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Legislative response to Coronavirus (Switzerland)

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ABSTRACT

The Coronavirus is a stress test not only for society but also for the legal order. It is usually the government first to respond. Still, Parliaments play an important role in the time of crisis as well. This is especially the case the longer the pandemic lasts. The Swiss Federal Parliament has seized its operations early in the pandemic. It has reconvened in May for an extraordinary session. The main topic of this session was the approval of the government's emergency measures. It was expected that the Parliament will also debate initiatives for emergency law from its members and that it will decide on its *modus operandi*. Also, the decision for an abortion of the session at the wake of the crisis was discussed. Proposals are to be expected to allow sessions by video conference. The paper will deal with the aforementioned questions from a legal perspective. It will analyse the nature of and the relationship between emergency law by the executive and the legislative branch. It focuses on the function of Parliament and its *modus operandi* in the moment of crisis. It will refer mostly to the Swiss Federal Parliament but will also, especially in comparison, take a look at cantonal law and practice. Some preliminary conclusions are offered at the end of the paper.

KEYWORDS Coronavirus; COVID-19; pandemic; emergency law; emergency measures; executive and legislative branch; legal basis; constitutionality; Parliament; right to convene; video conferences; approval and oversight; abortion of session; Switzerland; federalism

1. Introduction

Were we ready for the crisis? We do not mean whether Switzerland had enough hospital beds and ventilators, but whether its Federal Constitution¹ was ready to deal with it. Arguably, the former are vital, and as regards the latter, Switzerland is under no suspicion of losing its quality as a democracy and a 'Rechtsstaat'. Still, the constitutional questions raised by the Corona crisis are troubling. The federal government is applying emergency powers

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¹Federal Constitution of the Swiss Confederation of 18 April 1999 (SR [Classified Compilation of Swiss Federal Law] 101).

unheard of since WW2, and which were previously unimaginable for most. Legal scholars are only starting to grapple the full implications of the crisis.²

2. Emergency Measures of the Federal Council (Executive)

2.1 Legal basis

In times of crisis, important decisions must be taken quickly. Typically, such powers shift to the executive branch. Switzerland is no exception. The Federal Council takes measures to safeguard external security, independence and neutrality of Switzerland. According to Article 185 para 3 of the Constitution, the Federal Council may issue ordinances and administrative acts in order to counter existing or imminent threats of serious disruption to public order or internal or external security. A ‘sister’ provision is located in Article 184 para 3 of the Constitution, concerning measures in respect to foreign policy (closing borders etc.).³

It is undisputed that the current pandemic qualifies as an ‘imminent threat of serious disruption to public order or internal or external security’ under Article 185 para 3 of the Constitution.⁴ Less certain is the question whether the Constitution not only allows police measures, but also financial ones aiming to address the social and economic hardship that follows from the lockdown (see also *below* 2. c). The Federal Council invoked this provision in order to support the Swiss bank UBS in 2008, but many doubted the constitutionality of this financial measure.⁵ However, a newer doctrine tends to

²Giovanni Biaggini, “Notrecht” in Zeiten des Coronavirus – Eine Kritik der jüngsten Praxis des Bundesrats zu Art. 185 Abs. 3 BV (2020) 121 ZBI 239; Giovanni Biaggini, ‘Der coronavirusbedingte Fristenstillstand bei eidgenössischen Volksbegehren – eine Fallstudie zur Tragfähigkeit von Art. 185 Abs. 3 BV (2020) 121 ZBI 277; Andreas Kley, “Ausserordentliche Situationen verlangen nach ausserordentlichen Lösungen” – Ein staatsrechtliches Lehrstück zu Art. 7 EpG und Art. 185 Abs. 3 BV (2020) 121 ZBI 268; Daniel Moekli, ‘Grundrechte in Zeiten von Corona’ (2020) 121 ZBI 237; Florian Brunner, Martin Wilhelm and Felix Uhlmann, ‘Das Coronavirus und die Grenzen des Notrechts, Überlegungen zu einer ausserordentlichen ausserordentlichen Lage’ (2020) AJP 685.

³Ralph Trümpler, Notrecht – Eine Taxonomie der Manifestationen und eine Analyse des intrakonstitutionellen Notrechts de lege lata und de lege ferenda (Diss Zurich 2011, Schulthess, Zurich 2012) paras 234 ff; David Rechsteiner, Recht in besonderen und ausserordentlichen Lagen – Unter besonderer Berücksichtigung des Rechts bei Katastrophen (Diss St Gall and Zurich, Dike, St Gall and Zurich 2016) paras 41 and 494 ff; Jörg Künzli, ‘Art 185 Cst’ in Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (eds.), Bundesverfassung, Basel Commentary Constitution (1st edn., Helbing Lichtenhahn, Basel 2015) Art 185 para 4; Urs Saxer, ‘Art 185 Cst’ in Bernhard Ehrenzeller and others (eds.), Die Schweizerische Bundesverfassung, St Gall Commentary Constitution (3rd edn., Dike & Schulthess, Zurich and St Gall 2014) Art 185 para 9; Giovanni Biaggini, Bundesverfassung der Schweiz, Orell Füssli Commentary Constitution (2nd edn., Orell Füssli, Zurich 2017) Art 185 para 12a.

⁴See eg Georg Müller, ‘Notrecht in der Corona-Krise’ (*Tagblatt*, Zurich, 6 May 2020).

⁵Markus Schott and Daniela Kühne, ‘An den Grenzen des Rechtsstaats: exekutive Notverordnungs- und Notverfügungsrechte in der Kritik’ (2010) 409 ZBI 438 ff; Andreas Lienhard and Agata Zielniewicz, ‘Zum Anwendungsbereich des bundesrätlichen Notrechts’ (2012) 111 ZBI 135 ff; Andreas Lienhard and Agata Zielniewicz, ‘Finanzhilfen wie im Fall UBS bedürfen einer neuen gesetzlichen Ausgestaltung – Der Bundesrat mit dem Erlass der Notverordnung für den Milliardenkredit verfassungsrechtlich auf dünnem Eis’ (*NZZ*, Zurich, 16 February 2009) 8.

include social and economic emergencies as well as measures addressing them.⁶

The Swiss Epidemics Act (EpA)⁷ distinguishes between the normal, the special and the exceptional situation as far as communicable diseases are concerned. After a short period of a special situation, the Federal Council proclaimed the exceptional situation on 16 March 2020. In these circumstances, Article 7 EpA applies. It reads as follows:

If an exceptional situation requires it, the Federal Council can order the necessary measures for the whole country or for individual parts of the country.

