

## A look at the COVID-19 pandemic: the Italian case

### Um olhar sobre a pandemia de COVID-19: o caso italiano

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#### Abstract

The paper examines the complex, multidisciplinary and multidimensional scope of the coronavirus pandemic, focusing on its intertwined implications for international, supranational and domestic laws. The global reach of the phenomenon has highlighted limits and structural gaps at all levels of government in human society, raising questions to which rulers will have to give precise answers.

**Keywords:** Public health, Contact-tracing, Fundamental rights, Economic crisis, Monetary Union, Public Power.

#### Resumo

O artigo examina o escopo complexo, multidisciplinar e multidimensional da pandemia de coronavírus, enfocando suas implicações interligadas para as leis internacionais, supranacionais e domésticas. O alcance global do fenômeno evidenciou limites e lacunas estruturais em todos os níveis de governo da sociedade humana, levantando questões às quais os governantes terão de dar respostas precisas.

**Palavras-chave:** Saúde pública, Rastreamento de contatos, Direitos fundamentais, Crise econômica, União monetária, Poder público.

## Introduction: the global impact of the Covid-19 pandemic phenomenon

The short-term spillover effects of the Covid-19 global pandemic are already evident at various levels and may be generally identified in relation to: the health crisis and the

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consequent world-wide emergency; the economic repercussions and their significant impact especially on public activities, industrial production, financial markets, tourism and air traffic; the globalization phenomenon itself, both for the slowdown in global growth and for the risk of a serious economic recession. Furthermore, the epidemic may exacerbate conflicts and tensions between States<sup>2</sup>, affecting the free movement of goods and people, but also production and supply chains, global value chains and investments.

The necessary starting point is the concept of health and the importance of global public goods (Kaul *et al.*, 1999). From a purely economic perspective, health may well fall within the realm of global public goods both because it cannot be produced as a commodity sold on the market to individual consumers; and because threats to health and its loss, affecting the heart of humanity, bear with them negative global consequences<sup>3</sup>.

These brief considerations show the inherently complex nature of the COVID-19 pandemic, and its multidisciplinary and multidimensional scope. The former aspect involves drawing appropriately from a combination of disciplines in order to develop an all-round understanding of the coronavirus pandemic and, thus, to better face its challenges. The latter aspect rather concerns the pandemic's intertwined implications for international, supranational and domestic laws.

## **The international perspective: a) global rules and the welfare state**

From an international law perspective, the pandemic shows how important a global management of an inherently global phenomenon would be. Nevertheless, the current international order is weakened by two serious shortcomings. The first is the absence of global rules, above all, on the protection of health - from live animal markets, to the ability to quickly identify an epidemic. The second is the lack of health and welfare systems developed in all countries.

Furthermore, where government action is aimed at regulating social groups, we are confronted with that weberian *dictum* according to which only nation States hold the legitimate use of force to affect any rights (Weber, 1919, p. 4 ff), especially fundamental ones. This aspect will emerge throughout this study, in relation to the danger of undemocratic drifts and the erosion of fundamental rights.

As regards the first aspect, as a preliminary consideration, it is evident that around the year 2000 the process of globalization established itself according to a neoliberal model, which liberalized flows of capital and goods and created supranational powers to manage them, under the guise of inter-governmental bodies, such as the World Trade Organization, the International Monetary Fund and the World Bank, and private actors - the financial centers of Wall Street and the City, financial rating companies, large multinational

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<sup>2</sup> The potential risk of inter-State conflict and a return to competition between countries was evident even before the outbreak of the COVID-19 emergency especially between China, Russia and the United States

<sup>3</sup> The globalization debate has deeply affected health issues, see Smith *et al.* (2003). Criticism of the World Bank, which has recently developed financial instruments - with a very questionable "market-oriented" approach - to face the risk of a global pandemic and guarantee the "global public good of health", has been raised by Stein; Sridhar (2017).

corporations - which have conditioned the economy and politics of nation states. In those years, the proposals of progressive European governments, trade unions, the ILO, social movements to hold together the globalization of markets and the need for a global protection of labour, social rights and the environment, in the face of climate change, were rejected<sup>4</sup>.

