

# The Challenge of Remote Democracy: Parliaments in a Time of Pandemic - A Comparative Analysis (France/United Kingdom)

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## Abstract

The coronavirus is a challenge for all the governments and Parliaments in countries hit by the crisis. The pandemic has forced Parliaments to limit physical meetings and function remotely. In France and the United Kingdom, the challenge for the Chambers is huge, as most parliamentary processes assume that members are physically present. In the two countries, the role of Parliaments have been largely reduced to the bare essentials and the relationship between legislative assemblies and governments has been challenged by the crisis. Important theoretical questions arise from the modifications of the parliamentary procedures regarding the effectiveness of the scrutiny and democratic legitimacy during the pandemic. The work of the Chambers and the adaptations of parliamentary proceedings in both countries is compared in this paper, in order to assess the effectiveness of parliamentary democracy in a time of emergency. It appears that the parliamentary institutions grasped the challenge of adapting quickly to the new health situation, and that the members of the assemblies and the staff have been swift to respond to the challenges that the epidemic has posed to the functioning of democracy. But the parliamentary control seems to be slowed down by the pandemic. As most measures restrict many fundamental rights, it is highly problematic that such drastic interference in terms of citizens' fundamental rights could be decided by the Prime Minister or a minister alone, without any debate in the Chambers. The effectiveness of democratic control is at stake.

## I. Introduction

The coronavirus is a challenge for all the governments and Parliaments in countries hit by the crisis, probably one of the biggest since the Second World War. The desire to safeguard legislative and budgetary powers during the pandemic while maintaining political scrutiny and preserving the health of state officials and their administrative teams has led to an unprecedented period of procedural experimentation. The pandemic has forced Parliaments to limit physical meetings and function remotely: as in many workplaces in those countries, parliamentary estates gather many people who can spread the virus, and some of them have underlying medical conditions. In France, for example, some deputies of the National Assembly, together with some members of parliamentary staff, were infected, to the extent that the Chamber represented an epidemic cluster on its own. In France and the United Kingdom, the challenge for the Chambers is huge, as most parliamentary processes assume that members are physically present (e. g. for the votes or the committee proceedings). In the two countries, the power to legislate has been mostly delegated to the governments. The role of Parliaments have been largely reduced to the bare essentials, like in most European parliamentary systems, and the relationship between legislative assemblies and governments has been challenged by the crisis. The French and British

Parliaments did not adapt their proceedings the same way. Important theoretical questions arise from the modifications of the parliamentary procedures regarding the effectiveness of the scrutiny and democratic legitimacy during the pandemic. The work of the Chambers and the adaptations of parliamentary proceedings in both countries can be compared, in order to assess the effectiveness of parliamentary democracy in a time of emergency. A comparison between the French and British Parliaments is relevant because they are both Parliaments in a parliamentary regime. The French system is often called a 'presidential' system, as the President is directly elected by the citizens; however, it is technically a parliamentary regime. It can be called 'semi-presidential': the government is responsible for the legislature, but the President owns large executive powers. The comparison is then facilitated by the nature of the regime. Nonetheless, there remain differences in the nature of the Parliaments, as the British Parliament is sovereign. Conversely the French Parliament is limited by the written Constitution, which is very constraining for the legislative power. A comparison of the modifications to the parliamentary procedure in the two countries will then be useful in assessing the powers and competences of the Parliament in a time of pandemic, and to understand if those powers are significant enough to ensure democratic control of the decisions of the executive during the pandemic.

## II. Parliamentary procedure in a time of pandemic

### 1. Legislative work

Like the Parliaments of the other countries affected by the Covid-19 pandemic, particularly in Europe, the British Parliament has faced the enormous challenge of adapting its procedures to make them compatible with the new health requirements.

The originality of the British Parliament lies in the configuration of the parliamentary building, as it comprises in one place the House of Commons (650 MPs) and the House of Lords (more than 800 peers), as well as more than 3,000 civil servants plus parliamentary assistants.<sup>1 2</sup> The circulation of the virus or the acceleration of its spread is therefore highly probable, as in any enclosed area with many people, it being understood that among them, as among the general population, some are "at risk" due to health conditions. This is particularly true for the House of Lords, whose average age is 70 (the oldest being born in 1925).<sup>3</sup>

The other problem specific to the British Houses is the scarcity of remote or proxy procedures. Debates, of course, but also most of the means of oversight provided for in parliamentary law that require the presence of MPs and peers. The procedures, some of which are centuries old, sometimes seem anachronistic, outdated or ill-suited to the modern age of new technologies.<sup>4</sup>

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<sup>1</sup> 'Working For The House Of Commons' (*Parliament.uk*, 2021) <<https://www.parliament.uk/about/working/commons/>>

<sup>2</sup> 'Cost And Administration' (*The Institute for Government*, 2021) <<https://www.instituteforgovernment.org.uk/publication/parliamentary-monitor-2020/cost-administration>>

<sup>3</sup> Lord Christopher CBE 'Membership And Principal Office Holders' (*Parliament.uk*, 2021) <<https://www.parliament.uk/about/faqs/house-of-lords-faqs/lords-members/>>

<sup>4</sup> For example, since 1836 in the House of Commons, voting has been done 'by ear'. The Speaker asks the question, puts it to a vote, and asks each side voting yes or no to say 'aye' or 'no'. The Speaker then judges by ear which side has won the most votes. He then announces: 'I think the 'ayes' (or 'nos') have

The possibility of remote legislative voting has existed for a short time now: a resolution dated 28th January 2019 allows MPs on parental leave to appoint a colleague who establishes a proxy.<sup>5</sup> However, this proxy is not allowed in other circumstances or for other reasons. Another new procedure, introduced during the 2001/2002 session, provides for the postponement of the vote when the Speaker's conclusion is criticised during a vote after the moment of interruption. The division does not take place at that time but is automatically moved to the following Wednesday (deferred division).<sup>6</sup> However, those proceedings do not seem to be sufficient to face the challenge of physical distancing during the pandemic.

On 23rd March 2020, Prime Minister Boris Johnson announced the main lockdown measures (closure of non-essential shops and restriction of public events in particular). The *Coronavirus Bill* was examined and adopted by the House of Commons on 23rd March<sup>7</sup>, by the House of Lords on 24th and 25th March<sup>8</sup>, and subsequently it received royal assent (*Coronavirus Act 2020*).<sup>9</sup> During these three days, the Houses adapted their procedures to respect the physical distance between their members: physical presence was reduced within the Houses and voting was carried out in small groups. In addition, the proceedings in Westminster Hall were suspended until further notice.<sup>10</sup> On 25 March<sup>11</sup>, the Houses also decided to suspend their work (*recess*)<sup>12</sup> for

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*it*'. The House must then confirm the Speaker's conclusion, but if some MPs challenge his judgment, they must continue their exclamations in favour of the 'yes' or 'no'. In this case the Speaker gives the order to 'clear the lobbies' in view of proceeding to a 'division', which is a more precise count of the votes between opponents and supporters of the question by way of physical separation. The division is announced by an audible signal in Westminster and in other places frequented by the MPs. In this way, they can join the lobby of their choice. The Speaker then waits for two minutes and can again give his assessment, which is sometimes accepted at this stage. The Speaker has the discretionary power to continue the procedure or to stop it if he considers that the division has been unnecessarily requested. If the Speaker's opinion is criticised, each MP must leave the lobby registering his or her name as they leave. A teller of the two sides present in each lobby counts out loud, for no more than six minutes. At the end of eight minutes, the Speaker orders the lobbies to close. The two tellers from each side must face the Presidency, with those representing the majority votes to the left of the Speaker. They must stand five steps from the House table, bow before the president, advance to the table and bow again. One of the tellers from the majority announces the result. A clerk transfers the document containing the number of votes to the Speaker, who confirms the announcement.

<sup>5</sup> *Hansard* HC Deb. vol. 653, col. 596. See the guide on the use of proxys: *Scheme on proxy voting for use under para (4) of Resolution of 28 January 2019*.

<sup>6</sup> On that day, a voting paper is published together with the 'vote bundle' (working documents sent daily to the MPs). It lists all the questions to which the postponement procedure was applied the previous week. For each question there is a box in which MPs must write 'aye' or 'no'. They must then table the ballot between 11:30 and 14:00 on Wednesday. The count is made by the clerks and sent to the Presidency, which announces it immediately. Some questions are nevertheless exempted from this procedure. These include all those relating to bills and proposals and the division of time for their examination (programme motions). Amendments are also exempted. See: <https://www.parliament.uk/site-information/glossary/deferred-divisions/>

<sup>7</sup> *Hansard* HC Deb. 23 March 2020 vol. 674, col. 176.