The Federal Council's dispatch ('Botschaft') accompanying this provision states that this Article is merely declaratory and says nothing more than the constitution itself.⁸ There was no debate on this Article during the parliamentary deliberations. With hindsight, both the Federal Council and Parliament (as well as scholars) have missed the opportunity to clarify one of the key questions of the current pandemic, i.e. the relationship between this provision and Article 185 para 3 of the Constitution, on the one hand, and existing laws and the Constitution, on the other hand (*see below 2. c*).

Contrary to what happened in the context of WW2,⁹ the Parliament has not adopted – and is not planning to adopt – any 'empowerment act' ('Vollmachtenbeschluss') or any similar legal basis.¹⁰ Currently, the Federal Council is exclusively acting based on the Constitution and on the Epidemics Act. However, a Federal Act on the Legal Basis for Ordinances of the Federal Council to overcome the Covid-19 Epidemic (Covid-19-Act) is being drafted to provide a sufficient legal basis in case these ordinances will be in force for over six months (*see also below 3. e*).¹¹

2.2 Emergency measures in place

The Federal Council has enacted several ordinances on the Coronavirus. One key ordinance, the so-called Ordinance 2 on Measures to Combat the Coronavirus (COVID-19)¹² regulates the lockdown. It is less strict than in some other

⁶U. Saxer, 'Art 185 Cst' in *St Gall Comm. Const.*, Art 185 para 114; G. Biaggini, *Comm. Const.*, Art 185 para 12a.

⁷Federal Act on the combat of human infectious disease of 28 September 2012 (Epidemics Act, EpA, SR 818.101).

⁸Federal Council, 'Botschaft' of 3rd December 2010 on the revision of the Federal Act on the combat of human infectious disease (Epidemics Act, EpA), BBl [Swiss Federal Gazette] 2011 311 ff, 365; *see also* A. Kley, 'Lehrstück' (2020) 121 ZBl 268, 272 f.

⁹G. Biaggini, 'Notrecht' (2020) 121 ZBl 239, 259; for further details on the 'Vollmachtenbeschluss' *see* Andreas Kley, *Verfassungsgeschichte der Neuzeit* (4th edn., Stämpfli, Bern 2020) 353 f.

¹⁰U. Saxer, 'Art 185 Cst' in *St Gall Comm. Const.*, Art 185 para 11; A. Kley, 'Lehrstück' (2020) 121 ZBl 268, 276.

¹¹Cf press release of 28 May 2020: <<https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-79269.html>> accessed 9 June 2020.

¹²Ordinance on Measures to Combat the Coronavirus (COVID-19) of 13 March 2020 (Covid-19 Ordinance 2, SR 818.101.24).

countries. There is no curfew, but the population and especially vulnerable people are urged to stay at home.¹³ Social gatherings are prohibited and distancing is key. Universities, schools, museums, restaurants and most businesses with customers are closed but not the industry,¹⁴ supermarkets and hotels.¹⁵ Re-openings are in progress from the end of April through mid-June.¹⁶

This main ordinance is flanked by a myriad of other ordinances of the Federal Council.¹⁷ They concern financial aid which is lent by private banks but fully guaranteed by the Confederation up to the amount of CHF 500'000.¹⁸ Other ordinances facilitate short term work for enterprises,¹⁹ or concern special areas such as culture,²⁰ sports,²¹ education²² etc. Notably, the Federal Council has also cancelled various deadlines, not only in debt enforcement and court proceedings, but also in the area of political rights.²³ In any case, the federal competencies are used broadly to say the least. They affect everyone's life in some aspect or other.

2.3 Constitutionality?

Before the Corona crisis, many scholars considered the emergency powers of the federal government as relatively restrained compared to other countries and to the constitutions of some cantons (states) in Switzerland.²⁴ Indeed,

¹³For an overview see media release of the Swiss Confederation of 16 April 2020: <<https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-78818.html>> accessed 9 June 2020.

¹⁴See, however, Article 7e of the COVID-19 Ordinance 2, whereby 'the Federal Council may in response to a justified request authorize the canton concerned to restrict or suspend the activities of certain sectors of the economy for a limited time and in specific regions'.

¹⁵Art 6 of the Covid-19 Ordinance 2.

¹⁶ibid Art 10b para 1.

¹⁷See eg Ordinance of 20 March 2020 on the standstill of deadlines for federal popular initiatives and referenda (SR 161.16; not in force anymore); Ordinance of 20 March 2020 on the standstill of deadlines for civil and administrative procedures for the maintenance of the judiciary system in the context of the Coronavirus (COVID-19) (SR 173.110.4; not in force anymore); Ordinance of 20 March 2020 on measures in the case of loss of income due to the Coronavirus (COVID-19) (SR 830.31); Ordinance of 17 March 2020 on the attenuation of the impacts of the Coronavirus in the area of rental and leasing (SR 221.213.4); Ordinance of 1st April 2020 on the measures in the area of migration and asylum during the Coronavirus (SR 142.318); Ordinance of 16 April 2020 on the measures in the judiciary system and the procedural law in connection with the Coronavirus (SR 272.81); Ordinance of 16 April 2020 on insolvency law measures in order to overcome the Corona crisis (SR 281.242); Ordinance of 22 April 2020 on the compensation of members of the army in service to overcome the Corona pandemic (SR 834.15).

¹⁸Art 3 para 1 Ordinance of 25 March 2020 on the grant of credits and joint securities due to the Coronavirus (SR 951.261).

¹⁹Ordinance of 20 March 2020 on measures regarding the unemployment insurance in connection with the Coronavirus (COVID-19) (SR 837.033).

²⁰Ordinance of 20 March 2020 on the attenuation of the economic impact of the Coronavirus (COVID-19) in the cultural sector (SR 442.15).