This allowed for a tailor-made globalized economy of goods and capital, without restrictions on labour, rights and the environment but also without rules, powers and resources on a global scale to be created. These aspects have been neglected, considered only as “costs” for the economy, left to fragmented national choices, under the pressure of privatizations and cuts on public spending (Abraham *et al.*, 2009, p. 13-36; Schulze, Ursprung, 1999, p. 295-352; Boulhol, 2009, p. 223-233; Dreher, 2006, p. 1091-1110; Feenstra, 1998, p. 31-50).

The coronavirus epidemic has made concrete the costs, especially economic, deriving from the absence of global rules<sup>5</sup>. Indeed, the response to the pandemic has shown that a key role is still played by national health services. A system which, based on the idea of health as a fundamental right, must also be ensured by the State through the provision of universal public services designed to meet needs, outside the market logic of profit.

However, the three decades of neoliberal policies have seriously redimensioned the welfare state model established since the radical reforms of the British Labour Party in the immediate post-war period<sup>6</sup>. The epidemic has shown that that global market model not only creates threats to health, but is completely incapable of responding to emergencies and protecting health. Private healthcare has proven inadequate to effectively contrast the epidemic.

Even the World Health Organization has shown its limitations: the delays, mistakes and contradictory information about this pandemic have been such and so many as to induce the Italian Codacons on April 24 2020 to file a criminal complaint to the Public Prosecutor of Milan to ascertain its work<sup>7</sup>. A responsibility is assumed in the spread of the epidemic, because, despite having the task and obligation to provide accurate and timely information, to make important recommendations and decisions on public health, it seems to have disregarded all expectations, even providing wrong suggestions at first<sup>8</sup>.

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<sup>4</sup> See the documents of the movements against the 1999 WTO summit in Seattle and of the Millenium Forum of the civil society at the United Nations in 2000, General Assembly, resolution A / 55 / 2.8 September 2000.

<sup>5</sup> On the economic damage from the global pandemic, see Baldwin, Weder di Mauro (eds.), 2020.

<sup>6</sup> On the origins and development of the British welfare state, see: Harris (1992, p. 116-141); Fraser (1975); Laybourn (1995). For a European comparison, see Lowe (1997, p. 45-69).

<sup>7</sup> Codacons is an Italian non-profit association, founded in 1986 in defense of consumers and the environment. Codacons spokesperson asserted the WHO, in the person of the director of the agency, is responsible for epidemic crime since “had the task and obligation to provide accurate, timely and independent information to make decisions on public health (...) preventing the spread of the epidemic at the origin, saving thousands of lives and creating economic damage all over the world afterthoughts and sudden changes of direction, with the Italian health authorities given the wrong guidelines”, see <https://codacons.it/concorso-in-epidemia-colposa-codacons-denuncia-loms-in-procura/>

<sup>8</sup> Chen, 2020, A17. The problem is also of structural nature, in the sense that the WHO itself has very limited authority which tends to be at the mercy of the strongest or most able Member States in pursuing their own interest. Nor should the progressive crisis faced by supranational organizations, increasingly subordinated to particular interests, be neglected. In this regard, a close connection between the People's Republic of China and some of the most powerful members of the WHO has recently been maintained (Buranyi, 2020). Taiwan, back in December 2019, allegedly warned the Organization that the new virus could be transmitted from person to person, a warning that was ignored, as reported by the Financial Times, and of which other countries were never informed (Taiwan Says WHO Failed to Act on Coronavirus Transmission Warning. *Financial Times*, December 19,

## The international perspective: b) contact-tracing solutions

Contact-tracing solutions have been widely used and implemented around the world in the fight against coronavirus. They consist in a digital identification system for potentially infected people before symptoms emerge, designed - through a rapid collection of further information on these contacts - to prevent subsequent transmission from secondary cases. It is undeniable that these are “forms of social control”, and many have been introduced. They differ in terms of levels of interference with citizens’ privacy and in the type of tracking system used (via GPS or bluetooth) (Wilson, Jumbert, 2018, p. 1-13; Gostin *et al.*, 3229-3237; Dąbrowska-Kłosińska, 2017, p. 700-722).

Some of them - used in countries such as China, Singapore, South Korea, Israel - have undoubtedly proved to be exhaustive and effective, but also extremely categorical and pervasive<sup>9</sup>. In fact, where the use of population tracking is not entrusted to the choice of citizens, apps are used that can cross personal data in order to limit mobility on the territory in case of danger of contagion<sup>10</sup>. Strict control has been implemented in Israel with rules authorizing the secret services to use citizens’ cellular data to control their movements.

