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Rules and Regularities: Retrospectives on Three Ministerial Crises during Covid Emergency

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During the first pandemic wave, three parliamentary democracies had to organise the response to the health emergency in a period of ministerial crisis. The rules regulating government formation in a parliamentary system therefore had to be flexible enough to adapt to the situation. This makes it possible, some time later, to analyse the extent to which these rules are distinguishable from the regularities that are reproduced in ordinary times.
Keywords: parliamentary government, Covid-19, coalition government, judicial review.

1. Rules *vs* Regularities in Constitutional Law: a framework of analysis

Many have said that after Covid-19 the world will no longer be the same and so will the constitutional law. Nonetheless, the pandemic emergency offers a proper basis for legal comparison and, on this regard, it allows to observe the resilience of some constitutional systems facing emergency times[1].

This resilience has been particularly important in three parliamentary States, where the first wave of the health crisis crossed its paths with a salient moment of these democracies' life: a transition period after general elections, this before a new Government was formed. Such a peculiar situation happened in three countries in 2020: Belgium, Israel and Ireland.

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[1] The impact of the pandemic on the parliamentary systems of government are variously addressed by the doctrine. See on the subject C. Grosso, *Quello che resta. La forma di governo dopo l'emergenza:* post hoc ergo propter hoc*?, DPCE Online*, 1, 2023, 565 ff.; F. Rosa, *Parlamenti e pandemia: una prima ricostruzione*, in *DPCE Online*, 2, 2020, 2489 ff.; R. Tarchi, *L'emergenza sanitaria da Covid-19: una prospettiva di diritto comparato. Riflessioni a margine di un seminario pisano,* in *Gruppo di Pisa*, 2, 2020, 1 ff.; A. Vedaschi, *Il Covid-19, l'ultimo stress test per gli ordinamenti democratici: uno sguardo comparato,* in *DPCE Online*, 2, 2020, 1453 ff.

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After having outlined some common grounds of analysis for the three countries, this paper will focus on the manner in which parliamentary government rules were applied during the Covid-19 pandemic.

To address the effects of Covid-19 pandemics on parliamentary systems, we can apply an useful frame of analysis elaborated by some Italian constitutional doctrine[2].

Since '70's, authors began to inquire the differences between the Italian constitutional functioning and the text of the Constitution as usually interpreted. In order to explain this gap, an interesting distinction was borrowed from linguistics to distinguish *rules* from *regularities*. The latter are simple manifestations of what usually occurs (in Latin: *id quod plerumque accidit*). They have a descriptive function, but no binding force: regularities do not affirm what ought to be, but explain how institutional and political reality shows itself. Conversely, rules are binding: their value operates at normative level, enforcing, prohibiting or authorizing conducts.

A very simple example can be made looking to the British Constitution: to form a Government and become Prime Minister, a party leader must command a majority in the Commons[3]. In the most cases, this majority will be achieved after a general election, thanks to the first-past-the-post system.

The rule is that there must be a majority in the House of Commons to support a Cabinet. The regularity consists in the formation of single-party Governments commanding such a majority. But nothing is so easy, most of all when one tries to derive unwritten and binding rules observing institutional practice.

The very question is if and under which conditions a regularity may rise to the status of rule and when an established practice reveals the law principle existing beneath: it is the longstanding debate on the status of constitutional conventions[4].

[2] G.U. Rescigno, *Le convenzioni costituzionali*, Padova, Cedam, 1972, 98; M. Dogliani, *Indirizzo politico. Riflessioni su regole e regolarità nel diritto costituzionale*, Napoli, Jovene, 1985; A. Ruggeri, *Il governo tra vecchie e nuove regole e regolarità (spunti problematici)*, in *Annuario 2001. Il Governo (Atti del XVI convegno annuale A.I.C., Palermo 8-10 novembre 2001)*, Padova, Cedam, 2002, 318 ff.; O. Chessa, *La democrazia maggioritaria nell'interpretazione costituzionale della forma di governo*, in *Diritto pubblico*, 1, 2004, 19 ff.

[3] UK Government, *The Cabinet Manual*, October 2011, 17, par. 2.7, assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf.

[4] N. Aroney, *Law and Convention*, in B. Galligan, S. Brenton (Eds.), *Constitutional Conventions in Westminster Systems*, Cambridge, Cambridge University Press, 2015, 24 ff.

In ordinary times, constitutional conventions are regarded as regularities which have acquired the status of politically binding rules, the enforcement of which is usually not the responsibility of the Courts[5]. It is out of the scope of this paper to discuss the enforceability of conventions and the limits to that. Nonetheless, we can argue that exceptional times, by contrast, can show the inner differences between rules and regularities, only the first conserving their constraining force. The Covid-19 pandemic proves the existence of rules a democratic system cannot renounce to and of regularities which can be temporarily and justifiably let aside.

This is the reason why these events deserve a retrospective analysis, in order to outline persistent traits of parliamentary systems that overcome contingent challenges.

2. Ministerial crises in parliamentary democracies

Before introducing the object of our analysis, it is of paramount importance to explain what is meant by "ministerial crises" and their significance in constitutional law.

The term is usually found in systems where Executives are formed on a coalition basis and long periods of negotiations between parties are needed in order to provide the country with a government[6], but occurrences are equally present in Westminster-shaped systems[7].

