

Ammann, Odile, and Felix Uhlmann. "Switzerland: The (Missing) Role of Parliament in Times of Crisis." *Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19*. Ed. Matthias C Kettmann and Konrad Lachmayer. Oxford: Hart Publishing, 2022. 179–200. *Bloomsbury Collections*. Web. 30 Dec. 2021. <<http://dx.doi.org/10.5040/9781509946396.ch-009>>.

Downloaded from Bloomsbury Collections, www.bloomsburycollections.com, 30 December 2021, 23:00 UTC.

Copyright © The editors and contributors severally 2022. Released under a CC BY-NC-ND licence (<https://creativecommons.org/licenses/by-nc-nd/4.0/>). You may share this work for non-commercial purposes only, provided you give attribution to the copyright holder and the publisher, and provide a link to the Creative Commons licence.

9

Switzerland: The (Missing) Role of Parliament in Times of Crisis

ODILE AMMANN AND FELIX UHLMANN*

I. The COVID-19 Pandemic, a Shutdown of Swiss Democracy?

Swiss legal scholars have described the COVID-19 pandemic as giving rise to an ‘extraordinary extraordinary situation’ in Switzerland from a regulatory perspective,¹ an expression that alludes to the Swiss Federal Epidemics Act’s² distinction between ‘normal’, ‘special’, and ‘extraordinary’ epidemiological situations, and to the fact that the pandemic was so unprecedented that it was more than just ‘extraordinary’. COVID-19 does not only have severe health, economic, and social implications: it also has an impact on democratic institutions, including in Switzerland.³ In spring 2020, the press noted that Swiss democracy had ‘paused’;⁴ some legal scholars even talked about a ‘shutdown of direct democracy’ after the adoption, on 20 March 2020, of the Ordinance on the Standstill of Deadlines for Federal Popular Votes.⁵

*The authors thank Martin Wilhelm, MLaw, for his help with the editing of this chapter, and Konrad Lachmayer for his thoughtful suggestions and comments.

¹F Brunner, M Wilhelm, and F Uhlmann, ‘Das Coronavirus und die Grenzen des Notrechts: Überlegungen zu einer ausserordentlichen ausserordentlichen Lage’ (2020) 29 *Aktuelle Juristische Praxis* 685, 691–92.

²Bundesgesetz über die Bekämpfung übertragbarer Krankheiten des Menschen vom 28. September 2012 (SR 818.101).

³M Andina, ‘What Remains of Swiss Democracy After Covid-19 Measures?’ *swissinfo.ch* (Bern, 22 May 2020) www.swissinfo.ch/eng/democracy-lab_what-remains-of-swiss-democracy-after-covid-19-/45773496.

⁴C Lenz and P Loser, ‘Die Demokratie macht Pause’ *Tages-Anzeiger* (Zurich, 16 March 2020) 5; Y Pauchard and B Wuthrich, ‘La démocratie Suisse se met en mode pause’ *Le Temps* (Geneva, 18 March 2020) www.letemps.ch/suisse/democratie-suisse-se-met-mode-pause; D Ryser and O Würzler, ‘Wir haben ihn so geliebt, den Rechtsstaat’ *Republik* (Zurich, 17 April 2020) www.republik.ch/2020/04/17/wir-haben-ihn-so-geliebt-den-rechtsstaat.

⁵Verordnung über den Fristenstillstand bei eidgenössischen Volksbegehren vom 20. März 2020 (SR 161.16). See G Biaggini, ‘Der coronavirusbedingte Fristenstillstand bei eidgenössischen Volksbegehren – eine Fallstudie zur Tragfähigkeit von Art. 185 Abs. 3 BV’ (2020) 121 *Schweizerisches Zentralblatt für*

While the Swiss government – the Federal Council – had already used its intra-constitutional⁶ emergency powers before the outbreak, it had never done so in such an extensive, all-encompassing, and rapidly evolving way.⁷ At the time of writing (end of 2020), Switzerland is being severely hit by a second wave of COVID-19 infections, which in turn is triggering a new wave of emergency measures. The federal government's unprecedented regulatory activity provides 'a touchstone for the existing emergency law clauses and for the transposition of the measures taken into ordinary law.'⁸ Unsurprisingly, the Federal Council's emergency ordinances have been and continue to be hotly debated in the scholarly literature.⁹

What impact has the pandemic had on Swiss democracy? Many issues and Swiss peculiarities could be discussed in response to this vast question, such as the powers of the Federal Council versus Parliament in the context of emergencies,¹⁰ the (dis)advantages of Swiss federalism,¹¹ and the consequences of the federal and cantonal governments' measures for direct democracy¹² and fundamental rights, especially communicative and political rights. In this chapter, we focus on how the Swiss Parliament – the Federal Assembly – has been reacting to the pandemic.¹³

Staats- und Verwaltungsrecht 277, 277. See also R Trümpler and F Uhlmann, 'Problemstellungen und Lehren aus der Corona-Krise aus staats- und verwaltungsrechtlicher Sicht' in *COVID-19: Ein Panorama der Rechtsfragen zur Corona-Krise* (Helbing & Lichtenhahn, 2020) 567, 590. At the time of writing (end of 2020), the ordinance was no longer in force.

⁶ Extra-constitutional emergency powers are – as the term suggests – exercised outside the constitutional framework. Whether it is appropriate to use the expression 'emergency powers' to describe intra-constitutional measures is contested. See (besides many other examples) D Rechsteiner, *Recht in besonderen und ausserordentlichen Lagen* (Dike, 2016) para 34 ff. Still, most legal scholars rely on this terminology because it has gained currency in public discourse. See eg Brunner, Wilhelm, and Uhlmann (n 1) 688.

⁷ A Stöckli, 'Regierung und Parlament in Pandemiezeiten' (2020) Sondernummer *Zeitschrift für Schweizerisches Recht / Revue de droit suisse* 9, 11–12.

⁸ Brunner, Wilhelm and Uhlmann (n 1) 686.

⁹ eg D Wyss, 'Sicherheit und Notrecht: Ein Überblick über die Anwendung des Epidemiegesetzes und das konstitutionelle Notrecht des Bundesrats in der COVID-19-Krise und im Allgemeinen' (*Jusletter*, 25 May 2020) jusletter.weblaw.ch/juslissues/2020/1025/sicherheit-und-notre_4e888001e7.html. See also the references provided in O Ammann, 'Regulatory Uncertainty Over Emergency Powers in Switzerland' (2020) *The Regulatory Review* www.theregreview.org/2020/05/29/ammann-regulatory-uncertainty-over-emergency-powers-switzerland.

¹⁰ For a critique, see A Kley, "Ausserordentliche Situationen verlangen nach ausserordentlichen Lösungen." – Ein staatsrechtliches Lehrstück zu Art. 7 EpG und Art. 185 Abs. 3 BV' (2020) 121 *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 268. See also A Kley, 'Pandemie und exekutive Selbstermächtigung' *Neue Zürcher Zeitung* (Zurich, 18 May 2020) 8 (condemning a 'self-empowerment by the executive').

¹¹ eg F Bernard, 'La répartition des compétences entre la Confédération et les cantons en situation de pandémie' (2020) Sondernummer *Zeitschrift für Schweizerisches Recht/Revue de droit suisse* 55; Ammann (n 9); F Bergamin and S Mazidi, 'Kompetenzabgrenzung zwischen Bund und Kantonen bei der Bekämpfung von Epidemien: Erste Einschätzungen unter besonderer Berücksichtigung der COVID-19-Verordnungen' (*Newsletter IFF*, 7 April 2020) www3.unifr.ch/newsletter/archive/mail.php?lang=de&y=2020&id=2567. Depending on the viewpoint, Swiss federalism is described negatively as a 'patchwork rug', or positively as a 'mosaic'. See eg 'Die Kantone müssen jetzt Massnahmen zur Eindämmung des Virus treffen', *NZZ am Sonntag* (Zurich, 5 July 2020) 8; Wyss (n 9) para 5.

¹² Biaggini (n 5).