However, although the highly predictive and real-time analysis capability allowed by big data represents a strategic resource, especially in emergency situations such as coronavirus, the long-term impact on individuals’ rights and freedoms cannot be underestimated (Rynning, 2007, p. 105-112; Kierkegaard, 2011, p. 503-515).

Thus, if on a global level we are moving towards “citizen-tracking” solutions, their application - on a national level - cannot ignore the type of internal economic, political and social constitution. The reference is to the type of political regime: that is, if people are the main focus of government action, creating spaces of freedom, security and justice; conversely, if politics is the center of government action, as a mechanism for social regulation

In other words, where legal systems are inspired by the “Asian values”<sup>11</sup> that overturn the catalogue of individual freedoms, favouring Confucian-style communitarianism, people-tracing applications represent a habitual experience and tendentially guarantee very high

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2020. Available at <https://www.ft.com/content/2a70a02a-644a-11ea-a6cd-df28cc3c6a68>). Larry Gostin, WHO official, stated: “The charitable way to look at this is that W.H.O. simply had no means to what was happening on the ground. The less charitable way to view it is that the W.H.O. didn’t do enough to independently verify what China was saying, and took China at face value” (Pérez-Peña, McNeil Jr., 2020, A6). Lastly, the American president Donald Trump, in a letter (available at <https://www.whitehouse.gov/wp-content/uploads/2020/05/Tedros-Letter.pdf>) sent to Director General Tedros Adhanom Ghebreyesus, lists the accusations on the management of the Covid-19 crisis, the excessive proximity to China and states that: “if the World Health Organization does not commit to major substantive improvements within the next 30 days, I will make my temporary freeze of the United States funding to the World Health Organization permanent and reconsider membership in the organization”.

<sup>9</sup> On the legislative agenda and planned to enact a comprehensive data protection law by March 2022 in China, see Feng (2019, p. 62-82).

<sup>10</sup> See the apps used in: Singapore called *TraceTogether*; South Korea, *Corona 100m* and *Corona100*; China, where the most invasive privacy tool, called *Health Code*, is used, integrated with *Alipay* (Alibaba’s payment system) and *WeChat* (the “Chinese Whatsapp”) applications. The latter, thanks to the movements, the time spent in the places of the epidemic, the exposure to potential carriers of the virus and access to many other databases (video surveillance, cameras, digital purchases) automatically assigns people a QR code, which determines who is to be quarantined, and provides authorization to enter shops, malls and offices.

<sup>11</sup> On this topic, see Jacobsen, Bruun (2000, p. 21 ff).

levels of control in the population. On the other hand, in the legal systems inspired by the Western-style, liberal-democratic culture, which guarantees and recognizes fundamental rights and the confidentiality of personal data, experimentation has had a hard time starting or affirming itself with a necessary partiality.

## **The supranational profile: a) fundamental rights and the processing of personal data**

In the European Union, and therefore in Italy as in all the Member States, every measure that requires, even in emergency situations, the implementation of analysis activities and artificial intelligence (AI) applications, is always bound to safeguard fundamental rights and respect all current privacy principles. The problem arises, because the fight against the virus has led to the collection of a very large number of so-called particular data, both of infected people and those who have undergone swab or serological tests.

Furthermore, the lack of scientific knowledge about the transmission of the new coronavirus (2019-nCoV), its containment and prevention, have concentrated the efforts of the institutions on the voluntary isolation and the quarantine of infected individuals, as well as on the adoption of extraordinary measures, with a severe impact in all areas, from the health sector to the productive and social ones.

The pursuit of this goal deeply involves the sphere of personal data protection, by envisaging that numerous subjects (not only governmental ones) can collect and analyze, if authorized to do so by formal measures, people's personal information, including data relating to health and other particular data (personal data)<sup>12</sup>, judicial data (art. 10 GDPR, *supra* n. 16), data relating to travel and personal relationships (art. 4 (4) GDPR, *supra* n. 16). And if the treatment is determined by reasons of substantial public interest, relevant in the public health sector, in such circumstances it is not even necessary to rely on the consent of individuals (GDPR, para. 54, *supra* n. 16).