Despite its current meaning, in this case "crisis" does not imply a pathological or dangerous process: it simply underlines a state of change from the *status quo*. A new Parliament has been installed or a new major-

[5] Recently, after the rulings in the *Miller* cases by the Supreme Court of the United Kingdom, the theory conceiving constitutional conventions as binding and thus enforceable has found a new momentum and a strong authority to rely on: see F. Ahmed, R. Albert, A. Perry, *Enforcing Constitutional Conventions*, in 17 *Int. J. Const. Law* 1146 ff. (2019).

[6] In Italy the expression "government crisis" or "cabinet crisis" is employed (*crisi di governo*: see *e.g.* G. Guiglia, *The Executive*, in V. Onida *et al.*, *Constitutional Law in Italy*, Alphen aan den Rijn, Wolters Kluwer, 2021, par. 234 ff.). In the Italian literature see M. Galizia, *Studi sui rapporti fra Parlamento e Governo*, Milano, Giuffrè, 1972; P. Virga, *La crisi e le dimissioni del Gabinetto*, Milano, Giuffrè, 1948. In francophone countries "ministerial crisis" is generally used (*crise ministérielle*: see *e.g.* P. Lauvaux, *Le parlementarisme*, Paris, Presse universitaire de France, 1987, p. 67 ff.). In Germany this period is generally referred to as *Regierungsbildung* (government formation): see *e.g.* K. König, *Operative Regierung*, Tübingen, Mohr Siebeck, 2015, 157 ff.

[7] In Canada for example: see. M. Bosc, A. Gagno (Eds.), *House of Commons Procedure and Practice*, 2017, ch. 2, www.ourcommons.ca/about/procedureandpractice3rdedition/ch_02_3-e.html. In New Zealand the Cabinet Manual speaks of electoral (6.16) or mid-term (6.54) "transitions".

ity has arisen and the basic principle of parliamentary government – the government needs to be approved, or at least not opposed, by a parliamentary majority – applies, so that the ministry must change accordingly. That is not just a politically relevant period, as constitutional systems set rules to guide this process. Generally, they include, with different degrees of specificity, various arrangements. On the one hand, the two organs of the fiduciary relationship suffer limitations in their activities: the outgoing government is barred from acting beyond usual business[8] and the activities of Parliament are restricted until the crisis is solved[9]. The crisis triggers specific constitutional procedures in order to form a new ministry, involving the powers of the Head of the State. Furthermore, in some systems rule are envisioned to set the role of the civil service in order to facilitate the transition[10].

A slowdown of every institutional activity is required until the confidence relation between Parliament and government is restored and the Executive gains its full powers. The smooth running of a such delicate institutional turning point should normally be preserved: so, the Covid-19 pandemic has posed unprecedented problems that deserve to be addressed.

3. Common points to the three systems

The three selected countries show several similarities that allow to compare their cases.

First, in all three democracies a parliamentary system of government is enacted by the Constitution[11]: this is the fundamental point, which will be examined in detail later. Furthermore, and more important for our purposes, each of them may be classified as a consensual-type of parliamentary government. Whereas Belgium and Israel are classical examples of consensual democracies, in the last decades Ireland progressively swung

[8] See below, paragraph 4.1.

[9] See for the Italian Parliament V. Di Ciolo, L. Ciaurro, *Il diritto parlamentare nella teoria e nella prassi*, Milano, Giuffré, 2013, 721 ff.

[10] See the *UK Cabinet Manual*, par. 2.14

[11] Even if the Irish President is elected by the people, his or her role is highly ceremonial or, at best, moral guidance. So Ireland can easily identified as a parliamentary democracy and not a semi-presidential system. On the subject see the contributions in AA.VV., *The Politics of the Irish Presidency*, in *Irish Political Studies* 4 (2012), especially John Coakley and Kevin Rafter, *The President of Ireland: A Constitutional and Political Figurehead?*, 493 ff. and M. Gallagher, *The Political Role of the President of Ireland*, 522 ff.

from the majoritarian type of democracy to the consensual one[12], and in the last elections this quality has patently emerged.

This common trait derives from the fact that proportional representation exists in all three countries, even though with some differences[13]. Hence, a wide spectrum of forces can obtain seats in Parliament, increasing a political fragmentation that entails considerable periods to form a cabinet. Coalition deals underpinning a parliamentary majority need long negotiations between the factions, and no guarantee is given that a positive solution will be achieved. Consequently, in default of agreements, new general elections may be called, so that the people determine a new (or confirm the existing) balance of power between parties.

In fact, accordingly to its Basic Law[14], Israel witnessed three closely spaced elections in less than a year[15]. Ireland and Belgium, by contrast, did not experiment snap elections without forming a new government, but the time necessary to form a cabinet increased significantly in the most recent elections[16]; strikingly the central European kingdom reached a record for the absence of a new government after Parliament renewal[17].

The combination of these systemic peculiarities with the world health crisis caused by the Coronavirus resulted in an unprecedented occasion to stress the written and customary constitutional rules presiding parliamentary democracy.

4. Caretaker governments and emergency powers

The first aspect I intend to address is the application of the so-called "caretaker convention" during the health crisis. In fact, when the pandemic struck, in mid-March 2020, none of the three countries had a full-power government.

[12] A. Lijphart, *Patterns of Democracy*, New Haven, Yale University Press, 2012, 252.

[13] Israel has a nationwide proportional representation. In Belgium this is applied on a regional level. In Ireland, by contrast, the members of Parliament are elected by single transferable vote in different constituencies.

[14] See sections from 7 to 11 of the Basic Law: The government. Unless a government is formed within a certain period, the Knesset is dissolved.