¹³ For a detailed chronology of the measures adopted by Parliament since the beginning of the pandemic, see Parliamentary Services, Factual Report, 'Die Bundesversammlung und die Covid-19-Krise: Ein chronologischer Überblick', status as of 18 December 2020 (Appendix VIII: status as of

It is well known that the executive power usually moves centre stage in times of crisis,¹⁴ and Switzerland is no exception in this regard. The Swiss Parliament is slower to react due to its size, bicameral system, and heterogeneous composition. Moreover, the Federal Assembly is a non-professional ('militia') legislature which only holds four ordinary three-week sessions per year.¹⁵ Yet, the longer the pandemic lasts, the more pressing it becomes for Parliament to play an active part in tackling it. This is even more important in States like Switzerland, where the judicial review of executive measures is limited.¹⁶

In this chapter, we discuss two dimensions of Parliament's reaction to the pandemic. We first provide a critical appraisal of the COVID-19 Act, which the Federal Assembly adopted in September 2020 in order to establish a statutory legal basis for the Federal Council's numerous emergency ordinances (section II). We then examine how Parliament adjusted its own functioning to COVID-19, and the extent to which it maintained its capacity to act despite the crisis (section III). In both cases, our goal is to determine whether the Swiss legislature acted appropriately, a question which must be examined in light of Parliament's constitutional status as 'supreme authority of the Confederation',¹⁷ and of its institutional duty to keep the federal executive and administration in check.¹⁸ By shedding light on the Swiss example, our chapter contributes to a rapidly growing legal and political science scholarship on the implications of COVID-19 for parliamentary lawmaking, both in Switzerland¹⁹ and elsewhere.²⁰

8 February 2021) www.parlament.ch/centers/documents/de/Faktenbericht-Bundesversammlung%20in%20der%20Covid-19%20Krise-d.pdf (hereinafter: 'Factual Report'). See also 'Bericht des Bundesrates über die Ausübung seiner Notrechtskompetenz und die Umsetzung überwiesener Kommissionsmotionen seit Beginn der Krise' (27 May 2020) www.bk.admin.ch/bk/de/home/dokumentation/gesetzgebung/berichtnotverordnungen.html.

¹⁴This also applies to the Federal Council, mainly due to its capacity to meet and to act swiftly in a situation that requires almost immediate action. Moreover, the executive branch has a head start over the Federal Assembly when it comes to knowledge and information, as it can easily draw on the federal administration's expertise and resources. For a historical and political theory perspective, see Stöckli (n 7) 9, 13 ff.

¹⁵See Art 151(1) of the Federal Constitution of the Swiss Confederation of 18 April 1999 (SR 101; hereinafter: 'Cst.') and Art 2(1) of the Federal Act on the Federal Assembly of 13 December 2002 (SR 171.10, hereinafter: 'ParlA'), which merely prescribe that the Councils meet 'regularly'. Parliament can also hold special or extraordinary sessions (see Art 2(2) and (3) ParlA).

¹⁶This is especially due to the absence of abstract (direct) judicial review of federal ordinances: Swiss Federal Tribunal [BGer], judgment 2C_280/2020 of 15 April 2020; BGer, judgment 2C_776/2020 of 23 September 2020. On remedies against COVID-19 measures in general, see Stöckli (n 7) 45 ff. It is important to add that federal acts adopted by the Swiss Parliament are immune from judicial review (Art 190 Cst.), but that ordinances of the Federal Council can in principle be reviewed by courts in particular cases.

¹⁷Art 148(1) of the Swiss Constitution. On this topic, see G Rutz, 'Motion 18.4050, Die Verwaltung als oberste Gewalt im Staate?', 28 September 2018.

¹⁸G Biaggini, 'Demokratie in Zeiten des Coronavirus: Dürfen Parlamente nur tagen, wenn die Regierung es will?' (2020) 23(2) *Parlament – Parlement – Parlamento* 14, 14.

¹⁹See eg the issue dedicated to the 'Rights of Parliaments and Their Organs in Situations of Crisis' (2020) 23(2) *Parlament – Parlement – Parlamento*.

²⁰See the other contributions in this volume, and the forthcoming volumes in this book collection. See also 'Legislatures in the Time of Covid-19' Special Issue (2020) 8(1–2) *The Theory and Practice of*

Three caveats are in order. First, our chapter only focuses on the Federal Assembly, although it goes without saying that similar difficulties to those faced by the Swiss parliament can be witnessed in the federal subunits, ie in the cantonal and municipal legislatures. It is important to note that the cantonal constitutions offer different solutions to the interplay between the executive and the legislative branch in times of crisis, hence creating what can be described as a federalist laboratory – not unlike US Supreme Court Justice Louis Brandeis’ famous depiction of the US States as laboratories of democracy. Secondly, this chapter does not aspire to an exhaustive analysis of the impact of COVID-19 on Parliament; for reasons of scope, we only discuss selected facets of the Swiss case that call for further scrutiny. Thirdly, our chapter reflects the state of the law and practice in Switzerland as of the end of 2020. Considering the rapidly changing epidemiological situation, further analysis will be needed in the months (and perhaps even years) to come.

II. From Executive Emergency Ordinances to Parliamentary Emergency Legislation: Parliament’s Adoption of the COVID-19 Act

A. The Swiss Legal Framework Governing the Adoption of Emergency Regulation

The Swiss constitutional framework pertaining to emergency situations mostly took shape in the two decades preceding and following World War II.²¹ The emergency measures it provides for fall into three main categories: (1) emergency ordinances and rulings (‘Verfügungen’) adopted by the Federal Council (Articles 184(3) and 185(3) of the Swiss Constitution (Cst.)),²² (2) emergency parliamentary ordinances and decrees (Article 173(1)(c) combined with Article 173(1)(a) and (c) Cst.), and (3) emergency (parliamentary) legislation (Article 165 Cst.). Since our focus is on Parliament, we will not dwell on the first category; rather, our interest lies in the instruments which are at Parliament’s disposal.

First, as Article 173(1)(c) Cst. states, the Federal Assembly has the power, ‘[i]f extraordinary circumstances require, [to] issu[e] ordinances or simple federal decrees in order to fulfil its duties under letters (a) and (b).’ While Article 173(1)(a) Cst. enables Parliament to adopt ‘measures to safeguard external security and the independence and neutrality of Switzerland’, Article 173(1)(b) Cst. allows it to act in

Legislation; ‘National and European Parliamentary Involvement in the EU’s Economic Response to the COVID Crisis’ Special Issue (2020) N° 36 *EU Law Live Weekend Edition*.

²¹ T Gächter, ‘Demokratie und Dringlichkeit: Gedanken zu Geschichte und Anwendung des Dringlichkeitsrechts der schweizerischen Bundesverfassung’ in I Häner (ed), *Nachdenken über den demokratischen Staat und seine Geschichte – Beiträge für Alfred Kölz* (Schulthess, 2003) 75, 77.

²² Federal Constitution of the Swiss Confederation of 18 April 1999 (SR 101).

order to ‘safeguard internal security’. These ordinances are not subject to a referendum, nor is their validity limited in time. However, they must be abrogated as soon as the emergency is over. Emergency parliamentary ordinances are of limited practical relevance because their adoption is no less cumbersome than the enactment of emergency legislation.²³ Such ordinances primarily provide an ‘amendment and cancellation right’ to Parliament with regard to emergency ordinances adopted by the Federal Council,²⁴ although some scholars stress that for reasons of legal certainty, the legislature should be wary of making use of this possibility.²⁵

Secondly, Article 165(1) Cst. provides that ‘[f]ederal acts whose coming into force cannot be delayed (emergency federal acts) may be declared urgent by an absolute majority of the members of each of the two Councils’ – the two chambers of Parliament, the National Council and the Council of States – ‘and be brought into force immediately’. It also states that ‘[s]uch acts must be of limited duration.’²⁶ Article 165(1) Cst. does not require that specific public interests (‘Polizeigüter’, such as public health or public safety) be at stake; it only presupposes a situation that does not suffer any delay. As soon as this urgency fades away, Parliament must adopt ordinary legislation. Moreover, a referendum can be launched against an emergency federal act after its entry into force (Article 165(2) Cst.). Emergency acts need not have a basis in the Constitution; if such a basis is lacking, the act is subject to a mandatory referendum if it stays in force for more than one year (Article 165(3) Cst.). As long as the Federal Assembly is in a position to adopt emergency legislation, the Federal Council is barred from adopting emergency ordinances.²⁷

Besides these constitutional provisions, several statutory norms are equally relevant. First, in a ‘special’ epidemiological situation, the Federal Council can adopt emergency measures after having consulted the cantons (Article 6(2) of the Epidemics Act (EpA)).²⁸ In an ‘extraordinary situation’, it can even enact such measures for the whole country or for selected regions without any consultations (Article 7 EpA). Most scholars consider that Article 7 EpA has declaratory character, ie that it simply restates the content of Article 185(3) Cst.²⁹

²³ Gächter (n 21) 96.