However, the right to data protection is not the only one involved in the measures that have been adopted to avoid the spread of the contagion. It is therefore necessary to balance all the interests at stake: the rights to personal freedom, to freedom of movement<sup>13</sup>, assembly, worship, economic initiative, the right to security, the protection of personal data and respect for private and family lives. These rights all fall within the framework of Article 52(1)(3) Charter EU<sup>14</sup>, according to which a specific preeminence must be attributed to the objectives

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<sup>12</sup> Art. 9 (2) (g) (h) (i), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR, General Data Protection Regulation). For an in-depth analysis of the GDPR, see: Rucker, Kugler (2018); Gil González, de Her (2019, p. 597-621); Daško (2017, p. 123); Erdos (2016, p. 139-183).

<sup>13</sup> The freedom of movement for persons, services and capital has been guaranteed since the enactment of art. 3 (c), Treaty of Rome 1957 (ECT).

<sup>14</sup> Art. 52 (1) (3), 'Scope and interpretation of rights and principles', Charter of Fundamental Rights of the European Union 2012/C 326/02 (Charter EU), states: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". [...] "In so far as this Charter contains rights which correspond to rights

of general interest, enshrined in Article 3 TEU<sup>15</sup>. Among these, there is an interest in the protection of public health (art. 35 Charter EU)<sup>16</sup>, superior to the other rights involved.

It is clear that the profile of the protection of fundamental rights is given by the interaction between the European Convention for the Protection of Human Rights (ECHR), the Charter of Fundamental Rights of the European Union, national Constitutions and, lastly, the GDPR n. 2016/679

This means that even fundamental rights are never considered absolute, because there is always a balancing of the interests involved (Fontanelli, 2016, p. 630-660; Morijn, 2006, p. 15-40). Among these, the right to health undoubtedly has a central position guaranteed by all the Constitutional Charters and is protected in the double meaning: individual and collective (Young, 2017, p. 82-108; Brown *et al.*, 2006, p. 62-72; Blum, Talib, 2006, p. 273-281; Page, 2006, p. 517). Precisely in the general interest in public health, assessed as prevalent in the framework of expressed protections, other rights that are not considered prominent in the specific situation, given, in our case, by the Covid-19 pandemic, may be deemed less important.

Restrictions to fundamental rights must be adopted in compliance with the values and principles recognized by the EU. The evaluation criterion, therefore, is based on the ideas of “strict necessity”, “security safeguard” and “purpose of general interest” which always and in any case responds to the need to protect the rights and freedoms of others<sup>17</sup>. Paradoxically this approach can translate into a contraction of all freedoms, as evidenced by the “lockdown”.

However, regulatory action in these cases must be conducted in compliance with the principles of “proportionality”<sup>18</sup> and “minimization”<sup>19</sup>. In other words, there must be a balance between the emergency regulations, the consequent measures implemented, and the objectives of containment and prevention of the contagion. In addition, there must be the imposition of the smallest possible sacrifice of the least important right.

In compliance with these criteria, limitations to human rights imposed in the fight against this pandemic are admissible, considering its nature as an “extreme situation” of health emergency. In principle, the ePrivacy Directive also allows the processing of location data by operators only when they are made anonymous or when consent by the involved party is granted. In any case, the introduction of emergency legislative measures to maintain public safety are the exception to the limits of the treatment. But, this treatment cannot continue beyond the time strictly necessary to the emergency management<sup>20</sup>.

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guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”.

<sup>15</sup> Art. 3 (1) ‘The Union’s aim is to promote peace, its values and the well-being of its peoples’, Consolidated version of the Treaty on European Union (TEU), signed on 13 December 2007.

<sup>16</sup> Art. 3, ‘Health care’, Charter EU, *supra* n. 16, states: “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities”.

<sup>17</sup> See articles 8 (2) e 9 (2) ECHR and article 52 (1) Charter EU.

<sup>18</sup> Article 5 (4) Treaty on European Union (TEU), and article 52 (1) Charter EU.

<sup>19</sup> Article 5 GDPR, *supra* n. 11.

<sup>20</sup> See Article 15, Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

Therefore, the rules for the protection of personal data do not hinder the adoption of extraordinary measures to fight COVID-19, nor the use of tracking and geolocation systems, as a preventive measure. This is provided that the measures taken correspond to needs that are truly necessary and adequate to the risk, and are as little invasive as possible<sup>21</sup>.