<sup>8</sup> *Hansard* HL Deb. 25 March 2020 vol. 802, col. 1794.

<sup>9</sup> *Hansard* HL Deb. 25 March 2020 vol. 802, col. 1794

<sup>10</sup> Westminster Hall is a kind of second House of Commons, set up as a hemicycle to mitigate political confrontation. Even if the turnout is fairly low (10 to 12 MPs, with a quorum of 4), the debates organised in this annex allow MPs to discuss certain subjects away from government and media pressure. See: <https://www.parliament.uk/about/how/business/debates/westminster-hall-debates/>

<sup>11</sup> *Hansard* HC Deb. 25 March 2020 vol. 674, col. 436.

<sup>12</sup> Each Parliament (i.e. the period between two parliamentary elections) is divided into sessions. Until 2010, a session began in November and ended at the end of October of the following year, and the end date was set for the spring (April or May) after 2010. During these periods, a number of 'holidays' are determined, during which sessions of Parliament are adjourned, i.e. it does not sit. These 'vacancies' are commonly referred to as 'recess', although the term strictly applies to periods when the session of

the Easter holidays, instead of 31 March as previously planned. The Houses did not meet again until 21 April.<sup>13</sup>

With regard to legislative work, following the Easter recess, two motions were debated in the House of Commons, regarding the hybridisation of procedure and distance voting, and were adopted on 22 April.<sup>14</sup> Hybridisation means that the maximum number of MPs physically present may not exceed 50. Up to 120 other MPs could attend the debate or ask questions via the *Zoom* platform, and remote voting could be organised. A list of ‘substantial’ or ‘essential’ business subject to hybridisation was adopted (these are debates on bills and their adoption, questions to ministers and ministerial statements, as opposed to ‘non-essential business’, which can be postponed).

In application of these new rules, a historic remote vote was held on 12 May.<sup>15</sup> While the motion being debated was limited in scope (it follows a general debate on Covid-19), it was the first form of distance voting in the House of Commons. This hybridisation was in effect until 2 June (with the Houses suspended again between 20 May and 2 June).

On 2 June 2020,<sup>16</sup> hybridisation was dropped in the House of Commons in favour of a physical return of MPs subject to the rules of distancing, from which some with medical risks may be exempted. They could designate a colleague who will then vote by proxy, thanks to an extension of the cases provided for in the resolution of 28 January 2019.<sup>17</sup> These new rules were adopted precisely by applying physical distancing: a long line of MPs, at a distance of two metres from each other, extended several hundred metres across the garden to the outside of the building in order to vote on motions. The abandonment of the virtual Parliament has been strongly criticised by the opposition, who denounce it as a hasty and risky measure, but also as a discriminatory one against MPs suffering from medical conditions. There are quite a number of these MPs, given that on 21 July,<sup>18</sup> the list of MPs affected comprised nearly 200 names, i.e. nearly a third of the members of the House. Those opposed to the scrapping of the virtual Parliament also objected to the presence of Minister Alok Sharma, who showed signs of fever and physical malaise during the second reading of the *Corporate Insolvency and Governance Bill* on 3 June 2020.<sup>19</sup> He finally tested negative at Covid-19, but the image of the visibly tired, sweaty minister at the desk made a lasting impression.<sup>20</sup>

As far as the House of Lords was concerned, virtual procedures were applied from the very beginning of the lockdown via the platform *Teams*. Since 8 June<sup>21</sup>, the House used a hybrid procedure. This means that a minimum of three and a maximum of thirty peers could be physically present in the House, as opposed to 50 members present

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Parliament is prorogued. After each session, the Queen’s speech marks the beginning of the new session. Recess in the strict sense refers to the time between sessions, between prorogation, which marks the end of the session, and the delivery of the Queen’s speech. Prorogation may also be pronounced before a dissolution of the House of Commons.

<sup>13</sup> *Hansard* HC Deb. 21 April 2020 vol. 675, col. 1.

<sup>14</sup> *Hansard* HC Deb. 22 April 2020 vol. 675, cols. 80 et 88.

<sup>15</sup> *Hansard* HC Deb. 12 May 2020 vol. 676, col. 218.

<sup>16</sup> *Hansard* HC Deb. 2 June 2020 vol. 676, col. 757.

<sup>17</sup> *Hansard* HC Deb. vol. 653, col. 596.

<sup>18</sup> *Hansard* HC Deb. 21 July 2020 vol. 678, col. 2129.

<sup>19</sup> *Hansard* HC Deb. vol. 676, col. 890.

<sup>20</sup> ‘Business Secretary Tested For Covid-19 After Feeling Ill During Commons Speech’ (*the Guardian*, 2021) <<https://www.theguardian.com/world/2020/jun/03/business-secretary-alok-sharma-coronavirus-test-speech-commons>>

<sup>21</sup> Motion approved on 4 June 2020, *Hansard* HL Deb. vol. 803, col. 1449.

virtually if they have previously registered for the agenda item concerned. The first remote voting took place on 15 June, and distance voting continues to apply, unlike in the House of Commons. A guide to hybrid procedures was issued by the House Procedure and Privileges committee on 5 June 2020.<sup>22</sup> On 30 September,<sup>23</sup> divisions were temporarily cancelled following a failure of the online voting system during the first day of the report stage of the *Immigration and Social Security Co-ordination (EU Withdrawal) Bill*. The rescheduled divisions took place on 5 October.<sup>24</sup> On October 14,<sup>25</sup> the first hybrid ping-pong stage of a bill took place on Commons amendments to the *Extradition (Provisional Arrest) Bill*.

The procedure for amending parliamentary law itself is worthy of interest. Some aspects of parliamentary procedure do not require formal amendments to the Standing Orders of the Houses: this concerns, for example, the reduction of the number of MPs attending the House.<sup>26</sup> In this case, a simple, informal agreement between the parties would suffice. In other cases, however, a formal amendment of the Standing Orders would be necessary, i.e. an amendment by a majority of the House itself. To simplify the procedure for the required changes in the Commons, the motion on 22 April<sup>27</sup> regarding the organisation of the hybrid Parliament provides the Speaker with unprecedented powers, the so-called ‘*Henry VIII powers*’, allowing him to adopt *Temporary Orders* requiring the simple agreement of the Leader of the House. Moreover, the motion creates a new form of parliamentary organisation, similar to that of a ‘Bureau’: the leaders of the three main parties<sup>28</sup> can decide on the agenda of the House instead of the House itself.

The effectiveness of party discipline is also problematic. Regarded as a ‘nightmare’<sup>29</sup> for the whips, the dispersal of MPs throughout the country enabled by proxy voting makes their work much more difficult. Whips are responsible for discipline within their parties, especially for ensuring discipline during important votes, such as ‘three-line whips’. When the whips can no longer meet MPs in the corridors of Westminster, it is more complicated to personally ensure their vote. The lack of party discipline does not pose a drastic problem when the texts under discussion are not vital, but it could cause difficulties during more important votes, relating to Brexit for example.

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<sup>22</sup>Procedure and Privileges Committee, *Consideration of Commons amendments in hybrid House* (2019-21 HL Paper HL139) <https://committees.parliament.uk/publications/2884/documents/27970/default/>

<sup>23</sup> *Hansard* HL 30 September 2020 Deb. vol. 806. col. 204.

<sup>24</sup> *Hansard* HL 5 October 2020 Deb. vol. 806. col. 363.

<sup>25</sup> *Hansard* HL 14 October 2020 Deb. vol. 806. col. 1111.

<sup>26</sup> These are written standards adopted without any particular procedure by the House concerning the procedure laid before it, in particular the conduct of debates, but also the discipline of its members.

<sup>27</sup> *Hansard* HC 22 April 2020 Deb. vol. 675, col. 75.

<sup>28</sup> Conservative Party, Labour Party and the Scottish National Party.

<sup>29</sup> ‘The Unusual Channels: How To Whip Mps In The Age Of Coronavirus’ (*Politics Home*, 2021) <<https://www.politicshome.com/thehouse/article/the-unusual-channels-how-to-whip-mps-in-the-age-of-coronavirus>>

In addition, the whips are involved in setting the agenda during informal negotiations ('usual channels'<sup>30</sup>) requiring a physical meeting. The virtual 'usual channels' may not be as flexible or efficient when organised remotely.<sup>31</sup>

Finally, the health crisis confirms that the rights of backbenchers<sup>32</sup> and MPs who are neither part of the majority nor of the main opposition parties<sup>33</sup> are significantly reduced. This is particularly the case with regard to the inclusion of proposed legislation on the agenda: this procedure is very restrictive in normal times and has been deemed to be 'non-essential parliamentary business' during the crisis,<sup>34</sup> which makes the situation of the isolated member of parliament even more complex. Already unenviable, the plight of MPs has not improved during the health crisis: the timetable for the presentation of private members' bills, initially running from 13 March to 10 July, has been postponed several times.<sup>35</sup> The question of how the rights of MPs can be protected is now being raised.