²⁴ U Saxer, ‘Art. 185 BV’ in B Ehrenzeller, B Schindler, and R J Schweizer (eds), *Die schweizerische Bundesverfassung: St. Galler Kommentar*, 3rd edn (Dike, 2014) para 63.

²⁵ Stöckli (n 7) 35 f, 50. See also M Häfliger, ‘Wir machen viele Parlamentarier hässig’, Interview with Hans Stöckli, *Tages-Anzeiger* (Zurich, 27 March 2020) www.tagesanzeiger.ch/nach-verfassung-ist-das-parlament-die-oberste-gewalt-im-bund-450043086249.

²⁶ The Federal Council has stated that in practice, the period of validity usually amounts to two to six years. See Federal Council, ‘Botschaft zum Bundesgesetz über die gesetzlichen Grundlagen für Verordnungen des Bundesrates zur Bewältigung der Covid-19-Epidemie (Covid-19-Gesetz) (12 August 2020) BBl 2020 6563 (hereinafter: ‘COVID-19 Dispatch’), 6616.

²⁷ Brunner, Wilhelm, and Uhlmann (n 1) 689.

²⁸ Federal Act on the Control of Communicable Human Diseases of 28 September 2012 (SR 818.101).

²⁹ Brunner, Wilhelm, and Uhlmann (n 1) 693 f. For an overview of the different positions, see B Waldmann, ‘Staatsrechtliche Herausforderungen’ in F Uhlmann and S Höfler (eds), *Notrecht in der Corona-Krise* (Dike, 2021) 3, 13 fn 54. See also Stöckli (n 7) 21 f. In the dispatch regarding the revision of the EpA, the Federal Council explicitly noted that Art 7 EpA has ‘declaratory character’. See Federal Council, ‘Botschaft zur Revision des Bundesgesetzes über die Bekämpfung übertragbarer Krankheiten des Menschen (Epidemiengesetz, EpG) vom 3. Dezember 2010’ BBl 2010 311, 365.

Another important provision is Article 7d of the Government and Administration Organisation Act (GAOA).³⁰ Amongst other things, its second paragraph states that a Federal Council ordinance pursuant to Article 185(3) Cst. loses its validity after six months if the government has not submitted a bill to Parliament within this time frame, with the goal of creating either a statutory legal basis for the Federal Council's ordinance, or a parliamentary ordinance replacing the government's ordinance. However, Article 7d GAOA does not mean that an emergency ordinance lapses automatically after six months.³¹ This has been criticised by some authors, who regret that under the current regime, Parliament is under no duty to adopt a corresponding legal basis.³²

B. The COVID-19 Act of 25 September 2020

In light of the Federal Council's frenetic regulatory activity, many voices quickly pressed Parliament to adopt legislation in order to place the Federal Council's measures on firmer – ie more democratically legitimate – ground³³ (on Parliament's reaction to the crisis before the adoption of such a legal basis, see below, III.B. and III.C.). On 19 June 2020, the federal government opened the consultation procedure on its bill for a COVID-19 Act. While the consultation period usually lasts for at least three months,³⁴ the government shortened it to three weeks to ensure that Parliament could deliberate on the bill as soon as possible.³⁵

On 12 August 2020, the Federal Council presented its dispatch on a draft emergency law to Parliament. By doing so, it ensured that its emergency ordinances did not lose their validity after six months, as stated in Article 7d(2)(a) GAOA (above, A.). Based on the consultations, the Federal Council had proceeded to several adjustments, which included shortening the period of validity of the Act by one year, ie until 31 December 2021.³⁶ In its dispatch, it requested Parliament to

³⁰ Government and Administration Organisation Act of 21 March 1997 (SR 172.010). Art 7d GAOA, which pertains to Federal Council ordinances pursuant to Art 184(3) Cst., and Art 7e GAOA, which concerns rulings ('Verfügungen') of the Federal Council, are of limited relevance to our analysis.

³¹ Brunner, Wilhelm, and Uhlmann (n 1) 699 f. This solution was adopted based on legal certainty considerations. See 'Parlamentarische Initiative Wahrung von Demokratie, Rechtsstaat und Handlungsfähigkeit in ausserordentlichen Lagen, Bericht der Staatspolitischen Kommission des Nationalrates' (5 February 2010; hereinafter: 'PIC-NC Report') 1582.

³² A Glaser and K Gfeller, 'Das Ringen des Parlaments um mehr Macht: Rückschlag infolge der Corona-Pandemie?' (*Jusletter*, 5 October 2020) jusletter.weblaw.ch/fr/juslissues/2020/1039/das-ringen-des-parla_3ae3ddfeb2.html para 43.

³³ eg Brunner, Wilhelm, and Uhlmann (n 1).

³⁴ See also Art 7(3) of the Federal Act on the Consultation Procedure of 18 March 2005 (SR 172.061). However, Art 7(4) of this Act provides that this period may exceptionally be shortened '[i]f the project may not be delayed.'

³⁵ Federal Chancellery, Letter to the Political Parties, the Umbrella Organizations for the Communes, Cities, and Mountain Regions, the Umbrella Organizations for the Economic Sectors, and Interested Groups, 19 June 2020.

³⁶ COVID-19 Dispatch (n 26) 6587.

debate the bill and to legitimise its measures as swiftly as possible.³⁷ This occurred shortly thereafter, in the autumn parliamentary session, where Parliament discussed the bill under great time pressure. Eventually, on 25 September 2020, the legislature adopted the Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19 Epidemic (COVID-19 Act),³⁸ which entered into force on the next day.³⁹ The Council of States approved the Act unanimously; in the National Council, the statute was adopted by 153 votes to 36, with six abstentions.

Article 1 of the COVID-19 Act, titled ‘Subject matter and principles’, is the most important provision for our purposes. Initially, this provision only had three paragraphs. Amongst other things, it established a duty for the Federal Council to only adopt measures ‘to the extent that they are required to respond to the COVID-19 epidemic’ (Article 1(2)). Article 1 did not mention Parliament, nor did the rest of the bill.

The version eventually adopted by Parliament encompasses six paragraphs. Article 1(2) COVID-19 Act now also states that the Federal Council ‘shall not use these powers if the same objective can be achieved using regular or emergency legislative procedures’. Importantly, Article 1(4) provides that the government ‘shall inform Parliament regularly, in good time and comprehensively about the implementation of this Act’, and ‘consult the relevant committees beforehand about planned ordinances and amendments to ordinances’. Another relevant provision is Article 1(5), which requires that in an emergency, the federal government must inform the presidents of the relevant parliamentary committees, which in turn must swiftly inform the committee members. At this point in time, it is too early to assess whether this provision has indeed led to a greater – and especially more meaningful – inclusion of Parliament. The interaction between the Federal Council and Parliament was certainly intense during the second half of 2020.

While additional clarity is provided on Parliament’s role in the context of emergency measures, the involvement of the legislature remains modest. The bill had already been criticised for mainly containing delegation norms in favour of the executive⁴⁰ as well as discretionary clauses (‘Kann-Vorschriften’), two problems which the revised version does not address. The emphasis on the subsidiary role of executive measures vis-à-vis parliamentary ones constitutes an improvement. Yet, it does not modify the existing institutional arrangements in any way.

The duty of the government to inform Parliament and to consult the relevant committees before adopting or amending ordinances certainly goes in the right

³⁷ COVID-19 Dispatch (n 26) 6622–23.

³⁸ Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19 Epidemic of 25 September 2020 (SR 818.102).

³⁹ See Art 165(1) Cst., which states that emergency legislation is ‘brought into force immediately’, and Art 21(2) COVID-19 Act; see however Art 21(3) COVID-19 Act.

⁴⁰ T Sägesser and D Kettiger, ‘Fragwürdiges Covid-19-Gesetz’ *Neue Zürcher Zeitung* (Zurich, 3 September 2020) 7.

direction. However, Article 1 of the Act does not give Parliament an actual veto right, nor does it contribute to streamlining the procedure through which the committees are consulted. In particular, the Act does not establish an *ad hoc* (COVID) delegation, as some scholars had suggested.⁴¹ Such a delegation could have been tasked with assisting the government before the measures are adopted, with reviewing its measures (eg from the perspective of their proportionality), and potentially even with adopting emergency measures itself. The fact that the legislature must merely be consulted also means – as Parliament has already repeatedly emphasised in the past⁴² – that it does not assume any political responsibility for the emergency measures.