However, the multiple risks deriving from the protection of privacy rights cannot be underestimated or ignored: the use of the new "digital technologies" and the implementation of "Artificial Intelligence" involves the management of millions of personal data that must be protected from illegal interference or improper use, to protect citizens and the same values on which our civil coexistence is based (Scheltema, 2019, p. 305-310; D'Antonio, Scocozza, 2018, p. 8-29; Müller, 2014, p. 297-301).

## **The supranational profile: b) the economic crisis and the European Union**

From a supranational law perspective, that is, the European Economic Area, the dreamlike presence and abundance of rights and principles for the protection of people and legal relationships, is however often at odds with the strong resistance shown by the EU to take charge of the economic and health crisis experienced by its Member States, made evident by the pandemic.

This initial reluctance revealed all the shortcomings of a yet unfinished European integration process, with a single currency which created an economic-financial system that appears to be only a multiplier of inequalities within the Union and a factor of political and social disintegration.

This imbalance has emerged where academic economists have shown broad consensus in favour of massive government intervention to address the effects of coronavirus. In this perspective, a pivotal role would be played by the European Union, as an Economic and Monetary Union, in which the common interest prevails over individual State-narrowed ones (De Grauwe, 2020; Blanchard, 2020, p. 49-50; Alesina, Giavazzi, 2020, p. 51-54; Bertocco, Kalajzić, 2020)<sup>22</sup>.

In fact, many European countries have strongly supported the need for a Union-based intervention capable of facing the impact of the crisis and supporting economic recovery with measures financed through the issuance of European bonds, the so-called *coronabonds*<sup>23</sup>, or with non-repayable economic contributions.

In fact, the economic crisis caused by the "lockdown" gives foundation to that theoretical model, which requires that public finance assumes a significant role, through interventions in

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<sup>21</sup> Italy has recently adopted the so-called *Immuni* app.

<sup>22</sup> See also, Petition to the governments of all Member States and to EU institutions: 'European Solidarity Now', Joint German-Italian appeal to the governments of all Member States and to EU institutions, in <https://weareinthetogether.eu/petition/european-solidarity-now-in-the-interest-of-all-member-states/>.

<sup>23</sup> On the introduction of European Coronabonds, see Horn *et al.*, 2020. The economists - Alesina, Giavazzi, 2020 - write that "the" hawks "[Germany and Holland, in opposition] of Northern Europe do not seem to understand that at stake here are not the mere technical disquisitions on Eurobonds, but the survival of the Union itself.

the development process based on the introduction of innovations that profoundly change the lives of citizens (e.g. railways, cars, computers)<sup>24</sup>.

In other words, the economic development process requires the presence of a financial system based on the creation of bank money. In the absence of bank money, there can be neither development nor capitalism. Therefore, the State has the task of carrying out interventions aimed at protecting the production of strategic goods and directing the process of introducing innovations towards the achievement of socially relevant objectives.

The significant role that, in this model, is attributed to finance represents also the foundation of the idea according to which Europe should lead the fight against COVID-19. The role of Europe so far, however, seems to follow the so-called *mainstream* model that puts the individual at the center of the analysis (methodological individualism) and the State in the background, which simply sets the rules that allow the market to function at its best (Schauble, 2012; Williamson, 2009, p. 7-23; Frankel, Rose, 1998, p. 1009-1025; Alesina *et al.*, 2011, p. 1-37).

The latter model, in fact, highlights a structural limit of the architecture of the monetary, Euro-based, union built on neoliberal principles<sup>25</sup>. This limitation consists in the fact that the countries belonging to the monetary union have given up their monetary sovereignty, without transferring it to a supranational authority that we could call Europe<sup>26</sup>.

Monetary sovereignty is the prerogative enjoyed by countries that can issue public debt denominated in the currency created by the national central bank. This prerogative gives public debt a characteristic that private debts do not have: States that enjoys monetary sovereignty commit themselves to repaying their securities with the currency that is created by the national central bank. These States cannot therefore become insolvent as they will always be able to repay the securities issued in the currency created by the national central bank (Stockhammer *et al.*, 2020, p. 231-266; Wyplosz, 2006, p. 207-261).

