DIMENSIONE GIURIDICA | LEGAL DIMENSION
Studi per il Dottorato in Scienze Giuridiche dell'Università di Firenze

2

Freedom v. Risk
Social Control and the Idea of Law in the Covid-19 Emergency

edited by

Sara Cocchi and Alessandro Simoni

G. Giappichelli Editore

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Dimensione giuridica/Legal dimension *si pone in continuità ideale con i "Quaderni del dottorato fiorentino in scienze giuridiche" pubblicati tra il 2013 e il 2017 e vuole porre in evidenza come quanto avviato negli anni passati sia diventato ora un dato strutturale. È questo il caso anzitutto del processo di internazionalizzazione, che ha condotto a un'elaborazione scientifica che è bene sia accolta in una tipologia di pubblicazione capace di evidenziare, anche già nel nome, la rilevanza non puramente municipale del suo contenuto.*

Il percorso costruito attraverso gli anni ha permesso di gettare le basi anche dell'elemento di innovazione introdotto in questa nuova fase, ossia la valorizzazione del lavoro dei dottorandi e di chi si è recentemente formato nel dottorato fiorentino e sta costruendo il proprio percorso scientifico. Dimensione giuridica/Legal dimension *non vuole infatti proporsi come luogo dove i "giovani" sono semplicemente invitati a fornire contributi all'interno di iniziative ideate e dirette da altri, più avanti negli anni e nella carriera, ma intende accogliere principalmente ricerche proposte e coordinate in prima persona proprio da* early career scholars, *pur senza escludere a priori l'inclusione di scritti di studiosi affermati.*

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INDEX

page

page

page

COVID-19 AND ICT: A NEW FRONTIER IN THE LAW AND TECHNOLOGY DEBATE

THE ROLE OF TECHNOLOGY IN COVID-19 PANDEMIC

by *Carlo Botrugno*

IT'S ALL ABOUT TRUST: THE UPS AND DOWNS OF COVID-19 CONTACT-TRACING APPS

by *Enza Cirone*

MANAGING THE PANDEMIC: BETWEEN INDIVIDUAL'S RIGHTS, TECHNOLOGY, AND SOVEREIGNTY

by *Valentina Pagnanelli*

page

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WE'RE ALL IN THIS TOGETHER: IDENTIFYING COMMON LEGAL CHALLENGES IN THE EARLY PANDEMIC TIMES

by *Sara Cocchi*

Mid-April 2020. Italy was approximately one month into the very first full lockdown declared by any Western country as an extreme measure to tackle the escalating Covid-19 pandemic. With very few notable exceptions, one after the other, almost all countries across the world were applying restrictions to everyday activities, in the desperate attempt to slow down the spread of Sars-CoV2. With social distancing, curfews and remote working as the cornerstones of our lockdown routines, the work environment as well as social interactions became even more reliant on video calls and instant messaging applications than they had been until just a few weeks before. Especially in Western countries, the sense of awe in experiencing such extraordinary times was omnipresent in any conversation with a friend from another part of the world.

Through this endless stream of calls with colleagues from outside of Italy, we realised that we were not only expressing solidarity to one another: we were also sharing our perspectives on how we were faring through those brand-new pandemic times. While similarities were self-evident, striking differences emerged as soon as we plunged beneath the surface of the most common limitations. Reasons ranged from a country's size to its socio-economic connotations, demographics, constitutional order and territorial organisation.

From the point of view of legal scientists – and legal comparativists in particular – such a composite picture needed to be further explored. We could provide a certain degree of systematisation to those one-to-one conversations, without losing that informal tone which is key to a fruitful scientific cooperation and exchange of ideas. The University of Florence Department of Legal Sciences doctoral programme was the natural context in which to focus the efforts of a considerable number of junior and senior academic researchers and legal professionals, who joined online to discuss the legal measures adopted at that early stage to tackle the Covid-19 pandemic in approximately a dozen countries from three different continents.

Easy enough to imagine, the political, economic, social and legal specificities of each country did not allow for a predetermined pattern of analysis. However, we recommended the experts cover at least a set of key aspects that could facilitate comparison and guide the following discussion.

The constitutional framework was deemed crucial to explore the power of governmental authorities to restrain civil rights and liberties by means of general provisions with the underlying justification of the ongoing pandemic. In particular, the existence of a constitutionally regulated "state of emergency" – or its absence – could lead to the adoption of comparable substantive solutions, but entailed a completely different set of problems in terms of sources of law (prescribed by the constitution v. selected by the government), subjection to (constitutional or administrative) judicial review, enforcement and justiciability of the measures adopted (detection of violations and application of the relevant sanctions). As a consequence, contributors were either asked to examine the powers granted to public authorities (governments in particular) by a constitutionally regulated state of emergency (when present), its contents and time limits, as well as the existing control mechanisms and procedural constraints; or to discuss the other constitutional or legal foundations justifying an emergency regulatory activity in times of public health crisis.

As we all could see, it only took a few weeks for the Covid-19 contagion to turn into a global pandemic, but it is certainly hard to predict how and when it will end. Against an uncertain backdrop governed by fluctuations in the number of active cases and virus transmission rate, it became relevant to inquire how to reconcile the necessarily temporary nature of stringent limitations to fundamental rights with a potentially undetermined deadline set by the development of the pandemic itself. Interestingly enough, solving this conundrum was only apparently easier when the state of emergency is regulated by the constitution, as its rigidly predetermined duration and contents might still leave room for potential abuse or – in turn – not prove flexible enough to face the consequences of a constantly evolving emergency such as a global pandemic.

Without an in-depth analysis of the relevant enforcement and sanctioning mechanisms, a mere description of containment measures and key restrictions to personal liberties would not suffice to provide a comprehensive overview of the measures implemented in the selected countries. Therefore, we recommended our colleagues to include a focus on the *law in action* alongside a detailed account of a rapidly evolving (and sometimes incomplete) *law in the books*, in order to offer the audience a practice-oriented perspective. Only complementarity between the two standpoints can shed light both on the effectiveness of the measures adopted and on the actual implementation policies

adopted by law enforcement bodies in their everyday practice. As we will see, the reasons for discrepancies may range from the specificities of the socio-economic context, which entails additional difficulties in detecting and sanctioning possible violations, to public authorities' substantive lack of interest in implementing what would turn out to be merely formal restrictions.

The same context and policy-related diversity, as well as the practical impossibility of sanctioning any behaviour that might take place in citizens' private sphere, has oftentimes led governments to adopt a blend of "hard" and "soft" measures. The latter are often formulated as recommendations and widely disseminated as good practices that should have a persuasive force rather than be perceived as mandatory orders, and hopefully be absorbed as such into everyday life. References to this mixed approach – and to its successful or unproductive outcome – provide an added value to our colleagues' contributions and offer useful hints to further explore the potential of best practices in managing complex crises.

Since the early stages of the lockdown, Italy has offered a tangible example of how difficult it can be to implement emergency restrictive measures in a decentralised (in our case, regional) form of State. In federal, regional, or anyway decentralised forms of State, the all-encompassing implications of a contagion containment strategy on individual rights and freedoms, but also on collective (e.g., labour-related) and social rights (e.g., the right to education or to health care), allow legal researchers and professionals to test all the intricacies of the constitutional distribution of legislative powers between the different territorial levels and the relevant political authorities (State/Federal Government, States/Regions, municipalities) and highlight potential and actual overlapping of, or even conflicts between, the respective regulatory sources. On the other hand, in centralised forms of State, the lack of flexibility was often questioned as ineffective and discriminatory. Whenever relevant, contributions in this volume analyse the measures adopted in each country with an eye to the different forms (or lack) of geographical distribution of power and the main issues connected to it.

The webinar «Freedom v. Risk? Social Control and the Idea of Law Face to Covid-19 Emergencies» took place on 29 and 30 June 2020. When preparing it, we realised that the topics described above were just a few of the many key points that we might have suggested our colleagues to analyse. We are grateful to them for taking on the challenge and offering us in return countless suggestions for further reflection.

This volume collects and expands the presentations delivered during the two-day online event. We are perfectly aware that so much has happened since those early months that it would be impossible to summarise it here in a

few lines. With this collection of papers (all updated to 31 January 2021), we wish to share a picture of the initial stage of the pandemic from the point of view of legal researchers and professionals from different countries and areas of the world. Those were the times when the urgent need to address unprecedented global problems with viable local solutions and adequate guarantees started to reveal the complexity of the challenges that lay ahead.

FEATURES AND CULTURAL BACKGROUND OF A RESEARCH

by Alessandro Simoni

As already explained by Sara Cocchi in the first introductory section, the essays collected in this volume are the final product of a workshop organized in the early phase of the Covid-19 pandemic, when the whole world had yet a long way to go before getting more or less out of the health emergency. Although most of the contributions were written several months after the workshop, or were updated by the authors during the editing process, the general backdrop against which the arguments were developed was still one where sweeping restrictions of the individual freedom of movement were considered as the cornerstone of the fight against the pandemic. The English term "lockdown" suddenly became a loanword that in many European languages was used as an "umbrella term" to refer to the national policies aimed at minimizing all movements of persons outside of their homes.

The (online, it should go without saying …) workshop and the research that ensued was indeed designed and implemented mostly by persons whose contacts with the outside world – at least those beyond the immediate neighbourhood – took place solely through the screens of PCs, TVs, or smartphones.

Of course, we were not the only academics that were forced to stop their ordinary "mobile" activities, and equally not the only ones who decided to devote intellectual energies to understand the impact of the pandemics on the legal systems. "Law & Covid" has indeed rapidly evolved into a flourishing field of research, and the amount of scholarly writings and the variety of perspectives is impressing everywhere.

The exercise that we launched was quite simple in structure. We gathered young scholars (typically PhD candidates or post-doctoral researchers) who had both the interest and the competences required to shed light on some among the endless legal tensions created by the policies for the control of Covid 19. The directions taken by the research exploit as much as possible the potential – in terms of accumulated knowledge and level of internationalization – developed over the years by the Department of legal sciences (*Dipartimento di*

Scienze Giuridiche - DSG) of the University of Florence, that publishes the series "Dimensione giuridica – Legal dimension", primarily aimed at presenting researches developed by PhD candidates. We perceived indeed that, to add something useful to the flood of "Law & Covid" writings, the most effective approach was simply to stick to our established cultural profile, recently strengthened with the implementation of the five years development plan for 2018-2022 launched after the selection as a "Department of Excellence" by the Italian national agency for the evaluation of universities.

To start, this explains the attention given to the intricate legal issues arising from the use of specific technologies using data to contain the pandemic, as in the case of the three essays by respectively Carlo Botrugno, Enza Cirone and Valentina Pagnanelli. The DSG is now a definitely established hub of research on law and technology, particularly when it comes to data protection, and several PhD projects deal with related topics.

A further intellectual line followed by the volume relates to another cornerstone of legal research in Florence, i.e. the attention to the unequal impact that legal rules and institutions have on the lives of the weakest members of our society, such as migrants. Two essays, by Elisa Gonnelli and Olga Cardini, very well explore such dimensions. The intellectual milieu of the DSG easily explains as well the value of the analysis made by Jacopo Mazzuri and Matteo Romagnoli, that write from the angle of constitutional law and EU law respectively, where the strength of the scholarly tradition of Florence is widely known.

But Florence is as well a stronghold of comparative law, and the reader will accordingly find a variety of essays, of different length and style, devoted to legal systems different from Italy as Denmark (by Alice Giannini), Hungary (by Martina Coli), United Kingdom (by Andrea Butelli), Kosovo (by Bardhyl Hasanpapaj), together with several countries of Latin America as Brazil (with two essays by respectively Luciene Dal Ri together with Jeison Giovanni Heiler, and Rafael Köche together with Luíza Richter), Guatemala (by Irma Yolanda Borrayo), Peru (by Luís Álamo), and Japan (by Alessandro Caprotti). Thanks to these authors, it is thus possible to find an interesting analysis of systems that would otherwise remain relatively unknown when it comes to the legal framework introduced to fight the pandemic.

Here, too, the contribution that this collective work brings to the mass of comparative material on "Covid law" was made possible by what the DSG has built in the past. The possibility to get a comprehensive and qualified view on Latin America is e.g. the result of the extensive network of academic cooperation that the DSG has in the area, that allows a cross-fertilization of legal cultures, where the advances of Italian legal scholarship (that keeps a strong prestige in the Spanish and Portuguese speaking world) are shared globally and

our researchers have the opportunity to appreciate what is discussed e.g. in Brazil with regard to the impact on law of poverty and marginality, and much else. The strength of this cross-fertilization is, by the way, also easily proven by the increasing number of Brazilian candidates that are admitted to our PhD to obtain joint degrees.

While most of the sections touching aspects related to the systems of sanctions introduced to ensure compliance with the "lockdown" deal with foreign countries, there is an exception – that of Federica Helferich's essay on the use of criminal law in Italy. This work also is in line with the research priorities currently followed by the DSG, where both young and established scholars keep a vigilant eye on the risks implicit in the constant expansion of social control through criminal law ("panpenalism"), often with populistic overtones.

Last but not least, also the involvement of Alessandro Cocchi, a international cooperation expert, lies at the end of a journey of constant attention of the DSG for the role of law in development contexts, which beyond research projects is also reflected in the growing number of those that after a PhD in legal sciences choose a career in the legal segments of development work.

Every reader will verify what can be of interest for him/her among the materials offered. Now that the health emergency has no longer the monopoly of the headlines, some essays can probably be useful for a retrospective critique of the oversimplification often recurring in the past year in the media, but also in some scholarly works, where the countries that adopted restrictive measures labelled as "lockdowns" are considered as part of a homogenous family, assuming that the only relevant differences were the timing of the introduction of the restrictions and of their removal. Within legal scholarship, this oversimplification was partly endorsed by a focus on the constitutional basis for the introduction of the "lockdowns". A perfectly understandable choice given the situation, that sometimes – however – diverted the attention from the legal "nuts and bolts" of lockdowns, i.e. the provisions that on a daily level allowed limiting freedom of movement and the unwritten rules that governed their use in practice. Upon a closer look, the differences also within Europe at the level of actual restrictions of liberties appears as significant, with differences that are at first sight not in line with the alleged success or failure of national "covid strategies". One of the case studies presented here, that of Denmark, is an interesting example. As everyone knows, in Italy and elsewhere there has been a sweeping critique against the choice made by Sweden, that openly refused to adopt the "lockdown" line pioneered by Italy. One of the core arguments in this critique – sometimes very harsh – against the "Swedish exception" was the death toll of Denmark during the pandemic, that was much lower than that of its neighbour. But once again looking under

the surface brings more doubts than certainties in terms of causal connections. As it appears quite clearly from the legal machinery described in the essay by Alice Giannini, the "success story" in terms of number of victims of Denmark was e.g. not accompanied by a compression of individual freedom of movement even remotely comparable to what took place in Italy,[1] something that of course does not exclude *per se* that the Italian choice could have been, however, rational on some ground.

On this and other aspects, the contributions here made available by the PhD candidates that accepted to take part in this enterprise – and by the other colleagues that joined – will maybe serve retrospectively as small but useful pieces for a "global history" of how freedom was traded off against risk control during the Covid-19 crisis.

[1] On this point see my remarks in A. SIMONI (2020), *Limiting Freedom During the Covid-19 Emergency in Italy: Short Notes on the New "Populist Rule of Law"*, in *Global Jurist*, 2, pp. 11 ff.

EUROPEAN SOCIETIES AND THE COVID-19 EMERGENCY. LAW AND INSTITUTIONS IN THE EARLY STAGES OF THE PANDEMIC

THE ADOPTION OF COVID-RELATED EU LEGISLATION: WHAT ROLE FOR NATIONAL PARLIAMENTS UNDER EU LAW?

by *Matteo Romagnoli*

1. *The EU's response to the Covid-19 emergency: The key role of the EU legislator*

The European Council's conclusions of February 20, 2020 show that the Member States' heads of State and Government had initially underestimated the Coronavirus emergency and its potential consequences. Nonetheless, things changed after the worsening of the health crisis in Lombardy and also due to some skirmishes between the Member States over the supply of medical equipment. The European Council held a videoconference on Covid on March 10 in which heads of State and Government highlighted the need to work together and identified the main priorities for the European Institutions' future actions. Unfortunately, public debate about the Union and the Covid emergency – especially in the media – usually focuses solely on financial issues, whereas no one ever mentions the key role played by the European legislator.

The aim of this paper is therefore to analyse the procedure for the adoption of Covid-related EU legislation. There have been sixty-three EU acts proposed since March 2020 to combat the virus and its effects on the economy and society. These acts – due to the Union's competence in many areas affected by the health crisis – have proved essential in supporting the Member

States' efforts to respond to the emergency. The guiding principle of all regulatory actions has been the need to act as quickly as possible, overcoming the procedural *impasse*. This is mainly due to the collective public health emergency faced by the Union, an unprecedented scenario in recent history which "has produced an extreme economic shock that requires an ambitious, coordinated and urgent reaction on all policy fronts to support businesses and workers at risk".[1]

This paper is structured as follows. Section two illustrates the main features of the ordinary legislative procedure and the role of national parliaments in monitoring compliance with the principle of subsidiarity. Participation of national parliaments in the EU legislative process is critical because it is becoming an increasingly important aspect of the Union's constitutional legitimacy.[2] Section three explains how the EU Institutions rearranged the ordinary legislative procedure during the emergency. In section four, the focus then shifts to the eight-week exception, and the justifications provided by the EU Legislator. As a rule, in the context of the EU ordinary legislative procedure, national parliaments are granted a period of eight weeks in order to assess proposed legislation; in the context of the Covid-crisis, this procedure has been accelerated. Lastly, section five discusses how national parliaments are assessing EU acts during the pandemic.

