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The Italian Constitution Facing the Test of the Covid-19 Pandemic

Keywords: Italian constitutional system; Government; Parliament; Regions; Covid-19 pandemic
Słowa kluczowe: włoski system konstytucyjny; parlament; region; pandemia Covid-19

Abstract

The article analyses the Italian Government's response to the recent Covid-19 pandemic and, more precisely, the centralization of decisions and the consequent marginalization of Parliament and Regions. The author assesses the compatibility of the governmental emergency measures with the Italian Constitution (which does not expressly regulate the "state of emergency") and with the principle of proportionality, in order to verify whether the compression of some fundamental rights and constitutional competencies was justified by the contingent crisis.

Streszczenie

Włoska konstytucja w obliczu pandemii Covid-19

Artykuł przedstawia reakcję rządu włoskiego na niedawną pandemię Covid-19, a dokładniej kwestię centralizacji decyzji podejmowanych w temacie pandemii oraz związaną z tym marginalizację parlamentu i regionów włoskich. Autorka dokonuje oceny zgodności rządowych środków nadzwyczajnych z włoską konstytucją (która nie normuje wprost instytucji „stanu wyjątkowego") oraz z zasadą proporcjonalności, w celu

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sprawdzenia, czy centralizacja niektórych praw podstawowych i kompetencji konstytucyjnych była uzasadniona przez zaistniały kryzys.

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I. State of emergency in the Italian Constitution

The Italian Constitution does not include any specific provision concerning the state of emergency. Other contemporary European Constitutions (such as the Spanish, German and French ones), on the other hand, actually provide for some form of regulation of emergencies: while the details might vary, a common factor is that all of these constitutional systems enable the Government to adopt legislative acts limiting the rights of citizens, while ensuring the Parliament's involvement (and control) in the emergency's management[2].

However, the Italian Constituent Fathers were wary of the experiences of the fascist regime and of the collapse of the Weimar Republic (the abuse of the state of emergency enclosed in Art. 48 of the Weimar Constitution greatly facilitated the advent of the Nazi regime), and they chose non to expressly regulate emergencies. Consequently, the Italian Constitution does not provide for an emergency clause[3].

In other words, the Italian Constitution does not feature a provision that allows a constitutional body to take over special competences to face a particularly dangerous event, such as a pandemic, a natural disaster, or a war[4]. The Constituent Assembly has created a balance between the powers of the State, a wise weighting of checks and balances that does not envision a dominance of one power over another, as the Constituent Fathers believed that this would

[2] In Germany, for example, the *Verfassung* regulates cases of internal emergency (*innerer Notstand*): an act as the *Infektonsschutzgesetz* (IfSG38) provides the basis for the prevention and control of the acts of the Federal Government and of the Governments of the *Laender* in the event of an epidemic.

[3] On emergencies in the Italian constitutional system see G. De Minico, *Costituzione: emergenza e terrorismo*, Napoli, Jovene, 2016.

[4] M.C. Grisolia, *Brevi spunti introduttivi e qualche domanda su "emergenza e governo-pubblica amministrazione"*, "Rivista AIC" 2021, no. 1.

end up excessively unbalancing the constitutional system. The Constituents' choice to design a form of parliamentary government has been driven by the historical framework and, consequently, by the need to contain the powers of the Government: hence the emphasis on the centrality of the Parliament[5].

However, the Italian Constitution designs one instrument that may be used by the Government to regulate unforeseen and dangerous situations. According to Art. 77 of the Constitution, in extraordinary cases of necessity and urgency the Government can adopt provisional measures (the so-called "law decrees") having the force of law. Law Decrees come into force immediately after their publication on the Italian Official Bulletin, and on the same day the Government must present them to the Houses, in order for them to be converted into law by Parliament within 60 days. If they are not converted, these decrees lose their effects retroactively[6].