Countries that have adopted the Euro, on the contrary, issue debt denominated in a currency that is not created by a national central bank. They are therefore in the same condition as a country issuing debt denominated in a foreign currency. Theoretically, this may cause a situation of insolvency of a Eurozone country, thus exposing it to the evaluations of financial markets, which, being speculative markets, can bet on the insolvency of the country in question causing large fluctuations in the differential rate (spread) with the public debt securities of “virtuous” countries<sup>27</sup>.

For this reason, economists had advocated the issuance of “coronabonds” as a sign of Europe’s monetary sovereignty. In fact, the issuance of these securities does not expose a country to the risk of having to repay loans taken out from another country, since these

<sup>24</sup> J.A. Schumpeter’s (1911) economic theory (Schumpeter, 2017, p. 3 ff.) dismantles a pillar of mainstream theory which considers consumer needs as a factor to which businesses adapt. Schumpeter emphasizes, however, that there is no consumer sovereignty and that the needs of individuals are continuously conditioned by businesses.

<sup>25</sup> See Kalajžić, 2018. Criticism of the macroeconomic theory that supports the neutrality principle of finance was advanced by Blanchard, Amighini, Giavazzi, 2017.

<sup>26</sup> See De Grauwe (2020, p. 24 ff., 103 ff.) and Marelli, Signorelli (2018) argue that the weakness of politics and the specific interests of individual governments may end up slowing down and weakening the position of a common monetary policy in facing the crisis.

<sup>27</sup> In this regard, see Lane (2012, p. 49-68). For the case of Japan, see, for instance: Park, Sung (2020, p. 1-11).

securities can always be repaid using the currency created by the European Central Bank (Bertocco, Kalajzic, 2020).

After intense pressure, which also occurred during the Greek crisis (Fischer, Pastore, 2015), there seems to have been a turning point in the EU with the establishment of the Recovery Fund which will contain 500 billion in grants and 250 billion in loans to be repaid. The money will be collected on the markets from continental bonds issued by the European Commission. In total, the plan is expected to reach 1,000 billion, adding an investment system that will multiply resources.

Europe has apparently responded to the demands of economists in showing substantial unity, through the issuance of common debt securities. The final draft of the Fund may however show differences with the Commission's original proposal. Negotiations are opening between European leaders who will have to meet in an extraordinary European Council, which will have the last word.

Over time, it will be possible to assess whether all this meets the expectation of a recovery of its monetary sovereignty and the reconstruction of the health and economic systems of Eurozone countries.

## **The domestic law level: the Italian management of the pandemic**

In Italy, in addition to the problems related to the health, work and economic crisis, the fundamental issues concern the rights and the structure of powers.

First of all, it should be observed that the impact of public power on the beneficiaries of the norms has long found its balance and adequate containment in the principle of administrative legality (Fois, 1973, p. 659 ff). In fact, compliance with this principle, and with that of "legal reservation", requires that any form of exercise of public power, positive or negative, must be authorized by a primary rule of the State and exercised according to the content and purpose parameters set in it<sup>28</sup>.

However, in the Italian legal system, the pandemic outbreak has resulted in the predominance of the executive power over the legislative one. This allows us to understand the sense of the Weberian *dictum* and the state's ability to affect citizens' rights (Weber, 1958, p. 370 ff.).

In order to understand the questionable legal situation that has arisen in Italy with the lockdown - the blocking of all activities except those strictly necessary, and the consequent prohibition to leave, for about two months, home if not for proven and legally predetermined reasons<sup>29</sup> -, it is necessary to start from the Constitutional Charter.

The Italian Constitution does not recognize the "state of emergency" as a case in which the Chambers can confer the necessary powers on the Government. It is an ordinary law<sup>30</sup> that establishes that a resolution adopted by the Council of Ministers declares the state of

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<sup>28</sup> On the principle of legality and the differences with the institution of "legal reservation", see Casetta (2011, p. 42 ff).

<sup>29</sup> In this regard, a collection of the Decree-Laws, Resolutions and Ordinances of the Italian Government can be found on the website <http://www.governo.it/it/coronavirus-normativa>

<sup>30</sup> Decreto Legislativo 2 gennaio 2018, n. 1 (Raccolta 2018), in Gazzetta Ufficiale - Serie Generale n.17 del 22-01-2018.

emergency of national relevance, fixes its duration and extension, and at the same time authorizes the issuance of civil protection ordinances.