2. *The European Union's ordinary legislative procedure and the role of national parliaments*

The Covid emergency has compelled the EU institutions involved in the law-making process to deliver faster under the ordinary legislative procedure (OLP).[3] To understand how the EU legislator has managed to do so, it is important to stress that European Treaties do not mention emergency legislative powers. However, EU law is very flexible when it comes to deadlines for legislative procedures. At the beginning of the procedure, the Commission submits its

[1] Decision (EU) 2020/440 of the European Central Bank of 24.3.2020 (ECB/2020/17), recital no. 4.

[2] See M. OLIVETTI, *Art. 12 TUE [The Role of National Parliaments]*, in H.J. BLANKE, S. MANGIAMELI (eds), *The Treaty on European Union (TEU)*, New York-Vienna, 2013, pp. 467-526.

[3] About the ordinary legislative procedure see C. ROEDERER-RYNNING, *Passage to Bicameralism: Lisbon's Ordinary Legislative Procedure at Ten*, in *Comparative European Politics*, Vol. 17 (6), 2019, pp. 957-973.

proposal to the European Parliament (EP) and the Council, and then sends it to national parliaments. The first step is for the EP to adopt its position at first reading and forward it to the Council. If the Council approves the Parliament's position, the act is then adopted in the exact wording of the position. Otherwise, if the Council disagrees, it adopts a position at first reading and forwards it to the EP, thus initiating the second stage ("second reading") of the procedure. The EP then has three months to state its position and, depending on its assessment of the Council's first reading position, three different scenarios arise. Under the first two, the procedure comes to an end: in case of approval, the act is definitively adopted, whereas, in case of rejection, it is definitively not adopted. As a third option, the Parliament can propose amendments to the Council's position by a majority of votes, and the Commission is required to give its opinion on them. The Council can then approve all the parliamentary amendments by a qualified majority and consequently formally adopts the amended act. Otherwise, in agreement with the EP, the Council has to convene – within six weeks – a Conciliation Committee composed of the Commission, the members of the Council (or their representatives – usually members of COREPER[4]) and as many members of Parliament. The task of the Conciliation Committee is to reach, based on the positions expressed by the Parliament and the Council at second reading, an agreement on a "joint text" within six weeks, which may result in the adoption of the act by the Council and the Parliament[5] over the course of an additional six weeks. If no agreement is reached within the Conciliation Committee, the act in question will not be adopted.

To sum up, the two co-legislators adopt the legislation jointly, having equal rights and obligations – neither of them can adopt any legislation without the other's consent, and both co-legislators have to approve an identical text. Therefore, concerted actions of both institutions are indispensable for the OLP's success. On the one hand, this is a great step forward for EU democracy; on the other, it has also a significant impact on the length of the procedure. The

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[4] See D. BOSTOCK, *Coreper Revisited*, in *Journal of Common Market Studies*, Vol. 40 (2), 2002, pp. 215-234.

[5] As the Court of Justice itself has observed, the Conciliation Committee is granted significant freedom in seeking agreement on a joint project. CJEU, judgment of 10.1.2006, C-344/04, *IATA e ELFAA*, ECLI:EU:C:2006:10, paragraph 58: "*In adopting such a method for resolving disagreements, their very aim was that the points of view of the Parliament and the Council should be reconciled on the basis of examination of all the aspects of the disagreement, and with the active participation in the Conciliation Committee's proceedings of the Commission of the European Communities, which has the task of taking 'all the necessary initiatives with a view to reconciling the positions of the … Parliament and the Council'*". See R. SCHÜTZE, *European Constitutional Law*, Cambridge, 2015, p. 273 ff.

framework allows for the OLP to be terminated, without further steps, as soon as an agreement or a radical disagreement between the two institutions arises.

An early first-reading search for an agreement between the two co-legislators may help speed up the decision-making process. This is why the EP, the Council and the Commission have concluded an Inter-institutional Agreement aimed at facilitating the OLP in terms of timing. The Joint Declaration on the practical arrangements for the new co-decision procedure of June 13, 2007[6] provides for frequent contacts between the three institutions within the so-called trilogues,[7] which take place throughout the whole OLP and in particular from the first reading. The Declaration also requires the EU Institutions to synchronise their respective work schedules. The content of the Declaration was echoed in the Interinstitutional Agreement on "Better Law-Making" of April 13, 2016.[8] The current successful conclusion at first reading of 80% of OLPs proves the effectiveness of the agreed solutions. Thanks to the increasing use of Trilogues at the very early stages of the OLP, inter-institutional compromise is now often brokered at first reading and prior to second reading.[9] Nowadays, "trilogues have become the *modus operandi* of EU decision-making".[10]

Nonetheless, trilogues and the related early agreements pose two potential risks for the EP as an organ of parliamentary representation and for EU democracy: firstly, they depoliticise conflict by delegating decision-making to technical experts;[11] secondly, they reduce the accountability and transparency

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[6] Joint declaration on practical arrangements for the codecision procedure (article 251 of the EC Treaty) 2007/C 145/02, 30.6.2007, pp. 5-9.

[7] Trilogues are informal meetings between the Council Presidency, the Commission, and the chairs or rapporteurs of the relevant EP Committees. These accompany the whole procedure by preparing the formal meetings of the institutions involved and the Conciliation Committee. See S.L. BIANCO, *Informal Decision-Making in the EU: Assessing Trialogues in the Light of Deliberative Democracy*, in J. DE ZWAAN, M. LAK, A. MAKINWA, P. WILLEMS (eds), *Governance and Security Issues of the European Union*, The Hague, 2016, pp. 75-92.

[8] Interinstitutional Agreement Between the European Parliament, the Council of The European Union and the European Commission on Better Law-Making of 13.4.2016, OJ L 123, 12.5.2016, pp. 1-14; see R. BRAY, *Better Legislation and the Ordinary Legislative Procedure, with Particular Regard to First-Reading Agreements*, in *The Theory and Practice of Legislation*, Vol. 2 (3), London, 2014, pp. 283-291.

[9] See P. CRAIG, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford, 2013, p. 39.

[10] J. GREENWOOD, C. ROEDERER-RYNNING, *Taming Trilogues: The EU's Law-Making Process in a Comparative Perspective*, in O. COSTA (eds), *The European Parliament in Times of EU Crisis. European Administrative Governance*, Bordeaux, 2019, pp. 121-141, p. 137.

[11] Actually, "the EP has historically been the motor of trilogue reform and institutionalization". C. ROEDERER-RYNNING, *Passage to Bicameralism: Lisbon's Ordinary Legislative Procedure at Ten*, cit., p. 966.

of the decision-making process.[12] The Treaties do not specify a time limit for first readings.[13] Therefore hypothetically, in absence of an urgent legislative procedure, if EP, Council and Commission agreed immediately, they could pass a legislative proposal within the time needed to organise votes. However, this cannot actually occur because the rules of national parliaments' participation impose a minimum period of time that must elapse before passing an EU legislative act.

The purpose of involving national parliaments in the European integration process is to bring politics and policies closer together, thus filling a gap that has caused so many problems to the modern EU.[14] Limitations on sovereignty, the attribution of legislative powers to the Union, the principles of primacy and direct effect decrease the strength and the political representativeness of the Member States' national parliaments. This has led some scholars to highlight the "executives' dominance" when defining the government of the Union.[15] The transfer of competence to the EU enhances the power of the executive at the expense of national parliaments. As a result, "democratic disconnection" between supranational and national levels can be observed within the European integration process.[16] More precisely, there is a wide divergence between a large part of public policies that have now become "Europeanised" and a political debate that has remained predominantly national.[17]

Article 12 TEU and protocols 1 and 2 annexed to the Treaties have now established specific "European powers"[18] for the Member States' parliaments.

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[12] The General Court ruled on the lack of transparency of the Trilogues in the De Capitani judgment. CJEU, judgment of 22.3.2018, T-540/15, *Emilio De Capitani v. European Parliament*, EU:T:2018:167, See M. COSTA, S. PEERS, *Beware of Courts Bearing Gifts: Transparency and the Court of Justice of the European Union*, in *European Public Law*, Vol. 23 (3), 2019, pp. 403-420. About accountability see J. GREENWOOD, C. ROEDERER-RYNNING, *Taming Trilogues: The EU's Law-Making Process in a Comparative Perspective*, cit., p. 122.

[13] R. BRAY, *Better Legislation and the Ordinary Legislative Procedure, with Particular Regard to First-Reading Agreements*, cit., p. 287.

[14] N. LUPO, *National parliaments in the European integration process: re-aligning politics and policies*, in M. CARTABIA, N. LUPO, A. SIMONCINI (eds), *Democracy and subsidiarity in the EU. National parliaments, regions and civil society in the decision-making process*, Bologna, 2013, pp. 107-132, p. 108.

[15] K. AUEL, B. RITTBERGER, *Fluctuant nec Merguntur. The European Parliament, National Parliaments and European Integration*, in J.J. RICHARDSON (eds), *European Union: Power and Policy Making*, London, New York, 2006, p. 152 ff.

[16] See P.L. LINDSETH, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford, 2010, p. 12 ff.

[17] See V.A. SCHMIDT, *Democracy in Europe: The EU and National Polities*, Oxford, 2006.

[18] *Ibid.*, p. 114.

The first protocol provides for the transmission of documents drawn up by the Commission, as well as of annual legislative programmes, policy strategy documents and draft legislative acts.[19] The second one concerns the procedure under which national parliaments exercise *ex-ante* control in compliance with the principle of subsidiarity (Early Warning System).[20] Another tool created to help national parliaments interact with the European Commission without intermediation is the so-called "political dialogue".[21] Under the Early Warning System (EWS), each national parliament casts two votes. Where a parliament is composed of two different chambers, each chamber may present its reasoned opinion which corresponds to one vote. According to Protocol No. 2, when the reasoned opinions amount to one-third of the total votes that can be expressed, the author of the draft legislation must review it. The purpose is to decide whether to maintain it, modify it or withdraw it (the so-called "yellow card"). In addition, if the Commission decides to keep the proposal, even though the reasoned opinions expressed by national parliaments correspond to a simple majority of the total votes, the Council or the EP can definitively block the proposal, as stated in Article 7, par. 3, of the Protocol (the so-called "orange card").

Besides this, the Commission has established a new procedure to encourage national parliaments to follow a positive logic of cooperation, rather than a negative one of mere obstruction. At first, it was called the "Barroso procedure" and then it was renamed "political dialogue".[22] With a letter from President Barroso in May 2006, the Commission formally committed to taking into consideration all contributions sent by national parliaments, responding to each of them. In addition, this procedure has several complementary qualities to the EWS: firstly, these opinions are political, and may therefore not concern issues regarding compliance with the principle of subsidiarity; secondly, they may be evaluated by the Commission even after the eight weeks allowed for the EWS; thirdly, they are independent by nature and from the subject of the concerned EU acts, so they may also refer to

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[19] C. FASONE, N. LUPO, P.G. CASALENA, *Comment on Protocol No. 1, on the role of national parliaments in the European Union annexed to the Treaty of Lisbon*, in H.-J. BLANKE, S. MANGIAMELI (eds), *The Treaty on European Union (TEU)*, Vienna-New York, 2013, pp. 1529-1634.

[20] See K. GRANAT, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, London, 2018.

[21] See D. JANČIĆ, *The Game of Cards: National Parliament in the EU and the Future of the Early warning Mechanism and Political Dialogue*, in *Common Market Law Review*, Vol. 52 (4), 2015, pp. 939-975, p. 948.

[22] See D. JANČIĆ, *The Barroso Initiative: Window Dressing or Democracy Boost?*, in *Utrecht Law Review*, Vol. 8 (1), 2012, pp. 78-91.

non-legislative measures and exclusive competences. On the one hand, these procedures – notably, the EWS – have produced limited results in terms of actual impact on the decision-making process. On the other hand, they have accentuated the process of Europeanisation of national parliaments, contributing to political – and not just technical – dialogue on European choices.[23] Furthermore, as was observed, "the impact of these measures depends in part on the willingness of national parliaments to devote the requisite time and energy to the matter".[24]

Finally, there is also a standstill period, which is the basic precondition that enables national parliaments to carry out all functions granted to them by the Treaties and the Protocols.[25] According to Article 4 of Protocol No. 1, "an eight-week period shall elapse between a draft legislative act being made available to national Parliaments (…) and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure".[26] An additional deadline is provided for in the last sentence of Article 4: ten days should elapse between the inclusion of the proposal in the draft legislative agenda of the Council and the adoption of a position by this institution. As opposed to the first deadline, this one is set for the Council to carefully consider the content of the parliamentary opinions and other contributions received.[27] However, the same article contains an exception in case of urgency, whereby the approved act, or the Council's position on the act, has to include the grounds on which the exception was applied. The Council's Rules of Procedure implement this provision by stating that the Council may derogate from the eight weeks in accordance with the voting procedure applicable for the adoption of the act or position at issue. This exception could be identified as the only reference to an "EU urgent legislative procedure".[28] As pointed out by Fasone, "Article 4 of the Protocol introduces another element of uncertainty regarding the effectiveness of nation-

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[23] See B. GUASTAFERRO, *Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions*, in *Maastricht Journal of European and Comparative Law*, Vol. 21 (2), 2014, pp. 320-340.

[24] P. CRAIG, G. DE BÙRCA, *EU Law: Text, Cases and Materials*, Oxford, 2020, p. 98.

[25] C. FASONE, *Comment on article 4*, in C. FASONE, N. LUPO, P.G. CASALENA, *Comment on Protocol No. 1, on the role of national parliaments in the European Union annexed to the Treaty of Lisbon*, cit., pp. 1566-1573, p. 1566.

[26] Article 4, Protocol No. 1 On the Role of National Parliaments in the European Union.

[27] See C. FASONE, *Comment on article 4*, cit., p. 1569.

[28] See A. LEVADE, *Commentaire au protocole sur le role des parlements nationaux*, in L. BURGORGUE-LARSEN, A. LEVADE, F. PICOD (eds), *Traité établissant une Constitution pour l'Europe. Commentaire article par article*, Bruxelles, 2007, pp. 869-894, p. 887.

al Parliaments' participation, which nonetheless seems coherent with the need not to make the legislative process too rigid *vis-à-vis* unexpected situations that can occur in political life".[29] The protocol's article specifies that "save in urgent cases for which due reasons have been given, no agreement may be reached on a draft legislative act during those eight weeks".[30] Therefore, eight weeks and ten days is the minimum period within which an EU legislative act cannot be passed, unless the exception is triggered.

3. *The Covid emergency and the EU legislative response*

During the Covid emergency, the Union legislator has used all the available space for discretion under the existing procedures to deliver in a timely manner. Exceptional measures became necessary to overcome logistical difficulties, since the Institutions' intense activity had become problematic after the introduction of social containment measures. As a result of the restrictions on travel and access to the workplace, the meetings of the EU Institutions took place via remote video conferences. The EP adopted a new remote voting system for its Members (MEPs).[31] The Council also provided for a temporary derogation from the Rules of Procedure, allowing the convening of online meetings, thus overcoming any travel-related difficulties faced by its members.[32] These measures have ensured continuity in the regulatory work of the European Parliament and the Council. However, while these solutions are exceptional and limited in time, such procedures should be appropriately regulated to be used again in the future.

Furthermore, other exceptions had to be applied to ensure the effectiveness of the measures in the Commission's proposals. The Institutions decided that the Covid-related legislative acts would enter into force right after their publication in the Official Journal, to ensure the immediate effectiveness of the new legislation. Besides, the retroactive application of certain new regulations was arranged where necessary to ensure their *effet utile*.[33]

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[29] C. FASONE, *Comment on Article 4*, cit., p. 1571.

[30] Article 4, Protocol No. 1, cit.

[31] Decision of the Bureau of the European Parliament of 20 March 2020 supplementing its decision of 3.5.2004 on voting arrangements, available at https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649348/EPRS_ATA (2020)649348_EN.pdf.

[32] For instance, Council Decision (EU) 2020/702, OJ L 165, 27.5.2020, pp. 38-39.

[33] For instance, See recital no. 22 of Regulation (EU) 2020/698, OJ L 165, 27.5.2020, pp. 10-24.

Finally, since the introduction of the first regulations on March 30, 2020 the Council has consistently used the eight-week period exception in all legislation passed to address – or at least handle – the current emergency. The first measures adopted under the OLP were amendments to three regulations concerning emergency procedures on common rules for the allocation of slots at airports, on the Coronavirus Response Investment Initiative, and on the reformation to the European Solidarity Fund.[34] The latter was identified by the European Council as a measure symbolising solidarity between the Member States. The Council and the EP agreed to vote at first-reading the Commission's proposals, so that such provisions could enter into force by March 31, 2020. Therefore, on March 27, 2020 the Council, besides approving at first reading all the proposed acts, voted unanimously to derogate from the eight-week period. This exception was applied to all subsequent Commission proposals, at least until June. The systematic application of the exception suffered a setback when the EP and the Council examined proposals for the first acts related to the Multiannual Financial Framework (MFF), Recovery Fund and Next Generation EU. The final adoption and publication in the Official Journal of all the legislative acts adopted between March and May 2020 in response to the health emergency took, on average, one month.

4. *The use (and misuse) of the exception to the eight-week period and the obligation to state reasons for urgency*

Focusing on the exception to the eight weeks, there was no reference to justifications in the position of the Council. By contrast, in the regulations which were finally adopted, there is a recurring recital stating that the exception is justified "in view of the Covid-19 outbreak and the urgency to address the associated public health crisis".[35] How should this "standardised" justification be evaluated?

Protocol No. 1 does not provide indications on the meaning of the expression "due reasons". One may consider that "reference can be made to the existence of a compelling interest, to be clearly identified by the Council, whose protection is directly related to the adoption of that legislative measure, and that could be severely jeopardised without shortening or cancelling the dead-

[34] Regulation (EU) 2020/459, OJ L 99, 31.3.2020, pp. 1-4; Regulation (EU) 2020/460, OJ L 99, 31.3.2020, pp. 5-8 and Regulation (EU) 2020/461, OJ L 99, 31.3.2020, pp. 9-12.

