

# Post-Pandemic Legislatures:

## Is real democracy possible with virtual parliaments?

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**Legislatures are crucial for functioning democracies.** The Corona virus has changed them. This ELF Discussion Paper by Olivier Rozenberg asks if real democracy is possible with virtual parliaments. The author challenges the thesis of a parliamentary backlash and assesses the hypothesis of virtual parliaments.

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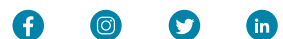
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## Part 1

# Challenging the parliamentary backlash thesis

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Parliamentary democracy is an issue about which it is easy to be pessimistic. Analysts emphasise the fact that “2 billion people have parliaments shut or limited by COVID-19” as of April 2020.<sup>1</sup> Many deplore those leaders from Malaysia<sup>2</sup> to Hungary who have taken advantage of the health crisis to obtain new and, on occasion, unlimited powers. This contribution does not share such pessimistic views. Globally, and especially within the European Union, legislatures have proved both their resilience and adaptative capacity in the time of coronavirus. Yet the use of technological devices also brings into question the very nature of parliamentarism, as this raises both opportunities and concerns regarding the concrete functioning of legislatures.

The coronavirus has not killed parliaments in countries where these institutions were present, old, and functioning. This point was established by a Franco-Israeli team of scholars who compared 160 countries around the world.<sup>3</sup> They state that while there have been successful attempts by authoritarian leaders to take advantage of the pandemic and close or limit their legislatures, this has been observed mainly in countries with an intermediate level of democratic development. In established liberal democracies, legislatures generally remained open during the peak of COVID-19, albeit using specific procedures. Taking for instance the 20 most developed democracies according to the Freedom House index,<sup>4</sup> parliaments have only been closed in two of them (the UK and Switzerland) and almost closed in just one (New Zealand).

1 Provost, C., Archer, N. and Namubiru, L., “Alarm as 2 Billion People Have Parliaments Shut or Limited by COVID-19”, *openDemocracy.net*, April 2020.

2 Tew, Y., “Constitutionalism in the Time of Corona”, *I-CONnect*, blog of the International Journal of Constitutional Law, June 2020.

3 Waismel-Manor, I., Bar-Siman-Tov, I., Rozenberg, O., Levanon, A., Benoît, C. and Ifergane, G., “COVID-19 and Legislative Activity: A Cross-National Study” (July 2, 2020), available at SSRN.

4 <https://freedomhouse.org/>

There are still some exceptions to this. In Hungary, Prime Minister Victor Orban obtained special prerogatives with no sunset provision, moving that country further away from Europe’s liberal democracies. The same can be said of Serbia or North Macedonia. While these cases are not anecdotal, this list of countries suggests that such regimes were already suffering from democratic backlash. Authoritarian leaders were already there, and they simply took hold of the pandemic opportunity to strengthen their positions.

It should also be recalled that public gatherings have been especially dangerous in the time of COVID-19. Legislatures have closed, half-closed, or turned into virtual forums not because they are legislatures but because they are supposed to gather human beings. Some parliaments, such as the French National Assembly or the Iranian Parliament, were even identified as pandemic clusters during the crisis.

Despite the restrictive shutdown situation, many parliaments in Europe and elsewhere continued to perform their two main tasks: law-making and oversight.<sup>5</sup> Bills were passed to grant governments extraordinary powers or adapt financial bills. In many cases, these were discussed and amended despite the exceptional circumstances and pressure to use fast-track procedures.<sup>6</sup> MPs also developed all kinds of over-

**In established liberal democracies, legislatures generally remained open during the peak of COVID-19, albeit using specific procedures.**

sight tools such as parliamentary questions or investigative committees. It is likely that governments were more influential and less controlled than they would be in ordinary times. Yet, precisely, times were extraordinary. Classical authors like the French revolutionaries Mirabeau and Sieyes suggest that during periods of extreme crisis, the balance

of power between government and parliament should be modified. A new kind of cooperation, called ‘concurrent powers’ (*le concours des pouvoirs*), should be pragmatically found in order to conciliate the efficiency of ministers and the deliberation of parliamentarians.<sup>7</sup> In contrast to the Montesquieuan framework based on the balance of powers, concurrent powers organise a subtle and complex division of tasks between institutions depending on the procedural steps. This wartime theoretical framework *de facto* applied during the special weeks of spring 2020.