²¹Ordinance of 20 March 2020 on the accompanying measures in the area of sports in order to attenuate the impacts of the federal measures to combat the Coronavirus (SR 415.021).

²²See eg Ordinance of 29 April 2020 on the cantonal high school maturity exams during the Coronavirus pandemic (SR 413.16).

²³Ordinance of 20 March 2020 on the standstill of deadlines for federal popular initiatives and referenda (SR 161.16); for further details see G. Biaggini, 'Fristenstillstand' (2020) 121 ZBI 277 ff.

²⁴See A. Kley, 'Lehrstück' (2020) 121 ZBI 268, 275; G. Biaggini, 'Notrecht' (2020) 121 ZBI 239, 256 f and 265 ff.

more extensive emergency powers were rejected by Parliament during the deliberations on the new Constitution of 1999.²⁵

It was generally assumed that the Federal Council is bound to the constitution when invoking its emergency powers.²⁶ Arguably, the Federal Council is also bound to federal laws.²⁷ To be more precise, it may invoke the emergency powers only when a legal basis is missing, and it cannot create a legal basis that contradicts existing federal law (*praeter legem*, not *contra legem*). However, a closer look reveals that in the current crisis, the Federal Council has often amended federal law, and that it has actually done so quite openly by stating which provisions of federal law do not apply or apply differently under the federal ordinances.²⁸ The Federal Council has thereby assumed powers that were typically reserved to Parliament.

Furthermore, several provisions of the federal ordinances are in contradiction with the Constitution. Some deadlines in respect to political rights are regulated in the Constitution, but are now affected by the federal ordinances.²⁹ Some measures of the federal government clearly fall in the competences of the cantons.³⁰ Contrary to conflicts with federal legislation, the Federal Council has neither highlighted these conflicts nor issued any statement in this regard.

The legal debate on the constitutionality of these interventions has just started and is ongoing as this paper is written. It is too early for an assessment but there is no doubt that criticism of the measures of the federal government will be voiced. From preliminary exchanges, it may be assumed that there will be voices criticising the Federal Council for overstepping the constitutional limits of its emergency powers.³¹ Others will defend the federal government.³²

²⁵Federal Council, 'Botschaft' on the new Federal Constitution of the Swiss Confederation of 18 April 1999 (SR 101), BBl 1997 I 1, 418 f; G. Biaggini, 'Notrecht' (2020) 121 ZBl 239, 258 f.

²⁶Federal Council, 'Botschaft' Federal Constitution, BBl 1997 I 1, 419; see also Decision of the Swiss Federal Supreme Court 117 Ia 202, c. 5 under the old Cst of 1874; G. Biaggini, *Comm. Const.*, Art 185 para 10c.

²⁷G. Biaggini, *Comm. Const.*, Art 185 para 10c; Regina Kiener, 'Bundesrätliches "Notrecht" und Unabhängigkeit der Justiz' in Festschrift Tobias Jaag (Schulthess, Zurich 2013) 465 f; Andreas Auer, Giorgio Malinverni and Michel Hottelier, *Droit constitutionnel suisse* (vol I, 3rd edn., Stämpfli, Berne 2013) para 1629; cf also DTF 122 IV 258, c. 2a under the old Cst of 1874.

²⁸Likewise, F. Brunner, M. Wilhelm and F. Uhlmann, 'Coronavirus' (2020) AJP 685, 696.

²⁹Art 139 para 1 Cst and 141 para 1 Cst; see also F. Brunner, M. Wilhelm and F. Uhlmann, 'Coronavirus' (2020) AJP 685, 696.

³⁰See eg Ordinance of 20 March 2020 on the standstill of deadlines for civil and administrative procedures for the maintenance of the judiciary system in the context of the Coronavirus (SR 173.110.4; not in force anymore), since it also affects cantonal administrative procedures. The organisation of the latter lays within the competence of the cantons according to Art 47 para 2 Cst; see G. Biaggini, 'Fristenstillstand' (2020) 121 ZBl 277 ff, for further details.

³¹G. Biaggini, 'Notrecht' (2020) 121 ZBl 239; G. Biaggini, 'Volksbegehren' (2020) 121 ZBl 277; A. Kley, 'Lehrstück' (2020) 121 ZBl 268; A. Kley, '"Notrecht" in der Corona-Pandemie: Der Bundesrat hat die geltende Rechts- und Verfassungsordnung verlassen' (NZZ, Zurich, 18 May 2020); D. Moeckli, 'Grundrechte' (2020) 121 ZBl 237.

³²See eg G. Müller (*Tagblatt*, Zurich, 6 May 2020); for an overview of the different opinions among scholars in the media see Daniel Gerny, 'Notrechts-Exzess wird staatspolitisches Problem' in NZZ (ed.), *Recht im Spiegel der NZZ* (Zurich, NZZ no 95, 24 March 2020); Daniel Gerny, 'Juristen kontern die Kritik am angeblichen Notrechtsexzess: "Hinterher ist man immer schlauer"' (NZZ, Zurich, 5 May 2020).

As of writing, the Administrative Court of the Canton of Zurich has invalidated a cantonal ordinance supporting childcare facilities, mainly on the grounds that the cantonal constitution lacks a legal basis for the executive to intervene against social or economic hardships in times of crisis.³³ The Federal Supreme Court has not spoken to the question (and only rejected for obvious procedural reasons a direct attempt to invalidate a federal ordinance).³⁴ As for the background, it should be noted that unlike in many other countries, there is traditionally only a limited constitutional jurisdiction in Switzerland. The Federal Supreme Court must respect federal laws since Parliament is perceived as the supreme legislative body under direct democratic control by popular referendum.³⁵ While the Supreme Court cannot control the constitutionality of such a federal act or ordinance itself in an abstract way (as rejected in the decision mentioned above), it may, however, incidentally control the constitutionality in the course of its implementation in connection with a specific case of its application.³⁶ With regard to the current emergency legislation, some voices are raised in favour of a more comprehensive constitutional jurisdiction, but scholars point out that apart from not being in line with the tradition, it would be very challenging for the court to decide upon such time-critical and complex questions.³⁷

Back to the ordinances of the Federal Council: From a practical standpoint, it was difficult if not impossible for the Federal Council not to react. Legally, one may contend that the emergency powers have been gradually understood more extensively in the past, so as to include not only police action, but also measures aiming to address social and economic hardships.³⁸ Additionally, the Epidemics Act may also serve as a basis for extensive governmental measures – or at least as an argument that when passing the Epidemics Act, the Federal Parliament accepted far-reaching measures by the Federal Council in case of a pandemic.