In France, the closure of schools was announced by the President of the Republic on 12 March. On 14 March, the closure of establishments open to the public (bars, restaurants, museums...) from midnight on was announced by the Prime Minister, while the first round of municipal elections was maintained the following day. On 16 March, the lockdown from noon on 17 March was announced, together with the postponement of the second round of the elections (initially scheduled for 22 March). The lockdown was extended twice until 11 May.

The Parliament was supposed to be in recess during the week before the municipal election and the week between the two rounds (from 9 March to 22 March). However, it was no longer possible to respect this schedule, especially because an Act of Parliament was needed to postpone the second round of the elections. Therefore, the calendar of the parliamentary session was modified, and the members of the Parliament were recalled, even if the National Assembly itself had become an epidemic cluster (on 16 March, 26 cases were recorded among staff and MPs<sup>36</sup>).

During the parliamentary meetings, it was decided that only essential functions of the Parliament would continue, but with a reduced number of physically present members: only a limited number of MPs and senators from each party group would be allowed to attend the debates on bills.<sup>37</sup> The same limitation is applied to committee meetings and

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<sup>30</sup> Expression referring to the informal relationship between the whips of the different parties and the leaders of the majority and opposition. It refers to arrangements and compromises regarding the conduct of parliamentary procedure. Often denounced by backbenchers, this cooperation avoids confrontation to some extent and speeds up the legislative process. See: <https://www.parliament.uk/site-information/glossary/usual-channels/>

<sup>31</sup> [www.politicshome.com](http://www.politicshome.com) (n29)

<sup>32</sup> See: 'Backbench (Backbenchers)' (*Parliament.uk*, 2021) <<https://www.parliament.uk/site-information/glossary/backbenches/?id=32625>>

<sup>33</sup> Under Standing Order No. 14, 20 sitting days are reserved for the opposition, which sets the agenda as a matter of priority. Although only the official opposition (Her Majesty's Most Loyal Opposition) is theoretically concerned, it often graciously allocates some time to one or more other parties not belonging to the majority.

<sup>34</sup> *Hansard* HC Deb. 22 April 2020 vol. 675, cols. 80 et 88.

<sup>35</sup> See: *Hansard* HC Deb. 22 April 2020 Deb. vol. 675, col. 73.

<sup>36</sup> J.-P. Derosier, G. Toulemonde, 'The French Parliament in the time of Covid-19: Parliament on Life support' [2020], Study, Fondation Robert Schuman.

<sup>37</sup> There are 9 political groups in the National Assembly plus 25 non-attached MPs, and 8 groups in the Senate plus 3 non-attached senators.

to questions to government ministers each week (only a limited number of members would be present in the Chamber).<sup>38</sup>

Contrary to the British Parliament, videoconferencing was not used for parliamentary work. Public sessions were organised to limit the number of MPs to a minimum and to ensure a physical distance between them. Videoconferencing was used only for some limited occasions: the ‘Conference of Presidents’,<sup>39</sup> which sets the agenda, or for the special committee on the coronavirus, during which the Prime Minister was questioned by MPs.<sup>40</sup>

The voting procedure was adapted in order to respect sanitary requirements and to limit the number of members allowed to be physically present in the Chambers. On 17 March, the National Assembly decided to allow only three MPs per political group (out of 577 MPs). On 27 April, 75 MPs were admitted to the Chamber, chosen according to the proportionality of the groups, and 150 from 11 May. From 22 June, all MPs wearing masks were allowed to be present. In the Senate, the presence was limited to 18 members out of 348 (three or two per group depending on their size). From 20 April, 48 senators were allowed to be present, chosen according to the representation of the groups. On 2 June, the Chamber was open to 77 senators and to 189 on 22 June.

Contrary to the rules in the British Parliament, proxy votes are allowed in the French assemblies. Article 27 of the Constitution requires personal voting but allows one delegation per member.<sup>41</sup> In the National Assembly, proxy votes are allowed by art. 62 of the rules of procedure<sup>42</sup>; in the Senate, by art. 63 of the rules of procedure.<sup>43</sup>

Consequently, the French Parliament maintained a relatively normal legislative activity during the lockdown.

First, an Act of Parliament was needed to institute the state of a health emergency. Like other European countries, the state of emergency was invoked in France, but not according to the existing provisions of the Constitution or the law. The first measures to combat the pandemic were based on existing legislation (Public Health Code), but it

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<sup>38</sup> J.-P. Derosier, G. Toulemonde, *op. cit.*

<sup>39</sup> Rules of procedure of National Assembly 2010, art 47(1) : ‘The Conference of Presidents shall be made up, in addition to the President, of the Vice-Presidents of the Assembly, the chairmen of the standing committees, the General Rapporteur of the Finance, General Economy and Budgetary Monitoring committee, the Chairman of the European Affairs committee and the chairmen of groups’.

<sup>40</sup><https://www2.assemblee-nationale.fr/presse/espace-presse/communiqués-de-presse/avril-2020/mission-d-information-sur-l-epidemie-de-coronavirus-covid2019-mercredi-1er-avril-2020>

<sup>41</sup> ‘No Member shall be elected with any binding mandate. Members’ right to vote shall be exercised in person. An Institutional Act may, in exceptional cases, authorize voting by proxy. In that event, no Member shall be given more than one proxy’.

<sup>42</sup> Rules of procedure of National Assembly 2010, art 62 (1-4) ‘1 An MP’s right to vote shall be exercised in person. 2 However, MPs may vote by proxy in public ballots as provided for by Ordinance 58-1066 of November 7, 1958. 3 A proxy shall be a personal document, naming a specific MP. It may be transferred, with the prior agreement of the principal, to another named MP. The President shall be notified of proxies before the opening of the ballot or of the first of the ballots to which they apply. 4 When the duration of the proxy is not stated, it shall automatically expire after eight clear days from its reception’.

<sup>43</sup> Rules of procedure of National Assembly 2010, art 63 (1-6) ‘Senators may only delegate their right to vote in the following circumstances: 1. illness, an accident or a serious family misfortune preventing a Senator from attending; 2. a temporary mission entrusted to him by the Government; 3. military service in peacetime or wartime; 4. participation in the work of an international assembly by virtue of a Senate appointment; 5. absence from the mainland of France (in the event of an extraordinary session); 6. by order of the Bureau of the Senate (cases of force majeure)’.

was soon necessary to establish more powers for the executive branch, especially legislative powers.

The French constitutional and legislative system establishes three different frameworks of emergency, that are regulated in art. 16 of the Constitution, art. 36 of the Constitution and an Act of April 3, 1955. Article 16 of the Constitution<sup>44</sup> confers extraordinary powers on the President of the Republic in the event of an interruption in the regular functioning of the public authorities, which was not the case during the pandemic. The state of siege (art. 36 of the Constitution<sup>45</sup>) transfers police powers to military authorities in the event of an imminent danger resulting from a foreign war or armed insurrection, which was not the case either. Last, the state of emergency (Act of 1955) extends the police powers of the prefects and the Home Office minister in the event of imminent danger resulting from serious breaches of public order. It concerns exceptional situations and has been lastly implemented in order to combat terrorism.<sup>46</sup> As none of these instruments was deemed relevant to deal with the situation, a special law was needed: rather than resorting to those systems, the government has developed an *ad hoc* system.

According to the explanatory memorandum of the *Emergency Bill*, the health crisis, ‘unprecedented in a century, highlights the need to develop the means available to the executive authorities to deal with the emergency’ and, due to its ‘hitherto unimagined scale’, calls for a response ‘on a scale that could not itself have been envisaged when the existing legislative and regulatory provisions were devised’.<sup>47</sup> The Bill of 18 March was promulgated on 23 March after a very short debate in both Houses.<sup>48</sup> It allows the government to act by means of ordinances in place of the Parliament. Its application was renewed at the end of the lockdown.<sup>49</sup> It states that the state of emergency shall be decreed in the Council of Ministers after a report by the Health Minister. The extension thereof after a period of one month may be authorised solely by Parliament, after consultation of the scientific council (Public Health Code, art. L. 3131-13).

Secondly, it was also necessary to provide financial support to companies and employees during the lockdown, with two Amending Finance Acts<sup>50</sup> and one Act providing for economic and social measures.<sup>51</sup>

Third, some legislative changes were needed regarding jurisdictional<sup>52</sup> or electoral procedures.<sup>53</sup>

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<sup>44</sup> Constitution of France 1958 art 16(1) ‘Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council’.