Furthermore, the deepness of the crisis also recalls the incomparable virtues of parliamentarism. The severity of the ongoing emergency situation calls not only for decisions to be made but also for places to be defined for discussing major choices regarding civilisation.<sup>8</sup> On some occasions, legislatures have acted as symbolic *loci* in staging national unity. These emotional arenas<sup>9</sup> serve to show the nation’s sorrow for the victims and gratitude towards ‘essential’ workers, especially in hospitals. In other cases, a minimal but resilient pluralism has enabled contradicting the official government discourse as well as scientific and medical views. Legislative debates indeed

5 We follow the conclusions of a comparative survey: Ginsburg, T. and Versteeg, M., “Binding the Unbound Executive: Checks and Balances in Times of Pandemic”, University of Virginia School of Law, Public Law and Legal Theory Research Paper No. 20-52, May 2020.

6 See, e.g., in Canada: Malloy, J., “The Adaptation of Parliament’s Multiple Roles to COVID-19”, *Canadian Journal of Political Science*, 1-5, May 2020.

7 Blanc, F., “Le concours des pouvoirs aux origines du régime constitutionnel en France et aux États-Unis”, *Jus Politicum*, No. 18, 2017.

8 Murphy, J., *Parliaments and Crisis: Challenges and Innovations*. Parliamentary Primer 1, INTER PARES project, May 2020, p. 51.

9 Fineman, S., “Organizations as Emotional Arenas”, in Fineman, S. [ed.], *Emotion in Organizations*, London: Sage, 1993.



bring with them *pro et contra* views that contribute to the drastic relativising of any official truth, be it political or scientific in nature.<sup>10</sup> There are reasons to believe that this is good not only for the quality of public debate but also, at the end of the day, for the governing capacity of authorities. In France, for instance, the government decided to organise a parliamentary debate and non-binding vote on a smartphone application for digitally tracing the virus on 27 May 2020.<sup>11</sup> The legitimisation of parliament, as well as the fact that such debates force each party to take a position, seemed to safeguard a highly contested governmental team.

To summarise, there are good reasons to praise the adaptive capacity of parliaments and the virtues of parliamentarism in times of severe crisis. Yet it bears mentioning that the quality of parliamentary representation has undoubtedly suffered due to the coronavirus: for example, disadvantaged MPs who were elected remotely vis-à-vis the parliament building or female MPs who were trapped by domestic tasks.<sup>12</sup>

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Challenging the parliamentary backlash thesis

“Governments were more influential and less controlled than they would be in ordinary times.”

<sup>10</sup> Palonen, K., *From Oratory to Debate. Parliamentarisation of Deliberative Rhetoric in Westminster*, Baden-Baden: Nomos, 2016.

<sup>11</sup> “Coronavirus: après l’Assemblée, le Sénat valide l’application StopCovid”, *Le Monde*, May 2020.

<sup>12</sup> “Gender and COVID-19: A Guidance Note for Parliaments”, Inter-Parliamentary Union, April 2020.

Part 2

# Assessing the hypothesis of a virtual parliament

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While legislatures stood firm – except when democracy was already under stress – many have adopted new ways to debate and make decisions. Electronic devices enable MPs to act from a distance, either through fully virtual events or partially virtual ones. The digitisation of legislatures had already started before COVID-19, but the virus greatly accelerated it. For instance, the Welsh Senedd now holds fully virtual meetings, while Chile has changed its constitution to permit virtual parliamentary decision-making. The question remains whether this process is compatible with the very nature of modern parliaments. Legislatures have indeed been thought of as physical places where human beings sit, talk, and decide together. Thinkers like Jeremy Bentham describe in detail how such gatherings should take place and the way parliamentary rooms should be organised. Is it possible for legislatures to become virtual without losing their soul?