Personally, we believe that the Constitution allows federal ordinances to make the necessary adjustments to federal laws if the (strict) requirements for an emergency are met and these corrections are still in line with the

³³Administrative Court of the Canton of Zurich, Decision AN.2020.00004 of 28 May 2020 c. 4.2. f; cf also press release of 28 May 2020, <<https://vgr.zh.ch/internet/verwaltungsgesicht/de/aktuell/medienmitteilungen/2020/AufhebungderNotverordnungRR.html>> accessed 9 June 2020; see also Stefan Hotz, 'Richter kassieren die Kita-Notverordnung der Zürcher Regierung' (NZZ, Zurich, 28 May 2020).

³⁴Swiss Federal Supreme Court, Decision 2C_280/2020 of 15 April 2020.

³⁵See Art 190 Cst.

³⁶For an appreciation in the current context see F. Brunner, M. Wilhelm and F. Uhlmann, 'Coronavirus' (2020) AJP 685, 694.

³⁷See eg <<https://www.srf.ch/news/schweiz/notverordnungen-des-bundesrats-wer-ueberprueft-eigentlich-die-verhaeltnismaessigkeit>> accessed 9 June 2020.

³⁸See F. Brunner, M. Wilhelm and F. Uhlmann, 'Coronavirus' (2020) AJP 685, 692 and 694 f for further details.

general principles of that legislation.³⁹ Indeed, arguing to the contrary would mean that the Federal Council's emergency powers would be severely restricted. More troublesome are federal ordinances in contradiction with the Constitution. Such derogations must be considered as *ultima ratio* and must be swiftly approved by the Federal Parliament (see below 3. d).

3. The Parliament in the State of Emergency

3.1 Self-Suspension of the Federal Parliament

The Federal Parliament was in session during the rapid increase of the crisis. Still, on 15 March 2020, the offices of both chambers decided to abort the session – although one chamber, at the beginning of the same week, explicitly rejected such a request ('Motion'). The offices also suspended all committee meetings.⁴⁰

The decisions of the offices of both chambers attracted widespread criticism.⁴¹ It is doubtful that these decisions were legally correct; the offices of the chambers have mainly an administrative function and their members do not enjoy superior authority compared to the other MPs (see expert opinions⁴²). However, it is fair to say that the situation in Switzerland was critical and that the decisions were taken under substantial time pressure. It is also understandable that the Federal Parliament wanted to show its resoluteness to contribute its share in fighting the crisis.

It is less understandable that the subsequent holding of an extraordinary session was first requested by the Federal Council, and not by the MPs themselves. Only after the request of the Federal Council members of the senate filed a corresponding request. This request was symbolic, as it does not matter whether Parliament is convened by the request of the government

³⁹Likewise, U. Saxer, 'Art 185 Cst' in *St Gall Comm. Const.*, Art 185 para 103; J. Künzli, 'Art 184 Cst' in *Basel Comm. Const.*, Art 184 para 41; J. Künzli, 'Art 185' in *Basel Comm. Const.*, Art 185 para 42; R. Trümpler, 'Notrecht', para 317; D. Rechsteiner, 'Recht', para 381; for a more conservative opinion see eg G. Biaggi, *Comm. Const.*, Art 185 para 10c.

⁴⁰Fabian Schäfer, 'Zuerst wollte das Parlament ein "Vorbild" sein und die Session trotz Corona durchziehen – doch dann kam die Einsicht' (*NZZ*, Zurich, 15 March 2020); Cristof Forster, 'Die Corona-Krise hat Defizite beim Parlament aufgezeigt. Für die Zukunft muss sich einiges verändern' (*NZZ*, Zurich, 30 April 2020); A. Kley, "'Notrecht' in der Corona-Pandemie: Der Bundesrat hat die geltende Rechts- und Verfassungsordnung verlassen' (*NZZ*, Zurich, 18 May 2020).

⁴¹For self-criticism by the Parliament see <https://www.parlament.ch/de/services/news/Seiten/2020/20200504180605119194158159041_bsd162.aspx> accessed 9 June 2010.

⁴²See expert reports of 3rd and 16 April 2020 for the attention of the Social-Democratic Party of the Federal Chambers on the realization of sessions and committee meetings in extraordinary situations (Coronavirus) resp. on the abortion of the session and right to convene an extraordinary session (<<http://publikationen.sgp-ssp.net>> accessed 9 June 2020): F. Uhlmann and M. Wilhelm, *Kurzgutachten zuhanden der Sozialdemokratischen Fraktion der Eidgenössischen Räte betreffend die Durchführung von Sessionen und Kommissionssitzungen in ausserordentlichen Lagen (Coronavirus)*, 3rd April 2020, para 50; F. Uhlmann and M. Wilhelm, *Kurzgutachten zuhanden der Sozialdemokratischen Fraktion der Eidgenössischen Räte betreffend Sessionsabbruch und Einberufung zu einer ausserordentlichen Session*, 16 April 2020, para 28.

or by a quarter of the members of a council (see Article 2 ParlA).⁴³ The extraordinary session has started on 4 May 2020. In our opinion that is a late response.

This is not to say that the Parliament was completely inactive. Parliament is immediately needed when it comes to *emergency spending*. A delegation of both chambers must approve immediate expenses and appropriation credits, which it did.⁴⁴

3.2 Right to Convene

It is interesting that there was a discussion⁴⁵ whether the Parliamentary session should be suspended, but it was undisputed that this decision must be taken by the Parliament – and by the Parliament alone. From a formalistic viewpoint, this assumption is not self-evident.