Another constitutional problem is that the delegation clauses of the COVID-19 Act remain too vague for ordinary legislation, and that even if the Act is considered emergency legislation, it creates a form of empowerment *vis-à-vis* the government that lacks a constitutional basis. It is also doubtful whether Parliament may lower the bar for emergency regulation by the Federal Council – which it effectively does if one compares the requirements of the Act with those provided for in Article 185(3) Cst.

In 2010, the Political Institutions Committee of the National Council proposed the creation of a six-member ‘delegation for extraordinary situations’⁴³ before making a U-turn and abandoning this proposal. The idea also failed to garner support in the Council of States.⁴⁴ The Federal Council disagreed with it categorically, stating that a duty of the executive to consult such a delegation before adopting emergency ordinances would lead to conflicts of competence, and that it lacked flexibility and practicability.⁴⁵

Ten years later, the COVID-19 Act confirms this assessment. This is surprising, given the considerable power shift towards the executive triggered by the pandemic at the expense of parliamentary involvement. The President of the Council of States highlighted that an *ad hoc* committee would side-line the expertise of Parliament’s standing committees, and that its decisions would not enjoy broad enough political support.⁴⁶ While this view reflects a commendable commitment to the equality of MPs and to democratic legitimacy, it also endorses a weak position of Parliament *vis-à-vis* the executive. Indeed, it prevents Parliament from

⁴¹ eg Stöckli (n 7) 49. On this topic, see also C Forster, ‘Das Parlament benötigt eine Corona-Impfung’ *Neue Zürcher Zeitung* (Zurich, 30 April 2020) 10.

⁴² eg PIC-NC Report (n 31) 1564, 1579, 1586, 1588.

⁴³ PIC-NC Report (n 31) 1579, 1586 ff. Pursuant to this proposal, such a delegation would merely act in a consultative capacity.

⁴⁴ The Council of States considered that creating a new body would lead to conflicts of competence, and that the existing institutional structures were sufficient. See the statement of then Council of States member (now Federal Councillor) Alain Berset, ‘09.402 Parlamentarische Initiative SPK-NR. Wahrung von Demokratie, Rechtsstaat und Handlungsfähigkeit in ausserordentlichen Lagen’ (1 December 2010) AB 2010 S 1062.

⁴⁵ ‘Parlamentarische Initiative Wahrung von Demokratie, Rechtsstaat und Handlungsfähigkeit in ausserordentlichen Lagen, Bericht vom 5. Februar 2010 der Staatspolitischen Kommission des Nationalrates, Stellungnahme des Bundesrates’ (21 April 2010) 2808–2809.

⁴⁶ Häfliger (n 25). See also, in the same vein, Glaser and Gfeller (n 32) para 44.

being immediately involved and from reacting swiftly and autonomously in situations of crisis. Moreover, it is inconsistent with the significant powers enjoyed by the Finance Delegation (FinDel), which is composed of six members of the finance committees (three per committee),⁴⁷ and which can veto urgent expenses decided by the Federal Council.⁴⁸ More generally, this assessment does not cohere with Parliament's past and current intention to strengthen its own position vis-à-vis the executive branch.⁴⁹ Andreas Glaser and Katja Gfeller have argued that the FinDel mechanism – a short-term approval reservation – should apply with regard to all emergency ordinances of the Federal Council, and that it should be extended to Parliament as a whole, instead of being limited to a delegation.⁵⁰ Several Swiss cantons already follow this approach.⁵¹

As an emergency statute with a period of validity that exceeds one year, the COVID-19 Act was subject to a facultative referendum (see Article 165(1) and Article 141(1)(b) Cst.). After a referendum request was submitted, Swiss citizens voted on the COVID-19 Act on 13 June 2021. The Act was approved by 60.21 per cent of voters.

III. Parliamentary Lawmaking in Times of COVID-19: The Swiss Federal Assembly's Adjustment to the Pandemic

Since the first case of COVID-19 was confirmed in Switzerland on 25 February 2020, Parliament has also had to adjust its own working methods to the pandemic. We first provide a cursory overview of the main organs of the Federal Assembly (A.). We then highlight two aspects of Parliament's activity which were affected by the pandemic, namely the meetings of both chambers (the Councils) (B.) and of the parliamentary committees (C.).

A. The Federal Assembly and Its Organs

Article 31 of the Federal Act on the Federal Assembly (ParlA) lists eight parliamentary organs,⁵² several of which played an active part in adjusting Parliament's

⁴⁷ Art 51(1) ParlA.

⁴⁸ See Art 28(1) and Art 34(2) of the Financial Budget Act of 7 October 2005 (SR 611.0; hereinafter: 'FBA').

⁴⁹ On this trend, see Glaser and Gfeller (n 32). See also PIC-NC Report (n 31) 1565 (stating that Parliament should not be presented with a *fait accompli*).

⁵⁰ Glaser and Gfeller (n 32) para 51 f.

⁵¹ *Ibid.*, para 53.

⁵² Namely, a. the National Council, b. the Council of States, c. the United Federal Assembly, d. the Presiding College, e. the Offices, f. the Conference for Coordination and the Administration Delegation,

mode of functioning in the pandemic. Before we discuss these adjustments (below, sections B and C), additional clarifications as to these organs' roles are in order.

Each Council has a Presiding College, which is composed of the Council President and two Vice-Presidents.⁵³ Among other tasks, the President chairs the Council's meetings and has a representative function.⁵⁴

Each chamber also has 'an office to deal with its administration and other related matters',⁵⁵ which is composed of the members of the Presiding College, several tellers, and representatives of the parliamentary groups.⁵⁶ All three authoritative linguistic versions of the ParlA (ie the German, French, and Italian versions) suggest that the Offices 'lead' the Councils ('für seine *Leitung*'; 'chargé de sa *direction*'; 'per la propria *direzione*'; emphasis added).⁵⁷ Yet while the Offices play, without a doubt, an important role in facilitating and structuring the Councils' activities,⁵⁸ most scholars emphasise that this role is primarily administrative.⁵⁹

Taken together, the two Offices constitute the Conference for Coordination,⁶⁰ which takes care of a range of tasks, including scheduling the ordinary and extraordinary sessions, helping the Councils to coordinate themselves, and serving as an intermediary between them and the Federal Council.⁶¹

Parliament also has an Administration Delegation. The Delegation counts six members of the two Offices (three each)⁶² and is tasked with 'the overall management of Parliament',⁶³ eg as regards the use of the parliamentary premises (except for the two Council rooms).⁶⁴ It also has a residual administrative competence.⁶⁵ In practice, its members are the same as those of the two Offices.⁶⁶ As Boris Burri

g. the parliamentary committees and their subcommittees and delegations, and h. the parliamentary groups ('Fraktionen').

⁵³ Art 152 Cst.; Art 34 ParlA.

⁵⁴ Art 7(1) of the Standing Orders of the National Council of 3 October 2003 (SR 171.13; hereinafter: 'SO-NC'); Art 4(1) of the Standing Orders of the Council of States of 20 June 2003 (SR 171.14; hereinafter: 'SO-CS').

⁵⁵ Art 35(1) ParlA.

⁵⁶ Art 8(1) SO-NC; Art 5(1) SO-CS.

⁵⁷ See also M Graf, 'Die Büros des Nationalrates und des Ständerates: Hierarchisch vorgesetzte Parlamentsleitungen oder Organe der Selbstorganisation des Rates?' (2015) 18(2) *Parlament – Parlement – Parlamento* 14, 14.

⁵⁸ B Burri, 'Art. 35 ParlG' in C Theler, M Graf, and M von Wyss (eds), *Parlamentsrecht und Parlamentspraxis der Schweizerischen Bundesversammlung: Kommentar zum Parlamentsgesetz (ParlG) vom 13. Dezember 2002* (Helbing & Lichtenhahn, 2014) 301 ff, para 15 ff.

⁵⁹ F Uhlmann and M Wilhelm, 'Kurzgutachten zuhanden der sozialdemokratischen Fraktion der Eidgenössischen Räte betreffend die Durchführung von Sessionen und Kommissionssitzungen in ausserordentlichen Lagen (Coronavirus)' (2020) publikationen.sgp-ssp.net, paras 49 ff.

⁶⁰ Art 37 ParlA.

⁶¹ Art 37(2)(a) and (b) ParlA.

⁶² Art 38(1) ParlA.

⁶³ Art 38(2) ParlA.

⁶⁴ Art 69(1) ParlA.