An initial response consists of comparing the two main types of parliamentary activity in terms of their virtual functioning: legislation and oversight. The lack of physical meetings appears to be seriously detrimental to parliamentary influence over

“The digitisation of legislatures had already started before COVID-19, but the virus greatly accelerated it.”

law-making.<sup>13</sup> A minister may be swayed more heavily when she physically enters the parliament building – a place where she is, in a way, isolated from her advisors and services. In addition, the possibility for backbenchers to conduct informal discussions in lobbies,

the glances exchanged by participants during committee meetings, or the involuntary body language of orators are all subtle elements which disappear behind a computer screen. This lack of informal politics is especially detrimental to cross-party cooperation, which is a true source of parliamentary influence.<sup>14</sup> When MPs from different parties are not forced to sit in the same room week in and week out, they miss occasions to get to know each other that cannot be replaced by virtual (but more visible) so-called Facebook friendships.

Oversight, by contrast, may be practised from a distance. It is indeed a much more

<sup>13</sup> This does not mean that a virtual legislature would not be influential at all, as much of its influence operates through the informal activities of frontbenchers and especially rapporteurs. This could continue, virtually or not, with a virtual parliament. I merely state that virtual legislatures are *less* influential.

<sup>14</sup> Russel, M. and Gover, D., *Legislation at Westminster. Parliamentary Actors and Influence in the Making of British Law*, Oxford: Oxford University Press, 2017.

flexible type of activity, covering a diversity of collective as well as individual tools (like questions). Accounts of the corona period in France have actually shown that the parliament compensated for the loss of legislative prerogatives through investing in elaborated and renewed forms of oversight.<sup>15</sup> The pressure placed on ministers' shoulders may be more limited when they are questioned through digital devices than in plenary during question time. Still, the accountability process is able to function: ministers have to justify publicly what they have done and make commitments for the future.

A secondary response considers whether the theoretical virtues of parliamentarism may still operate in the virtual word. Four points may be distinguished here.<sup>16</sup> In the first place, debates in parliament, whatever their ends may be (law-making or oversight), are supposed to produce opposing views on a given topic – something essential for testing the intrinsic quality of the majority position and feeding public debate. This *pro et contra* feature can still emerge online and behind screens. Yet, its virtual aspect will probably lead to fewer colourful debates – knowing that colourful debates not only put on a nice show but are also a way to generate a plurality of viewpoints. The unforeseen development of certain exchanges, their rhetorical effects, the emotional range of some claims are more likely when orators are physically present and all contribute to maximising the *pro et contra* aspects of the debates. There are arguably different styles of legislatures; 'working parliaments' should be less impacted than 'talking parliaments' in the virtual world. In the end, though, the generalisation of Zoom meetings could turn all European parliaments into *the* European Parliament: a quiet place where rhetoric, jokes, and emotions are put aside most of the time. What is less embedded into the political culture is the fact that any parliamentary debate should be given some fluidity, especially when amendments are being discussed. The president usually enjoys some agency over the sitting conduct when a debate needs to be slowed down or sped up, depending on its internal dynamics. Again, this can be realised behind a screen, but it is definitely more difficult to do.

Additionally, parliamentary debates can be understood as devices aimed at motivating and controlling the MPs themselves.<sup>17</sup> Against the threat of free-riding, debates serve as incentives for MPs to participate in parliamentary life. They may also strengthen party cohesion through the management of orators. The observations made after a few weeks of virtual parliaments are more negative in this respect. The virtuality of these meetings has further fuelled MPs' great propensity to delegate their work and conduct several activities simultaneously. A major selling point for physical meetings is that, by definition, MPs themselves *must be present* and it may be publicly known if that is not the case. In the Zoom world, there is continuous incertitude not only over MPs' level of attention but also their very identity: who is really behind the screen? The MP or her assistants? This constitutes a severe threat, as it enables more free-riding among MPs. It is also an issue regarding democratic accountability. Transparency is central to the functioning of legislatures and in order for voters to judge their representatives.<sup>18</sup> The current situation runs the risk of making this transparency requirement purely formal, given the veil of ignorance permitted by electronic device-

15 Jense-Monge, P. and de Montis, A., "La lutte contre la crise sanitaire provoquée par le Covid-19: un repositionnement stratégique du Parlement au sein des institutions" unpublished: forthcoming in *Confluence des droits*.