<sup>45</sup> Constitution of France 1958 art 36 ‘A state of siege shall be decreed in the Council of Ministers. The extension thereof after a period of twelve days may be authorized solely by Parliament’.

<sup>46</sup> Lastly on 14 November, 2015, after the terrorist attacks in Paris.

<sup>47</sup> B. Ridard, A. Fourmont, [11/05/2020] ‘Parliamentary oversight in the health crisis’, European Issue n°558 <https://www.robert-schuman.eu/en/european-issues/0558-parliamentary-oversight-in-the-health-crisis>

<sup>48</sup> Law n°2020-290 of March 23, 2020

<sup>49</sup> Law n°2020-546 of May 11, 2020.

<sup>50</sup> Law n°2020-289 of March 23, 2020; law n° 2020-473 of April 25, 2020.

<sup>51</sup> Law n°2020-734 of June 17, 2020.

<sup>52</sup> Law n°2020-365 of March 30, 2020.

<sup>53</sup> Law n°2020-290 of March 23, 2020; Law n°2020-760 of June 22, 2020 to secure the second round of the municipal elections.



Lastly, the French Parliament also continued to legislate on some other ‘minor’ topics. Major current reform projects were suspended until further notice, including the delicate pension reform, but other bills were discussed in the assemblies during this period, such as the bills on support for families who have experienced the death of a child, on information on agricultural and food products and on hate speech.

Finally, the rights of the MPs in France and in the UK regarding the legislative procedure have been preserved, but through different ways (the use of videoconferencing or the representation of the Members who cannot be physically present). Nevertheless, the situation of the MPs belonging to the opposition parties are significantly reduced in the two countries. This is particularly the case in the UK with regard to the rights of backbenchers and of MPs who are neither part of the majority nor of the main opposition parties. In both countries, the legislative activity has been reduced to the bare essentials, mainly the legislation relating to the emergency powers of the executive.

## **2. Procedures of parliamentary control**

In the UK, most parliamentary oversight procedures demand the physical presence of MPs and peers. Notably, several types of oral questions,<sup>54</sup> which were introduced as of 1721, when the first question was documented in the House of Lords, even though these became more frequent and took their present shape as of 1832.<sup>55</sup> Also, all daily question sessions, notably the Prime Minister’s Questions on Wednesdays, are held in person.

Prime Minister’s Questions that were introduced in 1961 take place on Wednesdays from midday to 12:30 pm. In addition to this, Question Time takes place for an hour from Monday to Thursday after preliminary proceedings. The ordinary procedure for the submission and allocation of questions is very formal. The question is received by the Table Office, which establishes a random order between all the questions by means of a computerised procedure. Each MP may ask two questions per day to two different ministries. The order of appearance of the ministries is determined at the beginning of the session, with each ministry being allocated a specific day with other ministries. A rotation (‘rota’) is instituted, with four main ministries alternating in first place at each session. The MP can then ask his or her question on the following day, as well as a supplementary question. Other supplementary questions may be asked in an order determined by the Speaker, alternating between majority and opposition, but according to a rather random custom of members of the House standing up to attract the attention of the Speaker (‘catching the Speaker’s eye’). When he considers that the number of supplementary questions is sufficient, the Speaker calls the next question. The organisation of Question Time is therefore up to the Speaker.

Another procedure is called ‘urgent questions’.<sup>56</sup> The Speaker must determine whether the question is indeed of an urgent nature and whether the matter is of public interest.

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<sup>54</sup> As an exception to the oral nature of parliamentary questions, there are three types of ‘questions for written answer’. They may be questions intended to be answered orally, but which have not been considered in the sitting due to lack of time. They may be simple written questions, which are published two (sitting) days after their receipt by the Table Office, and are usually dealt with within a week. Finally, there are priority questions, or ‘questions for a written answer on a named day’, which impose a date on the competent minister to reply between three and ten sitting days later. Questions may be sent to the Table Office, or, unlike oral questions, directly to the ministry concerned. See: <https://questions-statements.parliament.uk/>

<sup>55</sup> Cobbett, William. *Cobbett's Parliamentary History of England from the Norman Conquest, in 1066 to the Year 1803* T. C. Hansard 1721, vol 7 (1714-1722, col. 1709).

<sup>56</sup> Before the 2002/2003 session, the procedure was known as ‘private notice questions’. The MP must send the question before 11.30 a.m. on Monday, 10 a.m. on Tuesday and Wednesday, 8.15 a.m. on

The minister is informed immediately, and the urgent question session takes place after Question Time.

Subsequently, 'topical questions' were introduced in the 2007/2008 session,<sup>57</sup> so as to allow the government to respond directly to the events of the day.<sup>58</sup> These questions may be put to the ministers without being tabled in advance ('without notice'), during the last fifteen minutes of Question Time.

Moreover, since 23 January 2003<sup>59</sup> in Westminster Hall, the cross-cutting questions procedure provides for the questioning of several ministries that are competent on an issue.<sup>60</sup> In the House of Lords, an important question procedure exists in the form of 'unstarred questions'<sup>61</sup> (before the 2006/2007 session) then 'questions for short debate'.<sup>62</sup> This is a question to a member of the government that gives rise to a debate. It differs from a motion because there is no right of reply.

Finally, oral questions are a highlight of British democracy and require the physical presence of members of the Houses and the government. During the lockdown, some adjustments were made in order to ensure the upkeep of the essential role of those question sessions.

On 25 March<sup>63</sup>, the Speaker of the Commons explained the new arrangement regarding the question session: *'I will allow the Leader of the Opposition two sets of questions - he will have a total of 12, which I expect to be taken in two sets of six. Similarly, I will allow the Leader of the second-largest party four questions in two sets of two. I will also, exceptionally, call a further question from an Opposition Front-Bench spokesperson. In order to maximise participation, may I ask for short questions and short answers?'* On 27 March<sup>64</sup>, he added: *'Whenever the Chamber is sitting during this exceptional time, there are some measures that I will consider in order to reduce the number of Members required in the Chamber at any one time. For example, removing the convention that only MPs present during a statement can ask questions on it; publishing speaking lists so people know where they are in the running order and can attend the Chamber at the relevant time; and allowing MPs to submit to ask*

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Thursday and 8.30 a.m. on Friday (Standing Order No. 21). See: <https://www.parliament.uk/site-information/glossary/questions-urgent-questions/?id=32625>

<sup>57</sup> The procedure was introduced following a proposal by the House of Commons Modernisation committee (20 June 2007) Select committee on the Modernisation of the House of Commons, *Revitalising the Chamber, The role of the backbench Member*, (HC 2006-07, 20 June 2007, HC 337, p28).

<sup>58</sup> The procedure was first introduced on 12 November 2007. *Hansard* HC Deb. 12 November 2007 vol. 467, col. 392.

<sup>59</sup> *Hansard* HC Deb. 23 January 2003 vol. 398, col. 143 WH.

<sup>60</sup> Four meetings per session must be devoted to them. The procedure is as follows: several members of the government are present. A first question is asked and the competent minister answers. The member who asked the question may ask a supplementary question and the minister who initially answered, or another minister, may answer. The Speaker of the House then calls other members to ask questions, including members of the opposition. This new procedure is not a series of mini debates, and each intervention must be short and to the point.

<sup>61</sup> Issues not marked with a star on the agenda. This type of debate takes place last during a sitting. Questions marked with a star are intended to request information, without debate.

<sup>62</sup> 'Questions For Short Debate' (*Parliament.uk*, 2021) <<https://www.parliament.uk/site-information/glossary/questions-for-short-debate/>>

<sup>63</sup> *Hansard* HC Deb. 26 March 2020 vol. 674, col. 330.

<sup>64</sup> 'Letter From The Speaker Of The House Of Commons, Sir Lindsay Hoyle, To Mps On Coronavirus' (*Parliament.uk*, 2021) <<https://www.parliament.uk/business/news/2020/march/letter-from-the-speaker-of-the-house-of-commons-sir-lindsay-hoyle-to-mps-on-coronavirus/>> accessed 7 July 2021.

a question on a statement in advance, so a rota can be set up that enables MPs to only come in for their question’.

On 21 April,<sup>65</sup> the House of Commons made orders for hybrid scrutiny proceedings to allow members to participate in questions to ministers, urgent questions and ministerial statements, and on 22 April, the first oral questions took place under hybrid procedures.<sup>66</sup>

On 4 June,<sup>67</sup> the House of Commons agreed temporary orders to allow MPs restricted by coronavirus to participate in proceedings on questions, urgent questions and statements virtually.