The Ordinance 2 on Measures to Combat the Coronavirus (COVID-19)⁴⁶ prohibits public and private gatherings (Article 6 para 1), gatherings of people of more than five people in public space (Article 7c para 1) and recommends (‘... should ...’) particularly vulnerable people to stay at home and avoid crowds (Article 10b para 1). Those who are over 65 or suffer from certain diseases are particularly at risk (Article 10b para 2). There are exceptions to the prohibition on gatherings, e.g. for public administration (Article 6 para 3 lit j). In addition, the competent cantonal authority can grant exceptional permits under certain conditions (Article 7).

The Federal Council expressly regulated the organisation of shareholder’s meetings of private companies to be conducted electronically.⁴⁷ However, the Federal Council did not expressly address Parliamentary sessions, but the offices assumed that the restrictions of the ordinance were not applicable.⁴⁸ Again, from a formalistic viewpoint, this conclusion is not obvious since the Federal Council may arguably change and certainly has changed federal laws, so technically, the federal ordinances may also concern the Parliament Act. However, in substance, it is necessary in our view that the Parliament must remain responsible for the question of if and how its sessions are organised.⁴⁹ In the context of an extraordinary situation, the powers are usually

⁴³Federal Act on the Federal Assembly of 13 December 2002 (Parliament Act, ParlA, SR 171.10).

⁴⁴Art 28 para 1 resp. Art 34 para 1 Federal Act on the Financial Budget of 7 October 2005 (Financial Budget Act, FBA, SR 611.0); see also Hansueli Schöchli, ‘Krisendarlehen an Betriebe ohne Rückzahlungspflicht?’ (NZZ, Zurich, 24 March 2020).

⁴⁵See eg F. Schäfer, ‘Zuerst wollte das Parlament ein “Vorbild” sein und die Session trotz Corona durchziehen – doch dann kam die Einsicht’ (NZZ, Zurich, 15 March 2020).

⁴⁶Art 6 paras 1 and 3 lit j, Art 7, Art 7c para 1, Art 10b paras 1 and 2 Covid-19 Ordinance 2 (SR 818.101.24).

⁴⁷Art 6b para 1 lit a Covid-19 Ordinance 2 (SR 818.101.24).

⁴⁸Parliamentary services [legal service, secretariat of the financial commissions, secretariat of the state political commissions], competences of the parliament and the federal council in extraordinary situations: note to the council presidencies, Bern, 25 March 2020 (<<https://www.parlament.ch/centers/documents/de/notiz-kompetenzen-parlament-und-bundesrat-in-ausserord-lagen-d.pdf>> accessed 9 June 2020) 5.

concentrated with the executive. However, with a view to the powers of the Parliament to enact emergency ordinances itself and its function with regard to oversight on government, it is inconceivable that the Federal Council or subordinate administrative authority can decide on the sessions of Parliament.⁵⁰ Otherwise, in the event of an emergency, the executive would have the power to prevent the approval or redemption of its emergency measures by preventing sessions of Parliament from being held. This would be, in our opinion, a clear violation of the separation of powers doctrine that must be upheld also in case of a crisis. The same logic applies to the judiciary, which must be able to provide some legal protection against emergency ordinances.

On the federal level, the competence of Parliament to decide on its sessions was never called into question. However, on the cantonal (state) level, the exact same question was briefly debated. The Parliament of the canton of Zurich ('Kantonsrat') was denied an exceptional permit under Article 7 COVID-19 Ordinance 2 by the local health department.⁵¹ Based on an expert opinion, the office of the 'Kantonsrat' protested – and the cantonal executive quickly confirmed that the 'Kantonsrat' itself was in charge to allow for an exception, thereby following the argument that the separation of powers implied that each power decided by itself if and under what form it shall convene.⁵² In Zurich, the session of Parliament was particularly relevant as the cantonal constitution required immediate approval of any emergency ordinances enacted by the government.⁵³

It is noteworthy that the troubles of the 'Kantonsrat' did not end here. In a statement to the press, the Federal Office of Justice (FOJ) declared that the session was not permissible under any circumstances. The office swiftly corrected the statement that was – if not plainly wrong – bare of any understanding for the role and the importance of Parliament in the times of crises.⁵⁴ The *faux pas* of the FOJ highlights how quickly fundamental principles of democracy may be forgotten, luckily only temporarily in this case.

⁴⁹See F. Uhlmann, expert report of 19 March 2020, para 14; F. Uhlmann and M. Wilhelm, expert reports of 3rd April 2020, paras 18 and 21; F. Uhlmann and M. Wilhelm, expert report of 16 April 2020, para 23.

⁵⁰See F. Uhlmann, expert report of 19 March 2020, paras 13 f, 28 and 35; F. Uhlmann and M. Wilhelm, expert report of 16 April 2020, paras 20, 23 and 35; F. Uhlmann and M. Wilhelm, expert report of 3rd April 2020, paras 17 f and 21.

⁵¹F. Uhlmann, expert report of 19 March 2020, paras 13 f; see also Stefan Hotz, 'Das Coronavirus bringt die Zürcher Politik in eine institutionelle Notlage' (NZZ, Zurich, 17 March 2020); Stefan Hotz, 'Der Bund beurteilt eine Sitzung des Zürcher Kantonsrats als derzeit verbotene Versammlung – Der Regierungsrat widerspricht' (NZZ, Zurich, 24 March 2020).

⁵²See F. Uhlmann, expert report of 19 March 2020, paras 13 f.

⁵³Art 72 para 2 Constitution of the Canton of Zurich of 17 February 2005 (LS 101).

⁵⁴S. Hotz, 'Das Coronavirus bringt die Zürcher Politik in eine institutionelle Notlage' (NZZ, Zurich, 24 March 2020); Stefan Hotz, 'Coronavirus in Zürich: Alle Fraktionen unterstützen das Notpaket für die Zürcher Wirtschaft' (NZZ, Zurich, 29 March 2020).

3.3 Video Conferences

Quickly, in the height of the crisis, came up the question whether Parliaments may convene electronically. However, in the respective acts concerning the functioning of Parliament, there was no basis to meet by video conferences and such, at least not for a plenary session.