Moreover, over time (and especially since the 1970's), Italy has also developed a high-profile Department of Civil Protection, which has the competencies to deal with seismic events, floods and other natural disasters that cannot be answered with the normal means available in the legal system. In these cases, the Government can declare the so called "state of emergency of civil protection", which is regulated by statutory law, and not by the Constitution, and therefore cannot, in theory, depart from constitutional provisions.

II. The Italian Government's response to the Covid-19 pandemic and the marginalization of Parliament

In the wake of the global pandemic, the Council of Ministers of the of January 31, 2020 declared the state of emergency of civil protection for six months, as a consequence of the serious health risk for the population posed by the new virus. Following the declaration of the state of emergency, the Head of the

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[5] P. Bonetti, *Terrorismo, emergenza e costituzioni democratiche*, Bologna, il Mulino, 2006 pp. 237 ff. The Author highlights that, while during emergencies there is usually a shift of powers towards the Government, the principle of separation of powers is reinstated through the Parliament's and judiciary's control on the Executive branch. Therefore, said controls represent the "hard core" of the Constitution.

[6] However, the Houses may regulate the legal relationships that arose from decrees that were not converted into laws with an *ad hoc* law.

Department of Civil Protection signed the order regulating the first urgent interventions on "the health risk related to the occurrence of diseases arising from transmissible viral agents". Despite its considerable experience in dealing with a wide variety of emergencies, this was the first time that the Department of Civil Protection has been involved in dealing with a pandemic situation.

The Minister of Health subsequently intervened with an ordinance implementing "New measures of compulsory quarantine and active surveillance".

These first attempts to contain the unforeseen pandemic were not particularly effective. Following the Covid-19 outbreaks in Lombardy and Veneto, and after a meeting of the Operational Committee at the headquarters of the Department of Civil Protection, the Council of Ministers, on the proposal of its President, approved a Law Decree introducing urgent measures on containment and management of the epidemiological emergency. On the same day (February 23, 2020) the President of the Council of Ministers signed a Decree (DPCM) containing new measures for the containment of the infection throughout the national territory, simply announced the previous evening. The provision provided for the shut-down of non-essential or strategic production activities. On the 25th of the same month the President adopted another Decree, introducing new measures, compared to those already taken on February 23rd.

Ultimately, the Government decided to completely centralize the decisions regarding safeguard policies, as the President of the Council of Ministers adopted a flood of decrees (DPCM) that implemented stricter and stricter restrictions, by mandating lockdowns and social distancing measures, that severely compressed some fundamental constitutional rights such as freedom of movement[7].

Usually, the Chamber and Senate would not be informed in advance of the contents of said decrees. However, it must be stressed that the marginalization of Parliament was, to some extent, self-inflicted. The fear of conta-

7 See: P. Bilancia, *Il grave impatto del Covid-19 sull'esercizio dei diritti sociali*, [in:] *Stato di diritto, emergenza, tecnologia*, eds. G. De Minico, M. Villone, "Consulta Online" 2020; G. Silvestri, *Covid-19 e Costituzione*, "Unicost", 10 aprile 2020, par. 1; A. D'Andrea, *Protezione della salute pubblica, restrizioni della libertà personale e caos normativo*, "Giustizia insieme", 24 marzo 2019; S. Prisco, F. Abbondante, *I diritti al tempo del coronavirus. Un dialogo*, "Federalismi.it" Osservatorio Emergenza Covid-19, 2020, no. 2.

gion often kept members of Parliament away from the Assembly, and the activities of control and parliamentary address were almost non-existent in the first phase of the pandemic. The Parliament basically voluntarily limited itself to the task of converting the law decrees approved by the Council of Ministers into laws within 60 days, often forsaking its own ability to amend them during the conversion proceedings[8].

While it is true that the use of DPCMs has allowed the Government to intervene quickly in order to face the health emergency, at the same time this amounted to a circumvention of the normal parliamentary dialectics and did not promote any form of cooperation between the majority and the minorities in the Houses[9].