On 8 June,<sup>68</sup> the Speaker explained he had reintroduced a complete call list for questions so members should not rise to try to catch his eye; they should rise only when called. When a substantive question is asked by a member participating virtually, he shall ask the minister to answer the question and then call the member to ask a supplementary question.

Regarding the work of Westminster Hall, its sittings resumed on 5 October.<sup>69</sup> A limit of 25 people in the room and a one-way system was introduced. It was also agreed that there would be no 3-hour debates while these temporary arrangements are in place. On 12 January,<sup>70</sup> sittings in Westminster Hall were suspended again.

The same kind of arrangements apply to the work of the Select Committees, which meet and conduct hearings only in person. The health crisis, therefore, has presented a particular challenge with regard to the continuity of the committees’ oversight mission or legislative work.

From March to 21 April, the Select committees continued their work remotely (letter from the Speaker of the House of Commons dated 27 March 2020<sup>71</sup>). The members of the Select committees could continue their work via e-mail, calls, or videoconference using *Zoom*, on condition that the committee Clerk is copied on each written communication and that the communication system is approved by the *Parliamentary Digital Service*. On 12 January,<sup>72</sup> the decision was taken to continue work remotely until 30 April 2021.

In the House of Lords, the first remote Select committee meeting took place on 16 April (the Procedure committee met privately via *Skype for Business*). On 2 September,<sup>73</sup> hybrid Grand committee proceedings took place for the first time, following the return of the House after the summer recess.

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<sup>65</sup> *Hansard* HC Deb. 21 April 2020 vol. 675, col. 2: ‘That this House is committed to taking all steps necessary to balance its responsibilities for continuing scrutiny of the executive, legislating and representation of the interests of constituents with adherence to the guidance issued by Public Health England and the restrictions placed upon all citizens of the United Kingdom, and is further committed, in pursuit of that aim, to allowing virtual participation in the House’s proceedings, to extending the digital capacity of those proceedings to ensure the participation of all Members, and to ensuring that its rules and procedures are adapted to permit as far as possible parity of treatment between Members participating virtually and Members participating in person’.

<sup>66</sup> *Hansard* HC Deb. vol. 22 April 2020 675, col. 34.

<sup>67</sup> *Hansard* HC Deb. 4 June 2020 vol. 676, col. 1103.

<sup>68</sup> *Hansard* HC Deb. 8 June 2020 vol. 677, col. 2.

<sup>69</sup> *Hansard* HC Deb. 23 September 2020 vol. 680, col. 1076.

<sup>70</sup> *Hansard* HC Deb. 12 January 2021 vol. 687, col. 265.

<sup>71</sup> www.parliament.uk (n64)

<sup>72</sup> *Hansard* HC Deb. 12 January 2021 vol. 687, col. 159.

<sup>73</sup> *Hansard* HL Deb. 2 September 2020 vol. 805, col. 1GC.

As in the UK, most parliamentary oversight procedures in France require the physical presence of members of Parliament, with the exception of written questions,<sup>74</sup> and as in the UK, questions to the government are the highlight of the parliamentary week.<sup>75</sup> They are supposed to take place once a week: ‘During at least one sitting per week, including during the extraordinary sittings provided for in article 29, priority shall be given to questions from Members of Parliament and to answers from the government’ (art. 48, al. 5 of the Constitution).

From 17 March onwards, the National Assembly decided to limit the number of questions, enabling the limitation of the number of ministers present. The questions were limited to two questions per group and one for the non-attached members. From March 30, four questions were allowed for the two largest groups and two for the other eight smaller groups. Only one deputy per group could be present in order to ask questions on behalf of the other members of the group to the few ministers present who were concerned by the subject matter of the question. This solution has been seen as a ‘parody of parliamentary control’.<sup>76</sup> It is not until 20 April that the authors of the questions were able to return to the Assembly to ask their questions themselves.

In the Senate, the time allocated for questions was limited to 40 minutes each week and to two questions for the three largest groups and one for each of the smaller groups.

According to article 42 of the rules of procedure of the French National Assembly, attendance of committee members at committee meetings is obligatory, and non-attendance must be justified.<sup>77</sup> During the lockdown, the committees mostly continued

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<sup>74</sup> Rules of procedure of the National Assembly, 2010 art. 135 : ‘1 MPs may ask written questions to a minister. Questions relating to the general policy of the government shall be asked to the Prime Minister. 2 Written questions shall be drafted briefly and shall confine themselves to what is strictly essential to an understanding of what is being asked. They shall contain no personal allegation against other named persons. 3 Any MP wishing to ask a written question shall convey it to the President of the Assembly, who shall notify the government. 4 Written questions shall be published, whether the House is in session or not, in the ‘Journal officiel’. 5 A minister’s answer must be published within one month of the publication of the question. This time limit shall not be interrupted. 6 However, ministers may, within this time limit, state in writing that it is not in the public interest for them to answer, or, by way of exception, ask for additional time of up to one month in which to gather the material needed for an answer. 7 Upon the expiry of the time limits mentioned in the two previous paragraphs, the chairmen of groups may draw attention to certain questions which have not been answered. This fact is mentioned in the ‘Journal officiel’. Ministers shall then be required to reply within ten days’.

<sup>75</sup> Rules of procedure of the National Assembly, 2010 art. 133 : ‘1 The Conference of Presidents shall determine the weekly sitting(s) which shall be given over, in accordance with Article 4, paragraph 6, of the Constitution, to MPs’ questions and to government answers. This shall also apply during extraordinary sessions. 2 Each week, one half of the questions to be asked during the sitting(s) organized in application of the previous paragraph shall be asked by MPs of opposition groups. 3 Each group shall ask at least one question during every one of these sittings. 4 The first question to be asked shall, as of right, be given to an opposition or minority group or to an MP who does not belong to any group. 5 The Conference of Presidents shall determine the conditions according to which MPs belonging to no group may ask questions’.

<sup>76</sup> J.-P. Derosier, G. Toulemonde, ‘The French Parliament in the time of Covid-19: Parliament on Life support’ [2020], Study, Fondation Robert Schuman.

<sup>77</sup> Rules of procedure of the National Assembly, 2010 art 42: ‘2 The names of members attending and the names of members who have conveyed their apologies, either for one of the reasons set out in Ordinance 58-1066 of November 7, 1958 or on account of some other insurmountable difficulty, or of members in whose stead correctly appointed substitutes have attended, shall be published in the ‘Journal officiel’ on the day following each committee meeting as well as by electronic means. 3 If a member is absent more than twice in a month, taking into account meetings of the committee which are held whilst the House is sitting and/or the presence of the MP at another standing committee, each subsequent absence of a committee member at a meeting of the committee convened, in ordinary session, during the morning given over, in accordance with paragraph 3 of article 50, to committee

their work remotely through hearings, using the platform *Zoom*, which was not recommended by the government because of security issues. Nevertheless, *Zoom* was used for a hearing of the military chief of staff by the Defense Committee on 22 April. The chief of staff warned that because of the use of this platform, the information given to the committee would not be as precise as it would have been during an ordinary committee.

Finally, it appears that the parliamentary institutions grasped the challenge of adapting quickly to the new health situation and that the members of the assemblies and the staff have been swift to respond to the challenges that the epidemic has posed to the functioning of democracy. But most parliamentary oversight procedures in France and in the UK require the physical presence of members of Parliament, and the parliamentary control seems to be slowed down by the pandemic. The Covid-19 crisis has had a profound effect on French and British parliamentary practice, continuing even one year after the beginning of the crisis. Aside from issues surrounding parliamentary procedure hitherto discussed, issues concerning the effectiveness of the assemblies powers should also be considered.

### III. Parliamentary powers in a time of pandemic

#### 1. Delegation of legislative power and oversight of delegated legislation

In the UK, there are various pieces of legislation that allow the government to respond rapidly to a public emergency by making regulations without an Act of Parliament.<sup>78</sup>

The *Public Health (Control of Disease) Act 1984* specifies that regulations may be introduced to manage an infection, ‘with a view to the treatment of persons affected with any epidemic, endemic or infectious disease and for preventing the spread of such diseases’ (section 13).<sup>79</sup> Appropriate intervention to control the spread of the disease, including isolation and quarantine, can be initiated (section 45G).<sup>80</sup>

The *Civil Contingencies Act 2004* allows ministers to take emergency powers in the event of a situation ‘which threatens serious damage to human welfare’ (section 1).<sup>81</sup> It was intended to be used for a major natural disaster and doesn’t seem to be appropriate for a pandemic.<sup>82</sup>

Last, the *Coronavirus Act 2020* has been fast-tracked through Parliament in just three sitting days.<sup>83</sup> The short time devoted to the examination of the bill appears all the more disproportionate as is it composed of 102 sections and 29 schedules (compared to only 22 articles for the French law of 23 March 2020).<sup>84</sup> It aims to give further

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proceedings, shall be liable to a deduction of 25% in his monthly working allowance. The questeurs shall be informed of such absences by the chairmen of the standing committees. This paragraph shall not apply to the members of the Bureau of the House, with the exception of secretaries, to the chairmen of groups, to MPs who represent constituencies outside metropolitan France, with the exception of those who represent a constituency in Europe. Nor shall it apply when the absence is justified by one of the reasons mentioned in paragraph 2 of article 38’.