It has been demonstrated that the emergency measures of the executive branch do, as a rule, not directly affect Parliamentary session. However, the current state of health emergency is not without any effects on Parliament, including the Federal Parliament. It cannot be denied that the conduct of meetings with physical attendance raises sensitive legal issues.⁵⁵ According to Article 10b para 1 COVID-19 Ordinance 2 ‘particularly vulnerable persons should stay at home and avoid crowds of people’. The term ‘should’ – typically a dubious term in legislation because of its ambiguity – does not imply an actual prohibition.⁵⁶ As stated, the regulation is neither binding on Parliament. Participation in the sessions is mandatory (see Article 10 ParIA). However, there is at least a significant contradiction in terms if particularly vulnerable people take part in sessions of Parliament. The authorities, including Parliament, are rightly expected to take federal measures seriously and serve as an example. In other words, there is considerable pressure, also from a legal standpoint, that particularly vulnerable people do not take part in a Parliamentary session, even if the session is conducted with all the precautions possible.⁵⁷

Technically, a lower participation of Parliamentarians is conceivable, provided they reach a certain quota. However, the composition of Parliament presumably changes based on criteria that are considered highly problematic under the equal protection clause,⁵⁸ meaning that some members are excluded by age and physical disability. If the pressure – possibly also from the media – leads to the fact that particularly vulnerable people do not participate, these members are discriminated against. This is not only problematic from an individual perspective, but also affects the core of democratic representation.⁵⁹ If Parliamentarians belonging to certain population groups are unable to attend sessions, there is a risk that the relevant population groups in particular, as well as the voters of certain parties, may only be represented to a limited extent. It would be a bitter irony if the most affected

⁵⁵See F. Uhlmann, *expert report of 19 March 2020*, para 32; F. Uhlmann and M. Wilhelm, *expert report of 3rd April 2020*, para 19.

⁵⁶*ibid* paras 19 and 32.

⁵⁷*ibid*.

⁵⁸Art 8 Cst; Walter Haller, Alfred Kölz and Thomas Gächter, *Allgemeines Staatsrecht, Eine juristische Einführung in die Allgemeine Staatslehre* (5th edn., Nomos and Schulthess, Zurich and Basel 2013) paras 1150 ff.

⁵⁹Michael Surber, ‘Potenzieller Gefahrenherd Parlament: Die Sondersession stellt die älteren Parlamentarier vor eine schwere Entscheidung’ (NZZ, Zurich, 30 March 2020).

citizens, i.e. particularly vulnerable people, are not properly represented in Parliament.

Still, in our view, such concerns do not lead to the conclusion that sessions in the times of this crisis are invalid, but they are in considerable tension with federal health measures or lead to a composition of Parliament which is undesirable under the constitution. One may say that sessions are valid but *constitutionally encumbered*.

The problem with video conferences that would solve this dilemma is that they typically lack a legal basis or that they are outright in contradiction to the constitution. According to Article 159 para 1 Cst, the chambers can negotiate validly ‘if the majority of their members are present’. Attendance is required not only for the decision-making process, but also for the debate.⁶⁰ The presence should ensure the ‘democratic legitimacy of the debate’.⁶¹ It is about ensuring a ‘minimal legitimacy of the debate’.⁶² Attendance is an obligation of the MPs (see Article 10 ParIA) and is understood as a being in the chamber, not necessarily at one’s own seat.⁶³ ‘Presence in the anteroom or in the walk-in hall (*salle des pas perdus*) is not sufficient’.⁶⁴ In practice, however, it is tolerated that council members stay ‘in the adjoining rooms of the council chamber’.⁶⁵ ‘Council members do not have to sit in the council room continuously’.⁶⁶ For the votes, the members are called in by acoustic signals.⁶⁷

From these starting points, we believe that an emergency federal law can amend the Parliament Act introducing video conferences. It should do so if particularly vulnerable persons are supposed to avoid sessions for a longer duration than just a few months. The physical presence of the MPs is not an end in itself, but is about legitimising debate and decisions. The current practice with regard to compulsory attendance also allows for loosening. If it is accepted today that the MPs can fulfil their duty to be present outside the chamber, it is questionable why the constitution should be that strict on video conferences.⁶⁸ As discussed, it must be also taken into account that a session under the current conditions is constitutionally encumbered

⁶⁰G. Biaggini, *Comm. Const.*, Art 159 para 3, with further details.

⁶¹Moritz von Wyss, ‘Art 10 ParIA’ in Martin Graf and others (eds.), *Parlamentsrecht und Parlamentspraxis der Schweizerischen Bundesversammlung, Commentary on the Parliament Act (ParIA) of 13 December 2002* (Helbing Lichtenhahn, Basel 2014), Art 10 para 5.

⁶²G. Biaggini, *Comm. Const.*, Art 159 para 2; Daniela Thurnherr, ‘Art 159 Cst’ in *Basel Comm. Const.*, Art 159 para 4.

⁶³G. Biaggini, *Comm. Const.*, Art 159 para 2.

⁶⁴*ibid* Art 159 para 2.

⁶⁵M. von Wyss, ‘Art 10 ParIA’ in *Comm. ParIA*, Art 10 para 6.

⁶⁶*ibid* Art 10 para 6.

⁶⁷M. von Wyss, ‘Art 159 Cst’ in *St Gall Comm. Const.*, Art 159 para 3.