Moreover, a Decree of the President of the Council is an administrative Act that is not subjected to any control as opposed, for instance, to the law decree which requires the signature of the President of the Republic (which ensures at least some form of minimum preventive control) and, above all, which needs to be converted into Law by the Chambers, under penalty of ineffectiveness. Lastly, law decrees can become the object of the review by the Constitutional Court.

It is true that the Decrees of the President of the Council issued during the pandemic found their legitimacy in a law decree issued by the Government (no. 6 of 2020). However, a law decree cannot delegate to the President of the Council (or to the administrative authorities) the adoption of measures thar compress fundamental freedoms that are guaranteed in the Constitution, as this is a matter reserved to statutory law. Moreover, the law decree did not properly delimit the range of operativity of the DPCM, as it should have[10].

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[8] On the marginalization of Parliament during the first phases of the pandemic see S. Curreri, *Il Parlamento nell'emergenza*, "Osservatorio costituzionale" 2020, no. 3.

[9] See N. Lupo, *Il Parlamento nell'emergenza pandemica: un rischio di autoemarginazione e "finestra di opportunità"*, [in:] "Il Filangieri", vol. 2020, *Il Parlamento nell'emergenza pandemica*, eds. V. Lippolis, N. Lupo, Roma 2020, pp. 145 ff.

[10] On the issues that the DPCMs posed with regard to the hierarchy of the sources of the law see: M. Luciani, *Il sistema delle fonti del diritto alla prova dell'emergenza*, "Rivista AIC" 2020, no. 2, M. Belletti, *La "confusione" nel sistema delle fonti ai tempi della gestione dell'emergenza da Covid-19 mette a dura prova gerarchia e legalità*, "Osservatorio costituzionale" 2020, no. 3, S. Staiano, *Né modello né sistema. La produzione del diritto al cospetto della pandemia*,

In the following months, a number of Decrees of the Prime Minister have followed, and other law decrees involving further limitations of constitutional rights and freedoms (such as the right to free movement, the right of assembly, the right to religious freedom with regard to religious ceremonies) were adopted[11]. These freedoms were limited in order to implement forms of social distancing, and therefore to stop the spread of the pandemic and safeguard the right to health and the right to life.

Some scholars observed that the regulatory model deriving from the contrast of the pandemic emergency – entrusted to a large extent to State (and regional) administrative sources – has marked an exception from the constitutional provisions on emergency as described in the previous section and, as a matter of fact, implies the establishment of an "emergency order" that kick-starts a new phase, albeit transitory, of republican history[12].

However, after a few months, the balance between powers, altered by the pandemic, slowly started to shift towards its normal configuration. The Government and the Houses developed a procedure that involved Parliament into the regulation of the emergency: a new law decree (no. 19 of March 25, 2020) singled out the specific rights that could be subject to limitations in the future, as well as the boundaries and requirements of future DPCMs. The President of the Council of Ministers (or a delegated Minister) always should inform the Houses in advance on the contents of the DPCM, and the Government should adjust their scope according to the motions passed by Parliament.

The Houses have thus re-entered the emergency decision-making circuit and since then the dialogue between Parliament and Government has been increasing and continuous: the approval of motions and resolutions by the Chambers actually helped in shaping the Government's policies[13].

"Rivista AIC" 2020, no. 2, L.A. Mazzarolli, *"Riserva di legge" e "principio di legalità'" in tempo di emergenza nazionale*, "Federalismi.it" Osservatorio Emergenza Covid-19, 2020, no. 2.

[11] See, on a critical note, V. Baldini, *La gestione dell'emergenza sanitaria: un'analisi in chiave giuridico-positiva dell'esperienza…*, "Dirittifondamentali.it" 2020, no. 3.

[12] See: R. Manfrellotti, *La delegificazione nella disciplina dell'emergenza pandemica*, "Rivista AIC" 2021, no. 2.