[35] E.g. Regulation (EU) 2020/459, OJ L 99, 31.3.2020, pp. 1-4, recital no. 11.

lines fixed by Protocol No. 1".[36] Moreover, "according to the principle of proportionality, the Council should also prove that the same result could have not been achieved by using other tools or other means less restrictive of the right of participation of national parliaments".[37]

Some commentators have already drawn attention to how the European Legislator fulfils its duty to state reasons as required by the Treaties.[38] In the subsidiarity test, for example, the reasons provided by the Commission are often too laconic and merely state that the EU action is justified. As it has already been highlighted, "as a matter of fact, European Institutions do not always draw up an accurate analysis to explain why Union action is deemed to be more efficient than action by the Member States".[39] It has been noted that because of the laziness of the Commission's reasoning, "several national chambers challenge the justification rather than the merit of subsidiarity compliance".[40] Furthermore, this cannot be justified by the fact that "the Court of Justice of the European Union notoriously has deemed the subsidiarity principle as a political rather than a legal concept, showing a strong deference towards the discretionary power of European institutions in assessing the compliance of Union acts with the principle of subsidiarity".[41] The CJEU has distinguished between *ex ante* control, exercised at the political level by national parliaments under the procedures laid down in the Protocols, and *ex post* control, whereby the Court must verify compliances with both the substantive conditions set out in Article 5(3) TEU and the procedural guarantees laid down in the Protocol.[42]

However, it becomes quite evident that the assessment of the Institutions' compliance with the conditions imposed by the principle of subsidiarity requires more political and economic evaluations rather than legal ones. When the Court started exercising its judicial control over EU acts in light of the principle of subsidiarity, it limited itself to assessing their formal appropriate-

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[36] C. FASONE, *Comment on article 4*, cit., p. 1572.

[37] *Ibid.*

[38] B. GUASTAFERRO, *Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions*, cit., p. 324.

[39] *Ibid.*

[40] *Annual Report 2009 on relations between the European Commission and national parliaments*, COM (2010) 291 final, p. 4.

[41] B. GUASTAFERRO, *Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions*, cit., p. 323.

[42] CJEU, judgment of 4.5.2016, C-358/14, *Poland v Parliament and Council*, ECLI:EU:C:2016:323, paras. 112 ff.

ness.[43] Judicial review on the initiative of national parliaments is made even more complicated by the procedure of the exception contained in Article 4 of Protocol No. 1. The Council actually delayed its justification (*ex post*), since it came after the pre-legislative stage, when national parliaments could have instead intervened. More precisely, the Council must include the reasons in its position or in the adopted act, after the legislative process has begun, but before its conclusion. This poses several problems. First of all, the activation of the exception does not allow a formal *ex ante* control. In this case, it becomes hard to reach the *quorum* required by the EWS. Secondly, there are no solutions available to national parliaments in case of abuse of the urgency procedure. In case of incomplete or insufficient justification, their position is even weaker, as they cannot directly challenge the validity of an adopted legislative act. Parliaments could only claim the legislative acts under Article 263 TFEU about compliance with the principle of subsidiarity.[44] Therefore, any Member State, through its Government, acting directly on behalf of its Parliament, could arguably claim a violation of an essential procedural requirement, such as the lack of consultation of national parliaments during the pre-legislative phase. The approach of the CJEU regarding subsidiarity does not bode well for the outcome of such legal actions. In addition, some questions about the political expediency of the involvement of national governments might arise given their participation in Council decisions.

Recently, a reflection on the revision of the Protocols was undertaken at the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union's (COSAC) annual meeting in Zagreb.[45] An amendment was considered to extend the time given to national parliaments to better carry out their scrutiny. However, it seems that no discussion was held on the rules on suspension for reasons of urgency, which is probably due to the use of the eight-week suspension in a limited number of cases until now. The main features of these cases deserve attention. EU Legislators used this exception mainly for draft acts intended to make changes to the transposition dates of directives or the application of regulations. The purpose of these acts was to avoid overly heavy burdens on the Member States and to allow adequate time for economic operators to prepare for the new measures. Some features

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[43] CJEU, judgment of 13.5.1997, C-233/94, *Germany v Parliament and Council*, ECLI:EU:C:1997:231, paragraph 28.

[44] Article 8, Protocol No. 2 On the Application of the Principle of Subsidiarity and Proportionality.

[45] *Meeting of the Chairpersons of the Committees for Union Affairs (COSAC)*, 19-20.1.2020, Zagreb.

can be highlighted by observing these examples and their reasons. If the exception was activated to postpone a deadline, the argument of the extension includes the description of the required urgency. For example, this can be seen in recitals no. 6 and 7 of Regulation (EU) 2016/2340, which state: "given the very short period of time left before the application of the provisions laid down in Regulation (EU) No 1286/2014, this Regulation should enter into force without delay (…), it is also justified to apply in this case the exception for urgent cases provided for in Article 4 of Protocol (No 1)".[46] Other cases in which this provision was adopted involved acts relating to trade measures ordered under the EU Neighbourhood Policy. Regulation (EU) No. 1150/2014 contained provisions anticipating customs duties in relations with Ukraine because of the political, social and economic crisis of 2014.[47] Instead, Regulation (EU) 2016/580 was a measure designed to quickly handle the economic fallout that occurred after the 2015 terrorist attacks in Tunisia.[48] The Council felt that the EU should grant exceptional and temporary measures to support the Tunisian economy. In these specific cases, explaining the urgency was the same as describing how the act should address a particular event. Thus recital 10 of Regulation (EU) 2016/580 stated: "in view of the severe damage done to Tunisia's economy (…) by the terrorist attack near Sousse on 26 June 2015, and the need to take emergency autonomous trade measures to alleviate Tunisia's economic situation in the short term, it was considered to be appropriate to provide for an exception to the eight-week period".[49] Finally, the applications of the exception include the acts adopted in view of the UK's withdrawal from the EU.[50] These Brexit-related acts seem to share a pattern with the current situation. There was a tendency to identify an emergency in the event (Brexit) without taking into account the object of the adopted act. The exception was then applied to these acts "in view of the urgency entailed by the withdrawal of the United Kingdom from the Union".[51]

Compared with the cases just mentioned, the urgency of intervention resulting from the health emergency outlined a more complicated scenario. In providing for recourse to the exception, the recitals of the legislative acts refer to the urgent need for immediate intervention, based on the assumption that a

[46] Regulation (EU) 2016/2340, OJ L 354, 23.12.2016, pp. 35-36, see recital no. 6 and 7.

[47] Regulation (EU) 2014/1150, OJ L 313, 31.10.2014, pp. 1-9.

[48] Regulation (EU) 2016/580, OJ L 102, 18.4.2016, pp. 1-4.

[49] *Ibid*. Recital no. 10.

[50] For instance, see Regulation (EU) 2019/503, OJ L 85I, 27.3.2019, pp. 60-65.

[51] *Ibid*. Recital no. 10.

health emergency calls for a quick response. Therefore, it is difficult to understand why all this is never made explicit. Arguably, the argument that the exception is justified "in view of the outbreak of Covid-19 and the urgency of addressing the public health crisis associated with it" is too brief and generic and it is based on circular reasoning. These concerns must be taken seriously because the exception at issue has become the rule for legislative procedures falling under the priority called "The EU's response to the Covid-19 pandemic". It is thus even more evident that these reasons are too generic. Until now, the EU Institutions have applied the exception to the eight-week period to the adoption of 20 legal acts, and they have proposed it in four other cases. These acts cover very different areas: health, medical devices and drugs, agriculture and fisheries, competition, financial tools, consumers, customs, digital single market, employment and social policy, companies, external relations and macroeconomic assistance to EU neighbour countries, foreign trade, food safety, internal market, regional policy, transport and use of structural and investment funds.[52] This exception has even been triggered in relation to the EU Regulation establishing the Recovery and Resilience Facility. In other words, they tackle very different legal and economic problems caused by the pandemic. Despite the exceptional situation, the heterogeneity of the adopted acts would require the justification of the urgency to include a reference to the specific characteristics of each one of them. Therefore, the subsequent assessment of compliance with the obligation to give reasons, whether political or jurisdictional, must be able to cover articulated and complete grounds relating to the specific act adopted. Moreover, not even one attempt to justify the proportionality and necessity of the exceptions can be found in the documents.

These findings are supported by some isolated cases in which the legislator, even in this emergency, was not hasty in justifying the eight-week exception. For example, Regulation (EU) 2020/561 explains clearly and precisely that it was approved quickly by activating the eight-week exception, in order to avoid the entry into force of some provisions concerning medical devices.[53] Another noteworthy example is Regulation (EU) 2020/1042, which establishes temporary measures regarding the deadlines for the collection, verification and examination phases of the European Citizens' Initiative during the Covid emergency. Initially, the Commission's proposal contained a detailed, struc-

[52] For an exhaustive list of the acts involved see on the Legislative Observatory of the EP the legislative priority "The EU's response to the Covid-19 pandemic", available at https://oeil.secure.europarl.europa.eu/oeil/popups/thematicnote.do?id=2065000&l=en.

[53] Regulation (EU) 2020/561, OJ L 130, 24.4.2020, pp. 18-22, recital no. 11.

tured and very specific justification of the subject matter of the act. According to the Commission, it is appropriate to provide for an exception to the eight-week rule because "this Regulation should be adopted as a matter of urgency, so that situations of legal uncertainty affecting citizens, organisers, national administrations and the Union institutions, in particular where the relevant time periods for the collection of statements of support, verification and examination in respect of a number of initiatives have already ended or are about to end, remain as short as possible".[54] By contrast, the act which was finally adopted only contains a formal reference to Covid,[55] and the reasons behind this change cannot be found. In addition, there are some critical remarks made by the European Ombudsman with respect to transparency of the legislative activity of the Council during the first months of Covid. On March 24, 2021, the Ombudsman demanded that the Council of the European Union adopt measures to achieve better transparency in its decision-making process after examining the procedures utilized during the Covid-19 crisis and finding them insufficient.[56] While noting the great efforts made by the Council to carry out its work under difficult circumstances, the Ombudsman's investigation verified that, for the first four months of the Covid-19 crisis, meetings of relevant ministers did not meet normal standards of transparency. These criticisms of the European Ombudsman also implicitly address the transparency of the activation of the exception to the eight-week period. At least as far as the first period of the anti-Covid rules is concerned.

To sum up, the Protocol requires inclusion of the urgency justifying the exception in the final act or in the Council's position. As much as aspects like national parliament's participation may appear as procedural deadlocks to be overcome, providing a complete justification for the activation of an exception established by primary law is a corollary of the principles of legality and of legal certainty,[57] as it enables an *ex-post* evaluation of the EU legislator's work. The inclusion of references to the reasons for urgency within the act would not seem to be an excessive burden for the EU legislator. Some adaptations to the justifications would be necessary.

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[54] Proposal for a Regulation of The European Parliament and of The Council, COM (2020) 221 final, recital no. 16.

[55] Regulation (EU) 2020/1042 OJ L 231, 17.7.2020, pp. 7-11, recital no. 19.

[56] Decision in strategic inquiry OI/4/2020/TE on the transparency of decision making by the Council of the EU during the Covid-19 crisis of European Ombudsman, 24.3.2021, available at https://www.ombudsman.europa.eu/it/decision/en/139715.

[57] CJEU, judgment of 21.9.1983, C-205/82, *Deutsche Milchkontor GmbH*, ECLI:EU:C:1983:233.

5. *The exercise of control by national parliaments over EU acts during the pandemic*

It is important to stress that the possibility to rely on an exception to the eight-week rule does not take away national parliaments' control over the EU act concerned. Clearly, the shorter time available during the Covid crisis makes it very difficult to reach the required majorities in the EWS. However, many national parliaments have managed to provide their opinion anyway. One reason could be the growing emphasis on political dialogue. A further reason may be that the control established by the subsidiarity Protocol has become a structural element of parliamentary activity in some Member States. Databases such as "the InterParliamentary EU information eXchange" (IPEX)[58] provide an overview on how various national parliaments have responded to the decisions taken by the EU institutions. IPEX is a system for the exchange of information and documents on all European-related activities of national parliaments and the European Parliament.[59] Notably, it allows sharing, thanks to smart and standardised formats in English and French, of an early and essential picture of the orientations and decisions of the various parliaments on specific measures or other EU issues, as well as the European Commission's responses to each one of them within the political dialogue.

An empirical analysis of the work of national parliaments shows that some of them have systematically analysed the Commission's proposals. In March 2020, for example, the Belgian House of Representatives considered the possible application of the eight-week exception by analysing together the proposed acts under the legislative priority of response to Covid.[60] Others, on the other hand, only select those which they consider relevant. In Italy, for instance, the *Camera dei Deputati* (the lower chamber) has prioritised and carried out its subsidiarity control only in respect of Decision (EU) 2020/701 concerning macro-financial assistance to EU neighbouring countries.[61]

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[58] IPEX, *the InterParliamentary EU information eXchange*, https://ipexl.secure.europarl.europa.eu/IPEXL-WEB/home/home.do.

[59] See V. KNUTELSKÀ, *Cooperating among National Parliaments: An Effective Contribution to EU Legitimation?*, in B.J.J. CRUM, E. FOSSUM (eds), *Practices of Inter-Parliamentary Coordination in International Politics. The European Union and Beyond*, Colchester, 2013, p. 35 ff., p. 41 ff.

[60] Belgian House of Representatives, 16.4.2020, *Cellule d'analyse européenne. Le deuxième paquet Corona (CRII +) COM(2020)138 à 144 et COM(2020) 170 à 175.*

[61] *Camera dei Deputati*, *Doc. XVIII N. 17 III Commissione (affari esteri e comunitari) documento finale*, 12.5.2020.

Furthermore, national parliaments do not limit their scrutiny only to EU legislative acts (i.e., acts adopted under the OLP). For instance, the EU Regulation that established SURE (Support to mitigate Unemployment Risks in an Emergency),[62] was approved via a non-legislative procedure. Among the most important and innovative initiatives, the Council has taken some decisions based on Article 122 TFEU, adopting coordination measures "in a spirit of solidarity". Yet, two national parliaments issued reasoned opinions – the first ones related to measures acted in response to the Covid-crises.[63] As for the proposal of this Regulation, the case of Finland deserves close attention. The internal discussion within the Finnish Parliament did not go as far as producing a reasoned opinion. This Member State has established a national decision-making procedure on EU matters that provides the national parliament with extensive rights of participation and information. Issues concerning European monetary policy and other related topics have especially been often discussed in the parliament,[64] including the Committee on Constitutional Law – the most important constitutional body in Finland, in the absence of a Constitutional Court.[65] The Committee "found that various elements in the proposals were problematic in light of the Finnish Constitution and gave the government clear and in practice binding guidance".[66] In relation to the governance of SURE, the Committee highlighted that, whilst "the approach might be feasible, from a strictly legal-technical viewpoint, (…) it is not convincing from the viewpoint of a correct, democratic and accountable process".[67]

National parliaments have also devoted special attention to a series of acts proposed and closely related to the Union's long-term budget, to the Recovery Fund and to Next Generation EU.[68] The eight-week exception was initially

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[62] Council Regulation (EU) 2020/672 of 19.5.2020, OJ L 159, 20.5.2020, pp. 1-7.

[63] Austrian Federal Council, STELLUNGNAHME, gemäß Art. 23e B-VG des EU-Ausschusses des Bundesrates vom, 6.5.2020; Assembleia da Repùblica, Written opinion on: COM (2020) 139 (PT), 24.4.2020.

[64] See P. LEINO, J. SALMINIEM, *The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?*, in *European Constitutional Law Review*, Vol. 9 (3), 2013, pp. 451-479.

[65] P. LEINO, *Solidarity and Constitutional Constraints in Times of Crisis*, in *VerfassungsBlog*, 2020, available at https://verfassungsblog.de/solidarity-and-constitutional-constraints-in-times-of-crisis/.

[66] *Ibid*.

[67] *Ibid*.

[68] See F. COSTAMAGNA. M. GOLDMANN, *Constitutional Innovation, Democratic Stagnation?: The EU Recovery Plan*, in *VerfassungsBlog*, 2020, available at https://verfassungsblog.de/constitutional-innovation-democratic-stagnation/; D. UTRILLA, *The European deal for post-pandemic economic recovery: content and meaning*, in *EU Law Live*, 2020, available at https://eulawlive.com/the-european-deal-for-post-pandemic-economic-recovery-content-and-meaning/.

planned for these ones too.[69] However, the protraction of the negotiations on these issues over time ended up delaying the approval of these acts. Whilst these acts have not been passed yet, the eight-week standstill period has long since expired. Therefore, the number of opinions delivered by national parliaments was significant in the political dialogue and not in the EWS. Leaving aside instances where substantial clarifications on the Commission's proposal were required,[70] the attitude of the Portuguese Assembly and of the Spanish General Courts should be analysed in detail.[71] These parliaments have indeed tried to support their governments' commitment by stating that action at the EU level was needed to overcome the economic crisis linked to the pandemic.[72] Since the media constantly discuss economic-related matters, national parliaments may have intentionally focused on acts concerning economic policies to draw their citizens' attention. However, it is important to remember that the EWS and political dialogue are the only ways for national parliaments to control or support the action of their member state's governments in increasingly large areas of economic policy. As mentioned above, institutions that have lost their traditional legislative functions have been assigned a supervisory role according to a checks and balances mechanism, following what has been called a "compensatory logic".[73] This is confirmed by the practice concerning parliamentary scrutiny under the Subsidiarity Protocol in "ordinary times". Barbara Guastaferro's studies have already shown that "most of the parliaments will not make use of this mechanism to block the European decision-making, but to have a say on the substance of European institutions' legal and political choices".[74] Indeed, national parliaments rather than being bodies of procedural control, as they were conceptualized in the EWS, are po-

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[69] See, for instance, Proposal for a Regulation of The European Parliament and of The Council COM (2020) 408.