⁶⁵ Art 20(2)(f) Verordnung der Bundesversammlung zum Parlamentsgesetz und über die Parlamentsverwaltung vom 3. Oktober 2003 (SR 171.115).

⁶⁶ B Burri, 'Art. 38 ParlG' in C Theler, M Graf and M von Wyss (eds), *Parlamentsrecht und Parlamentspraxis der Schweizerischen Bundesversammlung: Kommentar zum Parlamentsgesetz (ParlG) vom 13. Dezember 2002* (Helbing & Lichtenhahn, 2014) 323, para 5.

notes, the decisions of the Administration Delegation should not disproportionately interfere with the competences and activities of other parliamentary organs, which should be consulted in cases of doubt.⁶⁷

Last but not least, '[e]ach Council forms committees from its members'.⁶⁸ The parliamentary committees are crucial from the perspective of parliamentary lawmaking. They fulfil a range of functions, including 'conduct[ing] a preliminary discussion of the business referred to them for the attention of their council', 'consider[ing] and decid[ing] on the business referred to them for final decision', and 'draw[ing] up proposals relevant to their areas of responsibility'.⁶⁹ They also have the right to submit parliamentary initiatives to the Federal Assembly.⁷⁰ Each chamber appoints standing committees (12 for the National Council, 11 for the Council of States)⁷¹ and, 'in exceptional circumstances', special committees.⁷²

Having clarified the main responsibilities of these parliamentary organs, we now turn to two aspects of Parliament's lawmaking activity that were affected by the pandemic, namely the meetings of the Councils (section B) and those of the committees (section C). Scope precludes an in-depth analysis of the numerous and complex issues involved; instead, we highlight the main difficulties which arose in this context.

B. The Meetings of the Councils

Article 151(1) Cst. states that the two Councils 'convene in session regularly'.⁷³ The pandemic had three consequences for these meetings. First, on 15 March 2020, the Offices decided to interrupt Parliament's (three-week) spring session after two weeks.⁷⁴ Secondly, in early May 2020, the Councils convened for an extraordinary session outside the Federal Palace, in two halls inside Bernexpo, a trade fair and exhibition centre located in Bern.⁷⁵ The summer session of June 2020 also took place on these premises. Thirdly, the question arose as to whether the Councils' physical meetings could be replaced by virtual ones. We discuss each of these three issues in turn.

A first difficulty that has been discussed in the scholarly literature pertains to *the legality of the Offices' unanimous decision to interrupt the ordinary spring session.*

⁶⁷ *ibid* 325, para 13.

⁶⁸ Art 153(1) Cst.

⁶⁹ Art 44(1)(a) and (b) ParlA.

⁷⁰ Art 160(1) Cst. See also Art 45(1)(a) ParlA, which states that the committees may 'submit parliamentary initiatives, parliamentary procedural requests and proposals and compile reports'.

⁷¹ Art 42(1) and 43 ff ParlA, Art 10 SO-NC, Art 7 SO-CS.

⁷² Art 42(2) ParlA.

⁷³ See also Art 2(1) ParlA, which restates this requirement for ordinary sessions.

⁷⁴ 'Keine dritte Sessionswoche der Frühlingssession der Bundesversammlung', press release (15 March 2020) www.parlament.ch/press-releases/Pages/mm-vd-2020-03-15.aspx.

⁷⁵ On extraordinary sessions, see Art 151(2) Cst. and Art 2(3) ParlA. Art 2(2) ParlA also enables the Council 'to convene special sessions if the ordinary sessions are not sufficient to deal with the volume of business'.

At the beginning of the same week, on 9 March, MP Thomas Aeschi's request to interrupt the session had been overwhelmingly rejected by the National Council by 155 votes against 13 votes in favour and 8 abstentions, and on 13 March, the Administration Delegation had endorsed the same view, while adopting stricter measures aiming to prevent the virus from spreading inside Parliament.⁷⁶ The Offices' unanimous decision to eventually interrupt the session on 15 March was based on the rapid increase in cases in the previous days, on the need to protect MPs and their family members belonging to high-risk groups,⁷⁷ but also, as the press noted, on growing public pressure on Parliament.⁷⁸ For the first time in its history, Parliament was unable to complete its ordinary session.⁷⁹

It is widely accepted that the executive branch cannot prevent Parliament from convening.⁸⁰ This position was also defended by the Presidents of the two Councils.⁸¹ However, disagreement arises with regard to Parliament's internal division of competences: in light of the Offices' administrative function (above, section A), several scholars have expressed doubts about the legality of this interruption.

The Offices are indeed tasked with convening the Council meetings⁸² and even with defining the items of business to be discussed, although the Councils may modify the agenda items.⁸³ Yet, the law does not explicitly state that the Offices may *interrupt* a session. Andrea Caroni and Stefan G Schmid argue that the principle of parallel forms should be observed: if the Offices are in charge of convening the meetings, they should also be able to interrupt them.⁸⁴ By contrast, according

⁷⁶ 'Mit weiteren Massnahmen gegen das Coronavirus in die dritte Sessionswoche', press release (13 March 2020) www.parlament.ch/press-releases/Pages/mm-vd-2020-03-13.aspx.

⁷⁷ According to F Schäfer, eight MPs are older than 65 and therefore likely to be particularly at risk; moreover, while their exact number is not known, other MPs are vulnerable due to a pre-existing medical condition: 'Zuerst wollte das Parlament die Session durchziehen – doch dann kam die Einsicht' *Neue Zürcher Zeitung* (Zurich, 15 March 2020) 9.

⁷⁸ *ibid.*

⁷⁹ A Caroni and SG Schmid, 'Notstand im Bundeshaus: Die Rolle der Bundesversammlung in der (Corona-)Krise' (2020) 23 *Aktuelle juristische Praxis* 710, 710.

⁸⁰ eg F Uhlmann and E Scheifele, 'Legislative Response to Coronavirus (Switzerland)' (2020) 8(1–2) *The Theory and Practice of Legislation* 115, 122–23; M Würmli, 'Auswirkungen der COVID-19-Verordnung 2 auf die Versammlungsfreiheit der Parlamente' (2020) 23(2) *Parlament – Parlement – Parlamento* 42, 43; F Uhlmann and M Wilhelm, 'Kurzgutachten zuhanden der sozialdemokratischen Fraktion der eidgenössischen Räte betreffend Sessionsabbruch und Einberufung zu einer ausserordentlichen Session' (2020) publikationen.sgp-ssp.net, para 23; Caroni and Schmid (n 79) 717. Würmli also comes to this conclusion based on a teleological and systematic interpretation of the Ordinance on Measures to Combat the Coronavirus (COVID-19 Ordinance 2) of 13 March 2020 (SR 818.101.24, no longer in force) and based on the principle of proportionality: Würmli (above) 45 f. He therefore argues that even if parliamentary meetings were 'events' pursuant to the COVID-19 Ordinance 2, it would be inappropriate to require parliaments to obtain a derogation from a third party: *ibid* 46 f. See also Stöckli (n 7) 40. See further Legal Service/Secretariat of the Finance Committees/Secretariat of the Political Institutions Committees, 'Powers of Parliament and the Federal Council in Extraordinary Situations: Note to the Presidencies of the Councils (25 March 2020), www.parlament.ch/centers/documents/de/notiz-kompetenzen-parlament-und-bundesrat-in-ausserord-lagen-d.pdf.

⁸¹ Uhlmann and Wilhelm (n 59) n 15.

⁸² Art 33(1) ParlA.

⁸³ Art 9(1)(a) SO-NC and Art 6(1)(a) SO-CS.

⁸⁴ Caroni and Schmid (n 79) 719.

to Felix Uhlmann and Martin Wilhelm, it is unclear why the Councils should not be able to correct the decision of the Offices to interrupt the session if they may do so as regards the agenda items.⁸⁵ Andreas Glaser and Katja Gfeller submit that Parliament should be able to veto the Offices' decision or, by the same token, that this decision should be validated by a qualified majority of the legislature.⁸⁶ Moreover, while it seems acceptable for the Offices to interrupt a session in the event of an extreme emergency,⁸⁷ it can be doubted that in mid-March, the situation was such that the Councils could by no means be given the opportunity to meet one more time in order to decide themselves whether or not to interrupt the session.⁸⁸ At any rate, a suspension of the session would have been more proportionate than a complete interruption.⁸⁹

A second issue pertains to the Offices' and Administration Delegation's *decision of 26 March 2020 to hold an extraordinary session in the Bernexpo building starting on 4 May 2020*.⁹⁰ This location was chosen in order to ensure compliance with the Federal Office of Public Health's recommendations in terms of hygiene and physical distancing. The extraordinary session would be devoted to the emergency credits decided by the Federal Council.