<sup>78</sup> A. Nice, R. Hogarth, J. Marshall, C. Haddon, ‘Emergency powers’, Institute for Government, March 26, 2020.

<sup>79</sup> Public Health (Control of Disease) Act 1984 s13.

<sup>80</sup> Ibid s45G.

<sup>81</sup> Civil Contingencies Act 2004 s(1)

<sup>82</sup> <https://www.instituteforgovernment.org.uk/explainers/emergency-powers>

<sup>83</sup> www.Parliament.uk (n6), Hansard (n7) and Hansard (n8)

<sup>84</sup> Riddard (n47)

powers to the government to handle the pandemic; to increase the available health and social care workforce; to reduce administrative burden on frontline staff; to give public officials in England emergency powers to test, isolate and detain a person where they have reasonable grounds to think that the person is infected; to restrict or prohibit gatherings or events; to manage the deceased. Its provisions are time-limited for two years.

It appears that most of lockdown and quarantine regulations and other restrictions in England have been made under the *Public Health Act*. In Scotland, powers have mostly been exercised under Schedule 19 of the *Coronavirus Act 2020*, and in Northern Ireland, under Schedule 18 of the *Coronavirus Act 2020*, which amends the *Public Health Act (Northern Ireland) 1967*. Following those extraordinary mechanisms, ministers can act through regulations. They are secondary legislation, made under a statutory instrument, following three different procedures.

Under the default procedure, called negative procedure, a minister can make a law and bring it into force immediately, without prior parliamentary approval. Either House can, within 40 days of the instrument being laid, vote to annul the regulations. However, there is no automatic expectation of a debate and vote taking place: members of the Parliament can only vote to ‘approve’ or to ‘reject’ statutory instruments; they cannot amend the text.<sup>85</sup>

If the ‘made affirmative’ procedure is used, those regulations may come into force without prior parliamentary scrutiny, but lapse 28 days after they are made, unless they are approved by both Houses in that period.<sup>86</sup> Either House may reject the regulations within the 28-day period, in which case they expire at the end of that day.

Under the draft affirmative procedure, the statutory instrument is laid before Parliament in draft, and cannot be made into law by the minister unless and until it has been approved by the Houses.<sup>87</sup>

On 12 January, 2021, the *Hansard’s Society’s Coronavirus Statutory Instruments Dashboard* reported that ‘Of the 334 Coronavirus-related statutory instruments laid before Parliament [...]: 228 are subject to the ‘made negative’ procedure [...]; 88 are subject to the ‘made affirmative’ procedure [...]; 16 are subject to the ‘draft affirmative’ procedure [...]; 2 are ‘laid only’ ([...] the statutory instrument is laid before Parliament, but no further procedure is necessary or possible)’.<sup>88</sup> This means that most statutory instruments were subject to minimum parliamentary scrutiny. This is questionable, because there was not sufficient time for thorough scrutiny to take place during the three days of the debate on the *Coronavirus Bill*, and subsequent scrutiny of the government’s approach to Covid-19 is crucial.

The *Coronavirus Act* also introduces three different types of scrutiny of its implementation, but they do not seem to be effective enough. First, every two months (beginning from the date the Act was passed), the Secretary of State must prepare and publish a report on the status of non-devolved provisions in Part 1 of the Act, which is laid before Parliament. The report must include a ‘statement that the Secretary of State

<sup>85</sup> S(45Q)(1)

<sup>86</sup> *Public Health (Control of Disease) Act 1984*, s. 45R (4): ‘Regulations contained in an instrument made in accordance with subsection (2) cease to have effect at the end of the period of 28 days beginning with the day on which the instrument is made unless, during that period, the instrument is approved— (a) in the case of English regulations, by a resolution of each House of Parliament’.

<sup>87</sup> S(45Q)(4)

<sup>88</sup><https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>

is satisfied that the status of those provisions is appropriate' (section 97).<sup>89</sup> However, it has been objected that the status reports should contain reasons and evidence. The minister should not only say whether it is appropriate to keep provisions in force, but also why. Second, 'so far as practicable, a Minister of the Crown must make arrangements for the motion mentioned in subsection (1) to be debated and voted on by the House of Commons within a period of 7 sitting days beginning immediately after each 6 month review period'. The motion is 'That the temporary provisions of the *Coronavirus Act 2020* should not yet expire.' If the motion is negatived, a minister must end the relevant temporary provisions no later than 21 days after the rejection took place (section 98).<sup>90</sup> It can also be objected that six months may be too long to wait for a parliamentary debate and vote. Third, within the period of 14 sitting days beginning with the day after the end of the sixth-month reporting period, a minister must move a motion in neutral terms to the effect that the House has considered the one-year status report. This must be done in both Houses (section 99).<sup>91</sup>

The lack of parliamentary scrutiny raises some questions about the role of Parliament in the protection of fundamental rights, especially during such a crisis. As it was said by the Institute for Government: 'When parliamentary democracy is operating as normal, big decisions on changing the law are made by Parliament using primary legislation. Smaller ones can be made by the government using secondary legislation, but even then, they are at least explained and justified to Parliament, and Parliament's agreement in principle is often sought. The *Health Protection (Coronavirus, Restrictions) (England) Regulations 2020* (the 'lockdown regulations') amounted to the biggest change in the law in living memory, in that they criminalised leaving home without reasonable excuse'.<sup>92</sup>

But the lack of parliamentary scrutiny is not only a question of democratic legitimacy. As explained by the Public Administration Commons Select committee in its report on *Parliamentary Scrutiny of the Government's handling of Covid-19*: 'Limited Parliamentary scrutiny is not simply a mild inconvenience but often affects the quality of legislation.<sup>93</sup> A prime example of potential legislative error arose in the first set of lockdown regulations. Under Regulation six as originally enacted, it was an offence for a person to leave the place in which they were living without a reasonable excuse. This gave rise to a question of law, what happens once someone's reasonable excuse has expired? For example, one of the reasonable excuses was the need to obtain basic necessities such as food. If someone left their home to purchase food, were they compelled to immediately return home after purchasing the food?'

The same kind of issues have arisen in France. Although the French assemblies have maintained legislative activity during the lockdown, most of their laws organise the temporary dispossession of Parliament, through a delegation of legislative power. The law of 23 March 2020 empowers the government to act by means of ordinances under art. 38 of the Constitution.<sup>94</sup> In total, 66 ordinances were passed to deal with the Covid-

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<sup>89</sup> Coronavirus Act 2020 s(97)

<sup>90</sup> Ibid s(98)

<sup>91</sup> Ibid (99)

<sup>92</sup> Public Administration and Constitutional Affairs Committee, *Written evidence from The Institute for Government Responding to Covid-19 and the Coronavirus Act 2020* (HC 2019-21 RCC 12).

<sup>93</sup> Public Administration and Constitutional Affairs Committee, *Parliamentary Scrutiny of the Government's handling of Covid-19* (HC 2019-21 377).

<sup>94</sup> Constitution of France 1958 art 3 'In order to implement its programme, the government may ask Parliament for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law. Ordinances shall be issued in the Council of Ministers, after consultation with

19 pandemic. This raises an important question because restrictions to fundamental rights in France can only be decided by legislative norms (art. 34 of the Constitution).

According to art. 38, ordinances can be ratified by the Parliament, but this is not compulsory. If they aren't ratified, they remain administrative regulations and can be challenged in an administrative court through a judicial review. Some of them have been challenged in the courts. If the ordinance is ratified, it becomes a legislative act. The challenge of those acts is possible in the Constitutional council, through the procedure of 'QPC' (*Question prioritaire de constitutionnalité*/Priority question of constitutionality). This means that the control of ordinances is mostly made by the courts, and not the Parliament. This seems highly problematic, especially when the scrutiny by the administrative jurisdiction has proved to be largely ineffective, for reasons linked to the temporal nature of the proceedings and the partly political nature of the Supreme administrative court (*Conseil d'État*). It must be noted that, in the context of the health crisis, the appeals lodged in urgency against the measures adopted by ministerial or municipal authorities were almost all rejected. The Council of State considered that the conditions of urgency had not been met for an emergency ruling for possible infringement of civil liberties, or that the grounds for suspension of those measures were not serious.