16 Rozenberg, O., "Why Should Parliaments continue to Debate? The Intertwined Virtues of Parliamentary Debates", *Redescriptions*, vol. 21 n° 2, 2018, pp. 148-166. See also: Finlayson, A., "What Is the Point of Parliamentary Debate? Deliberation, Oratory, Opposition and Spectacle in the British House of Commons", *Redescriptions*, 2011, 2017, pp. 11-31.

17 Proksch, S.O. and Slapin, J.B., *The politics of parliamentary debate*. Cambridge: Cambridge University Press, 2015.

18 Guizot, F. *The History of the Origins of Representative Government in Europe*, 1851, trans. Scoble, A.R., Indianapolis: Liberty Funds, 2002.

es. In addition, many MPs who have a taste for making speeches may be frustrated by virtual exchanges. With semi-virtual events, participants may also suffer from a sort of rhetorical inequality among themselves. Those who are there in person can be subtler, adjust their tone to the visible reception of their speech, play with vocal cues, use their body language, or even exceed their time by a bit. Those who are there remotely are merely speaking to a computer.

Furthermore, debates are also aimed at legitimating parliamentary democracy. The fact that representatives are debating, not just voting, develops argumentative claims that feed public debate and, beyond that, create a show for voters to identify with. The rather conservative view that digital meetings reduce the legitimising power of legislatures will not be developed here. Though it is true that parliamentary decorum is severely limited via Zoom, Skype, or Cisco, it should still be admitted that parliaments' legitimising power in most contemporary democracies was already under threat for reasons independent from the use of e-devices. The deep trust deficit of legislatures, parties, and politicians calls for investigating the opportunities offered by new communication tools which could bring voters and representatives closer together. Virtual meetings are not the only solution for developing public engagement with parliaments; they may not even be the main ones.<sup>19</sup> Still, they obviously do offer new possibilities. The unity of locus for non-virtual parliaments efficiently guaranteed the monopoly of elected representatives over debates. This topography served as the MPs' protection against 'strangers', as visitors are referred to in Westminster. Those allowed to sit down are the same ones who are allowed to speak. With virtual parliaments, this confusion is removed and 'strangers' can more easily participate in (partially) parliamentary debates.

Those who are there remotely are merely speaking to a computer.

We can imagine, for instance, NGOs, civil society representatives participating in virtual meetings with MPs at early stages of the legislative procedure. This possibility should obviously be regulated but, considering the

worrying removal of legislatures away from the people, this is rather good news for democracy. There are no reasons why parliaments should be the last places where the dividing line between politics and society can be strictly maintained.

Finally, parliamentary debates ultimately serve to restrict the authoritarian nature of power. They force ministers to listen to criticism and respond to it. They transform the exercise of power into the practice of language. They breach the monopolistic claims of knowledge officials tend to make. To reiterate what was said already, virtual parliamentary debates can perform the task with a less colourful style than, let's say, Westminster question time. Another problem caused by e-conferences is that they de facto empower those in charge of controlling the electronic devices – usually members of the parliamentary majority. The president of the meeting may cut the microphone or even the camera of an MP once her speaking time has been exceeded. The right to reply, quite often less formalised than the right to question, may also suffer as a result of the distance between orators. The problem of authoritarian management of legislatures goes beyond their virtual functioning (mics are already often muted), but e-devices may strengthen it.

<sup>19</sup> Walker, A., Jurczak, N., Bochel, C., Leston-Bandeira, C., "How Public Engagement Became a Core Part of the House of Commons Select Committees", *Parliamentary Affairs*. 72(4), 2019, pp. 965-986.