Based on this law, following the spread of the contagion in Italy, the Council of Ministers with the 31 January 2020 resolution<sup>31</sup> declared a state of emergency for a period of six months. This resolution was followed by a series of Decree-Laws, Decrees of the President of the Council of Ministers, Ordinances, Circulars and Ministerial Directives, Civil Protection Ordinances, Regional and Municipal Ordinances, resulting in an impressive production of norms coming from the different divisions that make up the Public Administration.

This circumstance has raised several questions, far too many to be addressed in this paper, in which we limit ourselves to highlighting the most striking problem inherent in the legitimacy of public power.

Public power, exercised in antithesis to the autonomy of private individuals, needs to be legitimized by the guarantee of legality, that is, by the principle of constitutional legitimacy, seen as an evolution of the principle of legality. In other words, in a modern democracy, alongside the constitutionalization of natural rights, implemented through unchangeable principles and values, there is an accentuated regime of controls: over government, by the legislative power; over the legality of the acts, by the judiciary power; over the exercise of legislative power, by the Constitutional Court (Morbidei *et al*, 2004, p 27; Mortati, 1975, p. 148 ff.).

All this translates into the need for the primary law to establish in advance the content of the act, its procedure, the limits, the purpose and the effects that the act itself is meant to produce. The rationale of the principle, in fact, lies in the protection of citizens from the interference of public power<sup>32</sup>.

That said, in order to contain the spread of coronavirus infections and, hence, regulate the behaviour of citizens, rules belonging to sources of secondary legislative production were used. In particular, by means of decrees of the President of the Council of Ministers (DPCM) and regional and municipal ordinances, all the constitutionally-guaranteed freedoms of citizens were limited and restricted: personal freedom (Article 13 of the Constitution), freedom of movement (Article 16 of the Constitution), freedom of assembly (Article 17 of the Constitution), freedom of worship (Article 19 of the Constitution), freedom of economic initiative (Article 41 of the Constitution).

So, although these administrative acts are based on a decree-law n. 6 of February 26, 2020<sup>33</sup>, with which the idea of limiting these freedoms to the areas of greatest spread of contagion was advanced, this does not mean that the extension of these measures to the whole national territory occurred through decrees of the President of the Council of Ministers. Therefore, there is a clear contrast with the principle of “legal reservation”, according to

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<sup>31</sup> Delibera del Consiglio dei Ministri del 31 gennaio 2020, “Dichiarazione dello stato di emergenza in conseguenza del rischio sanitario connesso all’insorgenza di patologie derivanti da agenti virali trasmissibili (20A00737)”, in Gazzetta Ufficiale - Serie Generale n.26 del 01-02-2020.

<sup>32</sup> On the “typicality” of authoritative activity see Merusi (2012, p. 20 ff).

<sup>33</sup> Converted into law n. 1741 del 26 febbraio 2020, modified by decreto-legge 23 febbraio 2020, n. 6, recante “Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19”.

which the freedoms enshrined in the Constitution may be restricted only through ordinary law<sup>34</sup>.

Thus, even if it cannot be denied that the emergency situation that Italy has faced required effective measures and lean procedures, the massive use of secondary-source laws, which have so deeply affected fundamental rights, raises a strong doubt about their constitutional legitimacy. In fact, the balancing of conflicting constitutional values is a prerogative of the Parliament and its exercise of the legislative function, as in Article 70 of the Constitution.

A further doubt is whether the logic of the “state of necessity” can justify that at a territorial, non-national level, administrative measures can be adopted, and in discrepancy, sometimes even in contradiction with each other<sup>35</sup>, measures that, in order to deal with a health emergency, so clearly derogate from primary-source laws.

The reference is to *extra ordinem*<sup>36</sup> ordinances, whose feature is the atypical nature of their content, as it is left to the discretion of the adopting body. In fact, they are in charge of dealing with uncontrollable situations or situations of imminent danger. For this reason, these ordinances may have the most varied content and also an exceptional derogatory power compared to primary sources. However, they must always respect the general principles of the legal order<sup>37</sup>.

Lastly, it must be observed that the measures adopted have proved to be seriously discriminatory<sup>38</sup> towards classes of people, affecting their psychological and economic well-being. Think of the children of poor families, forced to spend long days within the narrow walls of their homes; the many schools not equipped to provide lessons remotely, with serious damage both for the students who attend them, and for poor students lacking digital technologies; the elderly, often left alone in facing difficulties and unable to overcome them; the homeless; people with no job protection; the situation of prisoners, not protected by the

<sup>34</sup> On “legal reservation”, see - among all - Carlassare (1990, p. 1 ff, 11 e Id., 2009, p. 89-106). More recently, see Piccirilli (2019, p. 24 ff).