[70] Bundesrat, *Decision of the Bundesrat – COM 2020 451*, 03.6.2020 and the Senate of the Parliament of the Czech Republic, *Resolution of the Senate on the Recovery and Resilience Facility and the Technical Support Instrument (COM 2020 408 and COM 2020 409)*, 22.6.2020.

[71] E. g. Assembleia da República, *Written opinion on: COM (2020) 408*, 29.6.2020; Cortes General, *Report 5/2020 of 30/06/2020 on COM (2020) 408 final*, 1. 6.2020; Cortes General, *Report 7/2020 of 30/06/2020 on COM (2020) 223 final*, 1.6.2020.

[72] Gobierno de España, *Pedro Sánchez y otros ocho líderes europeos defienden una respuesta coordinada frente al coronavirus*, 25.3.2020, https://www.lamoncloa.gob.es/presidente/actividades/Documents/2020/250320-Ingles.pdf.

[73] M. CARTABIA, *Prospects for National Parliaments in EU Affairs*, in G. AMATO, H. BRIBOSIA. B. DE WITTE (eds), *Genesis and Destiny of the European Constitution*, Bruxelles, 2007, p. 1093.

[74] B. GUASTAFERRO, *Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions*, cit., p. 338.

litical bodies that need to affect in some way the substantive outcome of decision-making processes. Nowadays, Covid-related cases confirm that the national parliaments' need to engage in direct dialogue with the EU institutions appears to have become a structural element of their European powers.

6. *Final remarks*

The EU legislator has shown the ability to finalise the legislative measures related to the Covid emergency more quickly than usual. However, this has required the activation of a clause in Article 4 of Protocol No. 1, which makes it much more difficult for national parliaments to monitor proposals for legislative acts. Yet, the arguments used to justify these exceptions are too generic and not tailored to the specifics of the heterogeneous areas of law that the acts at issue concern. Regrettably, this does not increase the accountability of the institutions involved in such a critical time. The role of national parliaments is important precisely with regard to the accountability of the EU.[75] The main channels for their contribution are the EWS and the informal "political dialogue". Sacrificing the time granted to national parliaments to evaluate EU legislative proposals for reasons of urgency implies the need for a more thorough elaboration of the justifications.

Yet, even though the exception to the eight week-period has become the rule for legislative acts adopted in response to the pandemic, national parliaments have not renounced their European powers. The reported data on the activities and reasoned opinions produced during this period clearly show the national parliaments' determination to play an autonomous role in the institutional framework of the European Union. National parliaments have been very constructive about EU legislative action during this time, showing their willingness to provide a political contribution to the legislative (and non-legislative) activity at the EU level.

In conclusion, whether exceptional legislative processes have become the norm in this time of urgency is something that the Union shares with many national constitutional systems.[76] The pandemic has put almost as much pressure

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[75] K. AUEL, *Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs*, in *European Law Journal*, Vol. 13 (4), 2007, pp. 487-504.

[76] See M.P. MADURO, P.W. KAHN (eds), *Democracy in Time of Pandemic: Different Future Imagined,* Cambridge, 2020; see also T. GINSBURG, M. VERSTEEG, *The Bound Executive: Emergency Powers During the Pandemic*, in *Virginia Public Law and Legal Theory Research Paper No.*

on various decision-making processes as it has on national health systems. One may wonder whether the inclusion of a formal urgency legislative procedure in the Treaties would lead to a better balance between an effective legislative response and a high degree of transparency and accountability. This could be discussed in the context of the Conference on the Future of Europe, which was delayed (also) due to the pandemic crisis.[77] The European Parliament believes "that the Covid-19 crisis has made the need to reform the European Union even more apparent, while demonstrating the urgent need for an effective and efficient Union; is therefore of the opinion that the Conference process should take into account the EU's existing recovery instruments and the solidarity that has already been established, while ensuring ecological sustainability, economic development, social progress, security and democracy".[78] It is essential to take advantage of what has happened over this period of time to discuss the need to provide adequate tools to empower the Union's decision-making process during emergencies.[79] It will then be possible to consider a Union act on emergencies in general, supported by a specific precautionary and urgent competence in the decision-making process.[80] A crucial issue will be the identification of guarantees, counterbalances and modalities of democratic control over these acts, including by national parliaments.

2020-52, U of Chicago, Public Law Working Paper No. 747, Chicago, 2020, available at SSRN: https://ssrn.com/abstract=3608974.

[77] Communication from the Commission to the European Parliament and the Council shaping the conference on the future of Europe, 22.1.2020 COM (2020) 27 final, https://ec.europa.eu/info/sites/info/files/communication-conference-future-of-europe-january-2020_en.pdf; European Parliament resolution of 18.6.2020 on the European Parliament's position on the Conference on the Future of Europe (2020/2657(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0153_EN.pdf; see F. FABBRINI, *Reforming the EU Outside the EU? The Conference on the Future of Europe and Its Options*, in *European Papers – A Journal on Law and Integration*, Vol. 5 (2), 2020, pp. 963-982.

[78] European Parliament resolution of 18.6.2020 on the European Parliament's position on the Conference on the Future of Europe (2020/2657(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0153_EN.pdf, paragraph 6.

[79] See A. ALEMANNO, *Taming COVID-19 by Regulation: An Opportunity for Self-Reflection*, in *European Journal of Risk Regulation*, Vol. 11, Special issue 2, 2020, pp. 187-194.

[80] G. TESAURO, *Senza l'Europa nessun paese andrà lontano*, in *Dibattito "Coronavirus e diritto dell'Unione"*, no. 3, aisdue.eu, 2020, pp. 10-17, p. 16, available at https://www.aisdue.eu/giuseppe-tesauro-senza-europa-nessun-paese-andra-lontano/.

ON THE INCLUSION OF AN *AD HOC* "EMERGENCY CLAUSE" IN THE ITALIAN CONSTITUTION

by *Jacopo Mazzuri*[*]

1. *The context: emergency and freedom in the Covid-19 pandemic*

Over the last year, in order to contain the Covid-19 pandemic many states have resorted to special legal instruments ranging from specific anti-epidemic legislation to *ad hoc* provisions embedded in the constitution. In general, the aim of the authorities has been to speed up the adoption of those measures deemed necessary to fight the spread of the virus. To provide some examples, the Spanish Government declared the "state of alarm" (*estado de alarma*) envisaged by article 116 of the Constitution; in Germany, the Infection Protection Act has been applied; in South Africa, the special "state of national disaster" has been declared under the Disaster Management Act; in some states of the USA, local Executives have been vested with emergency powers. Within such extraordinary legal frameworks and in an attempt to stop the contagion, public authorities have frequently intervened in the delicate field of people's

[*] This work was written in the Summer of 2020 and updated in December. Later developments in the crisis management do not affect my arguments, although the topic I chose seems to have lost attention in that part of the world (including Italy) where the mass vaccination campaigns have progressively reduced the need of emergency law imposing restrictions on the people's rights and freedoms.

rights and freedoms in unusually intrusive ways. In this global context, it is a fact that the balance between some of the basic "freedom(s)" of a liberal democracy and "(the minimisation of Covid-19) risk", in many countries, has been struck at the expense of our traditional liberties: putting aside the case of China due to its extraneity to the above-said liberal democratic model, extensive lockdowns have been or are still being imposed, amongst others, in Spain, France, (some states of the) USA, South Africa and, of course, Italy. Moreover, this often occurred by expanding the range of action of the executive power and posing questions concerning the judicial protection offered by courts against its acts.[1]

As regards Italy, from a constitutional point of view its reaction to such an unprecedented crisis has been marked by at least two features: on the one side the country has been facing the emergency in lack of any real "emergency clause" in its Fundamental Law. On the other, the Executive and Parliament have been able to rapidly enact legislation imposing extremely strict (though temporary) constrains on some of the fundamental freedoms envisaged by the Constitution. Judging from its outcome in terms of spreading containment, the strategy of the Government appears to have proven successful and the catastrophic scenario of a healthcare system breaking down under the pressure of mass intensive care hospitalisations has been avoided so far. Nonetheless, the severe limitations on Italians' rights indisputably represent a considerable price. The aim of this contribution is to investigate first the approach of the Italian Government to the crisis, focusing on how that branch used its powers in order to limit such rights; then, I will turn my attention to the ongoing debate concerned with the introduction of an "emergency clause" in the Italian Constitution as a means to safeguard the constitutional order and will try to assess this possibility.

2. *The Italian Executive and the anti-pandemic measures: two different legal strategies to tackle an unprecedented health crisis*

Given the aforesaid absence of an *ad hoc* clause in the Constitution, the Italian Executive decided to tackle the Covid-19 emergency by following two different paths.

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[1] In the Italian literature, general overviews may be found in L. CUOCOLO (ed.), *I diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata*, in *Federalismi.it*, *Osservatorio Emergenza Covid-19*, 5th of May 2020; in *DPCE* online; 2020, 2 (*II Sezione Monografica*); see also the debate *COVID 19 and States of Emergency*, *vergassungsblog.de* (entirely in English).

In the initial phase, the Council of Ministers activated the special "national state of emergency" (*stato di emergenza di rilievo nazionale*) envisaged by the legislation on the civil protection system (31 January),[2] conferring extraordinary powers on the Head of the Civil Protection Department. This faculty is bestowed on the Executive by the recently enacted Civil Protection Code (*decreto legislativo* 1/2018), in the event that the "emergency situation" is so "intense" and "extensive" that it cannot be faced except through "extraordinary means and powers" (article 7, paragraph 1 (c) *d. lgs*. 1/2018). According to article 24, paragraph 1 *d. lgs*. 1/2018, the nature of the emergency is assessed directly by the Civil Protection Department (which is part of the Presidency of the Council of Ministers), while the Council of Ministers determines its duration in time and the territory concerned, identifies the financial resources to grant first aid to the population and carry out other urgent interventions, allows further expenses borne by the National Emergencies Fund (*Fondo per le emergenze nazionali*). Yet, what is more interesting to the purposes of this work is that the decision at stake authorises the adoption of the so-called "civil protection ordinances" (*ordinanze di protezione civile*). Italian high administrative authorities (prefects, mayors, ministers …) have historically been vested with the power to enact special ordinances in cases of emergency, also in contrast with the existing laws of the Parliament: in fact, if a norm mandates a public organ to manage unexpected and unforeseeable situations, the necessity to adopt contingency measures has always been considered a sufficient reason for provisional derogations to the statutes – within certain limits, even if it impacts on rights and freedoms.[3] The Civil Protection Code falls under this

[2] *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*", published on the *Gazzetta Ufficiale* of the 1st of February 2020. Initially the "state of emergency" was declared until the 31st of July; on the 29 th of July, the Council of Ministers prorogued it until the 15th of October 2020 (*delibera del Consiglio dei Ministri del 29 luglio 2020* "*Proroga dello stato di emergenza in conseguenza del rischio sanitario connesso all'insorgenza di patologie derivanti da agenti virali trasmissibili*"); on the 7th of October it was prorogued again until the 31st of January (*delibera del Consiglio dei Ministri del 7 ottobre 2020* "*Proroga dello stato di emergenza in conseguenza del rischio sanitario connesso all'insorgenza di patologie derivanti da agenti virali trasmissibili*"). All the decisions are available at *www. gazzettaufficiale. it*.

[3] The matter has long been the subject of both constitutional (*ex multis*, see Constitutional Court, judgements 8/1956, 26/1961, 4/1977, 115/2011) and administrative jurisprudence: those decisions specified that, in any case, if the Fundamental Law reserves to the statutes the discipline of a right excluding all other sources, legislative norms can never be derogated. The same regime applies to the general principles of the legal system. Historical and theoretical insights in A. CARDONE, *La normalizzazione dell'emergenza. Contributo allo studio del potere* extra ordinem *del Governo*, Torino, 2011, p. 77 and further. For a detailed overview of the power of ordinan-

tradition,[4] enabling the President of the Council of Ministers and/or the Head of the Civil Protection Department to enact "ordinances […] derogating to any provision in force" (article 25, paragraph 1; article 5, paragraph 1 *d. lgs.* 1/2018);[5] the only insurmountable limits to the content if these acts are the "general principles of the legal system and […] the norms of the European Union" (article 25, paragraph 1 *d. lgs.* 1/2018; and, obviously, the Constitution). Procedurally, the Code prescribes the involvement of local authorities in representation of the affected areas; as to the formal aspects, whatever derogation to the laws in force must be specifically indicated and justified (article 25, paragraph 1 *d. lgs.* 1/2018). Within this framework, the presence and scope of judicial remedies against possible abuses of the PA clearly constitute a most delicate issue. In Italy, the jurisdiction over the ordinances belongs to the administrative courts, as confirmed by article 25, paragraph 9 *d. lgs.* 1/2018: when one of them is challenged it undergoes an articulated test examining not only its compliance with the Constitution and all the law that cannot be derogated, but also its motivation (especially when it contrasts with the statutes), its correspondence with the subjects, purposes and competences envisaged in its legal basis, the subsistence of the necessity and urgency to enact it, and compliance with the principle of proportionality. If the scrutiny is negative, the act is struck down: the possibility to obtain such a judgement represents the best guarantee of the rule of law during the "state of emergency".[6]

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ce, see R. CAVALLO PERIN, *Potere di ordinanza e principio di legalità. Le ordinanze amministrative di necessità e urgenza*, Milano, 1990 and E.C. RAFFIOTTA, *Norma d'ordinanza: contributo a una teoria delle ordinanze emergenziali come fonti normative*, Bologna, 2019. The subject is well summarised also in F. SORRENTINO, *Le fonti del diritto italiano*, Assago-Padova, 2015, pp. 189-192; R. BIN-G. PITRUZZELLA, *Le fonti del diritto*, Torino, 2019, pp. 290-298.

[4] Other examples may be found in the National Healthcare Act (*Legge* 833/1978, article 32) and in the Single Book on Local Authorities (*d. lgs.* 267/2000, articles 50 and 54).

[5] The above-mentioned decision of the 31st of January conferred this power on the Head of the Civil Protection Department, who enacted thirty-six ordinances in the first six months of emergency (31st of January – 31st of July), and other twenty-one from August to the end of the year.

[6] On the civil protection system and the emergency powers, see A. CARDONE, *op. cit.*; A. FIORITTO, *L'amministrazione dell'emergenza tra autorità e garanzie*, Bologna, 2008, p. 161 and futher; F. TEDESCHINI, *Emergenza [dir. amm.]*, in *Diritto online*, 2017, *www.treccani.it*; on the use of the civil protection ordinance in the Covid-19 crisis, see A. ARCURI, *Cose vecchie e cose nuove sui d. p. c. m. dal fronte (…dell'emergenza coronavirus)*, in *Federalismi.it*, 2020, 28, pp. 238-241; A. CARDONE, *La "gestione alternativa" dell'emergenza nella recente prassi normativa del Governo: le fonti del diritto alla prova del Covid-19*, in *La legislazione penale*, 18th of May 2020 and *Il baratro della necessità e la chimera della costituzionalizzazione: una lettura della crisi delle fonti del sistema di protezione civile contro le battaglie di retroguardia*, in *Osservatorio sulle fonti*, *fasc. speciale*, 2020, pp. 314-350; E.C. RAFFIOTTA, *Sulla legittimità dei provvedimenti del Governo a contrasto dell'emergenza virale da Coronavirus*, in *BioLaw Journal*, *Special Issue* 1/2020, pp. 95-103.

Nevertheless, a few weeks later (more precisely, on the 23rd of February), the Government changed its approach to the crisis by adopting the first of a number of decrees under article 77 of the Constitution (*decreti-legge*: primary legislation of provisional nature enjoying the same legal force as statutes, enacted by the Council of Ministers in extraordinary cases and immediately transmitted to Parliament for its potential conversion into law).[7] The Executive has favoured this instrument not only as a means to introduce containment measures limiting rights and freedoms, but more generally in order to manage almost every aspect of the emergency, from the postponement of tax payment deadlines to that of elections and *referenda*, from the urgent reorganisation of the judicial system to that of public healthcare. Most importantly, the entire economic response to the Covid-19 crisis has been given through the *decreto-legge*.[8] It may well be said that, in line with their constitutional rationale, such decrees proved an effective instrument to fight the epidemic and its multiple effects in a rapid manner: indeed, after a summary preview by the President of the Republic, they enter into force as soon as they are published in the *Gazzetta Ufficiale*.[9] Still, on the other hand, the Executive is obliged to establish an immediate dialogue with the legislature by submitting them to the Parliament in the form of bills to be approved within sixty days (otherwise the decrees themselves will lose any effect *ab origine*). With regard to judicial remedies, if the *decreto-legge* (like any law of the Parliament) cannot be directly challenged before the Constitutional Court by the people, it may still be subject to such a control (as well as laws themselves) if a judge, called to apply

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[7] *Decreto-legge 23 febbraio 2020, n. 6 "Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19"*, published on the *Gazzetta Ufficiale* of the 23rd of February 2020 (*www.gazzettauffciale.it*), then converted into law (*Legge 5 marzo 2020, n. 35, "Conversione in legge, con modificazioni, del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili all'intero territorio nazionale"*). Between the 31st of January and the 31st of December twenty-five decrees have been enacted.