[15] April 2019 ; September 2019; March 2020.

[16] In 2014 the elections were held on 25 May and the Michel government was sworn five months later.

[17] In 2010 541 days were needed after general elections to form the Di Rupo Cabinet.

In Belgium the federal legislative elections had been held almost 10 months before, in May 2019 simultaneously with the European Parliament elections[18], resulting in the government (more precisely: two governments)[19] dealing solely with currents affairs since then.

In Israel, the Netanyahu Cabinet was serving as caretaker government since April 2019, when a snap election was called due to the disagreements between the Coalition partners. After two unsuccessful elections (in April and September 2019), a third vote was held in March 2020, with no outstanding winner able to command a majority in the Knesset.

In Ireland a snap election called by Prime Minister Leo Varadkar took place on 8 February 2020 and as the ballot returned no majority a rather complicated panorama emerged, in which the outgoing coalition pact would have not been sufficient to secure the *Dail Eireann's* confidence to a new Cabinet.

4.1. *The caretaker convention (or "principle of restraint")*

The caretaker convention, also referred to as "principle of restraint"[20], is a fundamental corollary of the basic principle of parliamentarism: the Executive branch must retain the confidence of the Legislative one (or, in case of bicameralism, of the elective Chambers). If the Parliament has been dissolved and a new government has not been appointed yet, or the confidence relation languishes due to a no-confidence motion or to a spontaneous Prime Minister's resignation, the continuity of the State imposes that the Cabinet must stay in charge[21], but with limited powers and functions. Therefore, what happens when these limited powers need to cope with a national emergency?

[18] See B. Biard *et al.*, *Les résultats des élections fédérales et européennes du 26 mai 2019*, in *Courrier hebdomadaire du CRISP*, 28-29, 2019.

[19] In practice, after the resignation of the Prime Minister Charles Michel, who was appointed at the head of the European Council, a new Prime Minister was nominated by the King to guide the caretaker Executive.

[20] It is significant to observe the shift between the terms "convention" and "principle". I agree with Pr. Adam Perry, who underlines that this is not necessarily a contradiction: A. Perry, *Enforcing Principles, Enforcing Conventions*, in *UK Constitutional Law Association Blog*, 3rd December 2019, ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/.

[21] As the Israeli Supreme Court stated in 1986, «governments rise and fall, but the government forever stands» (HCJ 5/86 *SHAS Party Association of Sephardim Shomrei Torah in the Knesset v. Minister of Religions*).

In the Westminster systems[22] the Cabinet Manuals and Handbooks outline the issue. The British Cabinet Manual[23] states that: «if decisions cannot wait they may be handled by temporary arrangements or following relevant consultation with the Opposition». As the New Zealand Manual Cabinet explains, «the level of consultation might vary according to such factors as the complexity, urgency, and confidentiality of the issue»[24] and the Australian guidelines appear to be consistent with this understanding[25]. More clearly, in Canada it is well established that «in the event of emergencies, such as natural disasters, the government must have a free hand to take appropriate action to ensure that the public interest, notably the safety and security of Canadians, is preserved»[26].

4.2. *Caretaker governments facing pandemic*

The caretaker principle is well known also in continental European democracies under the name of "current affairs principle" (in French: *affaires courantes*)[27] and it is currently deployed by administrative jurisdictions to review elective authorities' acts during interim periods.

[22] See J. Menzies, A. Tiernan, *Caretaker Conventions*, in B. Galligan, S. Brenton, *Constitutional Conventions*, cit., 91.

[23] *UK Cabinet Manual*, 17, par. 2.29.

[24] New Zealand government – Cabinet Office, *Cabinet Manual 2017*, June 2017, 91, par. 6.25: «if neither deferral nor temporary arrangements are possible, be made only after consultation with other political parties, to establish whether the proposed action has the support of a majority of the House. The level of consultation might vary according to such factors as the complexity, urgency, and confidentiality of the issue», dpmc.govt.nz/sites/default/files/2017-06/cabinet-manual-2017.pdf.

[25] Australia government – Department of the Prime Minister, *Guidance on Caretaker Conventions*, 2018, 2, par. 2.4: «If circumstances require the government to make a major policy decision during the caretaker period that would bind an incoming government, the Minister would usually consult the Opposition spokesperson beforehand. In the past, for example, the government has agreed to provide urgent financial assistance to drought-affected areas following consultation with the Opposition», www.pmc.gov.au/sites/default/files/publications/guidance-caretaker-conventions-2018.pdf.

[26] Government of Canada – Privy Council Office, *Guidelines on the Conduct of Ministers, Ministers of State, Exempt Staff and Public Servants During an Election*, September 2019, par. 1. See also *Manual of the Official Procedure of he Government of Canada*, 91: «It is recognized that the principle of restraint should not however operate to prevent action being taken on urgent or routine matters necessary for the conduct of government or to forestall immediate action where the public interest requires it», jameswjbowden.files.wordpress.com/2011/09/manual-of-official-procedure-of-the-goc.pdf.

[27] See for a discussion on the principle in the European continental law: F. Laffaille, *L'expédition des affaires courantes, un principe du droit public?*, in *Droit prospectif. Revue de la recherche juridique*, 1, 2009, 373 ff.

There is no doubt that the pandemic represents an urgent and unforeseen emergency to cope with and, consequently, that it allows the incumbent governments to take the appropriate actions to preserve their citizens' health. Nonetheless, the breadth of the phenomenon and the need to contrast its spread through social distancing and constraining people's freedoms forced the governments to follow specific methods for action.