Strikingly, the Federal Council was the first to request that such an extraordinary session be held.⁹¹ It did so on 23 March 2020, invoking Article 34(4) of the Federal Financial Budget Act (FBA). Only afterwards, on 25 March, did 31 members of the Council of States ask that Parliament be convened for an extraordinary session as well, a request that can thus be described as symbolic. Twelve members of the National Council submitted an equivalent request demanding that an extraordinary session be held in April, but the required quorum of one quarter of the members of the National Council was not reached.⁹²

The ParLA (not the Constitution) provides that '[t]he Federal Assembly meets in Bern'.⁹³ Given that the ParLA does not mandate meeting in the Federal Palace, holding the extraordinary session at Bernexpo in May 2020 was unproblematic from the perspective of parliamentary law.

The Offices' and Administration Delegation's decision of 26 March can be criticised on several counts. First, scheduling the beginning of the extraordinary session on 4 May 2020 – six weeks after the Federal Council had declared the

⁸⁵ Uhlmann and Wilhelm (n 80) para 28. See also M Wilhelm and F Uhlmann, 'Herausforderungen für Parlamente in der Corona-Krise – Versuch eines Überblicks' (2020) 23(2) *Parlament – Parlement – Parlamento* 4, 10.

⁸⁶ Glaser and Gfeller (n 32) para 42.

⁸⁷ Uhlmann and Wilhelm (n 80) para 32.

⁸⁸ *ibid.*, para 33 f.

⁸⁹ *ibid.*, para 35.

⁹⁰ 'Corona-Krise: Das Parlament tagt Anfang Mai in der Bernexpo', press release (26 March 2020) www.parlament.ch/press-releases/Pages/mm-information-2020-03-26.aspx.

⁹¹ Art 151(2) Cst., Art 2(3) ParLA.

⁹² Factual Report (n 13) 27 f.

⁹³ Art 32(1) ParLA.

existence of an extraordinary situation – did not enable a swift enough reaction to the federal government's measures.⁹⁴ To describe this extraordinary session as a 'rebirth of democracy'⁹⁵ therefore seems exaggerated: as rightly noted by Glaser and Gfeller, Parliament largely stood in front of a *fait accompli*.⁹⁶ The authors argue that whenever the executive adopts an emergency ordinance, Parliament should have the *duty* to immediately meet for an extraordinary session.⁹⁷

Secondly, and importantly, Article 34(4) FBA requires that if an extraordinary session is requested for the subsequent approval of urgent supplementary credits, the session should take place 'in the third calendar week following the filing of the request', a requirement which was disregarded.

Thirdly, the question arises as to whether the Councils should be able to meet virtually, something that many voices (including MPs) have called for.⁹⁸ Indeed, for MPs belonging to a high-risk group, the decision as to whether to attend the Bernexpo session was not self-evident.⁹⁹ Currently, an explicit legal basis for virtual Council meetings is lacking. Article 151(1) Cst. and Article 2(1) ParlA merely state that Parliament 'convenes', while Article 32(1) ParlA provides that it 'meets'. Moreover, as per Article 159(1) Cst., '[t]he Councils are quorate if a majority of their members is present'. Article 10 ParlA creates a duty for MPs to attend the meetings of the Councils.

Legal scholars consider that Article 159(1) Cst. requires being physically present in the Council rooms.¹⁰⁰ This requirement applies not only to the voting stage, but also to the deliberations.¹⁰¹ In practice, however, it is only followed in

⁹⁴ eg Glaser and Gfeller (n 32) para 41. Some members of the Council of States criticised this state of affairs: 'Ständerat gibt sich zu Beginn der Sondersession selbstkritisch' (SDA, 4 May 2020) www.parlament.ch/de/services/news/Seiten/2020/20200504180605119194158159041_bsd162.aspx. The President of the Council of States defended this decision by stating that Parliament needed to be well-prepared: Häfliger (n 25). This is in line with the Federal Council's observation that a three-week deadline is too short to allow for meaningful preparation, especially when the topic is complex. See 'Parlamentarische Initiative Wahrung von Demokratie, Rechtsstaat und Handlungsfähigkeit in ausserordentlichen Lagen, Bericht vom 5. Februar 2010 der Staatspolitischen Kommission des Nationalrates, Stellungnahme des Bundesrates' (21 April 2010) 2810–2811.

⁹⁵ 'La renaissance de la démocratie' *Le Temps* (Geneva, 4 May 2020) www.letemps.ch/suisse/renaissance-democratie.

⁹⁶ Glaser and Gfeller (n 32) para 48.

⁹⁷ *ibid.*, para 56.

⁹⁸ eg Forster (n 41); T Brunner, 'PaIv 20.423, Situationsgerechte Flexibilisierungsmöglichkeiten für den Parlamentsbetrieb bei aussergewöhnlichen Umständen' (5 May 2020); K Christ, 'PaIv 20.425, Schaffung der rechtlichen Grundlagen für einen digitalen Parlamentsbetrieb respektive die digitale Teilnahme am physischen Betrieb' (6 May 2020); PIC-NC, 'PaIv 20.437, Handlungsfähigkeit des Parlamentes in Krisensituationen verbessern' (29 May 2020); PIC-NC, 'PaIv 20.438, Nutzung der Notrechtskompetenzen und Kontrolle des bundesrätlichen Notrechts in Krisen' (29 May 2020).

⁹⁹ M Surber, 'Parlament kann per Videokonferenz tagen' *Neue Zürcher Zeitung* (Zurich, 9 April 2020) 11.

¹⁰⁰ Caroni and Schmid (n 79) 719; Glaser and Gfeller (n 32) para 31; Giovanni Biaggini, 'Art. 159 BV', *BV Kommentar: Bundesverfassung der Schweizerischen Eidgenossenschaft*, 2nd edn (Orell Füssli, 2017) para 2.

¹⁰¹ Stöckli (n 7) 41.

relation to voting.¹⁰² According to Moritz von Wyss, this flexibility is appropriate given that the Federal Assembly is a non-professional parliament.¹⁰³ Moreover, while violations of Article 10 ParlA could in theory be sanctioned pursuant to Article 13 ParlA, this does not happen in practice.¹⁰⁴ Still, Caroni and Schmid argue that *de lege lata*, virtual meetings are not an option as long as Parliament can use another physical meeting place in Switzerland.¹⁰⁵ Uhlmann and Wilhelm likewise consider that virtual meetings are not envisaged by, and might even conflict with, constitutional law, as well as with the requirement for Parliament to meet in Bern.¹⁰⁶

On the one hand, several authors believe that online meetings would have a negative impact on, or at least modify, the quality of the deliberative process.¹⁰⁷ For this reason, Caroni and Schmid argue that Article 159(1) Cst. would need to be amended to allow for virtual meetings.¹⁰⁸ This position was also adopted by the Offices in September 2020.¹⁰⁹ Relatedly, it is often argued that parliamentary lawmaking requires direct human contact in order to generate trust, and for compromises to eventually be reached.¹¹⁰ As a matter of fact, it is generally accepted that trust emerges in the context of face-to-face – but not virtual – interactions.¹¹¹

On the other hand, and as Uhlmann and Wilhelm stress, given that the duty of attendance is handled loosely in practice, ‘it seems questionable to apply excessive demands of deliberation to telephone or video conferences’.¹¹² Deliberation, they emphasise, also takes place in the lobby of Parliament, and it seems unclear why it should not be allowed to happen online.¹¹³ Moreover, and crucially, the rationale

¹⁰² M von Wyss, ‘Art. 10 ParlG’ in C Theler, M Graf, and M von Wyss (eds), *Parlamentsrecht und Parlamentspraxis der Schweizerischen Bundesversammlung: Kommentar zum Parlamentsgesetz (ParlG) vom 13. Dezember 2002* (Helbing & Lichtenhahn, 2014) 84, para 6; Caroni and Schmid (n 79) 719; Glaser and Gfeller (n 32) para 31; Stöckli (n 7) 41.

¹⁰³ von Wyss (n 102) 85 para 9.

¹⁰⁴ *ibid* 85, para 11.

¹⁰⁵ Caroni and Schmid (n 79) 720.

¹⁰⁶ Uhlmann and Wilhelm (n 59) para 33.

