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Abstract	<p>The chapter argues that the best answer to the challenges for representative democracy is based on strengthening parliamentary oversight powers of executive activities. During the second half of the twentieth century it has become evident that parliaments were no more the principal law-maker. In the last two decades, however, two threats have been putting into question the role and functions of parliaments. First, executives that are expanding well beyond the boundaries fixed by the constitution to the expense of parliaments’ prerogatives. Second, populism, which disregards any constraint on the will of the majority embodied in the charismatic leader. To counter these two threats, both tending to the creation of powerful and unaccountable executives, parliaments need to fully recover their capacity to hold the executive to account. By analysing the Italian and Spanish parliaments’ activities during the COVID-19 pandemic, the chapter shows that the creation of more instruments for ensuring executive accountability and guaranteeing the involvement of parliaments in governmental decision-making may well compensate the loss of legislative functions. Thus, injecting in constitutional democracy another, but not less important, input of democratic legitimacy.</p>
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“To Watch and Control the Government”. 1  
‘Rediscovering’ Parliaments’ Oversight 2  
Function 3

*Marco Antonio Simonelli* 4

I INTRODUCTION 5

The COVID-19 triggered a wide academic and political debate about its 6  
impact on constitutional democracy, and in particular on how parliaments 7  
have been marginalised during the crisis.<sup>1</sup> As a matter of fact, the manage- 8  
ment of the pandemic and of its economic and social consequences has 9

<sup>1</sup>In the academic literature see amongst many: Griglio, *Parliamentary oversight under the Covid-19 emergency*, 52; Windholz, *Governing in a pandemic*, 93-113. Concerning political reactions see: European Parliament, *Resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights* (2020/2790(RSP)), P9\_TA(2020)0307.

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Contemporary Democracy in Europe*,  
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10 been dominated by national governments (Bar-Siman Tov 2020, 12). In  
11 principle this situation is not new—emergency situations have always been  
12 dealt with by governments—neither worrying, as “[t]he concept of emer-  
13 gency rule is founded on the assumption that in certain situations of politi-  
14 cal, military and economic emergency, the system of limitations of  
15 constitutional government has to give way before the increased power of  
16 the executive”.<sup>2</sup> Indeed, far from being an isolated and temporally limited  
17 phenomenon, the marginalisation of parliaments during the pandemic has  
18 to be seen as the last episode of a long-standing evolutionary trend of  
19 constitutional democracy, which sees parliaments sidelined in their tradi-  
20 tional role of legislators.

21 Nonetheless, in the last two decades, two intertwined threats have  
22 accelerated and exacerbated this trend, menacing the role and the legiti-  
23 macy of legislatures. First, the expansion of executives’ functions well  
24 beyond the boundaries fixed by the constitution, which is reducing parlia-  
25 ments to mere validators of governmental actions. Second, of course,  
26 populism. In its quest for a direct relationship with the ‘true people’, pop-  
27 ulist parties disregard any form of intermediation between the leader and  
28 his people, above all parliaments. Consequently, when populists are in  
29 power, this results in the parliaments hollowed out of any meaningful  
30 powers *vis-à-vis* a strong unaccountable executive.

31 Against this backdrop, the present chapter tries to identify, by analysing  
32 the parliaments’ reactions to executives’ dominance during the COVID-19  
33 emergency, possible solutions to reinstate parliaments at the centre of the  
34 political system. In particular, it argues that the loss of law-making func-  
35 tions may be at least partially compensated by an alternative—but not less  
36 important—function: overseeing executive’s actions. After all, as John  
37 Stuart Mill famously affirmed in 1861 “the proper office of a representa-  
38 tive assembly is to watch and control the government” (Stuart Mill, 1861).

39 In order to reach this stated aim, the chapter will proceed in the follow-  
40 ing order. Section 2 sets the background of the chapter, explaining why  
41 legislatures are not going to regain a prominent role in the production of  
42 norms. Section 3 illustrates how executives’ aggrandisement and populism  
43 have contributed to open a crisis in the mechanisms of constitutional

<sup>2</sup> CDL-AD(2020)018 *Interim Report on the measures taken in the EU Member States as a result of the COVID-19 crisis and their impact on democracy, the rule of law, and fundamental rights*, adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020), para. 19.

democracy and explains why strengthening the oversight function of parliament can represent a remedy. In Section 4 the reaction of parliaments to executive dominance during the pandemic will be analysed, with a special focus on the Italian and Spanish parliaments. Section 5 identifies which of these reactions may provide some solutions to the challenges posed by populism to contemporary democracy and concludes.

Before embarking on this task, a few brief methodological premises are necessary. First, in the context of this chapter when we refer to the crisis of representative democracy, we are pointing to a set of concurring factors that reduced parliamentary policy-making power, defined as the formal ability of parliaments to legislate and to constraint executive rule making (Mezey 1979, 23). To put it otherwise, in the following pages the crisis of representative democracy will be considered only through the prism of the parliament-government relationship. Second, the solutions that will be presented at the end of this chapter are applicable for parliamentary systems, that is, for systems in which exists a relationship of confidence between the parliament and the executive.

## 2 THE ROLE OF THE PARLIAMENT IN CONTEMPORARY CONSTITUTIONAL DEMOCRACY

In the traditional notion of separation of powers as resulting from Montesquieu work, the government's essential function is 'executing' the laws approved by the parliament. According to Montesquieu, not only the parliament is to be the sole bearer of legislative powers, but also any involvement of the government in the legislative process is considered unnecessary (Montesquieu, 1748, 405). Yet, this notion has long lost its validity.