In Israel, Prime Minister Netanyahu's Cabinet has been adopting emergency regulations since 15 March 2020. The Constitutional basis for those orders was identified in art. 39 of the *Basic Law: The Government*, qualifying the acts as temporary regulations related to a state of emergency[28]. Furthermore, in the absence of a formal pronouncing by the Knesset ascertaining the state of emergency, the government invoked the letter *b*) of the same Basic Law article, which entitles the Prime Minister to adopt the emergency regulations without convening the Knesset, if that is impossible according to the Prime Minister's own judgment[29]. It is important to note that while the first emergency regulation was enacted the day before the swearing-in of the freshly elected Knesset, a state of emergency was already declared by the previous Parliament and on 17 February 2020 its extension was granted until June 2020 before elections. As a matter of fact, in Israel the state of emergency is permanent: the declaration of emergency has been renewed by the Knesset at every expiration since the foundation of the State[30]. In 1999, the Association for Civil Rights in Israel made an application with the Supreme Court asking to prevent the Knesset to extend the state of emergency. Since then, though if it refuses to rule the state of emergency extension unlawful, the Court has implemented a sort of permanent control in order to verify that the emergency legislation has been amended and replaced by non-contingent Knesset statutes[31].

[28] Art. 39, *a*): «During a state of emergency the government may make emergency regulations for the defense of the State, public security and the maintenance of supplies and essential services; emergency regulations will be submitted to the Foreign Affairs and Security Committee at the earliest possible date after their enactment».

[29] Art. 39, *b*): «Should the Prime Minister deem it impossible to convene the Knesset, given the existence of an immediate and critical need to make emergency regulations, he may make such regulations or empower a Minister to make them».

[30] Basic Law: The government, art. 38, *b*): «The declaration will remain in force for the period prescribed therein, but may not exceed one year; the Knesset may make a renewed declaration of a state of emergency as stated».

[31] See HCJ 3091/99, *Association for Civil Rights in Israel v. Knesset*: the affair, initiated in 1999, was carried on by a series of adjournments by the petitioners and consequent orders by the Court, following the historical evolution of Israel security situation. In the end, the final decision rejecting the petition was given on May 5th 2012.

Therefore, considering the letter of art. 30 of the Basic Law: The government and with regards to this context and the gravity of the pandemic, one can not be surprised that the nature of transitional government of the Netanyahu Cabinet did not affect its emergency powers [32]. Nor is surprising the Supreme Court's approach to the issue: if the Court had enforced the caretaker principle in the past, in many periods of Israeli history the then incumbent governments – during transition periods – would not have been able to cope with the fragile internal and exterior security situation. In fact, in 2020 the high jurisdiction was filed a petition against a governmental decision authorizing the Israel Security Agency to collect, process and use data regarding persons who had tested positive for the Coronavirus. In this *Ben Meir v. Prime Minister* case (decided on 26 April 2020), the Court affirmed, in opposition to a more ancient case-law[33], that a caretaker government enjoys «more limited powers than a regular one»[34]. However, it also considers that «under the unique, exceptional circumstances that developed, and especially given the time frame imposed by the rapid spread of the Coronavirus, which did not allow for initiating primary legislation», the government decision – regarded as a primary source of law – was lawful.

With regards to Ireland, the caretaker convention is not as firmly established as in other Westminster-shaped systems (*e.g.* New Zealand). Under the Irish Constitution (art. 28.11.1), the Prime Minister (*Taoiseach*) and his/her government remain in place until a successor is appointed[35]. The law sets no limits to the outgoing Cabinet's powers, exception made for the appointment of eleven senators by the Prime Minister (art. 18.3

[32] *B*): «When a new Knesset has been elected or the government has resigned (sections 18, 19, 20, 21 or 29), the outgoing government shall continue to carry out its functions until the new government is constituted»; *c*): «A Prime Minister who has resigned shall continue to carry out his functions pending the constitution of the new government. If the Prime Minister has died, or is permanently incapacitated, from carrying out his duties, or if his tenure was ended because of an offense, the government shall designate another of the Ministers who is a member of the Knesset and of the Prime Minister's faction to be Interim Prime Minister pending the constitution of the new government».

[33] Cfr. President Barak's opinion in *Weiss v. Prime Minister* (HCJ 5167/00): «There is nothing in the Basic Law: the government which narrows the formal authority of the resigning prime minister and the formal authority of the ministers, to ongoing activities only».

[34] A textual foundation for this position might be found in art. 29, *g*), of the Basic Law: The government, where an outgoing Prime Minister is barred from dispersing the Knesset. The Supreme Court in the case *Orr-Hacohen v. Prime Minister* (HCJ 7510/2019) hold that a transitional government suffers limitations in respect to the appointment of ministers, accordingly to art. 30, *d*), of the Basic Law: The government.

[35] Irish Constitution, art. 28.11.

Constitution)[36]. The 2020 Caretaker government was actually the fifth in the history of the insular Republic[37]. The first Covid-19 case was detected in Ireland on 29 February, three weeks after the snap election called by Prime Minister Varadkar and nine days after the Dáil first venue, which triggered the Prime Minister's resignation.