The declaration of the state of health emergency also allows the Prime Minister to take, by decree, measures restricting freedom of movement, freedom of enterprise and freedom of assembly, measures to requisition any goods and services needed to end the health disaster, and temporary price control measures. The Minister of Health has the power to decide by order all other measures that fall within the framework set by the Prime Minister.<sup>95</sup>

Finally, most measures restrict many fundamental rights (freedom of movement, freedom of assembly, right to respect for private and family life, right to education, freedom of religion). It is highly problematic that such drastic interference in terms of citizens' fundamental rights could be decided by the Prime Minister or a minister alone, without any debate in the Chambers. Moreover in France and in the UK, it seems that a lot of fragmented, heterogeneous and disconnected measures have been adopted, without a previous roadmap that apparently aims to give a response to an emergency, but it seems it was undertaken with great improvisation. Admittedly, the emergency legislations allow different types of scrutiny of their implementation, but they do not seem to be effective enough. Most of them take place after the coming into force of the executive measures, and they do not lead to a challenge of those measures or a sanction of the government. As stated in a report published in January 2021 by the Study of Parliament Group, there is a 'need to do better at scrutinising delegated powers before they are handed to ministers, and to redouble efforts to make scrutiny of delegated legislation once made fast, forensic, and effective'.<sup>96</sup>

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the Conseil d'État. They shall come into force upon publication, but shall lapse in the event of failure to table before Parliament the Bill to ratify them by the date set by the Enabling Act. They may only be ratified in explicit terms. At the end of the period referred to in the first paragraph hereinabove Ordinances may be amended solely by an Act of Parliament in those areas governed by statute law'.

<sup>95</sup> Law of 23 March, 2020.

<sup>96</sup>S. Chaplin, 'Review of Parliaments and the Pandemic' [2021] U.K. Const. L. p208 <https://ukconstitutionallaw.org/2021/03/08/steven-chaplin-review-of-parliaments-and-the-pandemic/>



## 2. General oversight of the health policy

As stated in the law of 23 March, 2020 in France, introducing art. L. 3131-13, al. 2 of the Public Health Code, the National Assembly and the Senate are informed without notice of the measures taken by the government relating to the state of health emergency. The National Assembly and the Senate can ask for any complementary piece of information in the field of the oversight and assessment of those measures.<sup>97</sup>

Nevertheless, the effectiveness of parliamentary oversight is under challenge during the health crisis, because Parliaments were forced to adapt their monitoring activity. In particular, certain opposition rights had to be set aside for practical reasons, such as the holding of ‘opposition days’ in the UK, which did not take place between 4 March<sup>98</sup> and 16 June 2020,<sup>99</sup> whilst their normal pace is one session per month. The same applies to the procedure for ‘topical questions’, which has been temporarily interrupted because it has not been possible to guarantee the presence of the minister to whom the question is addressed on that particular day. Similarly, the work of Westminster Hall has been suspended until 5 October, and from 12 January, despite the fact that this assembly is supposed to be a less passionate place of debate than the House of Commons itself, which is subject to strong political pressure. The House of Lords, despite its undemocratic character, represents a strong check on the power of the majority, and has been greatly constrained by the hybridisation of procedures that allows only a small number of peers to participate.

According to the Public Administration and Constitutional Affairs committee, until 10 September, in both the Commons and the Lords, there have been on Covid-19: 20 oral statements, 7 general debates, 2 Lords debates, 60 statutory instruments debates (35 in the Commons, 25 in the Lords), 21 Lords oral questions, 17 Lords topical questions, 6 Commons oral question sessions, 6 Westminster Hall debates.<sup>100</sup> This seems nevertheless really reduced in comparison with the ordinary parliamentary activity. Moreover, statements, urgent questions and debates lost their spontaneity.

Despite the exceptional nature of the situation, no specific parliamentary oversight mechanisms were set up in France or in the UK in the context of the health crisis, and the traditional repertoire of parliamentary oversight has found application. Especially, no *ad hoc* committee has been established to monitor the government’s action in health matters and the implementation of the coronavirus regulations transversally. On the contrary, some countries have decided to set up a parliamentary committee dedicated to the management of the pandemic. For example in Belgium, the Chamber decided to create a ‘Covid-19 Standing Committee’, whose status has the advantage of limiting neither its duration of exercise nor the scope of its broad and varied missions.<sup>101</sup> The purpose of the establishment of such a committee is to better control the action of the federal government within the framework of the texts implementing the law of special powers.

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<sup>97</sup>(*Legifrance.gouv.fr*, 2021)

<[https://www.legifrance.gouv.fr/codes/article\\_lc/LEGIARTI000041747768](https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041747768)>

<sup>98</sup> *Hansard* HC Deb. 4 March 2020 vol. 672, col. 903

<sup>99</sup> *Hansard* HC Deb. 16 June 2020 vol. 677, col. 704

<sup>100</sup> Public Administration and Constitutional Affairs committee, *Fourth Report of Session 2019–21, Parliamentary Scrutiny of the Government’s handling of Covid-19* (HC 2019-21377), 10 September 2020

<sup>101</sup> M. Verdussen, ‘The impact on parliamentary assemblies: the crisis triggered by the Covid-19 pandemic in Belgium. Restricting parliamentary control over the government and limiting democratic debate’, [2020] Study, Fondation Robert Schuman.

Admittedly, the work of the Select committees has continued through inquiries into specific aspects of the management of the crisis.

For example, the Home Affairs committee of the House of Commons released on 27 April a report titled: 'Home Office preparedness for Covid-19 (Coronavirus): domestic abuse and risks of harm within the home'.<sup>102</sup> The committee underlined that while lockdown and strict social distancing measures are in place, new strategies are needed to ensure victims can access forms of urgent help and support.

The Public Administration and Constitutional Affairs committee published its Fourth Report of Session 2019–21 (*Parliamentary Scrutiny of the Government's handling of Covid-19*) on 10 September 2020.<sup>103</sup> One of its conclusions is that 'the current system of Parliamentary scrutiny in relation to lockdown regulations is not satisfactory. The fact that this legislation, which contains stark restrictions on people's civil liberties, is not amendable by Members, made under the urgent procedure and therefore without parliamentary scrutiny or effective oversight, coupled with the extremely quick passing of the *Coronavirus Act* means the framework of Parliamentary scrutiny of the government's handling of Covid-19 is inadequate'.

The results of some other inquiries are still pending. The House of Lords Constitution committee is currently undertaking an inquiry into the constitutional implications of Covid-19: 'It is exploring the impact of the pandemic, and the government's response to it, in relation to the operation of the courts and Parliament and the use of emergency powers'.<sup>104</sup>

The Public Accounts committee in the Commons is also currently undertaking two inquiries into the following topics: 'Covid-19: Government procurement and supply of personal protective equipment' and 'Covid-19: Planning for a vaccine Part 1: preparations for potential Covid-19 vaccines'.<sup>105</sup>

The Women and Equalities committee in the Commons has also launched an inquiry in order to study the different and disproportionate impact that the Coronavirus and measures to tackle it are having on people with protected characteristics under the *Equality Act*.<sup>106</sup>

Last, an important inquiry has been launched by the Joint committee on Human Rights about 'The Government's response to Covid-19: human rights implications'.<sup>107</sup>

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<sup>102</sup> Home Affairs committee of the House of Commons, *Home Office preparedness for Covid-19 (Coronavirus): domestic abuse and risks of harm within the home* (HC 2019-21 321).

<sup>103</sup> Public Administration and Constitutional Affairs committee, *Parliamentary Scrutiny of the Government's handling of Covid-19* (HC 2019–21 377).

<sup>104</sup> Constitution Committee 'Committee calls for evidence on the use of emergency powers during the COVID-19 pandemic' Constitution Committee Blog (29/09/2020) <https://committees.parliament.uk/committee/172/constitution-committee/news/119633/committee-calls-for-evidence-on-the-use-of-emergency-powers-during-the-covid19-pandemic/>

<sup>105</sup> Public Accounts committee, *Covid-19: Government procurement and supply of personal protective equipment* (HC 2019-21 928); Public Accounts committee, *Covid-19: Planning for a vaccine Part 1: preparations for potential Covid-19 vaccines* (HC 2019-21 930).

