "surprising" as in the above-mentioned contexts. Rather, if read in the light of the general functioning of some forms of government, in some jurisdictions it was quite expected and coherent with the ordinary working

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of the system, namely the Westminster parliamentarisms. Nevertheless, the very fact that, in Westminster systems, this trend was foreseeable does not exclude the typical tricky issues arising from such a long predominance of executive bodies. As a matter of fact, one thing is having a very blurry Legislature-Executive relationship in ordinary times—which happens in Westminster models—another thing is such a "weak" separation when an emergency is in place. During a long-lasting crisis, the Legislature should be called to check the Executive in a more meaningful way than in "normalcy," and this is because, in times of emergency, much more serious limitations of rights and freedoms are taken than in "quiet" times. The easy objection in this regard, that emergency is exactly the "time for Executives," can be (just as easily) overcome if one bears in mind that COVID-19 was too long a crisis to allow Executives to simply take the lead, as happens in shorter-term emergencies (for instance, an earthquake or another natural disaster).

A further interesting point that arose in Part B concerns the links between politics and the law of emergency. The study clarified that the steadier the political dynamics in terms of relationships among political groups were, the more likely initial marginalization of legislative assemblies was to be remedied through the time, over the several "waves" of the pandemic, as happened, among others, in Germany. When we refer to political stability, we do not mean just those "one-party" Governments—actually, something very uncommon in the current political scenarios—but also coalitions made up either of not so ideologically distant parties or even by parties with diverging political views that, though, consolidated their "political partnership" over the years and so, when the pandemic broke up, already knew how to work together. The connection between political stability and re-involvement of Parliament is demonstrated *a contrario* by the example of Spain, where the coalition was fragmented and shaky, the opposition was strong and with quite "extreme" ideological positions, and in fact the engagement of Parliament was mainly formal and not substantive.

Additionally, we proved that, even when there were no specific issues in terms of coalitions, some very "atypical" approaches by the political leaders still drove to unexpected dynamics. We refer to "negationism," which implied an "underreach" of a normally very "bold" Executive, such as the United States federal Executive, as well as entailed new horizontal patterns, with non-federal entities forced to "replace" the inertia of the federal power (see *infra*).

Last but not least, the link between the (legal) culture of a country and the Legislature-Executive relationship is a further pivotal aspect to take into account and that has emerged during the pandemic. We pointed out that more balanced approaches—for example, those with a "healthier" Legislature-Executive relationship since the beginning of the pandemic—although being a minority trend, were anyway more widespread in North-European countries, whose cultural roots are less based on binding legal imposition and readier to accept the so-called soft measures, than in any other system.

In Part C of this work, we examined the separation of powers from the vertical perspective, and so the dynamics of the form of state. We ascertained that, independently of the type of federal/regional system, centrally-driven choices were not always the best option; rather they would have needed to be "corrected" by involving sub-central entities more in the decision-making process to pass anti-COVID-19 measures, something that would have been beneficial, for instance, in Austria or in Spain during the first wave. As a matter of fact, what seemed to work better was the cooperative attitude carried out by some other countries, with central bodies engaging sub-central ones. Such strategy generally implied a smoother implementation of measures and, at the same time, left sub-central entities some leeway to adapt the response to their specific situation in terms of contagion. We had evidence that cooperation was a working strategy insofar as it was chosen not only by those countries where it could be expected, because their system is traditionally based on cooperative federalism: The clearest example is Germany; but also, by those jurisdictions where resorting to a cooperative scheme meant a significant change in the very roots of their federalism: Australia and Belgium are paradigmatic examples. This shift of pattern resulted in a significant cultural-political effort.

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A caveat we stressed, in highlighting the good performance of cooperation, concerned its very meaning: Cooperation worked well only if intended as real involvement of the different levels of government. Instead, when central authorities simply chose to shift the responsibility of unpopular anti-COVID-19 measures from themselves to sub-central entities as happened in Spain during the second state of alarm, this led to excessive fragmentation and unreasonable differentiations from a practical perspective, and to political short circuits from a legal-institutional viewpoint. In other words, the "degenerated" aspects of leaving excessive autonomy came out.