To restrain the pandemic, the caretaker government proposed two pieces of legislation that were rapidly passed by both Houses[38]. Following the opposition parties' request, the two Acts granting the government special faculties were approved with specific "sunset provisions" that fixed 9 November 2020 as expiring deadline of the Covid-related provisions[39]. It is interesting to underline that those Statutes were approved just a week before the Irish Senate was renewed and thus raised the question whether the second Chamber could be circumvented in emergency legislation approval. Finally, the fast-track procedure left the issue to speculations (and so did the High Court: see below).

The weakness of the caretaker principle in Ireland is well shown in this case: in fact, the government was able to introduce new legislation in the Chambers, which technically is the first power an Executive becoming a Caretaker government is supposed to loose[40]: this can also be seen in the Belgian case.

The Belgian example projects us to the next topic, meaning a new Cabinet formation during the emergency. In fact, the first Wilmes government had been in charge as caretaker government since 29 October 2019 and, as such, the Cabinet had really narrow powers, for customary

[36] That provisions became, indeed, quite relevant during the transition period: see *infra*.

[37] Cfr. *Caretaker Governments and Caretaker Conventions*, Oireachtas Library and Research Service Note, 28 June 2016, updated 19 March 2021, data.oireachtas.ie/ie/oireachtas/libraryResearch/2021/2021-03-23_l-rs-note-caretaker-governments-and-caretaker-conventions_en.pdf.

[38] Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (henceforth: the Health Act), signed into law by the President of the Republic on March 20th; Emergency Measures in the Public Interest (Covid-19) Act 2020, enacted on March 27th (the Emergency Measures Act).

[39] Health Act, section 2 (3*b*); Emergency Measures Act, section 1(3).

[40] G. Hogan, H. Hogan, *Legal and Constitutional Issues Rising from the 2020 General Election*, 27 April 2020, ssrn.com/abstract=3587047, 10: «the Covid-19 pandemic has necessitated a radical executive and legislative response from the government. 28 Constitutionally imposed constraints on the caretaker government could have been disastrous, by limiting the executive's ability to respond effectively to the pandemic. While it may be desirable for a government to take major policy decisions with the backing of a full democratic mandate, the Constitution ensures that the State will not be left without a functioning executive, and that caretaker governments do have the ability to respond swiftly to an emerging crisis with the full scope of their executive powers».

constitutional law on "current affairs" is strict and duly applied by the Administrative Court (the Council of State)[41]. Given this situation, the Parliament could not confer the government the special powers needed by the emergency.

In Belgium, the conferral of extended powers to the King, who is expected to exercise them based on the advice of the responsible cabinet, is briefly envisioned by art. 105 of the Kingdom Constitution.

A legislative tradition has thus been established: when an emergency context demands so, Parliament bestows these *pouvoirs spéciaux* upon the government (even if formally vested on the King) to cope with the extraordinary circumstances[42]. In this frame, it is quite obvious that a caretaker government cannot receive the special powers, due to the necessity of restoring the confidence relation between the two branches[43]. Indeed, to receive *special* powers is widely in contradiction with the very nature of an *ordinary affairs* administration. Therefore, the absence of a majority-approved Cabinet stood out as an insurmountable obstacle, which could bar Belgian authorities to act properly against the pandemic. A witty solution for the long-lasting ministerial crisis was hence found.

5. Cabinets' formation

The Belgian case introduces the second point of observation: how did the rules and conventions on the formation of the Executives work in the pandemic emergency, and how did the latter influence the outcomes?

The end of the ministerial crisis in Brussels followed an unusual path, since the Wilmes Cabinet was confirmed in charge by a covenant among the non-nationalist political forces, but only temporarily (six months) to deal with the epidemiological crisis. Therefore, the King re-appointed the Cabinet without changes and the confidence was renewed by the House of Representatives on 19 March, after a Prime Minister's speech in which Sophie Wilmes confirmed she would return before the Chamber within six months, on 17 September, asking for a new confidence vote. The Cabi-

[41] C. Behrendt, M. Vrancken, *Principes de droit constitutionnel belge*, Bruges, la Charte, 2019, 328.

[42] Ivi, 343.

[43] That does not mean that a caretaker government could not deal with the emergency, but it could do so exclusively with its ordinary powers: ivi, 333.

net was a minority one, but with the fullness of its faculties, so that the Special Powers Act could be approved and enforced[44].

These developments were quite a detour from the classical procedure ruled by constitutional customs and conventions. The former notably imposes the appointment of one or more *informateur*, whose scope is to fathom the parties' intentions and to propose a basis for a coalition agreement[45]. Only when such a political will is established, the King appoints a *formateur* in order to shape the ministerial team in accordance with parties' requests. This *formateur* usually becomes the Prime Minister, after a Royal Decree is enacted on purpose. All these passages were skipped in March 2020: the government resigned in the hands of the King, who immediately re-appointed M.me Wilmes as Prime Minister.

As to convention, the fact that the Second Wilmes Cabinet is a minority government is not a real *première* for Belgium, but is actually a rare event: generally coalition governments are constituted after long and hard negotiations and the current government is the third minority administration in charge since the foundation of the Kingdom of Belgium, in 1831[46].

As a matter of fact, as the Executive was heading to its six months expiration, the process was resumed in August 2020 following the usual pattern: the King appointed two new *informateurs* entrusting them with exploring the possibility of a so-called "Vivaldi coalition"[47].

In Israel, the Executive's formation was far more suffered. After the third elections on 2 March 2020, two blocks confronted each other, with a very scarce difference of seats in the Knesset. On the one hand, the Prime Minister Nethanyau could count on 58 seats of the right-wing parties; on the other hand, his principal opponent, Benjamin Gantz, led the anti-Netahanyau area with 62 seats, fifteen of which had been won by the Arab Joint List (an electoral coalition of Palestinian parties).