[13] See: V. Lippolis, *Emergenza, costituzionalismo e diritti fondamentali*, "Rivista AIC" 2020, no. 2; M. Luciani, *Il Sistema delle fonti del diritto alla priva dell'emergenza*, "Rivista AIC" 2020, no. 2; G. Silvestri, *Covid-19 e Costituzione*, "Unicost", 10 aprile 2020.

III. Centralization of powers and the marginalization of Regions

In the Italian constitutional system, the pandemic crisis has also accentuated some critical issues in the relationships between State and Regions[14].

The constitutional reform of 2001 strengthened the regional system by transferring some important legislative and administrative powers at the regional level in the perspective of a significant decentralization. According to Art. 117 of the Constitution, the State maintains an exclusive legislative power on the essential levels of civil and social rights that must be guaranteed across the national territory, as well as a full competence on the matters of international prophylaxis (and therefore, it can set the rules and methods to prevent or contrast the spread of pandemic diseases). This includes, in particular, the rules and measures to be taken, collectively or by individuals, for the protection against a given disease, as well as their practical implementation.

On the other hand, the Regions are responsible for the legislation and administration on the matters connected to the protection of health, in compliance with the fundamental principles established by the laws of the State. In the last 20 years, this has allowed the development of twenty one different models of regional healthcare systems: some were widely regarded as excellencies in the field of health protection, while others showed some serious difficulties.

The financial crisis of 2009 – which translated into a severe economic and social crisis for our Country – has led to heavy cuts in the healthcare system's budget, with partial or total blocks in the turnover of the medical staff and also of the staff of the hospital administration. For these reasons, the fact that the Coronavirus has hit heavily the inhabitants of Lombardy and Veneto seems almost paradoxical, if one considers that these two Regions were widely regarded as those with the best and most efficient healthcare systems in Italy.

In Lombardy and Veneto the pandemic affected the population with thousands of victims and casualties: intensive care units availabilities were structurally insufficient and pharmacological treatments of the disease appeared mostly inefficient. In this perspective, it must be stressed that Lombardy is a Region with more than ten million inhabitants, with a massive presence of productive settlements and therefore the virus circulated freely among a lar-

[14] On the State-Regions conflicts during the pandemic see M. Cosulich, *Lo Stato regionale italiano alla prova dell'emergenza virale,* "Corti supreme e salute" 2020, no. 1.

ge number of workers before the necessary protections (such as the territorial lockdown imposed by the State) before the supply-chains were implemented.

In this first phase (February 2020) the Regions did not have the possibility to autonomously close the parts of their territory that were more affected by the contagion of the Coronavirus. However, a subsequent law decree of March 2020 entrusted the Regions with the power to mandate a partial *cordon sanitaire*, in order to assess the conditions of criticality of the infection and contain it. In turn, this generated a contrast between the State and the Regions, that often disagreed on the decisions on the lockdown of territorial spaces, as well as on the actual proportionality of said lockdowns with regard to the degree of danger posed by the contagion (based on the number of hospital admissions)[15].

It must be stressed that the Italian Constitution (Art. 120) allows the Government to replace the Regions in the event of a serious danger to health, and the law establishing the national healthcare service assigns the task of intervening (with ordinances) to face epidemics to the Minister for Health. However, the Government chose not to use this power, and pursued a constant dialogue with the Regions, also in order to share (at least in part) the responsibility for the most unpopular decisions. Nonetheless, the principle of loyal cooperation between State and Regions, that was established as a cornerstone of the Italian regional model by the jurisprudence of the Constitutional Court since the 1990's, was particularly difficult to enforce in this period, as the unforeseen evolutions of the pandemic demanded a centralization and speeding up of the decision process.