<sup>106</sup> <https://committees.parliament.uk/work/227/unequal-impact-coronavirus-covid19-and-the-impact-on-people-with-protected-characteristics/>

<sup>107</sup> Joint committee on Human Rights, *The Government's response to Covid-19: human rights implications* (HC /HL 2019-21 265/125)

In France too, the rules of procedure of the National Assembly allows the establishment of special committees<sup>108</sup> in order to investigate on an issue and search for information (fact-finding missions). Such a mission was created by the Conference of Presidents on 17 March. The President of the Assembly himself (Richard Ferrand) was appointed chairman of the mission and general rapporteur. This can be seen as an issue, as the chairman is one close political friend of the President of the Republic. For example, in New Zealand, the Parliament has set up an *Epidemic Response committee* chaired by the Leader of the opposition.

The mission conducted several hearings, especially with the Prime Minister and the Minister of Health, on the 1<sup>st</sup> of April. As well as with the chairman of the Covid-19 scientific council (established on 11 March) and of other members of the administration.

The hearings were organised by videoconference, meaning that only the person auditioned along with the chairman of the committee and the rapporteur were present, and the other members could follow remotely. It has been objected that this kind of proceedings couldn't offer proper scrutiny.<sup>109</sup> Its interim report was published on 3 June.<sup>110</sup> This report is mostly descriptive on the stages of the response of the public authorities, on the adaptation of the care system to tackle the pandemic and on the economic and social measures taken to face the crisis. The mission was dissolved on 27 January, 2021, and couldn't therefore submit its final report.

Another committee of inquiry<sup>111</sup> in the National Assembly has launched an investigation on the consequences of Covid-19 on children.<sup>112</sup>

In the Senate, art. 8 ter of the rules of procedure allows the establishment of a committee of inquiry. Such a committee was set up on 30 June, on the 'Lessons from the pandemic'. Its final report was published on 8 December.<sup>113</sup> It appears that the

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<sup>108</sup>Rules of procedure of National Assembly 2010 Art. 145 : '1 Subject to the provisions concerning them in title II, standing committees shall keep the House informed so that it can exercise its function of monitoring the policy of the government. 2 For this purpose, they may entrust one or more of their members with a temporary fact-finding mission concerning, notably, the enforcement of an item of legislation. Such fact-finding missions may be common to a number of committees. 3 If a mission is composed of two MPs, then one must be a member of an opposition group. If a mission is composed of more than two members, every endeavour should be made to ensure that it reflects the political make-up of the House. 4 Fact-finding missions may also be set up by the Conference of Presidents on a proposal from the President of the Assembly. The bureau of such missions shall be set up according to the provisions of article 143, paragraphs 1 and 4. The position of chairman or rapporteur shall be exercised as of right by a member of an opposition group if these functions are not carried out by the same person. 5 The public nature of the work carried out by fact-finding missions shall be decided by the bureau of the committee which sets them up. 6 A report by a fact-finding mission may give rise to a debate without vote or to a sitting with questions'.

<sup>109</sup> J.-P. Derosier, G. Toulemonde, 'The French Parliament in the time of Covid-19: Parliament on Life support' [2020] Study, Fondation Robert Schuman.

<sup>110</sup>Mission D 'Information, *Information mission on the impact, management and consequences in all its dimensions of the Coronavirus-Covid 19 epidemic in France* (3rd June 2020 n° 3053).

<sup>111</sup>Rules of procedure of the French National Assembly 2010 art 137: 'Draft resolutions calling for the setting-up of a committee of inquiry shall be tabled before the House. They shall precisely set out the facts warranting the inquiry or shall specify the public services or entities whose management is to be investigated by the committee. They shall be examined and debated in the conditions laid down by the current Rules of Procedure'.

<sup>112</sup> Mission D 'Information, *Commission of Inquiry to Measure and Prevent the Effects of the Covid-19 Crisis on Children and Youth* [https://www2.assemblee-nationale.fr/15/autres-commissions/commissions-d-enquete/commission-d-enquete-pour-mesurer-et-prevenir-les-effets-de-la-crise-du-covid-19-sur-les-enfants-et-la-jeunesse/\(block\)/73813](https://www2.assemblee-nationale.fr/15/autres-commissions/commissions-d-enquete/commission-d-enquete-pour-mesurer-et-prevenir-les-effets-de-la-crise-du-covid-19-sur-les-enfants-et-la-jeunesse/(block)/73813)

<sup>113</sup> Report no 199 (2020-2021).

control of the Senate is slightly more effective, because the Senate is in the opposition to the government. The committee concludes that France was not ready to face the pandemic, and that ‘the sad saga of masks’ will remain the symbol of a lack of preparation with serious consequences in the initial fight against the epidemic, fuelling the disarray and even the anger of caregivers. Together with this finding of unpreparedness, the strategy gave the feeling of neglecting the available arsenal. On all these aspects, the rapporteurs call for a new start for public health, which supposes as much a reform of structures as of the way in which they are mobilised, articulated and confronted with health democracy.

Even if the committees continued working during the lockdown, the control of the committees does not lead to a major questioning of the emergency measures taken by the government. The reports are published too late and they do not have a significant weight on the direction of the public policy in the two countries.

Moreover, one major issue was the government’s treatment of Parliament during the pandemic and the role of the media: ‘Only yesterday regulations on self-isolation were published, coming into effect just seven hours later, and imposing potential £10,000 fines; yet, despite media briefings eight days previously, these were not debated in Parliament. Such cases raise clear political questions, but also legal ones: [...] the underlying legislation allows ministers to bypass Parliament only if a measure is so urgent that there is no time for debate. But there are also bigger, broader concerns about parliamentary involvement. It’s an established convention that major government policy announcements should be made first in Parliament – to be examined and debated by the UK’s sovereign body. Instead, ministers have repeatedly announced major coronavirus policy shifts at Downing Street press conferences, or to journalists. [...]. Boris Johnson announced the ‘rule of six’ by press conference, with the regulations published four days later, just 30 minutes before they came into effect’.<sup>114</sup> In France too, a lot of measures have been leaked to the media before or instead of informing the Parliament. In both countries, the assemblies have been sidelined.

#### **IV. Conclusion**

Ultimately, the British and French Parliament were able to respond to the health requirements and adapt their procedures to ensure a minimum continuity in their work. But even if it appears that the parliamentary institutions grasped the challenge of adapting quickly to the new health situation, and that the members of the assemblies and the staff have been swift to respond to the challenges that the epidemic has posed to the functioning of democracy, most parliamentary procedures did not lead to challenge the measures taken by the executive power. Most parliamentary oversight procedures in France and in the UK require the physical presence of members of Parliament, and the issue of the effectiveness of the powers of the assemblies must be assessed. As it is stated in the aforementioned report of the Study of Parliament Group, ‘Parliaments must assert their centrality in holding governments to account. Can the opportunities of the digital world be used to increase, rather than stifle, effective oversight?’<sup>115</sup>

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<sup>114</sup> M. Russell, L. James, ‘MPs are right: Parliament has been sidelined’, UK in a changing Europe, (26 September, 2020) <https://ukandeu.ac.uk/mps-are-right-parliament-has-been-sidelined/>

<sup>115</sup> S. Chaplin, ‘Review of Parliaments and the Pandemic’ [2021] U.K. Const. L. p208 <https://ukconstitutionallaw.org/2021/03/08/steven-chaplin-review-of-parliaments-and-the-pandemic/>

But if many of the modalities of parliamentary scrutiny in the UK and in France were set aside during the pandemic, this does not seem to be specific to those Parliaments, because there has been a general trend towards the loss of power by parliaments to the benefit of the executive branch in most democracies. B. Ridard and A. Fourmont<sup>116</sup> wrote: ‘Some governments have taken advantage of the health crisis to strengthen their powers, sometimes beyond all proportionality. This is especially the case in Hungary, where a law adopted on 30 March grants ‘special powers’ to the Prime Minister, in particular the power to legislate by decree and to derogate from legal provisions in the context of a state of emergency of indefinite duration, without providing for a regular meeting of Parliament during this period.’ This is not the case in France and in the UK, even if the current systems of parliamentary scrutiny in relation to lockdown regulations is not satisfactory. It seems quite obvious that the health crisis triggered by the progress of Covid-19 has not been without consequences for the institutional balance within those countries. While modern parliamentary law has been forged over several centuries, a long-term crisis could call into question traditions and customs because of the imperative need for it. The effectiveness of democratic control is nevertheless at stake, and the standards of parliamentary law allowing the Houses to act as a counterweight to the government could easily be called into question.

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<sup>116</sup> 'Parliamentary Oversight In The Health Crisis' (*Robert-schuman.eu*, 2021) <<https://www.robert-schuman.eu/en/european-issues/0558-parliamentary-oversight-in-the-health-crisis>> accessed 7 July 2021.