## Part 3

# Conclusion and Recommendations

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This Discussion Paper has claimed that – despite some isolated cases – democratic legislatures did their best to continue working during the ‘extraordinary’ COVID-19 weeks. This suggests that parliaments are remarkably resilient institutions, easily able to adapt. The development of virtual means to discuss and make decisions, however, brings with it a series of threats and opportunities that should foremost be discussed in detail rather than either globally opposed or praised.

This Discussion Paper concludes by formulating three reform perspectives for the future regarding the virtualisation of legislatures:

1. *How should a partly virtual legislative procedure be designed?* A major feature of law-making in parliament is the iterative character of procedure. Between written and oral forms, committee and plenary stages, debates on the general aim of the law and the details of its articles, the way in which a bill is discussed regularly changes in order to benefit from every tool’s advantages and to limit inconveniencies. In the future, a similar movement could be elaborated for the virtual part of legislative procedure. E-discussions could be limited to specific stages. Moments where it is compulsory to be physically present could also be defined as well. Which steps should be banned from being virtual? The author of this text is inclined to answer that it is general discussions in the plenary that should be banned, but the relevant answer can only be elaborated through debates... in parliament.
2. *How should a ‘parliamentary Zoom’ be designed?* The electronic devices enabling the organisation of virtual meetings could be adapted to the specificity of parliamentary politics; such is the case for other kinds of social activities, like education or business. Four points are worth considering:
  - the identification of the speakers – MPs could be sometimes obliged to use their cameras, just as they are sometimes obliged to make their votes public<sup>20</sup>;
  - the interactions and liveliness of virtual debates – MPs need applause/laughter/indignation/boredom buttons;
  - the opposition’s rights – cutting off the microphones or cameras should be regulated and the right of reply needs protection, something which would probably require adding new provisions to Standing Orders;

<sup>20</sup> Alternatively, parliamentary clerks could certify that MPs are behind their screens, just as they certify in many parliaments that they are present in committee rooms.

- outside participation in debates – a clear distinction could be made between meetings and certain steps of the legislative procedure in which MPs monopolise speeches, on the one hand, and steps where NGOs, lobbies, and citizens could take the virtual floor, on the other. Parliamentary procedures are iterative and could quite smoothly alternate between these different phases.

3. *How could virtualisation help to settle a genuine multi-level parliamentarism?* COVID-19 has laid emphasis on the multi-level aspect of modern governance. Its major problems are transnational, starting with health and the environment. Many solutions are local, as illustrated by the key role regional governments have played in the management of the crisis. These changes call for the development of further parliamentary representation at all decision-making levels.<sup>21</sup> Still, this emerging multi-level parliamentarism suffers from coordination problems across arenas, which is a source both of information loss and moral hazard. In this sense, electronic devices could be of help. Joint meetings of committees belonging to assemblies from different countries and/or levels of governance could help to coordinate political actors and circulate information. The simultaneous and automatic translation of conversations, under testing at the European Parliament, could also help to transcend language barriers. The technical management of such debates could be a future task for the European Parliament – whether this assembly participates in the debates or not. The budget, infrastructure, and experience of the Strasbourg Assembly, as well as its multi-cultural identity, could indeed enable it to become a sort of public utility for virtual parliamentary democracy in Europe. Yet the experience of virtual bilateral meetings between national parliaments and/or with the European Parliament suggests that the technical feasibility is less what’s at stake than the MPs’ genuine commitment in and to virtual debates.

“The technical feasibility is less what’s at stake than the MPs’ genuine commitment in and to virtual debates.”

21 Lupo, N. and Fasone, C. [eds.], *Interparliamentary Cooperation in the Composite European Constitution*. Oxford: Hart Publishing, 2016; Crum, B. and Fossum, J.E. [eds.], *Practices of inter-parliamentary coordination in international politics: The European Union and beyond*, Colchester: ECPR Press, 2013.





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