All democratic constitutions of the twentieth century indeed recognise a prominent role for the government in law-making. Governments in situations of extraordinary urgency and necessity are empowered to adopt law decrees<sup>3</sup>; they can receive a delegation from the parliament to adopt norms having force of law to regulate highly technical and complex matters<sup>4</sup>; and government legislative initiative receives a preferential treatment in the

<sup>3</sup>See: Article 77(1) Italian Constitution; Article 86 Spanish Constitution. A relevant exception is France, as the 1958 Constitution, contrary to the two preceding constitutions (those of 1870 and 1946), does not empower the government to adopt law decrees.

<sup>4</sup>See: Article 76 Italian Constitution; Article 82 Spanish Constitution.

76 rules of procedure of many European parliaments.<sup>5</sup> Actually, a rapid com-  
77 parative overview of executive legislative powers in European constitu-  
78 tions allows to safely conclude that in contemporary constitutional  
79 democracy the government is not intended to be a mere executer of parli-  
80 ammentary laws, as it was in the nineteenth-century liberal state (Fabbri  
81 and Vassallo 1999).

82 Having said that, it would be misleading to explain the sidelining of  
83 legislatures with exclusive reference to the increased role of executives in  
84 the production of norms, as also the judiciary invaded the space once  
85 reserved to parliamentary law. Immediately after WWII, many European  
86 States reacted to the failure of parliamentary regimes in preventing descent  
87 into totalitarianism by introducing a more sophisticated version of the rule  
88 of law (Pinelli 2011, 13), characterised by the introduction of a strong  
89 counter-majoritarian power, that is, a constitutional court empowered to  
90 carry out judicial review of legislation. This model, referred to as demo-  
91 cratic constitutional state, was so successful that, during the second half of  
92 the twentieth century, European constitutional judges started to shape  
93 legal systems on an equal footing with the legislative and executive pow-  
94 ers, assuming a role of negative legislators.<sup>6</sup> Nevertheless, some authors,  
95 especially from north-American scholarship, maintained a critical stance  
96 towards this shift of power from democratically elected parliaments to  
97 unelected, unaccountable, judges, fearing that an excessive judicial activ-  
98 ism may end up eroding the democratic component of constitutional  
99 democracy (Hirschl 2007). To this regard, the declining role of parlia-  
100 ments as legislator goes hand in hand with the empowering of constitu-  
101 tional courts as negative legislators.

102 A third element concurring to determine the declining role of legisla-  
103 tives is the rise of the s.c. 'technocratic governance' (Vibert 2007). Lacking  
104 electoral incentives to pursuing long-term policies, political majorities pre-  
105 ferred to delegate to experts and technicians regulatory competences in a  
106 vast array of field (Pinelli 2011, 13), from media law to the regulation of  
107 financial markets. These bodies, albeit being created within the executive,  
108 enjoy a certain degree of autonomy from both the government and the

<sup>5</sup> For a comparative overview: Vintzel, *Les armes du gouvernement dans la procédure législative. Etude comparée: Allemagne, France, Italie, Royaume-Uni*.

<sup>6</sup> To a point that the twentieth century has also been dubbed the 'century of constitutional justice', in contrast with the nineteenth century usually considered the 'parliaments' century. See: Groppi, *Riformare la giustizia costituzionale*, 37.

parliament, and allow for an expertise-based regulation.<sup>7</sup> Yet, this solution ended up negatively affecting the representative dimension of democracy, as it has further reduced the scope for parliamentary law-making, letting unelected experts rule.

Finally, also the opening of contemporary democracies towards international law has multiplied the number of actors involved in law-making processes at different levels governance, probably ending once for all the centrality of statute law (Corkin 2013). To this regard, it should not be obliterated that also EU Membership contributes to marginalise the role of parliaments in the constitutional system. First and foremost because many legislative competences have been transferred to the EU, so that national legislation is pre-empted in these fields, and second because the executives are ministers who represent Member States in the EU institutions, whereas national parliaments have little or no say at all (Ragone 2020, 150).

All in all, it is evident that the diminishing role of parliaments in the production of norms is not a transitory phenomenon; rather it constitutes a long-lasting evolutionary trend of contemporary democracy, according to which legislatures have been conceding more and more powers to governments, judges, and experts (Loughlin 2019, 443). Nevertheless, it is not possible to overlook that legislature’ position in the political system has weakened up to a point that the very functioning of representative democracy is called into question.<sup>8</sup> It is therefore necessary to investigate the factors that have opened up the crisis of parliaments.

### 3 ARE PARLIAMENTS IN CRISIS? 133

At this point, it is necessary to go back to the beginning of this chapter and illustrate the two factors that are altering the delicate equilibrium of contemporary constitutional democracy. 134  
135  
136

<sup>7</sup>Extensively on the European model of independent authority see: De Somer, *Autonomous Public Bodies and the Law. A European Perspective*, in particular, 1-22.

<sup>8</sup>For a comparative overview of legislatives’ decline in Europe see: Khmelko, Stapenhurst, and Mezey (eds) *Legislative Decline in the 21st Century. A Comparative Perspective*. The decline of parliament as the main norm-producer is also considered a part of a more general crisis of representative democracy as a whole. For a wide-ranging analysis of the crisis of representative democracy see: Dahrendorf, *Después de la democracia*; Tudela Aranda, Castellà, Exposito, Kölling (eds), *Libro blanco sobre la calidad democrática en España*.