¹⁰⁷ von Wyss, ‘Wie virtuell kann ein Parlament sein?’ (2020) 23(2) *Parlament – Parlement – Parlamento* 16, 18 ff. See also the opinion of the Office of the National Council regarding D Fiala, ‘Interpellation 20.3098, E-Parlament als eine mögliche Antwort auf Notsituationen wie infolge des Coronavirus’ (11 March 2020); Wilhelm and Uhlmann (n 85) 11. See also Uhlmann and Wilhelm (n 59) para 29. More nuanced: Stöckli (n 7) 51.

¹⁰⁸ Caroni and Schmid (n 79) 720.

¹⁰⁹ See the response of the Offices of 10 September 2020 to M Binder-Keller, ‘Motion 20.3904, Dringliche Schaffung der gesetzlichen Grundlagen für die virtuelle Teilnahme an Parlamentssitzungen’, 19 June 2020.

¹¹⁰ von Wyss (n 107) 20. In the same vein: J Malloy, ‘The Adaptation of Parliament’s Multiple Roles to COVID-19’ (2020) 53 *Canadian Journal of Political Science* 305, 308; R Koop, K Blidook, and LA Fuga, ‘Has the COVID-19 Pandemic Affected MPs’ Representational Activities?’ (2020) 53 *Canadian Journal of Political Science* 287, 288. See also Forster (n 41), describing physical meetings as the ‘lubricant of parliamentary operations’.

¹¹¹ O’Neill, *A Question of Trust* (CUP, 2002) 83 ff.

¹¹² Uhlmann and Wilhelm (n 59) para 36.

¹¹³ *ibid*.

pursued by the requirement of physical presence is that the required quorum be reached, ie that the Councils retain their capacity to act.¹¹⁴ This, in turn, increases the democratic legitimacy of the deliberations and decisions; in other words, physical presence is not an end in itself.¹¹⁵ Glaser and Gfeller even argue that the quorum of Article 159(1) Cst. should be lowered to one quarter of all members in the event of an emergency.¹¹⁶ Importantly, this constitutional provision only requires being present, and not being *physically* present.¹¹⁷

Still, in light of the indeterminacy of existing legal provisions, and given that parliamentary law is currently tailored to physical meetings,¹¹⁸ the Councils would be well-advised to adopt an emergency statute or an emergency ordinance on phone and video meetings.¹¹⁹ Virtual meetings would resolve the issue of a discriminatory exclusion of specific MPs due to their age or a pre-existing medical condition.¹²⁰ Moreover, the exclusion of *any* MP is problematic from the perspective of political representation. The importance granted to the fact that MPs can represent their constituents by attending parliamentary meetings is reflected in several provisions of parliamentary law.¹²¹

Of course, the committees tasked with drafting such an emergency statute or ordinance would need to reflect upon ‘the implications of a virtual Council meeting, eg for the principle of publicity and the representative function of Parliament, but also for the media and interest representatives.’¹²² Moreover, the security requirements of virtual Council meetings must be high in order to avoid abuse, such as illegal substitutions.¹²³ Finally, even in a virtual setting, MPs’ rights and

¹¹⁴ von Wyss (n 102) 84 para 5. On the importance of this element (‘Verhandlungsfähigkeit’, ie of the Council being ‘quorate’), see Uhlmann and Wilhelm (n 59) para 9. See also Art 31 SO-CS; Art 38 SO-NC.

¹¹⁵ Wilhelm and Uhlmann (n 85) 11. See also Uhlmann and Wilhelm (n 59) paras 10, 34.

¹¹⁶ Glaser and Gfeller (n 32) para 57. The authors highlight that the requirement of physical meetings is ‘rigid’, and that unlike Germany and Austria, Switzerland does not have an ‘emergency parliament’ that would be able to adopt decisions in a situation of crisis. See *ibid*, para 38.

¹¹⁷ Stöckli (n 7) 41 fn 201.

¹¹⁸ See especially provisions pertaining to the ‘Right to use Assembly chambers and access to the Parliament Building’ (art. 69 ParlA) and to house rules (Art 61 f SO-NC and 47 f SO-CS), as well as individual provisions (eg stating that members of the National Council vote from their desks if they are rapporteurs, or from their seats in all other cases, Art 56(4) SO-NC; see also Art 44(1) SO-CS, providing that members of the Council of States vote from their desks).

¹¹⁹ Uhlmann and Wilhelm (n 59) para 33. See also Uhlmann and Scheifele (n 80) 125; Stöckli (n 7) 41–42.

¹²⁰ Uhlmann and Scheifele (n 80) 124–25.

¹²¹ See eg Art 11(3) ParlA (no duty of recusal for MPs even in the event of a conflict of interests); Art 20 ParlA (session attendance guarantee in relation to criminal proceedings pertaining to acts not covered by an MP’s immunity).

¹²² Opinion of the Office of the National Council regarding D Fiala, ‘Interpellation 20.3098, E-Parlament als eine mögliche Antwort auf Notsituationen wie infolge des Coronavirus’ (11 March 2020). See also the opinion of the Office of the National Council of 10 September 2020 regarding M Binder-Keller, ‘Motion 20.3904, Dringliche Schaffung der gesetzlichen Grundlagen für die virtuelle Teilnahme an Parlamentssitzungen’ (19 June 2020).

¹²³ Uhlmann and Wilhelm (n 59) paras 10, 34.

the applicable parliamentary procedural norms must be respected to the extent possible (eg the duty to hold minutes): ‘this is certainly a high, but not an insuperable hurdle.’¹²⁴

C. The Meetings of the Committees

COVID-19 also has an impact on the activities of the parliamentary committees. First, the interruption of the spring session equally affected the meetings of the committees. Indeed, by deciding to interrupt the spring session, the Offices also cancelled all committee meetings set to take place in the third week of the session and until the next session.¹²⁵ A second aspect pertains to whether parliamentary committees should be able to hold meetings over the phone or using videoconferencing software.

On 19 March 2020, the Offices announced that until the May and June session, only committee meetings devoted to urgent matters (ie, connected to the extraordinary situation) would be allowed.¹²⁶ These meetings would take place in the Federal Palace or in the Bernerhof, an adjacent government building. The Offices declared that if necessary, informal exchanges pertaining to urgent matters could be held via phone or videoconferences. However, these exchanges were not ‘committee meetings’ and MPs could not claim any compensation for them. Other committee meetings were, as mentioned, prohibited.

This decision remained applicable until 19 April 2020. Eventually, on 6 April 2020, the Offices declared that the parliamentary committees would be given the opportunity to meet for half a day from 20 April 2020 onwards. Moreover, they decided to allow videoconferences for ordinary meetings and not only for informal ones, provided that: (1) the President and the majority of the committee agreed to a videoconference; (2) the matters to be discussed were appropriate for a videoconference, eg ‘hearings or the deliberation of proposals’; (3) that Skype for Business was used, taking into account that classified topics could not be discussed.¹²⁷

On 21 April 2020, for the first time in the history of the Swiss Parliament, a parliamentary committee – the Environment, Spatial Planning, and Energy Committee of the National Council – held a meeting via videoconference. In total, 13 committee meetings were held in the National Council, and 11 in the Council of States. Three took place virtually.¹²⁸ Finally, on 23 April 2020, all restrictions

¹²⁴ *ibid.*

¹²⁵ Caroni and Schmid (n 79) 717–18.

¹²⁶ ‘Schweizer Parlament bleibt in der Krise handlungsfähig’, press release (19 March 2020) www.parlament.ch/press-releases/Pages/mm-bue-n-s-vd-2020-03-19.aspx.

¹²⁷ ‘Kommissionen arbeiten in der ausserordentlichen Lage weiter’, press release (6 April 2020) www.parlament.ch/press-releases/Pages/mm-information-2020-04-06.aspx.

¹²⁸ Factual Report (n 13) 31.

applicable to committee meetings were lifted.¹²⁹ The committees met again to deliberate before the summer session, which began on 2 June 2020.