[44] L. Rigaux, *Le gouvernement minoritaire Wilmès II. Les étapes de la formation d'un gouvernement minoritaire d'un nouveau genre*, in *Les Carnets de crise du Centre de droit public de l'ULB*, 7 April 2020, droit-public.ulb.ac.be/carnet-de-crise-8-le-gouvernement-minoritaire-wilmes-ii-les-etapes-de-la-formation-dun-gouvernement-minoritaire-dun-nouveau-genre1/.

[45] When the perimeter of the possible alliance is substantially shaped, the *informateur* is called *préformateur* and his or her role consists in facilitate the coalition deal. See C. Behrendt, M. Vrancken, *Principes de droit constitutionnel*, cit., 36, 289.

[46] See L. Rigaux, *Historique des gouvernements minoritaires en Belgique de 1830 à aujourd'hui: une solution de crise*, in *Les Carnets de crise du Centre de droit public de l'ULB*, 8 April 2020, droit-public.ulb.ac.be/wp-content/uploads/2020/04/Historique-des-gouvernements-minoritaires-en-Belgique-de-1830-%C3%A0-aujourd%E2%80%99hui-une-solution-de-crise-1.pdf.

[47] The name is taken from the Antonio Vivaldi's *Four Seasons*, since a great variety of political colors are supposed to be represented (seven parties).

The first option was for Gantz to form a minority government with a supply and confidence agreement with the Joint List, even though some MK from Gantz's own party refuse to constitute a parliamentary majority with the Palestinian elected. The second one was a national unity government deal between the "two Benjamin" (Netanhyau and Gantz).

In this context, and focusing on constitutionally relevant profiles, the activity of the President Rivlin became particularly significant, far from the ceremonial role typically attached to the Head of the Israeli State. Commissioning Gantz with a mandate to form a government, Rivlin spoke out for a coalition agreement between the two main opponents in order to provide stability to the country during the Coronavirus emergency.

Despite the difficulties in these negotiations, the President insisted on the direction of a national unity government to be formed as soon as possible. Consequently, he denied Gantz a mandate extension of two weeks, and also refused to grant Netanyahu a mandate to form a Cabinet if a no agreement between the two Benjamin was signed on 13 April. Finally, he acquiesced to a two-days extension of Gantz's mandate, after having secured the commitment of both parties to enter a coalition.

Such an intervention by the President of the State is quite unusual, since the President generally does not intervene in the political arena: his role is not conceived as a political leader's one, rather it is a moral guide for the Israeli Nation and, equally, he symbolically represents a moral authority for the Jewish diaspora communities worldwide[48]. But amidst a longstanding political crisis combined with a severe pandemic, he played a different role, and not just a moral suasion.

That is a perfect example showing the impact of factual and political contingencies on constitutional rules. In practice, this pandemic context gave raise to no new powers for the President: he simply had to act differently and exercise his office fully. At most, we might say that the emergency gave a *substantial dimension* to his powers, which are normally considered mainly as formal.

[48] See the Israeli Presidency website: «The choice of President is in the hands of the Knesset members, and thus would appear to be political. However, the symbolic and representative meaning of the institution of the Presidency has had the effect of ensuring that the presidents elected were usually men of high spiritual stature, who had contributed to the Zionist endeavor and to the State, and have won much favor among all sectors of the nation. Many of the world's Jews regard the President not just as the President of the State of Israel but as the President of the Jewish People», archive.president.gov.il/English/The_Presidency_In_Israel/Pages/PresidencyNew.aspx. This fact is underlined by the Hebrew title of the President (*nasi*) which is of biblical origin and designated the leaders of the Tribes.

Eventually, the solution he championed was enacted, as the two Benjamins agreed to form a coalition government, and more specifically, an "emergency" coalition government, envisaging a rotation between the two in the role of Prime Minister and Deputy Prime Minister, with Netanyahu going first. This arrangement required a Basic Law amendment, which on the one hand institutionalizes the constitution of "rotating governments" and, on the other hand, contains provisions applicable only to the new government as an emergency cabinet fighting against Covid-19.

In Ireland, by contrast, the government's formation process was less affected by the epidemic than Belgium and Israel. Better said, the health crisis did not influence the application of constitutional rules, but it urged two parties with an historical strong rivalry (the *Fianna Gael* and the *Fianna Fail*) to reach a coalition agreement. This was signed between the two as well as the Green Party only in June 2020, and in its very introduction, the coalition program recalls the urgent challenges the Covid-19 has presented to Ireland and to the global community[49].

6. Parliamentary government, emergency and the Courts

The last facet I intend to address concerns the interpretation of the parliamentary system of government given by the Court in light of emergency situations. In particular, my attention will focus on how judges handle the arguments that the parties draw from the extraordinary circumstances to endorse specific interpretations of constitutional rules.

I have already mentioned the fact that the Israeli Supreme Court had to deal with the caretaker convention and to interpret it, but a most relevant case arose in Israel, before the rotation government was created, and it concerned directly the core of parliamentary regime[50]. In fact, the outgoing Speaker of the Knesset, Mr. Yuli Edelstein, a member of the Likud Party led by Netanyahu, refused to convene the freshly elected

[49] *Our Shared Future – Program for Government*: «This is a defining moment for our country. We face urgent challenges which touch every community. In the space of a few short months our world has turned upside down. Lives have been lost and hearts broken, and our lives and livelihoods have been changed utterly. In striving together against something which threatens us all, we have shown we can surprise ourselves – adapting quickly, building new alliances and collaborating in ways we never expected – all to realize a common purpose: our common future».