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137 First, the relegation of parliaments to a subordinate position to execu-  
138 tives aggrandising well beyond the boundaries fixed by the constitution. A  
139 common feature of all European democracies—emerged in all its evidence  
140 during the pandemic (Ginsburg and Versteeg 2020, 4-5)—is indeed the  
141 executive dominance within national legal systems (Loughlin 2019, 435).  
142 The increased technical complexity of societal problems and the necessity  
143 of providing rapid answers to societal issues arising ever more rapidly  
144 appear to have rendered statute law radically unfit as an instrument to  
145 regulate public life. As a matter of fact, since at least 9/11, Europeans  
146 have been living in what has been called a permanent state of emergency  
147 (Agamben 2003, 12-13), characterised by a reduction of parliamentary  
148 activity to a mere endorsement of governments' actions to deal with col-  
149 lective threats; first terrorism, then the economic crisis, and now the  
150 pandemic.

151 This phenomenon has manifested itself with particular evidence in Italy  
152 and Spain where, in the last two decades—and especially after the eco-  
153 nomic crisis of 2010 (Longo 2017; De La Iglesia Chamarro 2013)—the  
154 governments have abused of their power to adopt law decrees,<sup>9</sup> frequently  
155 in the absence of a concrete urgency, creating a situation of an apparently  
156 'endless emergency' (Simoncini 2006; Agamben 2003). Looking at the  
157 bigger picture, however, also this tendency is part of a global trend,  
158 according to which decision-making powers are transferred to executives  
159 (Curtin 2014, 3). Nevertheless, this transferral blurs electoral account-  
160 ability and democratic control, opening up a creep that threatens to hol-  
161 low out the parliament of any meaningful power (Mair 2013).

162 Second, in this already troublesome setting, during the last decade popu-  
163 lism made its appearance on the scene as a major factor of disruption in  
164 European democracies.<sup>10</sup> In its most commonly accepted notion, popu-  
165 lism is an ideology that considers society to be ultimately separated into  
166 two homogeneous and antagonistic groups, 'the pure people' and 'the  
167 corrupt elite' (Mudde 2004, 543). The supposed aim of populist move-  
168 ment is to enhance the representativeness of the constitutional system as a  
169 whole and reaffirm the centrality of popular will, which they claim to

<sup>9</sup>For Italy see amongst many: Piergigli, *Le Regole della produzione normativa*; For Spain: Carmona Contreras, *Artículo 86*, 1277-1287.

<sup>10</sup>For a critical comparative overview of the impact of populism see: C. Mudde C. and C. Rovira Kaltwasser C. (eds), *Populism in Europe and the America. Threat or Corrective for Democracy?*, (Cambridge, CUP, 2012).

embody (Castellà 2020, 4). Therefore, the natural target of populist parties are counter-majoritarian institutions, above all judges. Conversely, once on power populists usually claim that the parliament is the sole legitimate authority to be obeyed in a democracy, an authority which is conceived fundamentally as free from any legal constraint.

Hence, at least from a theoretical point of view, one should expect the strengthening of the parliament's position once a populist majority reaches the power, and many authors have actually tried to consider populism as a corrective for representative democracy (Mudde and Cristóbal 2012). Against the above-mentioned tendency, according to which parliaments have been conceding more and more powers to unelected bodies, populism could indeed function as a corrector, by reaffirming the principle of representation and thus the centrality of the parliament.

At a closer analysis, however, things are not all like this.<sup>11</sup> In its quest for a direct relationship with the 'true people', populist parties disregard any form of intermediation between the leader and the people, above all parliaments. This implies that, at least in the first phase,<sup>12</sup> populist parties tend to advocate for an extensive use of referenda and other instruments of direct democracy, thus contributing to the marginalisation of parliaments in decision-making processes. Also, thanks to the opportunities offered by social media, the populist leader can communicate directly with his/her people, making parliaments superfluous as a forum for debate.<sup>13</sup> Empirical evidences indeed suggest that all forms of populism have in common a reluctance to accept any constraint on executive actions, thereby including those imposed by the legislature (Mudde 2007).

<sup>11</sup> It has also been suggested that the emergence of populist parties may function as a corrective to democracy, but when those parties reach the power, they become a threat. See: Ruth, "Populism and the Erosion of Horizontal Accountability in Latin America," 358.

<sup>12</sup> As Isaiah Berlin has observed, after a first phase in which the people are continuously interrogated with referenda about his will, a second phase follows in which the populist leader affirms to know the will of his people without the need of consulting him. See: Berlin, *To define populism*, 143.

<sup>13</sup> It is interesting to note that already in 1935 Walter Benjamin saw this trend coming: '[s]ince the innovations of camera and recording equipment make it possible for the orator to become audible and visible to an unlimited number of persons, the presentation of the man of politics before camera and recording equipment becomes paramount. Parliaments, as much as theaters, are deserted'. See: Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, 23-24. Available at: <https://web.mit.edu/allanmc/www/benjamin.pdf>.



195 In practice, this attitude has been translated into legal reforms aimed  
196 either at downsizing parliaments, like it happened in Italy,<sup>14</sup> where the  
197 populist Five Star Movement pushed a constitutional reform that reduced  
198 the number of MPs by one-third,<sup>15</sup> or at placing the parliament under the  
199 governmental supervision, thus completely reversing the normal relation-  
200 ship between the legislative and the executive in a parliamentary system.<sup>16</sup>  
201 All in all, in the populist perspective, the parliament is an unnecessary  
202 intermediary institution, which represents and defends only the interests  
203 of the elites, and populism, rather than as a corrective for representative  
204 democracy, is a major factor of its crisis.