<sup>35</sup> As an example and without getting the heart of the matter, the following ordinances are reported. With ordinance no. 53, 29 May 2020, the Governor of the Campania Region prohibits the sale of alcoholic beverages, with any gradation, after 10 p.m. by any business (including bars, kiosks, pizzerias, restaurants, pubs, wineries), effective in all the municipalities of the region. While, in clear contrast, with Ordinance no. 248, 29 May 2020, the Mayor of Naples (capital of the Campania Region) authorizes the opening of night clubs until 3.30 a.m. and the sale of takeaway alcohol until midnight. It is clear that these are different and conflicting provisions between the Municipality and the Region.

<sup>36</sup> The “extraordinary and urgent ordinances”, also known as “free”, are provided and disciplined by art. 54 del Testo Unico degli Enti Locali, Decreto Legislativo n. 267 del 18 agosto 2000. They have been deemed admissible for the coronavirus emergency by art. 35, “Disposizioni in materia di ordinanze contingibili e urgenti”, del Decreto Legge n. 9 del 2 marzo 2020, about “Misure urgenti di sostegno per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19”.

<sup>37</sup> The identification of the nature, limits and requirements legitimizing the exercise of said power has been subject of careful jurisprudential elaboration, see: Corte Costituzionale, 2 luglio 1956, n. 8, in *Giurisprudenza costituzionale*, 1956, 602; Corte Costituzionale, 27 maggio 1961, n. 26, in *Giurisprudenza italiana*, 1961, I, 1, 756; Corte Costituzionale, 4 gennaio 1977, n. 4, in *Giurisprudenza costituzionale*, 1977, 20; Corte Costituzionale, 14 aprile 1995, n. 127, *ivi*, 1995, 994. Furthermore, the matter of “extraordinary and urgent ordinances” has been subject of extensive elaboration by Administrative Courts. First of all, it has been specified that *extra ordinem* power is an exceptional power (T.A.R. Campania-Napoli, Sez. IV, 18 febbraio 2020, n. 779) and has a residual nature (T.A.R. Calabria-Reggio Calabria, Sez. I, 30 luglio 2019, n. 489), whose *raison d'être* lies in the exceptional nature, contingency and temporariness of their effects (Consiglio di Stato, Sez. V, 26 luglio 2016, n. 3369; T.A.R. Campania-Napoli, Sez. V, 6 febbraio 2020, n. 565; T.A.R. Campania-Napoli, Sez. V, 9 novembre 2016, n. 5162 e 17 febbraio 2016, n. 860; T.A.R. Puglia-Lecce, Sez. I, 12 gennaio 2016, n. 69; T.A.R. Lazio-Roma, Sez. II, 19 agosto 2015, n. 10859).

<sup>38</sup> In violation of the “non-discrimination principle” enshrined in the Consolidated version of the Treaty on the Functioning of the European Union (TFUE) - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, *Part Two - Non-Discrimination and Citizenship of the Union*. The Treaty allows the Council to take appropriate measures to combat discrimination based on nationality, gender, race or ethnicity, religion or belief, disability, age or sexual orientation.

security measures provided for other citizens<sup>39</sup>. A final mention should be made to episodes of domestic violence exacerbated by forced coexistence, in the absence of effective measures aimed at protecting the victims

This brief overview of the scale of the pandemic leads us to reflect on our being part of a global-risk society, also in consideration of a surveillance regime that is expanding precisely because of the implementation of artificial intelligence. In the Italian legal system, in particular, what emerged from the management of the emergency situation caused by COVID-19, needs to be urgently assessed. First of all, with regards to the actual solidity of our democratic system, so that future emergencies are addressed on the basis of a certain and precise regulatory framework. Secondly, a serious reflection on the real hierarchy of values in our legal system is necessary, also in order to establish on which and precise exceptions any limitations of the recognized and protected rights of citizens may be imposed.

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<sup>39</sup> Serious tensions, unrest and riots occurred in many Italian penitentiary institutions. Frankly, the coronavirus was only the pretext to report pre-existing precarious conditions, see Del Porto (2020).

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