[8] See in particular the first decree of this kind, *Decreto-legge 17 marzo 2020, n. 18 "Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19"*, published on the *Gazzetta Ufficiale* of the 17th of March 2020 (*www.gazzettauffciale.it*), then converted into law (*Legge 24 aprile 2020, n. 27, "Conversione in legge, con modificazioni, del decreto-legge 17 marzo 2020, n. 18, recante misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19. Proroga dei termini per l'adozione di decreti legislativi"*). The last *decreto-legge* concerned with economic matters enacted in 2020 has been *Decreto-legge 18 dicembre 2020, n. 172 "Ulteriori misure urgenti connesse all'emergenza epidemiologica da COVID-19"* (still pending at the end of the year).

[9] By contrast, parliamentary laws enter into force only after fifteen days of *vacatio legis* (article 73, paragraph 3 of the Constitution).

it in a proceeding, doubts its constitutionality and appeals to the *Consulta* (which will also have jurisdiction on the "law of conversion"). Nevertheless, in the present case the content of the decrees under article 77 has been characterised by a remarkable novelty, one touching on a paramount aspect from the standpoint of a liberal democracy: the many (temporary) compressions of the Italians' rights introduced by them. Indeed, the power to decide on the number and nature of these limitations has constantly been delegated to the President of the Council of Ministers. More precisely, the containment measures have been envisaged via *decreto-legge* only abstractly, like in a sort of catalogue, leaving to the President the ability to select those he deems necessary on a case by case basis and to impose them through his own decrees (*decreti del Presidente del Consiglio dei Ministri*, *dPCM*).[10]

This unusual line of action has given rise to heated debate and the Government has been accused of gross legal (even constitutional) infringements regarding both the content of the *decreti-legge* and that of the *dPCMs* adopted on their basis: as regards the former ones, the most common negative remarks have probably concerned the first of them (*decreto-legge 23 febbraio 2020, n. 6*, in force up to the adoption of the *decreto-legge 25 marzo 2020, n. 19*, which superseded it), considered by its critics to be extremely vague insofar as it conferred upon the President of the Council of Ministers and other undefined[11] administrative authorities the power to constrain a large number of rights and freedoms through their own decisions. This, they said, amounted to a violation of the principle of legality governing administrative action pursuant article 97 of the Constitution.[12] Secondly, some commentators have highlight-

[10] Twenty-one *dPCM* have been enacted between the 31st of January and the end of the year. These presidential acts, whose first legal ground was the *decreto-legge* 6/2020, later superseded by the *decreto legge* 19/2020, have had an impact on a multitude of rights entrenched in the Italian Constitution: among them, freedom of movement (article 16), freedom of assembly (article 17), freedom of religion (article 19), freedom of enterprise (article 41). Commentators do not agree whether personal freedom (article 13) has been impinged upon by them or not. For a database highlighting analytically the relationship between the single provisions of the *dPCM* and the rights at stake, see *Covid-19 – Fonti governative – Decreti del Presidente del Consiglio dei Ministri*, edited by F. PACINI, in *Osservatorio sulle fonti* (*www.osservatoriosullefonti.it*); for a general comment on the use of this instrument, see A. ARCURI, *op. cit*.

[11] Articles 1, paragraph 1, and 2 referred generically to "competent authorities".

[12] The list of containment measures provided by article 1, paragraph 2 was deliberately not exhaustive and articles 2 left to the "competent authorities" the power to adopt unspecified "further measures". See *ex multis* the observations by V. BALDINI, *Emergenza sanitaria e Stato di prevenzione*, in *Dirittifondamentali.it*, 2020, 2, pp. 590-594 and *Emergenza costituzionale e Costituzione dell'emergenza. Brevi riflessioni (e parziali) di teoria del diritto*, in *Dirittifondamentali.it*, 2020, 1, pp. 886-894; *Cassese: "La pandemia non è una guerra. I pieni poteri al governo*

ed the inconsistency of the *decreti-legge* not only with article 97 but also with article 77 of the Constitution, namely with their own legal basis.[13] Further, it is worth-recalling that part of the doctrine insisted also on a third point: if the Constitution formally reserves the norms specifying the content of a right and its limits for statute law, any other legal discipline should be considered void. Thereafter, according to this position almost all the *dPCMs* would be incompatible with the Fundamental Law to the extent they impact on such rights, given that unlike the *decreti-legge* they do not have the force of the law.[14] It must be added that some of the norms of the presidential decrees have probably been enacted *ultra vires*, lacking any sufficient basis in the *decreti-legge* they were intended to implement.[15] To sum up, besides the specificities of the single provisions impinging upon this or that right, commentators pointed out

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non sono legittimi", interview to *Il Dubbio*, 14th of April 2020 (available at *www.ildubbio.news*); L. CUOCOLO, *I diritti costituzionali di fronte all'emergenza Covid-19: la reazione italiana*, in L. CUOCOLO (ed.), *op. cit.*, pp. 31-39; A. D'ALOIA, *Costituzione ed emergenza: l'esperienza del Coronavirus*, in *BioLaw Journal*, *Special Issue* 1/2020, pp. 7-12; N. LUPO, *L'attività parlamentare in tempi di coronavirus*, in *Forum di Quaderni costituzionali*, 2020, 2, pp. 133-141; G. SILVESTRI, *Covid-19 e Costituzione*, in *www.unicost.eu*, 10th of April 2020; A. VENANZONI, *L'innominabile attuale. L'emergenza Covid-19 tra diritti fondamentali e stato di eccezione*, in *Forum di Quaderni costituzionali*, 2020, 1, pp. 491-495. Nevertheless, almost all authors conceded that the *decreto-legge* 19/2020 did not suffer from such constitutional shortcomings.

[13] With reference to a number of characteristics that these decrees must have (above all, a homogenous content), according to the interpretation given by the Constitutional Court to that provision: L.A. MAZZAROLLI, *"Riserva di legge" e "principio di legalità" in tempo di emergenza nazionale. Di un parlamentarismo che non regge e cede il passo a una sorta di presidenzialismo* extra ordinem, *con ovvio, conseguente strapotere delle pp.aa. La reiterata e prolungata violazione degli artt. 16, 70 ss., 77 Cost., per tacer d'altri*, in *Federalismi.it*, *Osservatorio Emergenza Covid-19*, 23th of March 2020, p. 20; G. MOBILIO, *La decretazione d'urgenza alla prova delle vere emergenze. L'epidemia da Covid-19 e i rapporti tra decreto-legge e altre fonti*, in *Osservatorio sulle fonti*, *fasc. speciale*, 2020, pp. 354-357.

[14] See V. BALDINI, *op. cit.*, pp. 591-593; apparently, *Baldassarre: "Dpcm in tutto incostituzionale"*, on *Adnkronos*, 27th of April 2020 (available at *www.adnkronos.com*); M.A. DE PASQUALE, *La gestione normativa della crisi. Dalle deficienze sanitarie alla caotica gestione multilivello della crisi (sperimentale):* "Necessitas non habet legem sed ipsa facit legem", in *Diritti regionali. Rivista di diritto delle autonomie locali*, *Forum La gestione dell'emergenza sanitaria tra Stato, Regioni e Enti locali*, 18th of April 2020, especially p. 599; L.A. MAZZAROLLI, *op. cit.*, pp. 15 and further. In this regard, it must be remembered that the Constitutional Court itself has acknowledged the possibility for the legislature to comply with some of the above-said constitutional clauses also by providing a discipline of the rights in question limited to the mere outlines, leaving scope for the intervention of the Executive (in matter of freedom of movement under article 16 of the Constitution, see judgment 26/1961).

[15] Examples are given in A. CARDONE, *Il baratro della necessità e la chimera della costituzionalizzazione: una lettura della crisi delle fonti del sistema di protezione civile contro le battaglie di retroguardia*, cit., pp. 328-332.

how much the very system of the legal sources (and its meaning for the democratic principle, that system being a reflection of a precise allocation of decision-making powers) has been put under stress – for some, up to breaking point. Furthermore, there are authors who have disapproved of the *modus procedendi* of the Government not (only) for its legal shortcomings but (mostly) due to the choice to experiment an original and legally risky approach to the emergency, almost putting aside the long-established instruments of the civil protection system;[16] nonetheless, according to a different interpretation, the *dPCM* are nothing but civil protection ordinances of a special kind, grounded both on the "Covid-19 decrees" enacted by the Government under article 77 of the Constitution and on article 25 of the Civil Protection Code.[17]

Later, the further turn in governmental policy marked by the twentieth presidential decree of the year, enacted on the 3rd of November, is noteworthy. It regulates the imposition of specific containment measures to each of the twenty-one Italian regions and autonomous provinces: to put it briefly, the faster the growth in infections, the more severe the restrictions on the freedom of movement and on the economic activities applied to a specific area of the country. Nevertheless, from the standpoint of the organisation of power, what is of greatest interest here is that the choice of the above-mentioned measures, made case by case and based upon the monitoring of a set of relevant indicators, is conferred directly on the Minister of Health.[18]

Other critiques of the response of the Italian institutions to the emergency focused on the alleged lack of proportionality and reasonableness of the governmental measures, on the contested role of the committees of experts set up by the Executive,[19] and on the avalanche of ordinances produced by regional and sub-regional authorities and single ministers (above all, the Minister of Health). Each of them would deserve to be analysed in depth, but it would be beyond the scope of the present work.[20]

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[16] See the two articles by A. CARDONE cited above.

[17] M. LUCIANI, *Il sistema delle fonti del diritto alla prova dell'emergenza*, in *Rivista AIC*, 2020, 2, pp. 121-127.

[18] Articles 1, 2 and 3 of the decree of the 3rd of November (on the *Gazzetta Ufficiale* of the 4th of November). Nevertheless, it should be specified that such power, exerted through ministerial ordinances enacted upon consultation with local representatives, appears to be highly constrained by the scientific evidence provided by the epidemic monitoring.

[19] Ordinance of the Head of the Civil Protection Department n. 630/2020, published on the *Gazzetta Ufficiale* of the 3rd of February 2020.

[20] Comprehensive overviews of the debate may be found in *BioLaw Journal*, *Special Issue* 1/2020, *Osservatorio AIC*, 2020, 3, and *Osservatorio sulle fonti*, *fasc. speciale Le fonti normative nella gestione dell'emergenza Covid-19*, 2020.

As far as it is concerned, at least initially Parliament proved unable to operate as usual and found difficulties in the regular exercise of (some, if not all) its prerogatives.[21]

3. *Should Italy include an "emergency clause" in the Constitution?*

Since the beginning of the present crisis, part of the Italian constitutional scholarship has either been advocating the inclusion of an explicit "emergency clause" in the text of the Constitution via the amendment procedure under article 138,[22] or suggesting that such a modification may however be discussed in the near future by the legislature and the public in general.[23] The main argument advanced by those scholars in favour of their proposal lies with the marginalisation experienced by Parliament, especially in the weeks between February and March.[24] According to them, the representatives of the people should have been involved in a declaration of emergency and in the conferral of extraordinary powers on the Executive: the introduction of an *ad hoc* clause codifying such an institutional passage in the Fundamental Law would be a good strategy to prevent these (alleged) offenses to the democratic principle, because henceforth situations like the Covid-19 pandemic could be managed only within that specific constitutional framework.

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[21] On the Italian Parliament during the Covid-19 pandemic, see N. LUPO, *op. cit.*, pp. 122-142; F. BIONDI, P. VILLASCHI, *Il funzionamento delle Camere durante l'emergenza sanitaria. Riflessioni sulla difficile praticabilità di un Parlamento "telematico"*, in *Federalismi.it*, 2020, 18, pp. 26-33; R. CARIDÀ, *La tenuta istituzionale del Parlamento tra COVID-19 e* referendum, in *Forum di Quaderni costituzionali*, 2020, 4, pp. 123-153.

[22] *Ex aliis* L. BUSCEMA, *Emergenza sanitaria ed ordinamento democratico: questioni di metodo e di valore*, in *BioLaw Journal*, *Special Issue* 1/2020, pp. 27-34 (especially pp. 32-34); S. CECCANTI, *Verso una regolamentazione degli stati di emergenza per il Parlamento: proposte a regime e possibili anticipazioni immediate*, in *BioLaw Journal*, *Special Issue* 1/2020, pp. 79-81; G. DE MINICO, *Costituzionalizziamo l'emergenza?*, in *Osservatorio sulle fonti*, *fasc. speciale*, 2020, pp. 542-564; A. RUGGERI, *La forma di governo nel tempo dell'emergenza*, in *ConsultaOnline*, 2020, 2, pp. 255-260.

[23] *Ex aliis* B. CARAVITA, *L'Italia ai tempi del coronavirus: rileggendo la Costituzione italiana*, in *Federalismi.it*, 2020, 6, pp. IV-X; A. D'ALOIA, *Costituzione ed emergenza: l'esperienza del Coronavirus*, cit. and *Poscritto. Costituzione ed emergenza: verso la fine del tunnel, con qualche speranza e (ancora) con qualche dubbio*, in *BioLaw Journal*, *Special Issue* 1/2020, pp. 13-26; T. GROPPI, *Le sfide del coronavirus alla democrazia costituzionale*, in *ConsultaOnline*, 2020, 1, pp. 192-196; E.C. RAFFIOTTA, *op. cit.*, pp. 102-103.

[24] The time when the first *decreti-legge* were enacted and the "unusual line of action" exposed in the second paragraph took shape.

Moreover, two bills specially focused on the functioning of the Parliament in times of emergency have been lodged at the Chamber of deputies (A. C. 2438, A. C. 2452).[25]

It is my opinion that these kinds of proposals should be carefully evaluated not on merely theoretical grounds, but taking into consideration the recent performance of the constitutional system *vis-à-vis* the specific critiques to its functioning advanced in the current scholarly debate. I would concentrate specifically on one of the most delicate aspects, i.e. the use made by the Italian Government of its powers in order to limit the rights and freedoms of the people: in fact, as we have already said, the Executive has been accused of a number of constitutional infringements and some critics have come to denounce a dangerous alteration of the constitutional equilibrium.[26]

Would an "emergency clause" be necessary to address such (alleged) shortcomings in the behaviour of the Government and preserve the rule of law from the risk of abuses?

4. *Government and Parliament in the pandemic: are constitutional changes really needed?*

4.1. *Governmental action and judicial safeguards*

Constitutions may envisage "emergency clauses" to entrench an organic disciplining of the state of emergency at the highest level of the legal system, with special reference to its declaration, its duration in time and the temporary reorganisation of the state machinery entailed by exceptional events: in a liberal democracy, this usually means bestowing special powers (the "classic" content of such norms) upon the executive branch, balanced by enhanced checks. In some cases, a minimum content of rights and liberties that cannot be renounced even in circumstances of crisis is specified.[27] The comparative scenario provides many examples.[28]

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[25] Both available at *www.camera.it*.

[26] *Ex aliis*, see the interview *Baldassarre: "Dpcm in tutto incostituzionale"* cited above; G. DE MINICO, *op. cit.*

[27] Deep historical and theoretical insights concerning the emergency and the "state of exception" (be it embedded in the constitution or not) in G. DE MINICO, *Costituzione. Emergenza e terrorismo*, Napoli, 2016, pp. 7-168; G. MARAZZITA, *L'emergenza costituzionale. Definizioni e modelli*, Milano, 2003, p. 43 and further and pp. 206-250; A. PIZZORUSSO, *Emergenza, stato di*, in *Enciclopedia delle scienze sociali*, III, Roma, 1993; with specific reference to the Covid-19 cri-

Having said that, it should be ascertained first whether the Italian Constitution really needs an explicit emergency clause, or it contains provisions which may play an equivalent role in its place, enabling a rapid and effective answer to unexpected events. In this regard, initial reference can be made to the previously mentioned article 77, the norm allowing the Executive to enact emergency measures. Secondly, article 78 (which has never been applied, and clearly has nothing to do with a health emergency) vests in Parliament the power to declare a state of war and to confer on the Government the "necessary powers". Thirdly, article 120, section 2 envisages, in a number of cases including that of "grave danger for public safety and security", an exceptional concentration in the hands of the Executive of competences ordinarily bestowed on regional and local authorities.[29] Nevertheless, in the context of the present epidemic the Council of Ministers has deliberately not resorted to it. Furthermore, in a judgment given in 1982 on a decree under article 77, the Constitutional Court stated that during an emergency the legislature (or the Executive via *decreto-legge*) may introduce "unusual measures" which otherwise would be unconstitutional.[30]

It is my opinion that the combination of the above-mentioned provisions already offers all the necessary means to tackle virtually any kind of unexpected situation in an effective fashion and with due respect for the rule of law. In none of these cases is the ordinary jurisdictional control over laws, decrees or ordinances prejudiced, the only potential exception being the state of war due to its vague discipline. On the other hand, if (in line with an ancient doctrine dating back to the beginning of the last century)[31] one argues that necessity, as a legal source, is so strong to justify all sorts of derogations to the

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sis, see A. VEDASCHI, *Il Covid-19, l'ultimo stress test per gli ordinamenti democratici: uno sguardo comparato*, in *DPCE online*; 2020, 2, pp. 1456-1463. See also the essay by B. ACKERMAN, *The emergency constitution*, in *Yale Law Journal*, 2004, 5, p. 1029 and further. The subject is well summarized also in G. DE VERGOTTINI, *Diritto costituzionale comparato*, Bologna, 2019, pp. 476-477; G. CERRINA FERONI-G. MORBIDELLI-M. VOLPI (eds), *Diritto costituzionale comparato*, Torino, 2020, pp. 124-135.

[28] In Europe, for instance, the Spanish Constitution envisages three different states of emergency in article 116 (state of alarm; state of exception; state of siege); the French Constitution envisages the exercise of exceptional powers by the President (art. 16) and the state of siege (art. 36); the German Basic Law contains a multitude of provisions ranging from the state of defence (art. 115a) to the concentration of powers in the end of the Federal Executive (art. 91).

[29] These competences may be both administrative and normative, as specified by the implementing legislation: article 8, *Legge* 131/2003.

[30] Judgment 15/1982. Nonetheless, the Court has never acknowledged the possibility of derogations to the Fundamental Law.