205 Against this backdrop, parliaments find themselves stripped away of  
206 substantial law-making powers and helpless *vis-à-vis* ever-stronger execu-  
207 tives. Yet, if contemporary democracy is built upon the assumption that  
208 parliaments, as the primary vehicle of electoral representation, must have  
209 a leading role in the constitutional system (Issacharoff 2018, 450), the  
210 removal of parliaments from the centre of the political system is not sus-  
211 tainable in the long run. It is thus mandatory to reflect upon possible  
212 alternatives through which parliaments can inject democratic legitimacy  
213 into the political system.

214 Being precluded, for the reasons above stated, the path of re-legitimising  
215 the political system through outputs, that is legislation, the most promis-  
216 ing alternative seems to focus on one of the traditional function of parlia-  
217 ments, that is the oversight of government's actions.<sup>17</sup>

<sup>14</sup> Similar proposals have been presented both in France and in Spain. In the political programme of the right-wing populist *Rassemblement National*, the downsizing of both the lower and upper houses of the French parliament is one of the 144 commitments that Marine Le Pen assumed for the 2022 presidential elections. See: <https://rassemblementnational.fr/pdf/144-engagements.pdf>. In Spain, the right-wing populist party Vox together with the Popular Party has agreed to cut down the size of the Madrid Autonomous Community parliament, where they support a coalition government. See: <https://www.rtve.es/noticias/20210609/pp-vox-acuerdan-reducir-101-diputados-asamblea-madrid/2101081.shtml>.

<sup>15</sup> The lower house size was reduced from 630 to 400 members, whilst the upper house from 315 to 200. On the significance of this reform for the role of the Italian Parliament see: Di Majo, *Riduzione del numero di parlamentari e centralità del parlamento*, 40-77.

<sup>16</sup> The most prominent example is Hungary, where for instance the executive has a veto power over the approval by the parliament of budgetary law. More in details about the reforms implemented by the Orban's government concerning the role of parliament see: Szente, "How Populism Destroys Political Representation," 1609-1618.

<sup>17</sup> In the same sense, in an official document of the Inter-Parliamentary Union—an international organisation comprising 189 national parliaments—parliamentary oversight is defined as "a key marker of parliament's relevance in the 21st century". See: Inter-

Parliamentary oversight is intended here as a multipurpose function embracing both the limiting and the sharing of executive powers (Griglio 2020, 69), which guarantees that the government’s decisions are provided with the necessary democratic legitimacy.<sup>18</sup> In this sense, parliamentary oversight has a twofold purpose: on the one hand it safeguards the principle of representation, and on the other it serves to trigger executive’s accountability (Avril 2009, 6). Its scope includes not only the review and monitoring of executive’s actions, but also acts adopted by the parliaments aimed at orientating the actions of the executive, in particular as regards the implementation of policies, legislation, and budget.

The necessary counterpart of the parliamentary oversight power is the executive’s accountability towards the legislature,<sup>19</sup> which can be ensured by various means. There are formal mechanisms—interpellations, questions, motions of confidence—and informal ones, for example the screening by political parties of potential cabinet members (Strøm et al. 2006, 70); soft mechanisms, like reporting duties towards the parliament, or hard ones, above all the possibility to force one minister, or the whole government, to resign.<sup>20</sup> Also, since the transparency and the openness of the decision-making procedures are fundamental conditions to enhance public trust in decision-making procedures, also fact-finding missions and *ad hoc* inquiry committees can be considered as *ex ante* accountability instruments. Lastly, there are those parliamentary acts—like resolutions, recommendations, the institution of non-permanent committees for the elaboration of legislative proposals—aiming at orientating executive’s

Parliamentary Union and United Nations Development Programme, *Global Parliamentary Report 2017: Parliament’s Power to Hold Government to Account: Realities and Perspectives on Oversight*, 11. Available at: <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> last accessed 30 September 2021.

<sup>18</sup> In political scholarship this form of legitimisation is known as ‘throughput legitimacy’, a concept that has been employed especially with reference to multilevel governance as an alternative way to elections to provide the legal system with the necessary legitimacy. See: Schmidt and Wood, *Conceptualizing throughput legitimacy*, 727-740.

<sup>19</sup> Actually, the least common denominator of all parliamentary democracies is that the executive is accountable to the parliament and can be voted out of office by the latter. See: Strøm, Müller, and Bergman (eds.), *Delegation and Accountability in Parliamentary Democracies*, 12-13.

<sup>20</sup> For a more detailed categorisation of the various types of accountability mechanisms see: Griglio, *Parliamentary oversight under the Covid-19 emergency*, 62-65.

AU3 242 policies.<sup>21</sup> Albeit those acts are outside the framework of accountability  
 243 instruments, they can facilitate parliamentary oversight by providing a  
 244 clear backdrop against which evaluating the government's actions whilst  
 245 allowing the parliament to directly influence executive's norm-making.

246 From this standpoint, strengthening the oversight powers of parlia-  
 247 ments appears particularly promising to face the challenges posed by pop-  
 248 ulism and ever-more dominant executives. On the one hand, in fact, by  
 249 ensuring the accountability, transparency, and openness of executive's  
 250 actions, parliaments provide decision-making procedures with a direct  
 251 source democratic legitimacy that enhances the representativeness of the  
 252 legal systems, thus filling in the legitimacy gap that populism supposedly  
 253 aims to correct. On the other, expanding the accountability toolkit of  
 254 parliaments means putting more constraints on government's actions  
 255 whilst obliging it to share its power with the parliament.