⁶⁸For the members of the parliamentary commissions see <https://www.parlament.ch/de/services/news/Seiten/2020/20200504180605119194158159041_bsd162.aspx> accessed 9 June 2020.

because it has a potentially discriminatory effect and infringes the core of democratic representation.⁶⁹

3.4 Approval and Oversight

Having established that it is up to Parliament whether and how to convene, one must ask what is the role of Parliament vis-à-vis the federal ordinances regulating everyday life? On the federal level, the Constitution does not give any answers. A newer provision of the Government and Administration Organization Act (GAOA)⁷⁰ was introduced after the support of the Swiss bank UBS in 2008.⁷¹ It stipulates that emergency ordinances of the government must be brought to Parliament after six months at the latest (Article 7d para 2 GAOA). If not approved by Parliament via legislation, they become void.⁷²

The delicate legal question behind this rule is whether both Federal Council and Parliament may wait till the second half of 2020 before the process of Parliamentary legislation is started. No practice from the authorities has been established to this question. In our view, Article 7d GAOA provides not only for a maximum duration before alternatives must be brought to Parliament: it requires *immediate action both from the Federal Council and Parliament*.⁷³ As discussed, many of the provisions of the federal ordinances alter federal law and some are even in contradiction with the Constitution (see *supra* 2. c). Such a far-reaching application of the executive emergency powers seems permissible only if these powers are brought back to the realm of the rule of law as quickly as possible. Only Parliament can do so.⁷⁴

Meanwhile, the Federal Council has submitted to Parliament its first report on the use of its emergency legislation competence during the Corona crisis. The report also addresses the question of the expected duration of the emergency ordinances and whether they should be (partly) included in the planned Federal Act on the Legal Basis for Ordinances of the Federal Council to defeat the Covid-19 epidemic (Covid-19-Act), which is currently being elaborated. Furthermore, the report informs about the sixteen requests ('Motionen') submitted to the Federal Council by the Parliamentary Commissions during this time and the state of their implementation.⁷⁵

⁶⁹See also M. Surber, 'Das Parlament könnte in der Corona-Krise auch per Video tagen' (NZZ, Zurich, 9 April 2020).

⁷⁰Art 7d of the Government and Administration Organization Act of 21 March 1997 (GAOA, SR 172.010).

⁷¹D. Rechsteiner, 'Recht', para 381; see also Parliamentary Initiative on the preservation of Democracy, 'Rechtsstaat' and Empowerment in extraordinary situations of 5 February 2010, BBI 2010 1563, 1568 f.

⁷²Art 7d para 2 lit b GAOA.

⁷³Likewise, F. Brunner, M. Wilhelm and F. Uhlmann, 'Coronavirus' (2020) AJP 685, 700 f.

⁷⁴*ibid* 699 f.

⁷⁵Report on the use of the Federal Council's emergency legislation competence of 27 May 2020, <<https://www.bk.admin.ch/bk/de/home/dokumentation/gesetzgebung/berichtnotverordnungen.html>>

3.5 Emergency Law of the Parliament

If Parliament comes into action, it can, of course, replace federal emergency ordinances by ordinary legislation. This seems appropriate for governmental measures that seem not be urgent or not urgent anymore.

Often, however, swifter action is needed. Parliament has its own clause enabling it to enact emergency legislation which is however less clear concerning its boundaries, and which provides for measures that are not much faster in passing than ordinary emergency legislation of Parliament; hence, this second clause is rarely used.⁷⁶ Federal legislation may be declared urgent by an absolute majority of the members of each of the two chambers and be brought into force immediately.⁷⁷ Contrary to what applies to other federal laws, the right to a referendum is temporarily suspended in the case of parliamentary emergency legislation.⁷⁸ Most importantly, emergency legislation of the Parliament must not necessarily have a constitutional basis.⁷⁹ Acts *praeter constitutionem* are possible (but limited concerning their duration).⁸⁰ It goes without saying that Parliament can also correct all contradictions between existing federal laws and executive ordinances by passing emergency legislation. Hence, only Parliament can legally resolve the tension – if not conflict – between the measures in place on the one hand, and federal law and the Constitution on the other. It should do so as quickly as possible.⁸¹

3.6 Legislative Powers and the Dilemma of *Fait Accompli*

From the hierarchy of norms, it is undisputed that Parliament can supersede ordinances by the Federal Council. Still, a closer look should be taken at the question whether Parliament could fully revert the decisions of the Federal Council.⁸²

In our view, it could be legally problematic and constitutionally undesirable if Parliament were able to fully correct all emergency measures taken by the

accessed 9 June 2020; see also press release of 28 May 2020: <<https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-79269.html>> accessed 9 June 2020.

⁷⁶For the emergency ordinances of Parliament see Art 173 para 1 lit and b in conjunction with lit c Cst; for ordinary emergency legislation of Parliament see Art 165 para 1 Cst; see also Art 77 ParlA; Urs Saxer, 'Art 173 Cst' in Bernhard Ehrenzeller and others (eds.), *Die Schweizerische Bundesverfassung, St Gall Commentary Constitution* (3rd edn., Dike & Schulthess, Zurich and St Gall 2014), Art 173 paras 61 f; G. Biaggini, *Comm. Const.*, Art 165 paras 4 and Art 173 paras 12 ff; Cornelia Theler, 'Art 77 ParlA' in *Comm. ParlA*, Art 77 para 5.

⁷⁷Art 165 para 1 Cst and Art 159 para 3 lit a Cst and Art 77 ParlA; G. Biaggini, *Comm. Const.*, Art 165 para 2; Pierre Tschannen, 'Art 165 Cst' in *St Gall Comm. Const.*, Art 165 para 3.

⁷⁸Art 165 paras 2 and 3 Cst in conjunction with Art 140 para 1 lit c and Art 141 para 1 lit b Cst.

⁷⁹Art 165 para 3 Cst.

⁸⁰It will automatically expire after one year, if it isn't submitted to popular vote and accepted by the population and the states within this one-year period; see eg P. Tschannen, 'Art 165 Cst' in *St Gall. Comm. Const.*, Art 165 paras 17 ff.

⁸¹F. Brunner, M. Wilhelm and F. Uhlmann, 'Coronavirus', (2020) *AJP* 685, 699 f.

⁸²*ibid* 700 f.

government. This concerns mainly the financial support of the private parties during the height of the crisis. From the perspective of a private party, such support was received in good faith as at the moment of receipt, the federal ordinances were the law of the land. If now Parliament intervenes and, e.g. request the immediate payback of all governmental aid or guarantees, such legislation must be considered retroactive which may come in conflict with the principle of good faith that is comparatively strongly understood under the Constitution.⁸³ Also, from an institutional standpoint, future emergency ordinances from the Federal Council would be undermined if the private parties may assume that they could be fully reverted by Parliament.⁸⁴

This means that the Federal Council will create *fait accompli* in some instances.⁸⁵ It will often have to do this for the measure to be effective. It must create legal certainty. You save a bank – or you don't save it. A 'maybe' will not do. This results in a functional limitation of the emergency legislation of Parliament: it can override and correct the Federal Council's emergency ordinances. However, it must not retrospectively correct the Federal Council's measures in such a way that, in a future application, there will no longer be any confidence in an emergency regulation of the Federal Council (or this will not be followed, because those subject to the law speculate on an 'amnesty' of Parliament).⁸⁶ The Federal Council is therefore responsible for the most urgent measures – and only the Federal Council. Parliament can express its displeasure. But this is only a political correction, not a legal one.