The critical issues on the lockdowns of the territories have continued throughout 2020 and into 2021: the Regions sometimes campaigned for partial re-openings to protect the economies of the territories, while the Government, with the support of the Scientific-Technical Committee of experts[16], finally laid down the precise parameters to define the levels of health risk of the Regions and the need for total or partial lockdowns, depending on the severity of the local epidemic situation.

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[15] A. D'Aloia, *L'art. 120 Cost., la libertà di circolazione e l'insostenibile ipotesi delle ordinanze regionali di chiusura dei 'propri confini'*, "Dirittifondamentali.it", 18 aprile 2020.

[16] F.G. Pizzetti, *Decisione politica ed expertise tecnico,* [in:] *Stato di diritto, emergenza, tecnologia…*

In this complex framework, the Constitutional Court had to determine the balancing point between centralization and regional competencies. With its decision no. 37/2021, the Court has upheld the centralization of decisions by the Government, by leveraging the exclusive competence of the State on the matter of international prophylaxis (and the relative decisions in its application), but nonetheless reiterated the necessity of loyal cooperation between central and local constitutional bodies.

Lastly, in summer of 2021, characterized by mass vaccinations and by the decrease of infections and of the number of victims, a new climate of cooperation has been established: the State-Regions Committee (a body that was created more than thirty years ago), has become the theatre of a new and intensified dialogue between the Presidents of the Regions and the President of the Council (or the delegated Minister). In this framework, in the second half of 2021 the state of the art regarding competences and healthcare seems to have entered into a fairly stabilized state, in a solid context of coordination between the centre and the territories. This is especially true in the field of vaccination, the main tool to fight the epidemic.

IV. Conclusive remarks

In my view, the recent events of the Covid-19 pandemic have shown that, in the Italian constitutional system, the implementation of loyal cooperation between the State and the Regions is preferable and desirable in "normal" times, but in a critical situation such as the current emergency, it is both fundamental and appropriate to strive for a better coordination on the State's behalf, which is necessary and possible (as confirmed by the Constitutional Court in its decision no. 37/2021[17]) even in the absence of a "centralizing" constitutional reform.

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[17] With this decision the Italian Constitutional Court declared the unconstitutionality of a regional law (adopted by the Region "Valle d'Aosta") that regulated the pandemic emergency in the Region's territory in a way that diverged from that set out by national law. The Court found that the regulation of the pandemic falls within the matter of "international prophylaxis", and therefore within the State's exclusive competence ex Art. 117 sec. 2 lett. q) of the Italian Constitution.

In the wake of an unprecedented health and sanitary crisis (that, as of today, is still far from over), only time will tell if the "centralizing" decisions adopted at the national level (that sometimes were radically contrasting with those adopted at the regional level) and the severe limitations and compressions of fundamental freedoms (that, at least at a first stage, bypassed Parliament), were compatible with the principle of proportionality.

With more than 130.000 victims, over a million infected, and in the face of an unprecedented crisis of the healthcare system, it can be safely stated that the protection of the right to health and of the right to life, that translated into the implementation of temporary and efficient measures of containment at the expense of other freedoms, amounted to attempts at fighting the pandemic in the absence of a recognized effective cure (even though said measures were not always adopted in a way compliant with the constitutional hierarchy of the sources of the law).

In the Italian constitutional system, the principle of proportionality demands that every compression of a fundamental constitutional right or interest is proportionate to the need to protect a rival right of interest in the situation at hand. In the recent crisis, the measures adopted during the pandemic were proportionate to the severe risk for the right to health and the right to life, as well as for other constitutionally relevant interests (such as those connected to public health and to the functionality of the economy). In other words, an unprecedented threat to multiple constitutionally relevant rights and interests justifies and unprecedented compression of other rights and interests (as long as their "hard core" is preserved).

In this perspective, it is my opinion that the extraordinary measures adopted by the Government did not inflict an irreparable harm to the principle of proportionality as they were justified by the need to answer a crisis that endangered the constitutional system in its entirety.

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