256 Having clarified that populism and executive's aggrandisement are the  
 257 real challenges for the equilibrium of constitutional democracy and identi-  
 258 fied the strengthening of parliamentary oversight as a possible answer to  
 259 these threats,<sup>22</sup> the next step is to illustrate the solutions adopted by  
 260 national parliaments for holding the executive to account during the  
 261 COVID-19 emergency.

#### 262 4 PARLIAMENTS DURING THE PANDEMIC. THE ITALIAN 263 AND SPANISH CASES

264 The health, social, and economic crises provoked by the COVID-19 con-  
 265 stituted also an unprecedented challenge for parliaments and more in gen-  
 266 eral for constitutional democracy (Murphy 2020, 13-14). During the  
 267 pandemic, the scope for legislative interventions was extremely narrow, as  
 268 the rapid evolution of the disease required a real-time decision-making  
 269 radically incompatible with the unavoidable delays and uncertainties of a  
 270 legislative procedure.<sup>23</sup> Besides, the health situation affected significantly

<sup>21</sup> Those kinds of acts are known in the Italian constitutional tradition as "atti di indirizzo" and constitute an exercise of the corresponding parliamentary function—the '*funzione di indirizzo*'. Extensively see: Cheli, *Atto politico e funzione di indirizzo politico*,

<sup>22</sup> Many studies have already evidenced that parliaments have played a decisive role in constraining and checking the executives' actions during the pandemic. See in particular: Ginsburg and Versteeg, *The Bound Executive*, 39-46.

<sup>23</sup> Actually, from an institutional point of view one of the most visible effect of the pandemic has been the predominance of executives as law-makers. On this point see also:

the normal functioning of parliaments, with plenary sessions reduced to a minimum.<sup>24</sup> Unsurprisingly, the pandemic also represented an opportunity for populist rulers to tighten their grip on power, by further loosening constraints coming from the parliament and the judiciary (Fourmont and Ridard 2020, 1).<sup>25</sup> All in all, the exceptional powers exercised by executives and the heavy restrictions on fundamental rights imposed by emergency measures made the necessity for a close parliamentary oversight over executive’s actions all the more compelling. Indeed, as the Venice Commission emphasised, “[l]egislative control over the acts and actions of emergency rule authorities and special procedures for such control are important for the realisation of the rule of law and democracy”.<sup>26</sup>

Parliaments actually resorted with much more frequency than in normal times to oversight instruments, and given the circumstances, they had to be creative as to the arrangement concretely put in place to ensure the government’s accountability. Hence, assessing the activity of European national parliaments during the COVID-19 can help to identify new practices and procedures which may guarantee the smooth functioning of constitutional democracy well after the emergency is ended. As anticipated in the introduction, the scope of the analysis is limited to two case studies, Italy and Spain.<sup>27</sup>

The Italian constitutional system was not prepared to the challenge posed by the COVID-19 pandemic. The Italian Constitution indeed does not contain any provision regulating exceptional states,<sup>28</sup> and ordinary

Ginsburg and Versteeg, *The Bound Executive*, 747.

<sup>24</sup> The Venice Commission Observatory on emergency situations prepared a comparative report on how the activity of national parliaments were affected during the s.c. first wave. It results that albeit only a minority of parliaments suspended their activities, many convened only when provided for the constitution, in most of the cases for the validation of law decrees. The report is available at: <https://www.venice.coe.int/files/EmergencyPowersObservatory//T13-E.htm>.

<sup>25</sup> Fourmont and Ridard, *Parliamentary oversight in the health crisis*, 1.

<sup>26</sup> CDL-PI(2020)005rev, *Respect for democracy, human rights and the rule of law during states of emergency—Reflections*, paras 79-80. Available at: [https://www.venice.coe.int/web-forms/documents/?pdf=CDL-PI\(2020\)005rev-e](https://www.venice.coe.int/web-forms/documents/?pdf=CDL-PI(2020)005rev-e) last accessed 30 September 2021.

<sup>27</sup> In addition to the reasons exposed along the text (see: above, fn 26) the choice of the Italian and Spanish cases is due to the fact that they are the only two Western democracies with a populist party in the ruling majority.

<sup>28</sup> The only provision which foresees the possibility for the government to wield *extra-ordinem* powers is Article 78, which only affirms that the parliament declares the war and confer to the government all the necessary powers. In any case, the applicability of this provi-

294 legislation related to crisis management did not confer any extraordinary  
295 powers on the government.<sup>29</sup> Also, Italy has been the first European country  
296 to be hit by the virus. It is therefore unsurprising that, especially during  
297 the first phase of the emergency—from February to April 2020—the gov-  
298 ernment reaction has been to ‘flood’ the legal order with law decrees and  
299 secondary acts (Massa-Pinto 2020), with the Italian Parliament that essen-  
300 tially gave a blank cheque to the government (Clementi 2020, 44).