Conversely, the Federal Council is the trustee of the powers and interests of Parliament. He must not present Parliament with a *fait accompli* where this is not necessary. Like a good judge, the Federal Council takes the measures for the duration of the procedure or here the parliamentary process. A judge cannot always prevent that there are no more decisions to be made by the final decision due to precautionary measures, but a *fait accompli* must be prevented whenever possible.⁸⁷ The Federal Council should also act in this sense. Otherwise, it risks a correction by Parliament.

3.7 Back to Normal: Legislative Challenges

Last but not least, one should not forget that the road back to normal is plastered with challenges, also from a legal perspective. Parliament cannot simply cancel the ordinances of the Federal Council. Already the first loosening of the

⁸³For the principle of good faith see eg Ulrich Häfelin, Georg Müller and Felix Uhlmann, *Allgemeines Verwaltungsverfahren* (7th edn, Dike, Zurich and St Gall 2016) paras 620 ff; D. Rechsteiner, 'Recht', para 371.

⁸⁴F. Brunner, M. Wilhelm and F. Uhlmann, 'Coronavirus' (2020) *AJP* 685, 700 f.

⁸⁵*ibid* 700 f.

⁸⁶*ibid* 701.

⁸⁷*ibid*.

strict measures illustrates that the restrictions must be lifted one by one, possibly accompanied with side measures such as tracking infected people etc. The equal protection clause will be a constant challenge (*see supra* 3 c); it is far from obvious why small businesses may open before larger stores if the latter satisfy the same standards on hygiene etc.⁸⁸ Another example: Even if financial aid is granted in principle, it must be decided whether government should take some form of control over a heavily subsidised enterprise, or whether the governmental aid should be attached to other targets such as stricter environmental standards.⁸⁹ One may assume that airlines are just the tip of the iceberg of a much larger debate. Hence, again, we believe that Parliament must start its work as fast as possible. The burden will be heavy.

4. Federalism

A last quick glance at federalism: Switzerland is a federalist state. From a Swiss perspective, it is interesting to see that the equivalent of the powers now assumed by the Federal Government rest within the states in the US and with the Länder in Germany (which is surprising, as the 'Länder' have less competences than the Swiss cantons).

The main federal ordinance concerning the Coronavirus has triggered a debate on the residual powers of the cantons. It is clear from the text that the cantons may still regulate questions not covered by the federal ordinances.⁹⁰ Still, it is unclear what shall happen to areas that have been addressed by the Federal Council only vaguely or in principle.

The Federal Council has resolved one conflict with the canton of Ticino, which had introduced stricter measures than on the federal level.⁹¹ Legally, this was doubtful, but the Federal Council retroactively introduced a clause (Article 7e COVID-19 Ordinance 2) allowing for such exceptions – a move that is creative from a legal standpoint, but presumably politically wise since the canton is located at the border to Italy. The Federal Council also

⁸⁸See eg Matthias Benz, 'Trotz rascher Öffnung bleibt Ansturm auf Geschäfte aus' (NZZ, Zurich, 18 April 2020); D. Gerny, 'Notrechts-Exzess' (Zurich, NZZ no. 95, 24 March 2020), 12.

⁸⁹See Federal Council, 'Botschaft' on urgent amendments of the aviation act due to the Covid-19-crisis, BBl 2020 3667; Parliament decided in the extraordinary session of May 2020 that the financial help for the 'Swiss' airline would not be linked to climate goals (for the debate in both chambers see the Official Bulletin <<https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=48905>> accessed 9 June 2020); for other countries see also Werner Enz, 'In Frankreich und den USA erhalten Airlines Milliardenhilfe. Nun rückt auch die Staatshilfe für die Lufthansa näher' (NZZ, Zurich, 27 April 2020); Daniel Friedli, 'Die Lufthansa muss eine halbe Milliarde für die Swiss-Hilfe zahlen' (NZZ am Sonntag, Zurich, 2 May 2020).

⁹⁰Art 1a Covid-19 Ordinance 2.

⁹¹Art 7e Covid-19 Ordinance 2; see also Florian Ergamin and Mazidi Simon, 'Kompetenzabgrenzung zwischen Bund und Kantonen bei der Bekämpfung von Epidemien: Erste Einschätzungen unter besonderer Berücksichtigung der COVID-19-Verordnungen', Special Issue Newsletter of the Institute of Federalism of the University of Fribourg (2020) 2 IFF 1 ff <https://www3.unifr.ch/federalism/de/assets/public/files/Newsletter/IFF/Bergamin.Mazidi_Kompetenzabgrenzung%20zwischen%20Bund%20und%20Kantonen_COVID-19.pdf> accessed 9 June 2020.

authorised the canton of Ticino to extend the lockdown by one week, contrary to what applies to the rest of the country.

5. Conclusions

It is certainly too early to draw meaningful conclusions from the current situation. Still, we think that the extent of the crisis shows that emergency measures should not be the task of the executive branch only. True, it is necessary that the executive branch moves first as it has the shortest response time. Still, in a crisis that presumably lasts longer, it is the task of Parliament to legitimize emergency measures from the executive branch and to provide for a solid legal basis of such measures.

These works should start immediately. The challenges for a transition back to normal should not be underestimated. Not all the measures of the Federal Council may be revoked if Parliaments wants to refrain from acting retroactively.

Procedurally, it is Parliament, and Parliament only, that decides whether to convene or not. Video conferences deserve a closer look as they solve the problem that the representation of Parliament may suffer from the possible exclusion of vulnerable persons.

Disclosure statement

No potential conflict of interest was reported by the author(s).