[31] S. ROMANO, *Sui decreti-legge e lo stato di assedio in occasione del terremoto di Messina e di Reggio-Calabria*, in *Rivista di diritto pubblico e della pubblica amministrazione in Italia*, 1909.

existing norms and may prevail over the Constitution itself, the discussion whether to introduce the clause at stake loses most of its practical interest.

The ongoing debate concerned with the *decreti-legge* and the *dPCM*, summarised in the former paragraphs, seems to underpin this conclusion: indeed, discussions by scholars say little in favour of including an *ad hoc* emergency clause in the Italian Constitution, insofar as such an amendment would enable temporary increments in the powers of the Executive (namely, the usual primary content of this type of clauses). Actually, few authors argue that the Italian Government is "unarmed" when situations like an epidemic must be faced up to, and that the present institutional difficulties are the straightforward consequence of this lacuna.[32] By contrast, the majority of them appear more focused on casting light on infringements (both of formal and substantial nature) of the Constitution *as it is* than on stressing the need for a stronger Executive.

What is centre stage now is the system of checks and balances and the guarantees of the rule of law, not their effectiveness and government action. From this point of view, I would like to advance some remarks.

It is important to stress that none of the alleged violations committed by the Executive is abstractly nonjusticiable before a court. As we have already said, the *decreto-legge* can ordinarily be challenged before the Constitutional Court by a judge; if Parliament converts it into a statute, this statute shall be subject to constitutional adjudication; if it is repealed by the legislator, its effects will be removed *ab origine*. On the other hand, it is true that the decrees adopted in these months by the President of the Council of Ministers are more problematic, especially because they are a novelty in the Italian legal panorama. I would underline four main defects in these instruments: a) the legislative discipline leaves to the President a very broad political and administrative discretion as to their content; b) as to the adoption procedure, the involvement of authorities different from the President is marginal, being as it is limited to proposals and opinions;[33] c) the only administrative control exerted on them is that of the Court of Auditors, and they are not previewed by the President of the Republic;[34] d) the sole political scrutiny they undergo is that envisaged by article 2, paragraphs 1 and 5 of the *decreto-legge* 19/2020.[35] In

[32] A. RUGGERI, *La forma di governo nel tempo dell'emergenza*, cit., p. 256.

[33] Article 3, paragraph 1 *decreto-legge* 6/2020; then article 2, paragraph 1 *decreto-legge* 19/2020.

[34] Article 3, paragraph 6 *decreto-legge* 6/2020; then article 2, paragraph 4 *decreto-legge* 19/2020.

[35] The original provision imposed on the President of the Council of Ministers *ad hoc* duties of communication towards the Parliament, both before and after the enactment of containment measures via *dPCM*. In the conversion procedure, the legislature amended it by introducing the

addition, some of the decrees enacted in the last few months have probably been partially *ultra vires* with respect to their own legal basis. Nevertheless, the activity in question does not seem legally invalid *per se*.[36] Most importantly, I want to stress that judicial review of the "Covid-19 *dPCM*" has always been available before the administrative courts. It is true that judges pointed out the complexity of providing their exact legal qualification and discerning their governing norms,[37] and that, had the Government resorted exclusively to the traditional instruments of the civil protection system, the long-established tests shaped by case-law to adjudicate the legitimacy of the ordinances would have been applicable to its activity.[38] Still, the possibility to seek justice against such acts before an impartial judge has not appeared compromised.[39] In any case, even if the jurisdictional procedures at issue were defective, I doubt that the introduction of an emergency clause in the Constitution would be the solution. In fact, on the one side it is true that this provision would likely envisage *special checks* on the measures enacted by the Government; still, it must

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further duty for the President to "illustrate to the Chambers" the content *of each dPCM* prior to its adoption (except in cases of urgency).

[36] Unless one believes that, when the Constitution formally reserves to statute law the norms specifying the content of a right and its limits, any other legal discipline (*dPCM* included) should be considered void even if based on a statute: still, this interpretation has not been upheld by the Constitutional Court.

[37] See the judgment given by the regional administrative court of Rome on the 13th of July 2020 (*TAR Lazio-Roma*, judgment 8615/2020). See also the observations by A. VEDASCHI, *op. cit.*, pp. 1469-1470.

[38] As argued by A. CARDONE, *La "gestione alternativa" dell'emergenza nella recente prassi normativa del Governo: le fonti del diritto alla prova del Covid-19*, cit.

[39] In this regard, it must be recalled that *ordinary judges* happened to (incidentally) contest the validity of the decrees at stake at least in two occasions. In July, in a case concerning a fine for breach of the general provision limiting the freedom of movement, the Justice of the Peace of Frosinone (Latium) annulled the administrative sanction insofar its legal basis (in that case, the *dPCM* of the 9th of March) would have infringed article 13 of the Constitution (personal freedom; *Giudice di Pace di Frosinone*, judgment 516/2020). In December, the court of first instance of Rome ruled on a controversy between the tenant of a commercial space and its landlord, the former claiming the impossibility to pay the rent to the latter due to the dramatic contraction of its business – a consequence of the restrictions imposed by the Government on the freedom of movement (*Tribunale di Roma*, *VI sezione*, ordinance of the 16th of December 2020). The judge stated that the responsibility for such an economic difficulty was entirely up to the tenant because it should have challenged the presidential decrees imposing the above-said measures given their patent unconstitutionality (for a very critical comment, see G. TROPEA, *La pandemia, i DPCM e il giudice "untorello" (breve nota a Trib. Roma, sez. VI, ord. 16 dicembre 2020)*, on *www.lacostituzione,info*, 30th of December 2020). So far, these are isolated decisions, and according to the rest of the jurisprudence the governmental action has been legal and constitutional.

be remembered that these checks would be needed only to balance the exercise of hypothetical *special powers*, according to the usual logic of emergency clauses; and that in the Italian constitutional system the introduction of special powers does not seem a necessity.

In summary, all the measures taken by the Government to fight Covid-19 are justiciable: if the pressure of the emergency had really forced the Executive to adopt *extra ordinem* acts escaping judicial control, this breach with a fundamental tenet of the rule of law would have been proof of the *necessity* to enact an *ad hoc* constitutional norm keeping together two opposite exigencies: risk containment (enhanced governmental action) and the guarantee of basic freedoms (judicial safeguards). I do not think that we have witnessed such a constitutional breakdown: if there have been infringements of the Fundamental Law (and it may have happened), they still can be sanctioned.

4.2. *The emergency and the marginalisation of Parliament*

In some way, such conclusions seem to be confirmed by the nature of the above-mentioned pair of bills, since they deal exclusively with the functioning of the Chambers and not with that of the Executive (nor with the judicial scrutiny over it). A. C. 2452 proposes a constitutional amendment[40] envisaging the possibility to establish, by a two-thirds vote of each Chamber, a temporary Special Commission composed of one tenth of the deputies and one tenth of the senators. The commissioners would be designated by the Parliamentary Groups and would substitute their colleagues almost entirely in the law-making activity; the decisions of the organ would be ratified at the end of the emergency by the legislative assemblies. According to the proponents, this constitutional change would enable the legislature to perform efficiently even when an extraordinary event threatens its regular functioning, therefore preserving the balance between the Chambers and the Government. A. C. 2438 contains a less articulated and slightly different project,[41] but both the purpose and the procedural and substantial essentials are the same.

Also some other (and very diverse) proposals advocating the inclusion of an "emergency clause" in the Italian Constitution do not rely on its alleged irredeemable unfitness to tackle extraordinary situations:[42] rather, they seek to

[40] The introduction of two new articles to the Italian Constitution, 55-*bis* and 55-*ter*.

[41] Still centered on the introduction of articles 55-*bis* and 55-*ter* in the Constitution.

[42] Above all, se the article by G. DE MINICO cited above. A partial exception may be represented by A. RUGGERI, who "supports *the need* for a constitutional discipline relating to the

avoid the undesirable scenario of a marginalised Parliament, unable both to enact emergency legislation and to control the Executive properly, pursuing this objective by involving the former in the declaration of emergency and in the conferral of extraordinary powers on the latter.

Having said so, I do not find any significant connection between clauses of this kind and the specific legal shortcomings found in the behaviour of the Government by the scholarly discussion of these months: it is hard to say to what extent these deficiencies would have been avoided, had the Constitution envisaged such norms. Overall, their aim seems to be preserving the centrality of representative assemblies: maybe, more a democracy issue than a rule-of-law one.

Yet, one may wonder what the expected result of embedding an emergency clause in the text of the Constitution would be? With regard to the prerogatives of the Parliament, if we exclude the possibility for it to confer special powers on the Government (something which in the Italian context does not really seem necessary, as we have said), the legislature would probably gain nothing but the mere faculty to declare the existence of an emergency[43] or the possibility to avoid the stalling of the parliamentary work through its concentration in a smaller body for a (hopefully) short time. Therefore, if such a declaration would were not to entail any extraordinary reorganisation of the state powers, there should be no need for the legislature – nor for other organs bodies – to be vested with special instruments of control: as I have already suggested, it would be odd to reinforce the checks on the Executive if its powers were to remain the ordinary ones. Furthermore, as the present crisis has shown, legislative assemblies may have difficulties to in holding their gatherings and therefore to declare the emergency.[44] On the other hand, focusing on speeding up parliamentary procedures – the central issue in the above-said bills, with special reference to the law-making – seems to be based on the (counter-intuitive) assumption that crisis management is the domain of the legislature and not of the Executive, that it is matter of more legislation and not of enhanced administration.

In the last few months, social distancing has meant for MPs the impossibility for MPs to gather as usual in the general Assemblies as well as in the Committees;[45] as to their ability to oversee the action of the Government, a

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management of emergencies which reinforces the guarantee of the President of the Republic [emphasis added]" (*op. cit.*, p. 255).

[43] With regard to one of the most articulated proposals concerned with the topic at issue advanced the scholarly debate: G. DE MINICO, *op. cit.*

[44] A. CARDONE, *La "gestione alternativa" dell'emergenza nella recente prassi normativa del Governo: le fonti del diritto alla prova del Covid-19*, cit., p. 347.

[45] N. LUPO, *op. cit.*, pp. 122-133.

type of check over the *dPCM* have been possible only since the end of March; it may also be argued that the (alleged) lack of proportionality and reasonableness detected in some of the governmental decisions could have been avoided by leaving more room for direct parliamentary intervention.[46] Nevertheless, it is not clear for what reason these objective criticalities affecting the crisis management should call upon the constitutional amendment at stake rather than modifications of the parliamentary rules governing the oversight of the Chambers on the Executive and the efficiency of their work.[47] I would add that the comparative panorama offers us other cases of legislative assemblies whose ordinary functioning has been negatively affected by the pandemic.[48] Furthermore, perhaps it is Parliament itself which has exerted its prerogatives in too much a timid a fashion: for instance, it could have imposed its own scrutiny over the *dPCM* since the beginning of the emergency (namely during the conversion procedure of the *decreto-legge* 6/2020); more in general, it could have been stricter in the conversion procedure of the decrees under article 77 as regards the respect of the Constitution. To put it briefly, the current constitutional framework is not an obstacle to a more intense control over the executive branch;[49] on the other hand, there is margin to strengthen parliamentary checks by working on ordinary laws and regulations, without embarking on the special procedure envisaged by article 138 of the Constitution.

5. *Old fears and new lessons from history and comparative law (with special regard to the French case)*

History and comparative law give other reasons to deem the inclusion of emergency clauses in the Fundamental Law inopportune and challenge the very logic of rationalising *ex ante* the constitutional response to unexpected events.

A classical objection to these norms is that article 48 of the Weimar Constitution (enabling the President of the *Reich* to enact the so-called "emergency decrees") notoriously facilitated the establishment of the Nazi regime in Ger-

[46] With special regard to the imposition of lockdown measures, since such a decision would have resulted from a discussion taking account of a wider range of perspectives (M. D'AMICO, *Emergenza, diritti, discriminazioni*, in *Gruppo di Pisa*, *www.gruppodipisa.it*).

[47] See N. LUPO, *op. cit.*, *passim*.

[48] F. BIONDI, P. VILLASCHI, *op. cit.*, pp. 33-39.

[49] It seems confirmed by what happened to article 2, *decreto-legge* 19/2020 (see above).

many.[50] Again, the current experiences of EU countries like Hungary and Bulgaria also seem to discourage the adoption of the clauses at stake.[51] Nonetheless, one could rebut that a good judicial review system should be sufficient to avoid such undesirable outcomes.

Nonetheless, even if we put aside such examples, the very idea of deciding once and for all how the system will have to react to the multiform emergencies of the future (newly the "state of emergency" disciplined in the "emergency clause") may be naïve. The French case provides a good example of what I mean.

In the French Constitution enacted in 1958 there are two *ad hoc* clauses: on the one side, article 16 bestows exceptional powers upon the President (resembling article 48 of the Weimar Constitution) and has been applied only during the Algerian War by President De Gaulle (1961); on the other one, article 36 on the "state of siege", containing an extremely vague discipline, has never been applied. Furthermore, a 1955 law is dedicated specifically to the "state of urgency" (*loi* 55-385 on the "*état d'urgence*"), which envisages the special transfer of administrative (and, exceptionally, judicial) powers to the Minister of Interior and to the prefects. It is worth-noticing that French authorities usually resort to this law (not to the constitutional provisions) to deal with unexpected events: it has been applied in 1958, 1961-3, 1984, 2005, 2015-6.[52] Nevertheless, during the Covid-19 pandemic the Executive resolved to ignore all of them and preferred to base its intervention on a different legal basis. In the initial phase, containment measures limiting important freedoms (freedom of movement, freedom of assembly, the economic liberties…) were

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[50] See R.C. VAN CAENEGEM, *An Historical Introduction to Western Constitutional Law*, Cambridge, 1995, pp. 276-277. This kind of objection, evoking the risk of a downward spiral towards authoritarianism, has emerged also in the Japanese debate: see A. CAPROTTI, *Japan and Covid-19: reflections on measures limiting personal freedom against the background of a constitutional debate*, in this volume, who underlines how the opponents to the inclusion of an "emergency clause" in the 1947 Constitution argue that the use of emergency powers was a typical feature of the "fascist" regime defeated in the World War II.

[51] See the articles by K. KOVÁCS (*Hungary's Orbánistan: A Complete Arsenal of Emergency Powers*, 6th of April 2020) and R. VASSILEVA (*Bulgaria: COVID-19 as an Excuse to Solidify Autocracy?*, 10th of April 2020) published on the debate *COVID 19 and States of Emergency*, *vergassungsblog.de* (entirely in English); and M. COLI, *Mitigating Covid-19 pandemic, but at what cost? Hungary's emergency measures in light of the rule of law as a European value*, in this volume.

[52] P. ARDANT, B. MATHIEU, *Droit constitutionnel et institutions politiques*, Paris, 2019, pp. 484-7; G. CARCASSONE, M. GUILLAUME, *La Constitution*, Paris, 2019, pp. 117-122, 193-195; L. FAVOREU *at alii*, *Droit constitutionnel*, Paris, 2016, pp. 713-714; J.-C. MASCLET, *Article 36*, in F. LUCHAIRE, G. CONAC, X. PRETOT, *La Constitution de la République française. Analyses et commentaires*, Paris, 2009.

adopted by the Minister of Solidarity and Health and by the Prime Minister; then, in the second half of March, the French Parliament passed a bill introducing the so-called "state of health emergency" (*loi* 2020-290). This special state of emergency is largely modelled on the "traditional" one, with some differences: it is declared for a longer time (thirty days versus twelve); it is declared on a report by the minister of health; the Government is called to cooperate with a scientific committee in the enactment of the containment measures, which may impose severe limitations on a wide range of rights (especially via prime-ministerial decrees).[53]

Therefore, despite the presence of multiple emergency provisions in the French legal system (two articles of the Constitution and an entire law of the Parliament), none of them have been applied in the fight against the Covid-19 epidemic. The most probable explanation is that, since articles 36 and 16 of the Constitution have not been considered legally viable options,[54] the French authorities have deemed *loi* 55-385 unfit to tackle something anything different from other than public disorders.[55] In any case, this episode suggests an important conclusion: the utility of providing *ex ante* a legal discipline for exceptional situations, be it entrenched at the level of the constitution or not, is extremely relative. In fact, such a legislation could be (so to say) "escaped" by from the same organs in charge of declaring the "state of emergency" (usually Parliaments or Executives), as confirmed by what happened even in other European states. Indeed, a significant part of the current European panorama appears characterised by a sort of "flight from the emergency legislation",[56]

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[53] A number of Italian scholars has followed the French management of the crisis: among them, see P. MILAZZO, *Le fonti del diritto e le diverse risposte ad una emergenza simmetrica: qualche lezione francese sul rendimento delle clausole di emergenza costituzionale*, in *Osservatorio sulle fonti*, *fasc. speciale*, 2020, pp. 410-435; F. GALLARATI, *Le libertà fondamentali alla prova del coronavirus. La gestione dell'emergenza sanitaria in Francia e Spagna*, in L. CUOCOLO (ed.), *op. cit*., pp. 46-77. With regard to the French experience, it should also be noted that the public debate concerned with the cleavage between "emergency" and "freedom" has been extremely similar to the Italian one, and the Government has been accused of intolerable attacks on the rights of the citizens. Furthermore, governmental acts have been regularly challenged before the courts (in particular, the Council of State). Negative comments on *loi* 2020-290 and its impact on fundamental freedoms have been advanced by the French National Consultative Committee on Human Rights (available at *www.cncdh.fr*).

[54] Article 36, concerned with military crisis, is clearly inapplicable; article 16, to summarise it, presupposes a menace to the survival of the Republic (or to the execution of its international obligations) and the simultaneous inability of its institutions to operate regularly.

[55] Namely, the usual reason for declaring the "state of urgency". See P. MILAZZO, *op. cit*., p. 424.