301 A turning point in the parliament-executive relationship during the  
302 pandemic has been the validation process of the Law Decree 19/2020.  
303 During the debate, the MPs decided to step into the management of the  
304 crisis and approved various amendments aimed at enhancing the oversight  
305 power of the assembly. In particular, the original text provided that  
306 Decrees of the President of the Council of Ministers (*Decreti del Presidente*  
307 *del Consiglio dei ministri*, most often abbreviated ‘DPCM’) would be sent  
308 to parliament within the day following their publication in the Official  
309 Journal. During validation, an amendment reversed the order, strengthen-  
310 ing the role of parliament. In its current version, the law obliges the gov-  
311 ernment to illustrate in advance to the parliament the content of the  
312 measures to be adopted and to take into account the parliament’s posi-  
313 tion. Besides the President of the Council, or a minister delegated by it,  
314 also has to appear every two weeks before the parliament to report about  
315 the implementation of these measures.<sup>30</sup> The combined effect of these two  
316 amendments allowed the parliament to influence the content of the  
317 DPCMs and to follow closely their implementation, as the President of  
318 the Council appeared regularly before both chambers to inform them.

319 The parliament also managed to guarantee itself a role in the decisions  
320 relative to the extension of the state of emergency, which according to  
321 Article 24 of Legislative Decree 2/2018 are taken by a decision of the

sion was not considered as the provision refers only to war *stricto sensu*. On the point see: Lupo, “L’attività parlamentare in tempi di coronavirus,” 139-140.

<sup>29</sup> The most relevant provisions in the ambit of crisis management are the Code of the Civil Protection (Legislative Decree 2/2018), on the basis of which the state of emergency was declared by the Italian government on 31 January 2020 and Law 833/1978 establishing the national health service. Extensively on the law of the emergency in the Italian legal order: Tresca, “Le fonti dell’emergenza L’immunità dell’ordinamento al Covid-19”, 200-214.

<sup>30</sup> Only where this is not possible for reasons of urgency related to the nature of the measures to be adopted, the government shall provide for information after the adoption of the measure (Article 2, paragraph 1). Such circumstance only occurred twice. See: Lippolis, *Il rapporto parlamento-governo nel tempo della pandemia*, 270.

Council of Ministers without consulting the parliament. On 28 and 29 July 2020, the President of the Council announced to the Chamber of Deputies and the Senate the government's intention to extend the state of emergency. In the debates, two identical majority resolutions were approved, committing the government to setting 15 October as the deadline for the extension. The executive, which initially intended to fix the deadline on 31 December, complied with the parliament's recommendation. The same procedure was followed for the second and third extensions of the state of emergency, to 30 April and 31 July respectively. With the majority resolutions approved by both chambers, the parliament committed the government to extend the state of the emergency to the deadline indicated in the resolution. The fourth and last extension, until 31 December 2021, was instead contained in a Law Decree (105/2020),<sup>31</sup> thus placing parliamentary oversight *ex post facto*. In any case, what is relevant to note is that a procedure that was at the outset carried out exclusively within the executive has been to some extent 'parliamentarised'.<sup>32</sup> It is also noteworthy that the Chamber of Deputies never suspended its weekly sessions dedicated to MPs' questions, the s.c. question time, and to urgent interpellation addressed to government members (Griglio 2020, 60).

Contrary to the Italian Constitution, the Spanish one does regulate exceptional states. Further, Organic Law 4/1981 provides a detailed discipline of the governmental powers during an exceptional state.<sup>33</sup> Yet, in Spain the crisis management has hardly been less controversial than in Italy, the main controversial issue being the choice of the exceptional state amongst the three listed in Article 116 of the Spanish Constitution.<sup>34</sup> According to Article 4 of Organic Law 4/1981, the state of alarm is declared by the government alone; however any extension shall be

<sup>31</sup> See: Article 1, Law Decree 23 July 2021 n. 105.

<sup>32</sup> Thus aligning the procedure with the recommendations of the Venice Commission, which require parliamentary involvement, either *ex ante* or *ex post*, on the extensions of the emergency state. Most recently see: CDL-PI(2020)005rev, *Reflections*, paras 63-64.

<sup>33</sup> Organic Law 4/1981 of 1 June 1981 (*de los estados de alarma, excepción y sitio*).

<sup>34</sup> The government indeed opted for declaring a state of alarm ('*estado de alarma*'), which however does not allow for a suspension of fundamental rights. Many authors have criticised this decision, arguing that the government should have asked the parliament to declare a state of exception, which instead allow for the suspension of some fundamental rights. See: Aragón Reyes, *Editorial. Covid-19*, 1-5. This opinion has been substantially confirmed by the Spanish Constitutional Tribunal in its judgement on the constitutionality of the Royal Decree declaring the state of alarm. See: STC 148/2018 of 14 July 2021.

350 authorised by the Chamber of Deputies, which shall also detail the condi-  
351 tions and the scope of governmental powers during the extension.<sup>35</sup> The  
352 state of alarm has been extended for a total of six times<sup>36</sup> and expired on  
353 21 June 2021.

354 During the first phase of the emergency, the parliament remained essen-  
355 tially passive leaving up to the government to deal with the emergency: all  
356 new sessions were postponed, and most of parliamentary activity was sus-  
357 pended for two weeks. The plenary of the Chamber of Deputies was con-  
358 vened only for authorising the state of alarm, and once per week the  
359 Minister of Health appeared before the Health Committee of the Chamber  
360 of Deputies (Tudela Aranda 2020, 7). After this initial phase of inactivity,  
361 the parliament progressively increased its involvement in the crisis man-  
362 agement. On 15 April 2020, for the first time, MPs were allowed to ask  
363 questions and interpellate government members during a plenary session  
364 (García de Enterría Ramos and Navarro Mejía 2020, 264).<sup>37</sup> The follow-  
365 ing 7 May, the Chamber of Deputies approved the creation of a non-  
366 permanent committee to elaborate proposals for the social and economic  
367 reconstruction (*Comisión para la reconstrucción Social y Económica*).<sup>38</sup> In  
368 the two months in which it has carried out its work, the committee has  
369 held twelve sessions, in which it has hosted more than twenty-five appear-  
370 ances of government's members and representatives of other public bod-  
371 ies.<sup>39</sup> Its conclusions, which were endorsed by the plenary in two separate  
372 sessions on 22 and 29 July, contain the guidelines and objectives to be  
373 pursued in the aftermath of the crisis.