[50] HCJ 2144/2020, *Movement for Quality Government in Israel v. Speaker of the Knesset*, decided on March 25, 2020.

assembly, in which a new majority was supposed to substitute him. This substitution would allow the anti-Netanyahu groups to take control of the parliamentary agenda during the cabinet formation. One of the main arguments opposed by the Speaker was that he wanted to prevent the spread of the infection among the lawmakers.

The case gave a great opportunity to the Supreme Court to reaffirm the role of the Knesset in the Israeli system of government. Even though the Court reasserts that its interventions in parliamentary affairs are limited only to «special cases that threaten harm to "the fabric of democratic life" or to the fundamental structure of [Israel] parliamentary regime», in this occasion the extraordinary of the circumstances was such that «the Speaker's continued refusal to allow the Knesset plenum to vote on the election of a permanent Speaker undermines the foundations of the democratic process». The Court consequently granted an order *nisi*, instructing the acting Speaker to convene the Knesset plenary.

I cannot retrace here the complete reasoning of the Court, which clearly referred to its precedents and to Israeli Law, but I would like to underline some passages directly related to the Coronavirus emergency. To synthesize, we can say the Supreme Court holds that in times of emergency institutional figures must abide by written rules and customs more scrupulously than ever, for the "rules of the democratic game" must be preserved when other rules yield to the force of emergency.

Facing the restrictions of freedoms imposed by pandemic, the citizens could not stare at their democratic institutions and see a chaotic situation. The strict respect of the rules can contribute to contain the uncertainty and only if democracy processes are safeguarded, the restrictions of liberties can be tolerated. That is a very clever and powerful argumentation to justify the judicial review of an highly discretionary and political act, like the convene of the Knesset by its acting Speaker. The substantive dimension of citizens' right cannot exist regardless to the institutional dimension of democracy and its mechanisms.

If such is the *acquis* of the Israel supreme jurisdiction, in Ireland the High Court reached divergent conclusions in a case that, even pretty different, had some common traits with the former. In facts, a group of senators sought a constitutional interpretation from the High Court allowing the Senate to seat even without the eleven senators appointed by the Prime Minister.

One of the argument moved by the plaintiffs was precisely referred to the Coronavirus emergency: what if the Senate would not have been able to legislate with the other Chamber to cope with the grave circum-

stances? Might the absence of a new elected *Taoiseach* bar the Parliament from performing its duties in a state of extreme need?

The answer of the Court was "yes". Firstly, because the emergency cannot influence the interpretation of the Constitution, whose terms refer to a completely constituted Senate[51]. Secondly, in such a contingency the political forces would not impede the election of a *Taoiseach*. It is a very hopeful answer, which the Court considers plausible, because – judges affirm – the parties acted in this manner during the pandemic approving unanimously several measures to fight Covid-19[52].

It is clear that this interpretation pushes for an acceleration in the election of a new Prime Minister. Nonetheless, it does not empower the role of Parliament as legislator: on the contrary, the High Court gave a great role to parties who can procrastinate the appointment of the head of the government and so potentially block the legislation. Concurrently the outgoing government is equally strengthened, because the Chambers' powers are substantially frozen, whereas the Cabinet ones are more or less unvaried (as I pointed out, there is no strong caretaker convention in Ireland).

Accordingly to this approach, the High Court had denied shortly before an application challenging the emergency legislation enacted in March 2020 on several grounds, one of whom was the nature of the caretaker government. In that case, the Court stated that «it cannot be doubted that one of the duties of the government is to take steps to address the health and economic issues that arise from the Covid-19 pandemic»[53].

[51] [2020] IEHC 313, *Senator Ivana Bacik and others vs. the Taoiseach*, 29th June 2020, par. 153: «The Court acknowledges as genuine and sincere the plaintiffs' concerns that without a functioning Seanad it would be impossible to enact emergency legislation that might at any time be required and that the arrival of the Covid-19 pandemic served to highlight the significance of risk to which the State might be exposed. While we understand why the plaintiffs have raised this issue, we do not believe that considerations of that kind can be allowed to influence the interpretation of the Constitution. As the Supreme Court judgment in *Curtin* stresses, we are bound to interpret the Constitution by reference to its terms. We see nothing in the terms of the Constitution which would permit the convening of a partially constituted Seanad comprising only the forty-nine elected senators».

[52] Ivi, par. 154: «Further, as already observed in this decision, had it been necessary inthe period since the Seanad general election was concluded to enact emergency legislation to protect the public, it seems to us inconceivable that the elected representatives of the people would not have acted urgently to overcome the political stalemate and elect a Taoiseach so as to allow the Oireachtas to function and carry out its legislative functions. Recent events in reaction to the Covid-19 crisis, demonstrate that, when necessary, the elected representatives of the people have been able to overcome their differences and to enact emergency legislation including legislation that was passed without a vote. There is no reason to suppose that the election of a Taoiseach would not proceed if that was what was required to pass legislation necessary to protect the public».

[53] [2020] IEHC 209, *O' Doherty vs. The Minister of Health*, 13th May 2020, par. 71.