[56] A. VEDASCHI, *op. cit.*, pp. 1463-1466.

showing a preference for the enactment of *ad hoc* new rules – and Italy makes no exception, if one thinks to the marginal use of the Civil Protection Code made by the Government. In summary, we may say that emergencies refuse to be regulated in advance and enjoy the capacity to create their own law.[57]

I would add that this seems particularly true with regard to *constitutional* emergency clauses, since they must be formulated in terms so general that the competent organ might easily avoid their activation even when necessary (in some way, it is the opposite risk of a Weimar-like scenario).

Should Italy risk to include in its Fundamental Law a potentially useless (even if not dangerous) norm?

6. *Conclusions*

I would conclude that, at least so far, the Covid-19 pandemic has not highlighted the need for an "emergency clause" in the Italian Constitution. Undoubtedly the crisis has put the political institutions under stress, and more than once the Government may have violated the Fundamental Law in exercising its law-making powers. Furthermore, the choice to proceed by resorting to legal instruments like the *dPCM* in the unusual fashion described above is contestable. Nevertheless, the instruments provided by the constitutional system appear to have allowed an effective answer to the crisis, and the rule of law, with special regard to the judicial control over the governmental action, has been preserved: therefore, I would say that such a constitutional amendment is not necessary. As far as Parliament is concerned, the improvement of its oversight on the Government and of its general efficiency does not seem appropriate matter for such a constitutional change. Eventually, and in addition to the risk of authoritarian turns, the very opportunity to entrench the disciplining of the emergency at the highest level of the legal system clashes with the general difficulty of rationalising *ex ante* the reaction to such events.

[57] As suggested by A. CARDONE, *La "gestione alternativa" dell'emergenza nella recente prassi normativa del Governo: le fonti del diritto alla prova del Covid-19*, cit., p. 346; P. MILAZZO, *op. cit.*, pp. 432-435.

COVID-19 AND IRREGULAR EMPLOYMENT: A HEALTH AND SOCIAL EMERGENCY

by *Elisa Gonnelli*

1. *The effects of the pandemic on irregular employment*

The Covid-19 health emergency has affected everyone, but not everyone in the same way. In particular, its impact has been harshest for whom were already in vulnerable situations before the crisis, like migrant workers, with poor means of subsistence or informally employed.

According to some studies,[1] the work activity itself is a factor that increases the risk of contracting Covid-19. This is true especially for those employed in 'essential' economic sectors,[2] which remained operative even during the most critical and contagious phases of the health emergency. These sectors include some in which there is a high incidence of irregular employment relationships

[1] Cf. INPS, *Attività essenziali, lockdown e contenimento della pandemia da COVID-19*, April 2020. The study finds a correlation between work and the increased risk of contagion of Covid-19. It indicates that there is an increase of about 25% in infections compared to the national average in the areas of the country with a higher concentration of essential economic activities. The data was obtained by comparing the official infection figures, provided by the Civil Protection and the number of regular employment contracts declared to INPS for the essential sectors. Details of the study can be obtained from: https://www.inps.it/nuovoportaleinps/default.aspx?sPathID=%3b0%3b46390%3b&lastMenu=53241&iMenu=1&itemDir=53803.

[2] The Prime Ministerial Decree of 22 March 2020 contains the first list of essential economic activities that are authorized to continue operations during the first *lockdown* in March 2020; while the sectors not mentioned had to stop work, with the exception of *smart working* or activities that were granted derogations by prefectures. Available from: http://www.governo.it/sites/new.governo.it/files/dpcm_20200322.pdf.

and a significant amount of foreign labour. For example, in 2019 the agri-food sector had the highest number of employment relationships with foreign workers (about 38%),[3] and an estimated 28.8% of contract irregularities, corresponding to about 220,000 irregular employment contracts.[4] In the domestic and personal care services sector, the figures are higher for both indicators, with 48.8% of foreign (mainly non-European) workers employed[5] and an estimated 58.8% of contract irregularities, which corresponds to about 900,000 workers without contracts.[6] In many cases, the combination of these two factors often leads to the so-called *indecent work*,[7] characterised by exploitation and unsafe working conditions. This has meant that migrants workers, especially irregular ones or informally employed, were unable to access to measures aimed at protecting individual health in the workplace, implemented by the Government at the beginning of the pandemic,[8] and were more exposed than other workers to the risk of contracting Covid-19.

In addition, these workers often live in insalubrious housing. Many trade

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[3] The data comes from the Tenth Annual Report by the Directorate General for Immigration and Integration Policies, *Foreigners in the Italian labour market*, pp. 36 and 96, available from https://www.lavoro.gov.it/documenti-e-norme/studi-e-statistiche/Documents/Decimo%20Rapporto%20Annuale%20-%20Gli%20stranieri%20nel%20mercato%20del%20lavoro%20in%20Italia%202020/X-Rapporto-Annuale-stranieri-nel-mercato-del-lavoro-in-Italia.pdf.

[4] Data sheet prepared by *Il Sole 24 Ore* based on ISTAT and IDOS data on undeclared work by Region. The graph is available from: https://i2.res.24o.it/pdf2010/Editrice/ILSOLE24ORE/ILSOLE24ORE/Online/_Oggetti_Embedded/Documenti/2020/05/25/GRAFICO_PAG2.pdf.

[5] Cf. Tenth Annual Report of the Directorate General for Immigration and Integration Policies, cit.

[6] Cf. Data sheet *Il Sole 24 Ore*, cit.

[7] The International Labour Organization (ILO) has defined the concept of *decent work* as having four key components: dignity, equal opportunity, fair pay and safety at work. Cf. ILO, *Decent Work. International labour conference*, 1999, p. 3, available from https://www.ilo.org/public/libdoc/ilo/P/09605/09605(1999-87).pdf. See also L. PALUMBO, *Trafficking and labour exploitation in domestic work and the agricultural sector in Italy*, European University Institute, 2016, available from: https://cadmus.eui.eu/bitstream/handle/1814/42406/GGP_TRAFFICKO_2016_EN.pdf?sequence=3&isAllowed=y.

[8] Prime Ministerial Decree No. 64/2020, "Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale". The measures to be applied to prevent infection in the workplace are listed in art. 1, such as maintaining an interpersonal distance, the use of Personal Protective Equipment (PPE) and the more frequent cleaning and sanitation of workplaces. These measures were incorporated and expanded in the "Protocollo condiviso di regolazione delle misure per il contrasto e il contenimento della diffusione del virus Covid-19 negli ambienti di lavoro" of 14 March 2020, and subsequently integrated on 24 April 2020.

unions and civil associations[9] have condemned the worsening health and hygiene situation experienced by thousands of farm labourers housed in unauthorized settlements nearby the crop fields – actual ghettos – scattered throughout Italy.[10] The lack of running water, electricity and sewerage, and the overcrowding of these areas, have made it impossible to comply with even the most basic requirements for preventing infection, such as frequent hand hygiene and maintaining interpersonal distance.[11] This has significantly encouraged the spread of Covid-19 in these communities.[12] Nevertheless, national and local institutions have not adopted any measures aimed at preventing outbreaks in them, such as, for example, the distribution of personal protective equipment, taking swabs or isolating people who have tested positive from the rest of the community.[13]

In this context, it is clear that those who even before the outbreak of the pandemic were in particularly vulnerable conditions, were most exposed to the risk of contagion as well as to the economic and social consequences of the prolonged health emergency.

Indeed, from a socio-economic point of view, the health emergency has resulted in a significant *disempowerment*[14] of these workers, exposing them to

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[9] Flai-Cgil, Terra! and Medici per i Diritti Umani submitted a letter-appeal to the institutions, available from: https://www.flai.it/campagne/emergenza-coronavirus-lettera-appello della-societa-civile-alle-istituzioni/. Oxfam and ASGI have also become involved with the issue, as explained by A. GAGLIARDI, *Regolarizzazione braccianti e colf, governo al lavoro. Dai sindacati alle associazioni le proposte in campo*, in *Il Sole24Ore*, 5.05.2020.

[10] For a comprehensive list of the 'shanty towns' in Italy, see: AGI, *Le baraccopoli di migranti in Italia. Una mappa*, in https://www.agi.it/cronaca/migranti_baraccopoli_mappa-5009442/news/2019-02-16/, 16.02.2019.

[11] S. RENNA, *Castel Volturno, gli "invisibili" al tempo del virus*, in *La Repubblica*, 15.05.2020, reports that about ten thousand people are encamped in conditions of extreme poverty in the ghetto of Castel Volturno, in Campania; C. MACCANI, A. RUGGERO, *I costi del contenimento, dai campi agli scaffali*, in http://www.cronachediordinariorazzismo.org/i-costi-del-contenimento-dai-campi-agli-scaffali/, 14.04.2020 describe the sanitary situation in the Borgo Mezzanone (FG) settlement in Puglia.

[12] Cf. C. RUGGERO, *Focolai dimenticati*, in https://www.collettiva.it/copertine/diritti/2020/10/31/news/focolai_di_indifferenza-511693/, 31.10.2020.

[13] As in MEDU, *VII Rapporto. La Pandemia a Rosarno*, 31.07.2020, p. 36. They also report that some municipalities have even excluded the inhabitants of shanty towns from the distribution program for personal protective equipment, as they are not officially resident in the area. Cf. A. CAMMILLI, *L'emergenza coronavirus tra i braccianti di Rosarno*, in *Internazionale*, https://www.internazionale.it/reportage/annalisa-camilli/2020/10/23/zona-rossa-tendopoli-rosarno, 23.10.2020.

[14] Regarding the concept of the *disempowerment* of migrant labour, see the analysis by E. BARBERIS, S. BATTISTELLI, P. CAMPANELLA, P. POLIDORI, E. RIGHINI, D. TEOBALDELLI, E. VI-

even greater exploitation, like the exponential increase in working hours, the reduction or non-payment of wages and a general worsening of working conditions. The agricultural sector, for example, has recorded a 20% increase in the number of undeclared labour, i.e. around 40-45 thousand more undeclared workers than in the previous two years.[15] Moreover, the suspension of inspections on farms and the social isolation has fostered the recrudescence of exploitation:[16] it has been reported[17] that – in response to the ban on crowding – the farm owners and the gangmasters did set up dormitories in caravans and makeshift shacks to overcome the problem of transporting the labourers every day.

Even in the domestic and personal care sector, there has been a significant decrease in regular employment. According to the figures elaborated by the National Association of Domestic Employers (Assindatcolf),[18] there were about 13,000 fewer employment contracts between March and June 2020. These data may indicate that there was either an increase in the amount of undeclared work or an increase in layoffs in this sector, encouraged by excluding this category of workers from the ban on redundancies,[19] by the increase in the amount of time people spent at home and, with it, the time dedicated to the care of their families and the home, as well as the fear of contracting the virus through contact with home helpers and carers who visit more than one household.[20]

GANÒ, *Vulnerabilità e irregolarità dei lavoratori nel settore agricolo: percezione, determinanti, interventi*, in *Agriregionieuropa*, 2018, n. 55. Available from: https://agriregionieuropa.univpm. it/it/content/article/31/55/vulnerabilita-e-irregolarita-dei-lavoratori-nel-settore-agricolo-percezione.

[15] M. OMIZZOLO, *Bracciantato e caporalato in Italia al tempo del Covid-19*, in MEDU, *VII Rapporto*, cit., p. 44, reports the data processed by the Tempi Moderni Study Centre.

[16] *Ibid.*, p. 45.

[17] G. FOSCHINI, *Tra i braccianti di Foggia sequestrati dai caporali*, in *La Repubblica*, 26.04.2020, https://rep.repubblica.it/pwa/generale/2020/04/26/news/tra_i_braccianti_di_foggia_sequestrati_dai_caporali-254976073/.

[18] Scheda di sintesi del rapporto IDOS, *Dossier Statistico Immigrazione 2020*, p. 9.

[19] M. MISCIONE, *Il Diritto del lavoro ai tempi orribili del coronavirus*, in *Il lavoro nella giurisprudenza*, 2020, issue 4, p. 326.

[20] *Ibid.* The author distinguishes live-in from live-out domestic workers and outlines various scenarios.

2. *The regularization provided for in article 103 of Decree Law No. 34/2020 to deal with the emergency*

The intervention measure most desired by political forces[21] and trade unions[22] to find a solution the health crisis of migrant workers was the regularization of irregular migrants. Indeed, obtaining a residence permit allows foreign citizens to register with the National Health Service (SSN) and have access to all the services it provides. Though Italian law on health protection for foreigners is among the best in Europe[23] – guaranteeing anyone urgent, essential and continuous care[24] – the pandemic has nevertheless made it unsafe to access first aid facilities, given the high risk of infection from Covid-19.[25] This led to regularization being identified as the only suitable way of ensuring full health protection irregular migrants in the territory, including their inclusion in the vaccination program.[26]

Furthermore, it was hoped that this instrument of extraordinary legislation could be used to deal with the fall in production experienced by some sectors due to the closing of borders and the consequent ban on the entry of foreign workers.[27] In this case, the *rationale* underlying the regularization seems to have been "functionalist",[28] i.e. aimed at finding as much labour as is available

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[21] The Democratic Party was the first to submit a document signed by a group of members of parliament led by Matteo Orfini. On this point, see M. RUBINO, *"Svuotare le baraccopoli e regolarizzare i braccianti"*, in *la Repubblica*, 10.04.2020.

[22] The most important initiative in this respect was the above mentioned appeal-letter endorsed by FLAI-CGIL – and by other associations involved in the fight against the exploitation of labour, including Terra! and Doctors for Human Rights (MEDU) – that urged the government to take appropriate measures to protect the health of labourers in the ghettos. For the full text see: https://www.flai.it/campagne/emergenza-coronavirus-lettera-appello-della-societa-civile-alle-istituzioni/.

[23] W. CHIAROMONTE, M. D'ONGHIA, *Cronaca di una sanatoria in tempo di emergenza sanitaria: genesi, finalità e limiti*, in *Diritto, immigrazione e cittadinanza*, 2020, issue 3, p. 16.

[24] Please refer to A.M. LUZI, G.M. PASQUALINO, L PUGLIESE, M. SCHWARZ, B. SULIGO, *L'accesso alle cure della persona straniera: indicazioni operative*, in http://www.salute.gov.it/imgs/C_17_opuscoliPoster_199_allegato.pdf, Rome, 2013.

[25] L. GARATTINI, M. ZANETTI, N. FREEMANTLE, *The Italian NHS: What Lessons to Draw from CoViD-19?*, in *Appl Health Econ Health Policy*, 2020, issue 18, no. 4, pp. 463-466.

[26] W. CHIAROMONTE, M. D'ONGHIA, *op. cit*., p. 17.

[27] The associations reported a shortage of between 270,000 and 350,000 workers. The information was published on the Mipaaf website, https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/15357.

[28] C. CAPRIOGLIO, E. RIGO, *Lavoro, politiche migratorie e sfruttamento: la condizione dei braccianti migranti in agricoltura*, in *Diritto, immigrazione e cittadinanza*, 2020, issue 3, p. 35.

within national borders by offering regular employment contracts and residence permits.

Last but not least, regularization was promoted by the Government as a suitable means to resolve the social crisis experienced by irregular foreign workers in the country, highlighting its importance in combating the illegal hiring and exploitation of labour.[29] The former Minister of Agriculture and Agricultural Policies, Teresa Bellanova, presented this extraordinary measure as an instrument capable of restoring dignity to workers, giving visibility to the 'invisible' and shielding them from exploitation and from gangmasters.[30] The three objectives of the regularization can be find on the Ministry website: "[i] promoting the emergence of thousands of 'invisible' people who live and/or work in Italy; [ii] providing adequate personal and collective health protection; [iii] taking a step forward in reinforcing the fight against unlawful hiring and the exploitation of Italian and foreign labour".[31]

With these premises (or promises), the Italian government has introduced a 'double amnesty' to art. 103 of Decree Law No. 34 of 19 May 2020, (the so-called Decreto Rilancio), containing procedures aimed both at bringing to light irregular employment arrangements and the regularization of workers in the country.[32] The window available for both procedures has been limited to between 1 June 2020 and 15 July 2020 and then extended until 15 August 2020.[33]

Contrary to the numerous proposals put forward on the subject,[34] the economic sectors involved were limited to the primary industries (agriculture, livestock and animal husbandry, fishing and aquaculture) and related activities,

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[29] Former Prime Minister, Giuseppe Conte, stated that the regularization would represent a necessary instrument to "blunt the weapons of the gangmaster system", in M. PERRONE, *Come funziona e quanto costa la regolarizzazione di colf, badanti e lavoratori agricoli*, in *Il Sole24Ore*, 13.05.2020.

[30] Cf. M. BORRILLO, *Braccianti, tutti i numeri degli irregolari. Gli «invisibili» e i 240 mila italiani senza sussidio*, in *Corriere.it*, 17.05.2020.

[31] Available at: https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/15518.

[32] Decree Law No. 34 of 19 May 2020 "Misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da COVID-19", converted, with amendments, by Law No. 77 of 17 July 2020.

[33] The Ministry of the Interior then reopened the period for submitting the applications from 25 November to 31 December 2020, for employers who had already paid the 500 Euro fee but had not submitted the request for regularization or they had submitted it to INPS by mistake. Cf. Ministero dell'interno, Nota n. 4623/2020, 23.11.2020.

[34] Cf. A. GAGLIARDI, *op. cit*.

personal care and domestic work (art. 103, para. 3). Three different conditions for regularization were available through the two procedures provided for in art. 103 of Decree Law No. 34/2020: i) signing a new employment contract with foreign nationals already in the country, regardless of whether or not they were irregular; ii) the regularization of ongoing undeclared employment relationships, for the benefit of both foreign and italian citizens; iii) requesting a six-month residence permit to seek work in the specified sectors, which can be converted into a work permit in the event of subsequent employment.