Were the Offices competent to interrupt all committee meetings? The Offices play an important role when it comes to coordinating the committees' work. In particular, they are in charge of defining 'the remit of the standing committees', 'schedul[ing] the meetings of the committees for the year', and 'handl[ing] all other issues of organisation and procedure in the Council'.¹³⁰ However, analogously to what applies to the Councils (see above section B), scholars argue that due to the committees' prominent status by virtue of constitutional and statutory law (above section A),¹³¹ the Offices mainly fulfil an administrative role vis-à-vis the committees. This administrative – as opposed to 'hierarchical' – function of the Offices is also derived from their statutory tasks and the equality of MPs.¹³² Therefore, according to Caroni and Schmid, a decision of the Offices 'to restrict the committees' activity for a prolonged period of time would violate the Constitution and statutory law'.¹³³ This has also been acknowledged by the Parliamentary Services, which however stated that the Offices and the Administration Delegation must organise and plan the meetings in a way that is safe for all participants.¹³⁴

One problem noted by Caroni and Schmid is that the committees 'do not have an (emergency) power to convene meetings despite contrary decisions by the Offices'.¹³⁵ When requesting that an extraordinary session be held, the 31 members of the Council of States had also asked that the relevant committees be given the possibility to discuss COVID-19-related matters beforehand. Because it is not formally covered by Article 2(3) ParlA, this second request constituted 'a mere wish directed at the Offices'.¹³⁶ When it comes to emergency situations, the regular instruments at the disposal of the committees (eg parliamentary initiatives, procedural requests, and proposals¹³⁷) are not particularly helpful, which leads Caroni and Schmid to conclude that the decisions of the Offices created *faits accomplis*.¹³⁸ Uhlmann and Wilhelm too concede that, as is the case with the meetings of the Councils, the Offices seem 'particularly able to cancel or postpone committee meetings in the event of a serious, immediate threat to the committee members',

¹²⁹ *ibid.*, 30.

¹³⁰ Art 9(1)(b), (e), and (j) SO-NC; Art 6(1)(b), (f), and (j) SO-CS.

¹³¹ See Art 153 Cst., Art 160(1) Cst., and Art 42 ff ParlA.

¹³² Uhlmann and Wilhelm (n 80) para 14. See also Graf (n 57) 14 ff.

¹³³ Caroni and Schmid (n 79) 717. See also Uhlmann and Wilhelm (n 59) paras 51, 58; Glaser and Gfeller (n 32) para 42.

¹³⁴ Parliamentary Services, 'Kommissionssitzungen und Corona-Krise: Beilage für die Sitzung der Koordinationskonferenz vom 6. April 2020', (30 March 2020) www.parlament.ch/centers/documents/de/kommissionssitzungen-und-coronakrise-d.pdf.

¹³⁵ Caroni and Schmid (n 79) 717.

¹³⁶ *ibid.*, 718.

¹³⁷ Art 45(1)(a) ParlA.

¹³⁸ Caroni and Schmid (n 79) 718.

and that ‘a cancellation of committee meetings by the Offices or the Conference for Coordination appears to be permissible only, but at least then when it is necessary to ensure the safety of the committee members.’¹³⁹ This is why Caroni and Schmid argue that the option of enshrining an explicit right of the committees to hold meetings should be examined, eg by amending Article 2(3) ParlA.¹⁴⁰

This brings us to our second point, namely virtual committee meetings. Indeed, the committees’ incapacity to act arises from the lack of an explicit legal basis for virtual meetings (which again mirrors the situation in the Councils, see above section B). It is doubtful whether the committees could themselves decide to hold a meeting via phone or videoconference, given that, as already mentioned, there is no emergency ordinance competence of the committees.¹⁴¹

Just like what applies to the meetings of the Councils, attending committee meetings is mandatory for MPs.¹⁴² However, Council and committee meetings are not comparable in every respect. First, no quorum applies to the latter, but for two narrow exceptions.¹⁴³ Secondly, such meetings do not need to take place in Bern. Thirdly, committee meetings are confidential,¹⁴⁴ which means that if virtual meetings are allowed, security requirements must be even stricter than for Council meetings. Fourthly, committee members who cannot attend a meeting can be replaced by another member of their parliamentary group.¹⁴⁵ Finally, the fact that circular resolutions (‘Zirkularbeschlüsse’) have been practised without an explicit legal basis¹⁴⁶ further suggests that there is no duty for committee members to *physically* attend the meetings. According to Caroni and Schmid, videoconferences should be possible as long as the various provisions governing the activities of the committees are respected.¹⁴⁷

Still, it seems appropriate for the possibility and modalities of virtual committee work to be enshrined in parliamentary law.¹⁴⁸ At present, online meetings are still being held on the basis of ad hoc regulation,¹⁴⁹ which weakens the position of Parliament. When adopting such a legal basis, the specificities of committee meetings should be accounted for. Moreover, a solution needs to be found in order to allow committees to discuss classified topics, especially in light of the fact that all committee meetings are confidential anyway.

¹³⁹ Wilhelm and Uhlmann (n 85) 10.

¹⁴⁰ Caroni and Schmid (n 79) 718.

¹⁴¹ Uhlmann and Wilhelm (n 59) para 47.

¹⁴² Art 10 ParlA.

¹⁴³ ie when the competent committee decides whether to lift an MP’s immunity (Art 17(a)(3) ParlA), or with regard to a conciliation committee (Art 92 ParlA).

¹⁴⁴ Art 47(1) ParlA.

¹⁴⁵ Art 18(1) SO-NC; Art 14(1) SO-CS.

¹⁴⁶ Caroni and Schmid (n 79) 718. This practice is simply based on Art 16 SO-NC and Art 12 SO-CS.

¹⁴⁷ *ibid.* See also Wilhelm and Uhlmann (n 85) 11.

¹⁴⁸ Caroni and Schmid (n 79) 718.

¹⁴⁹ Forster (n 41).

IV. Conclusion: COVID-19 as a Missed Opportunity for the Swiss Parliament?

As this chapter has shown, the pandemic has unveiled several weak spots in Swiss parliamentary and constitutional law. Through our analysis, our goal is not to criticise past decisions that were made under very difficult circumstances, but rather to adopt a prospective approach.¹⁵⁰ Such an approach is needed in light of the fact that Switzerland is currently facing a second wave of infections, and that others are likely to follow in the future as long as no highly effective vaccine is widely available to and used by the population. The present crisis has shown that in the future, Parliament will need to fulfil its decisional, legitimising, and control function even more.¹⁵¹

As regards the COVID-19 Act, it is comprehensible for Parliament to be focused on addressing the pandemic's consequences, and not primarily on its own role. Yet strengthening Parliament's position in times of crisis would constitute neither unwarranted narcissism nor an abuse of authority. Importantly, Parliament should not shy away from its political responsibility. Instead, it should strive to confer democratic legitimacy on the measures.

Handling the pandemic involves taking many unpopular decisions, as shown by the many protests against COVID-19 measures throughout the world, including in Switzerland. These measures require Parliament to intervene in order to deliberate and to ensure that citizens are adequately represented. Parliament reflects a wider spectrum of views than the government, even if in Switzerland, the federal government consists in a broad coalition; moreover, in contrast to the Federal Council, Parliament's plenary deliberations are public. If necessary, the legislature must contest the measures adopted by the executive. MPs should not be 'degraded to head nodders'.¹⁵² During the extraordinary session, however, they did not attempt to modify the measures adopted by the Federal Council.¹⁵³

Given the protracted crisis we are still experiencing, it seems particularly crucial for Parliament to adopt a legal basis for virtual Council and committee meetings. One of the main reasons why it is assumed that the executive is best able to react swiftly is that it can meet more quickly than the legislature. Yet as stated by the Political Institutions Committee of the National Council, 'modern means of communication make it possible for a decision of the [six-member] Finance

¹⁵⁰ See, in the same vein, M von Wyss, 'Die Demokratie ist eine Baustelle, auch 246 Jahre nach Philadelphia' (2020) 23(2) *Parlament – Parlement – Parlamento* 1, 2.

¹⁵¹ Biaggini (n 18) 15.

¹⁵² See the statement of then Council of States member (now Federal Councillor) Simonetta Sommaruga in the parliamentary deliberations surrounding the UBS safety package adopted by the Federal Council in 2010: '08.077 Massnahmenpaket zur Stärkung des schweizerischen Finanzsystems' (9 December 2008) AB 2008 S 924.

¹⁵³ Glaser and Gfeller (n 32) para 40.

Delegation to be taken within a short time'.¹⁵⁴ There is no reason why this assessment should not apply to larger committees and potentially even to Parliament as a whole. As Glaser and Gfeller rightly note, Parliament's status of 'supreme authority of the Confederation' (Art 148(1) Cst.) is not a mere privilege: it also means that Parliament must step in, including and perhaps all the more so in times of crisis.¹⁵⁵

¹⁵⁴ PIC-NC Report (n 31) 1588.

¹⁵⁵ Glaser and Gfeller (n 32) para 45.