In addition to these issues concerning vertical relationships, in Part C we have remarked an unusual trend of horizontal cooperation that actually we had already hinted when we examined the inertia of some federal Executives (Part B). Specifically, this horizontal cooperation characterizing the United States—as well as other experiences where the federal power denied the existence of the virus, as Brazil—besides spotlighting an unusual pattern pushed forward by the pandemic, drew attention on the interrelation between an element of the form of government—the federal Executive that shrinks back from its responsibilities, due to its "atypical" political approach at least under the Trump presidency—and one of the form of state, horizontal cooperation proved necessary in response to federal inaction.

Coming to constitutional review, examined in Part D, we noticed that, despite almost all courts resorted to mechanisms to work remotely, their level of "activity" was not the same across jurisdictions. From this perspective and in the comparative scenario, we classified courts into an "active" category, with some even "proactive" bodies that issued a very significant number of decisions and sometimes managed to influence policy-makers, and an "inactive" one—that is, courts whose activity was hindered during the pandemic.

In trying to detect which factors determined the courts' "activity" or "proactivity" and "inactivity," we once again demonstrated that some elements are technical-legal while other are cultural or, anyway, certainly non-legal.

For instance, the width of courts' jurisdiction—in terms of types of acts to be reviewed, and number of competences and procedures available to challenge legal provisions—was undoubtedly a legal aspect, and surely an impactful one. The analysis demonstrated that the wider a court's jurisdiction is, the more active this court proved. Yet, there were exceptions to this principle. Some courts would have had the legal and technical possibility to rule but, in practice, did not issue so many decisions due to either factual elements, namely very deferential landmark cases that discouraged further complaints, or cultural features as high trust in the action of public bodies and so low willingness to challenge their acts.

Another non-legal element that influenced the "reviewability" was no longer cultural but "factual." Reference is to the quick replacement of one anti-COVID-19 measure with another—a sort of "chain effect"—something that characterized a number of legal systems and did not leave courts the time to decide. This is a contingent feature, caused by a rapidly changing situation—the level of threat posed by the pandemic—and sometimes unescapable, but still could have some legal remedy. For instance, giving courts the chance to easily "transfer" the challenge on subsequent acts—even by introducing some exceptions to existing procedural rules, to be applied only in times of crisis—could turn out to be useful.

A "mixture" of legal and non-legal elements can be identified in the factors that determined the possibility in some countries to find—or not—well-working alternatives to constitutional adjudication bodies. From the side of legal elements, we saw that, in almost all jurisdictions, administrative courts reviewed the right-limiting acts of the Executives; but only in few circumstances these administrative courts performed timely and ensured review into the merits of the cases, and this was due either to specific procedures such as the French *référé-liberté*, or to the overall working of the legal system, as in the Netherlands. From the perspective of non-legal features, we found out that the countries where non-judicial bodies—ombudsmen, ad hoc parliamentary committee—carried out a thorough check of anti-COVID-19 measures with higher

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law are, once again, the North-European ones, where these bodies are profoundly entrenched into the legal culture and so are accepted by citizens as part of their legal system.

From a more general angle, all these findings lead to some further and broader research outcomes. The first is that the traditional taxonomies used as the most common "lenses" for the study of comparative public law—classification of forms of government, forms of state, models of constitutional review—are stretched in times of emergency to the point that they might not come back to their ordinary "shape." This is because, on the one hand, the COVID-19 emergency was a very long-lasting one; on the other hand, new emergencies are swirling one after the other, with the risk that the normal will be forgotten and the crisis will become the "new normal," both in factual and legal terms.

The second general finding is that the three elements that we analyzed—horizontal separation of powers, vertical separation of powers, constitutional review—are far from being isolated areas. Rather, they were particularly interacting during the pandemic, as some features of one area influenced another, and the other way around. For instance, many courts were silenced *because* the Executive prevailed with its acts—that in some systems cannot be reviewed by constitutional adjudication bodies—and some political dynamics of the form of government were swayed by the form of state, or vice versa. Let us think of the United States case, mentioned a few lines above, but also of Switzerland, where the overall political equilibrium in the central Government is influenced by the delicate balance between the Cantons, and this played a role in their engagement during the pandemic.

The third but not least in importance broader finding regards the fact that the pandemic brought to light the "very identity" of each system. We have underscored several times how non-legal aspects, and especially cultural and social ones, played a role and sometimes shaped the reactions. This is further demonstration that law is made up of "mute,"[163] non-legal elements, and that these elements—which may be more "dormant" in ordinary times—often show up during crises.

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[163]Rodolfo Sacco, Il diritto muto 4 (2015). These "mute" elements are also called "cryptotypes."

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