<sup>35</sup> Article 6, Organic Law 4/1981. Thus the predominant role of the Chamber of Deputies over the Senate is self-evident in the crisis management. On the point see: García-Escudero Márquez, *Actividad y funcionamiento de las Cortes Generales durante el estado de alarma*, 20.

<sup>36</sup> For a chronological review of the various declarations and the measures adopted with each of them see: <https://www.lamoncloa.gob.es/covid-19/Paginas/estado-de-alarma.aspx>.

<sup>37</sup> Enterría Ramos and Navarro Mejía, *La actuación de las Cortes Generales durante el estado de alarma*, 264.

<sup>38</sup> Diario de Sesiones del Congreso de los Diputados, XIV Legislatura, n.72. The legal basis for the creation of this committee has been Article 53 of the Rules of Procedure of the Chamber of Deputies, which allows the plenary to create non-permanent committee without investigative powers.

<sup>39</sup> A brief overview of the composition, functioning and activities of the committee can be found at: [https://www.congreso.es/web/guest/notas-de-prensa?p\\_p\\_id=notasprensa&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&notasprensa\\_mvcPath=detalle&notasprensa\\_notasId=37009](https://www.congreso.es/web/guest/notas-de-prensa?p_p_id=notasprensa&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&notasprensa_mvcPath=detalle&notasprensa_notasId=37009) last accessed 30 September 2021.

On the following 29 October, the Chamber of Deputies authorised the extension of the state of alarm disposed by Royal Decree 926/2020 and introduced some amendments to the text proposed by the government.<sup>40</sup> In particular, Article 14 was amended to impose an obligation for the President of the Council to appear every two months before the Chamber of Deputies “to give an account of the data and actions of the Spanish Government in relation to the application of the state of alarm”, whilst the original text only contained an obligation for the Minister of Health to appear once per week before the Health Committee of the Chamber of Deputies.<sup>41</sup>

In conclusion, this brief comparative overview has evidenced some analogies between the reactions of the two parliaments. First, both legislatures maintained in place the sessions dedicated to questions and interpellations to government’s member and even introduced some new obligation for them to appear before the parliament to inform it on the decisions to be made in the context of the crisis. Second, both parliaments adopted innovative instruments to enhance their participation in the management of the crisis. Whether those instruments can represent long-term solution for reinstating the parliament at the core of constitutional democracy will be discussed in the conclusions.

## 5 CONCLUSIONS

Before illustrating which arrangements may help strengthening the parliaments against the challenges posed by populism and aggrandising executives, it is necessary to make a premise. In the exceptional context of the pandemic, parliamentary oversight has been essentially majority driven, with the opposition relegated to a subordinate role (Griglio 2020, 68). This raises some concerns as to the effectiveness of the oversight, because too often the parliamentary majority is reluctant to trigger the executive’s accountability (Duenas Castrillo 2020, 45). Yet, parliamentary oversight cannot be reduced to the ability of the parliament to scrutiny and sanction the government. Resolutions, motions, and non-legislative decisions of

<sup>40</sup> Chamber of Deputies, Resolution of 29 October 2020 (BOE n. 291 of 4 November 2020).

<sup>41</sup> The original text only contained an obligation for the Minister of Health to appear once per week before the Health Committee of the Chamber of Deputies. See: Article 14, Royal Decree 926/2020, of 25 October, (*por el que se declara el estado de alarma para contener la propagación de infecciones causadas por el SARS-CoV-2*), BOE n. 282 of 25 October 2020.



405 the parliament also constitute a form of parliamentary oversight, as long as  
406 they politically commit the government to follow the indications of the  
407 legislature. From this standpoint, it is evident that only the majority is able  
408 to constraint the government. In any case, this concern is more nuanced  
409 concerning the Italian and Spanish cases, as the fragmentation of the gov-  
410 ernment coalition makes the two governments more responsive to the  
411 instructions of the supporting parliamentary majority. With this *caveat* in  
412 mind, it is time to put forward the possible lessons that can be learnt from  
413 the two case studies.

414 Even though Italian scholars are divided on the evaluation of the parlia-  
415 ment's behaviour during the pandemic,<sup>42</sup> it cannot be disputed that the  
416 Italian parliament managed to increase its involvement in crisis manage-  
417 ment by establishing new oversight practices. In particular, the possibility  
418 for the parliament to monitor the adoption and implementation by the  
419 government of acts having force of law. In Italy, concerning law decrees,  
420 parliamentary control only takes place at the moment of its validation. As  
421 regards legislative decrees, Article 14(4) of Law 400/88 only obliges the  
422 government to ask the position of the parliament when the duration of the  
423 delegation exceeds two years,<sup>43</sup> but in parliamentary practice the govern-  
424 ment asks the opinion of the competent legislative committee on the  
425 scheme of the delegated act also for delegation of less than two years (Tarli  
426 Barbieri 2009, 151). In Spain, notwithstanding Article 82(6) of the  
427 Constitution explicitly foresees the possibility of introducing in the dele-  
428 gating law 'additional forms of control' over the government's exercise of  
429 normative powers, the Spanish constitutional doctrine is wary about the  
430 possibility of introducing further parliamentary checks, as this would  
431 transform the legislative decree into a complex act prohibited by the  
432 Constitution (Dominguez Vila 2018, 33). Be that as it may, considering a  
433 more generalised use of the obligation for the government to inform the  
434 parliament and take into account its position before the entry into force of  
435 the delegated act would enhance the government's accountability towards  
436 the parliament and enhance the latter participation in governmental law-  
437 making procedures. A similar arrangement could be envisaged when a law

<sup>42</sup>For a positive assessment of parliamentary activity during the pandemic see: Lippolis, *Il rapporto parlamento-governo nel tempo della pandemia*, 274-275. For the opposite position instead see: Clementi, *Il lascito della gestione normativa dell'emergenza*, 43-46.