For the time being, we have no example to bring from Belgium. The Council of State has not reviewed Covid-related measures under the currents affairs principle yet, because, as I said, the government was reinstalled with full powers. But, since a new interim period is about to start as Prime Minister Wilmes promised when she received the confidence of the House, it is not to exclude that some questions on the subject will arise.

7. Conclusions

At the end of this itinerary, I think two orders of conclusive remarks should be made about the relation between emergency situation and parliamentary government.

The first concerns the slight difference distinguishing *rules* and *regularities* addressed at the beginning of this paper. It is clear and uncontroversial that a system of government lives through both the dimensions: political regularities, which usually shape the interpretation and application of some rules, and juridical and binding principles, which can be even enforced by the Courts[54].

Emergency times reveal the fracture between the two. If the *rules* must be obeyed even during a crisis or, at most, they had to be derogated by other temporary rules, *regularities* yield to the contingency. It is primarily – but non exclusively[55] – for the Courts to rediscover the principles

[54] Even the U.S. Supreme Court has recently underlined the weight of institutional practice in juridical interpretation: see US 591 [2020], *Trump v. Mazars USA, LLP.* In the majority opinion, the Chief Justice Robert writes: «Although the parties agree that this particular controversy is justiciable, we recognize that it is the first of its kind to reach this Court; that disputes of this sort can raise important issues concerning relations be-tween the branches; that related disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us. Such longstanding practice "is a consideration of great weight" in cases concerning "the allocation of power between [the] two elected branches of government," and it imposes on us a duty of care to ensure that we not needlessly disturb "the compromises and working arrangements that [those] branches themselves have reached"». It is rather interesting to highlight such statements, made in a system like the United States where written law is «a great continent, an expanse of land with scattered lakes, rivers and ponds of tradition», in contrast with the British parliamentary constitution where «written constitutional documents are islands of text in a sea of unwritten conventions» (M. Paulsen *et al.*, *The Constitution of the United States*, Foundation Press, 2010, 22).

[55] The Heads of the States and the Speakers of parliamentary assemblies are of course called upon to to defend the basic principles of the system.

lying under the practice and, as we have seen, they did it with various outcomes. An emergency might suggest new momentary practices or unexpected action, but especially then principles should be treasured and protected (as the Israel Supreme Court taught in the *Speaker of the Knesset* case).

The second point concerns the balance of powers. An emergency time is an Executive time: it is under the responsibility of governments to cope with the emergencies and the dangers for people. In parliamentary systems, that leads some *residuum* of dualism to resurface.

As the continental European doctrine affirms[56], the Executive in a parliamentary type of government can rely on two different form of legitimacy. Either it is a simple emanation of Parliaments majority – and we called that "monist Parliamentarism" – or it bases its powers on a substantial appointment by the Head of the State and the Parliament approval ("dualistic Parliamentarism"). The latter is generally viewed as an older version of the former, mostly if one conceives the British history as paradigmatic of the institutional evolution of Parliamentarism. In the monistic version, the government shares the Parliament democratic legitimacy as Parliament delegate to exert the executive power (and so every minister must be a member of the Chambers). In the dualistic one, a Cabinet is believed to have its own legitimacy regardless to Parliament, conferred to him by the Head of the State.

But in emergency times one might glimpse a flash of unavoidable dualism in almost every parliamentary democracy: emergency gives the Executives another basis of temporary legitimacy, which entitles them to act to protect the community exercising important powers. That has emerged very clearly with regards to the caretaker convention in two of our countries (Israel and Ireland), that are paradoxically two systems in which the monism is clearly enshrined by the Constitutions through the provisions concerning the government's appointment. On the contrary, the Belgian Constitution maintains a formal dualism – the King is formally free to appoint *his* ministers, to enact legislation and to receive the special powers – but the constitutional tradition has installed a substantial monism for almost two centuries. The problem in Belgium was that the government had no legitimacy at all, because a long period from the general elections had passed out and the Prime Minister had even changed without a parliamentary investiture.

[56] See D. Baranger, A. Le Divellec, *Régimes parlementaires*, in M. Troper, D. Chagnollaud (Eds.), *Traité international de droit constitutionnel*, II, Paris, Dalloz, 2012, 159 ff.

Some authors have expressed concerns about the thesis that seeks to recognize a preeminent competence of the government in coping with the health situation[57] and theses worries are, of course, of major importance to avoid arbitrary actions and threats to democracy foundations[58]. Yet, they have to be resettled in the institutional framework of parliamentary systems of government, in which Executive is always accountable to the legislature, regardless of contingent circumstances. Even if governments may take extraordinary measures, their constitutional responsibilities before Parliaments do not change or depart: this is a fundamental principle that cannot be overruled by emergency. If anything, the issue is how to guarantee a sufficient parliamentary scrutiny to hold ministers accountable.

In conclusion, emergency can entitle governments to act, but cannot substitute the essence of parliamentary democracy, which is people consent through their representatives. The fact that in every country the political crisis was overcome by the formation of new governments, all of whom was devoted to manage with the pandemic, confirms that.

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[57] T. Ginsburg and M. Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, July 26, 2020. Virginia Public Law and Legal Theory Research Paper No. 2020-52, Available at SSRN: ssrn.com/abstract=3608974.

[58] See, on the *Speaker of the Knesset* case, R. Weil, *Judicial Intervention in Parliamentary Affairs to Prevent a Coup d'état* (July 6, 2021). Maryland Law Review, 2021, Available at SSRN: ssrn.com/abstract=3880979.