<sup>43</sup>Article 14(4), Law 23 August 1988 n. 400, (*Disciplina dell'attività di Governo e ordinamento della Presidenza del Consiglio dei Ministri*).

decree empowers the government to adopt implementing acts, as it was 438  
the case of the law decrees adopted by the Italian parliament during the 439  
pandemic. 440

In general, the opinions of Spanish constitutional scholarship have been 441  
rather critic towards the attitude of the parliament during the pandemic. 442  
Nevertheless, a lesson can be learnt also from the Spanish experience. 443  
Specifically, the oversight tool that deserves more attention is the creation 444  
of the Committee for the social and economic reconstruction. The crea- 445  
tion of non-permanent committees for elaborating proposals and guide- 446  
lines for future actions of both the parliament and the government may 447  
indeed allow the parliament to focus on specific issues and opening up a 448  
path for a more equilibrated sharing of norm-making powers between the 449  
executive and the parliaments. 450

On a more critical note, it has to be noted that neither the Italian 451  
Parliament nor the Spanish one created inquiry committee to investigate 452  
government's responsibility in the management of the pandemic. In Italy, 453  
the creation of such a committee was proposed already in May 2020; how- 454  
ever, in July 2021, two amendments proposed by the parties supporting 455  
the government limited the scope of the investigation to what happened 456  
in China before 30 January 2020,<sup>44</sup> raising serious doubts on the useful- 457  
ness of such a committee. In Spain, instead, the ruling majority repeatedly 458  
blocked the creation of investigating committees proposed by the 459  
opposition. 460

Overall, it seems that whilst the two parliaments refrained from employ- 461  
ing accountability instruments *stricto sensu*, they were proactive in imple- 462  
menting new practices to guarantee their participation in governments' 463  
decisions. Such an approach is undoubtedly useful to contain the first 464  
threat identified in this chapter, that is executives' aggrandisement, as it 465  
allows parliaments to orient governmental norm-making, creating a sort 466  
of co-decision procedure between the two institutions (Griglio 2020, 65). 467

Conversely, the populist challenge requires in first place a parliament 468  
willing and capable of holding the executive to account, and this brings us 469  
back to the problem of the lack of incentives for parliamentary majorities 470  
to trigger the executive's accountability. Faced with this apparently 471

<sup>44</sup>DOC XXII-A, n. 42, 15 July 2021, *Istituzione di una Commissione parlamentare di inchiesta sulle cause dello scoppio della pandemia di SARS-CoV-2 e sulla congruità delle misure adottate dagli Stati e dall'Organizzazione mondiale della sanità per evitarne la propagazione nel mondo.*

472 unsolvable problem, a first solution is to enhance the transparency and  
 473 openness of government's activities, as this is a fundamental requisite for  
 474 ensuring the executive's accountability. To this regard, the informative  
 475 duties imposed by both the Italian and Spanish parliaments on govern-  
 476 ment's members during the pandemic are going in the right direction. A  
 477 second solution could be to increase the instruments the opposition has to  
 478 scrutiny the government's action, for example by allowing the opposition  
 479 to create investigative committees.<sup>45</sup> On this aspect, however, the Spanish  
 480 and Italian parliaments do not constitute good examples.

481 The future equilibrium of constitutional democracy will be determined  
 482 by the capacity of parliaments to establish themselves as the primary fora  
 483 for elaborating proposals capable of steering government's law-making in  
 484 fundamental matters, whilst at the same time holding the government to  
 485 account for its failures in taking into account the parliament's instructions.  
 486 Only if they will manage to do so, the loss of parliaments' centrality in law-  
 487 making will be properly compensated by an effective parliamentary  
 488 oversight.

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<sup>45</sup>A good case in point is the European Parliament where, pursuant to Article 226 of the Treaty on the Functioning of the European Union, an investigating committee can be created at the request of a quarter of its component Members.

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# Author Queries

Chapter No.: 15      0005296831

Queries	Details Required	Author's Response
AU1	Please check if placement of closing single quotes in Note 6 is correct.	
AU2	Please check if the text “because the executives are ministers who represent Member States” is okay as edited.	
AU3	Please check if this note is complete.	
AU4	References “Aragón Reyes (2020), Berlin (1968), Carmona Contreras (2018), Dahrendorf (2002), De Somer (2017), Di Majo (2020), García-Escudero Márquez (2020), Groppi (2010), Khmelko (2020), Lippolis (2017), Lupo (2020), Piergigli (2009), Ruth (2018), Schmidt & Wood (2019), Stuart Mill (2010), Szente (2019), Tresca (2020), Tudela Aranda et al. (2019), Vintzel (2011), Windholz (2020)” were not cited anywhere in the text. Please provide in text citation or delete the reference from the reference list.	