The first two applied the same procedure and were charged to the employer (art. 103, para. 1), who could choose whether to start a new employment relationship or to declare a pre-existing employment relationship. In the latter case, a flat-rate contribution of 500 Euros had to be paid for each worker who was not officially hired. The application for the regularization of the employment relationship had to be submitted to INPS if the worker was Italian or to the Single Desk for Immigration if the applicant was a non-EU national. Additionally, for the procedure to be carried out for a foreign worker, the employer was required to prove that he was present in Italy since 8 March 2020.[35]

The third case (art. 103, para. 2 and 4) was up to the foreign citizen, who could submit the application to the Police Headquarters both in the event of persons residing without authorisation in the country, and in the event that the applicant held a residence permit that was still valid, but not convertible into one for work.[36] In this case, however access to the procedure was subject

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[35] Art. 103, para. 1, Decree Law No. 34/2020: "A tal fine, i cittadini stranieri devono essere stati sottoposti a rilievi fotodattiloscopici prima dell'8 marzo 2020 ovvero devono aver soggiornato in Italia precedentemente alla suddetta data, in forza della dichiarazione di presenza, resa ai sensi della legge 28 maggio 2007, n. 68 o di attestazioni costituite da documentazioni di data certa proveniente da organismi pubblici; in entrambi i casi, i cittadini stranieri non devono aver lasciato il territorio nazionale dall'8 marzo 2020". ("To do this, foreign citizens must have been photographed and fingerprinted before 8 March 2020 or must have been Italy before that date according to the declaration of presence made pursuant to law No. 68 of 28 May 2007 or provide certificates, consisting of documents of a known date issued by public bodies. In both cases, foreign citizens must not have left the country after 8 March 2020", my translation).

[36] Cf. N. ZORZELLA, *Regolarizzazione 2020, una prevedibile occasione perduta. Some of the critical issues*, in *Critica del diritto*, 21.10.2020, which coined the expression "legally weaker permit" in reference to permission to seek asylum, special protection, humanitarian protection which is difficult to convert into a permit to seek work, after the reform of the first security decree, Decree Law No. 113/2018, for the assistance of minors pursuant to art. 31, para. 3 TU 286/98), on medical grounds, for study, for religious reasons, for natural disasters and so on. In reality, the right to apply for a temporary residence permit for asylum seekers was initially debated. Reference should be made to the article by E. SANTORO, *I rapporti tra la procedura di emersione dello straniero ex art. 103 c. 2 del D.L. 34_2020. 34_2020 e la domanda di protezione internazionale*, in *L'Altro Diritto*, 2020.

to those applying for it proving that they were in the country on 8 March 2020 and having worked in the sectors referred to in section 3, and having a residence permit that expired on 31 October 2019.

The suspension of criminal and administrative proceedings was proposed for the employer in relation to the irregular employment of those workers for whom the application was presented, while for the worker it was limited to illegal entry and stay in the country (art. 103, para. 11).[37]

3. *The failure of the regularization*

At a glance, it can be seen that the regularization provided for in art. 103 of Decree Law No. 34/2020 did not achieve the desired results.

From a sanitary point of view, to deal with the health crisis experienced by migrant workers the decree contains only one provision, in paragraphs 1 and 2, referred to the concentration of foreign nationals in accommodations with inadequate sanitary conditions, and the generic requirement to adopt solutions and urgent measures to ensure decent and safe housing conditions by local administrations.[38] The indeterminacy of the content and the wide discretion left to the administrative bodies have resulted in the measure being basically ineffective. In my opinion, it would have been necessary to institute the obligation to adopt a common action plan for all administrations, which contained a series of measures such as: the obligation to distribute personal protective equipment; the identification of suitable facilities in which to transfer the people amassed in the so-called ghettos; the transfer of those who had contracted Covid-19 to suitable facilities in order to ensure assistance; the replacement of the cardboard and sheet metal huts with tents; the installation of chemical toilets and electricity generators. The limited effectiveness of the legislative provision can be seen by the fact that, to date, no intervention has been carried out to protect the health of the workers in terms of providing decent and safe housing conditions.[39]

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[37] On the other hand, criminal proceedings are not suspended for employers who have been convicted, even if the judgement is not definitive, for serious crimes including aiding illegal immigration and labour exploitation (which are also barriers for submitting the application for regularization).

[38] Paragraph 20, art. 103 of Decree Law No. 34/2020.

[39] Cf. Comunicato FLAI-CGIL, *Migranti: Cgil, Flai, intervenire con urgenza per fermare contagi in accampamenti lavoratori agricoli*, 22.10.2020, available from: https://www.flai.it/comunicati/migranti-cgil-flai-intervenire-con-urgenza-per-fermare-contagi-in-accampamenti-lavoratori-

The regularization was not decisive enough even in terms of the economic production crisis. Official figures from the Ministry of the Interior show that a total of 207,708 applications were made for the regularization of employment relationships, in addition to nearly 13,000 applications for temporary residence permits.[40] The final figures on how many applications were accepted were not yet available after more than one year by the procedure's expire. An enormous delay can be observed concerning the first procedure: by 16 February 2021, only 6% of the applications started to be processed, while only 5% of procedures are at the final stage.[41] The figures are more reassuring looking at the second procedure, on the foreign worker's charge, where to the 31 December 2021, almost 68% residence permits were issued.[42]

However, the actual number of people who have benefited from the regularization is still not available and, in any case, for both procedures provided for by the Decree Law, the number of applications submitted was far below expectations.

Indeed, less than a fifth of those employed in the sectors covered by the regularization, estimated at approximately 1 million workers, have had access to the procedure for the emergence of employment relationships.[43] In addition, there was a significant disparity between the two sectors, with 85% of the total applications being from the domestic and personal care sector (almost 177,000 applications) compared to approximately 30,000 regarding subordinate employment (15%). This means that for each application for regularization in the primary sector, about 6 were submitted for the domestic and personal care sector. My opinion is that this difference can be explained both by the nature and by the duration of the employment relationships in the two sectors. One can assume that an agricultural entrepreneur will have less interest in incurring the costs and lengthy procedures involved in regularizing workers he does not know and who he employs on a day-to-day basis or, at most, for a few months.[44] In the domestic sector, on the other hand, contracts usually last longer and allow the cost of the procedure to be amortized, and

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agricoli/. Of the same opinion is T. BOERI, S. BRIGUGLIO, E. DI PORTO, *Chi e come regolarizzare nell'emergenza coronavirus*, in *Lavoce.info*, 24.04.20.

[40] The data is available on the website of the Ministry of the Interior, https://www.interno.gov.it/it/emersione-dei-rapporti-lavoro-report-quindicinali.

[41] The data belonging to the report made by the association Ero Straniero, available on the ASGI website: https://www.asgi.it/notizie/ero-straniero-regolarizzazione-2020-a-rischio-fallimento/.

[42] *Ibid.*

[43] Data sheet prepared by *Il Sole 24 Ore* based on ISTAT and IDOS data on undeclared work by Region, cit.

[44] Cf. Human Rights Watch, cit.

the working relationship is also based on a greater relationship of trust between the employer and the worker.[45]

Lastly, requests for temporary residence permits were far fewer than the number of undocumented foreigners involved in the two sectors: out of about 480,000 workers potentially involved[46] only 12,986 applications were submitted. In terms of these figures, the lack of applications can be explained by the strict requirements for accessing the procedure, including having to provide proof of one's uninterrupted presence in Italy as of 8 March 2020 and of having worked in the sectors indicated. This sort of evidence is very difficult to obtain, considering that those who live in irregular situations usually avoid interaction with public or institutional bodies for fear of being reported and expelled.[47] Furthermore, the time limit regarding the expiry of the residence permit to 31 October 2019 has excluded many *overstayers* from the possibility of applying for a temporary residence permit, i.e. those who legally enter the country with a residence permit – usually of a short duration (for example, for tourism) – but who subsequently stay after the permit has expired and become irregular persons.[48]

Eventually, regularization was not the right tool to counter the social crisis experienced by migrant workers. A residence permit for work or seeking work reasons is not in itself an *empowerment* instrument that allows foreign nationals to oppose exploitation in an employment relationship. The fear of being fired and therefore of falling into the "abyss"[49] of irregularity makes the migrant worker weak and subject to blackmail. A closer look shows, however, that not even an employment contract is per se a sufficient guarantee to protect the worker from exploitation. Consider, for example, the phenomenon of 'grey work', where employment relationships are formally regulated by a contract but its content does not correspond to how the work is carrying out.[50]

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[45] Likewise N. ZORZELLA, *op. cit.*, p. 9.

[46] F. DEPONTI, M. FINIZIO, V. MELIS, *Sanatoria colf e braccianti al via: interessati 480mila extracomunitari irregolari,* in *Il Sole24Ore*, 25.05.2020.

[47] The first part of section 16, art. 103 of Legislative Decree No. 34/2020 states that "[the] application for the issue of a temporary residence permit referred to in paragraph 2 should be submitted by the foreign citizen to the Chief of Police from 1 June to 15 July 2020, together with supporting documentation specified by the decree referred to in paragraph 6 which proves that work was carried out in the sectors referred to in paragraph 3 and that can be verified by the National Labour Inspectorate to which the request is also submitted". For a more detailed comment on the probative difficulties to provide supporting evidence for access to the two types of regularization, please refer to the essay by W. CHIAROMONTE, M. D'ONGHIA, *op. cit.*, p. 26.

[48] M. PAGGI, *La sanatoria ai tempi del Coronavirus*, in *Questione giustizia*, 14.06.2020.

[49] E. SANTORO (a cura di), *Diritto come questione sociale*, Torino, 2009, p. 163.

[50] Cf. F. NICODEMI, M. PAGGI, L. TRUCCO, *la tratta e il grave sfruttamento lavorativo dei mi-*

Furthermore, as happened during previous regularization attempts, we also saw the unpleasant phenomenon of the 'buying and selling' of employment contracts.[51] Basically, in many cases the employer was only willing to regularize the employment relationship if the worker himself paid, with prices ranging from the cost of the procedure (500 Euros) to much higher amounts.[52] In this way, in the absence of corrective mechanisms that would avert this (known) outcome, the costs of regularization fell entirely on the workers and this made them, due to the heterogony of ends, further exposed to abuse and blackmail.

4. *Concluding remarks*

As previously explained, the measures provided to promote the regularization of foreign workers have been a failure thrice: they have not been able to solve the sanitation problem experienced by migrant workers living in informal settlements, nor do they answer the shortage of labour in the most important sectors and nor do they provide a suitable instrument to protect workers from exploitation. These goals have been missed due to a misleading political analysis of the problem of exploitation and illegal hiring and limiting it to the question of whether the foreign worker has leave to stay in the territory. As noted in literature,[53] strengthening the legal *status* of migrants is not a sufficient measure to eliminate the subordination and social marginalization that characterizes the majority of foreign workers in the labour market, including the European ones, and makes them victims of abuses and exploitation.[54]

In our country, the regularization of migrant workforce is not an extraordinary and specific 'anti-pandemic' provision, but it has been set up as a 'traditional' tool with which, periodically, our system has managed the migration.

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granti, in https://www.cittalia.it/images/la_tratta_e_il_grave_sfruttamento_lavorativo_dei_migranti_2015.pdf, 2015, pp. 5-6.

[51] Cf. N. ZORZELLA, *op. cit.*, p. 9; W. CHIAROMONTE, M. D'ONGHIA, *op. cit.*, p. 24.

[52] Some evidence to that effect is reported by Human Rights Watch, cit.

[53] Cf. C. CAPRIOGLIO, E. RIGO, *op. cit.*, p. 45.

[54] Suffice to say that, according to FLAI-CGIL figures, the Romanians are the primary working community in the Italian agricultural sector, with over 120,000 workers, see S. FALCO, *Covid-19: braccianti rumeni verso Germania e Regno Unito, "l'Italia sta perdendo la corsa"*, in *Euronews*, https://it.euronews.com/2020/04/28/covid-19-braccianti-rumeni-verso-germania-e-regno-unito-l-italia-sta-perdendo-la-corsa.

Of course, the historical moment has made it particularly favourable to implement this measure, since the 'recall effect' of citizens from other countries has been largely averted due to the closure of the borders. In addition, this intervention was also expected to rebalance the effects of abolishing humanitarian protection by the Security Decrees of 2018, which made a large part of the migrant population even more vulnerable.[55] But, on closer inspection, to face the problems listed by the Government (sanitary, working and social ones) related to migrant people, the current reception and integration system doesn't work and must be entirely overcome. Given the importance of the role played by foreign labor in our economy, it is necessary to facilitate the encounter between employers and workers, through legal channels of entry in the country, as e.g. residence permits for job-seekers, in order to discourage irregular migration and undeclared work.

So basically, the regularization of workers (and employment relationships) can be a useful instrument but it is insufficient on its own to solve the crisis that hit migrant workers during the pandemic and, more generally, to solve the social and legal insecurity that often involves foreign workers. This vulnerability cannot be eliminated by making use of a single emergency provision, but it must be accompanied by structural changes aimed at regulating migration and fighting exploitation.

[55] Likewise C. CAPRIOGLIO, E. RIGO, *op. cit.*, pp. 55-56.

THE MEDITERRANEAN IN THE ERA OF COVID-19: BETWEEN CLOSED PORTS AND QUARANTINE SHIPS, WHICH IS THE RIGHT ROUTE FOR MIGRANTS?

by *Olga Cardini*

1. *Introduction*

The current global health crisis has had a major impact on the situation of migrants and border control, immigration and asylum policies throughout the European Union.

In the first few months of the pandemic, between March and June 2020, eighteen Member States and Schengen Associated Countries notified ninety-five measures to restore internal border controls, of which ninety-two related to the Covid-19 emergency[1] and different practices and administrative measures re-

[1] As regards the Member States, these are Austria, Belgium, Denmark, Estonia, France, Finland, Germany, Lithuania, Poland, Portugal, Czech Republic, Slovakia, Spain, Sweden and Hungary. The Schengen Associated Countries are Iceland, Switzerland and Norway. Despite having reinstated border controls with Italy, Slovenia has yet to make any notification under the Schengen Borders Code. For an overall picture of the measures adopted by the States, see the table contained in the European Commission document: *Full list of Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code* 30 September 2020, available online. For further information, see F. SPITALERI, *Covid-19 e ripristino dei controlli alle frontiere interne*, in *Il Diritto dell'Unione Europea*, issue 2/2020.

garding immigration were implemented by national governments throughout Europe.[2] Disembarkation and identification of people arriving by sea became more complex, due to the need to subject foreign nationals to quarantine, and reception centres had to deal with the lack of space; the transfer of asylum seekers pursuant to Dublin Regulation became impracticable; the assessment of asylum applications was slowed down by the difficulty of carrying out interviews with applicants and in some cases suspended;[3] resettlements, emergency humanitarian evacuations and repatriations were also stopped due to the closure of third countries borders.

The general confusion therefore led the EU Commission to issue a communication[4] proposing guidelines and operational measures to the Member States aimed at safeguarding health and, at the same time, preserving the application of European Union legislation and the protection of fundamental rights.

In this regard, the Commission notes that: even if there are delays, third-country nationals who apply for international protection must have their application registered by the authorities;[5] measures of quarantine or isolation may be applied in respect of applicants for international protection on the basis of national law, provided that such measures are reasonable, proportionate and non-discriminatory; where a transfer to the responsible Member State is not carried out within the compulsory time limit, responsibility shifts to the Member State that requested the transfer pursuant to Article 29(2) of the Dublin Regulation unless it is a matter of family reunification, for which Article 17, paragraph 2;[6] could be applied extensively. Member States should also

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[2] See ECRE, *Information Sheet, 23 April 2020: Covid-19 measures related to asylum and migration across Europe*, available online.

[3] This is the case of Greece, which ordered the examination of applications to be suspended until April 10. This measure should not be confused with the emergency measure that was adopted in March in response to Turkey's decision to open its borders for migrants wishing to reach Europe, which was also strongly condemned by the UNHCR as it violated the right to asylum, and the prohibition of refoulement. See *UNHCR statement on the situation at the Turkey-EU border*, 02 March 2020, available online.

[4] See EU Commission, *Covid-19 Communication: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement*, in *OJEU* C 126/2020.

[5] In this case, the Commission suggests the application of Article 6, paragraph 5, of Directive 2013/32/EU (the so-called procedures directive) that allows Member States to extend the time limit for the registration of applications to ten working days where simultaneous applications by a large number of third-country nationals or stateless persons make it very difficult in practice to respect these time limits.

[6] According to which a member state may, at any time before a decision is taken on the substance of an application, request another Member State to take charge of applicants in order to

grant a period for voluntary departure longer than thirty days from the time return decision is issued and if the deadline cannot be respected due to the lack of transportation to the third country of return or any other reason independent from the person's will and related to the restrictive measures, Member States should refrain from issuing or should withdraw an issued entry ban.

It is important to keep these principles in mind, because they will be useful as parameters when analysing the Italian situation.

In our country, in fact, the outbreak of the pandemic has contributed to creating situations of limbo, grey areas in which the protection of rights is not always guaranteed as it should be: the restrictive measures of personal freedom adopted in the context of the Covid-19 pandemic for the purpose of safeguarding the population, in reality have proved to be detrimental to the rights of persons already subject to limitations on freedom of movement by virtue of their status, as they have considerably hindered access to healthcare and legal protection.

As is well know from the situation in prisons,[7] the greatest number of violations of foreigners' rights also occurred under administrative detention,[8] which can be assimilated to the conditions in which people were obliged to undergo quarantine or fiduciary isolation in inadequate conditions at *ad hoc* facilities that were set up in April or the condition of migrants in *hotspots*, which are legally controversial and still under observation places, following the *Khlaifia* judgement issued by the Strasbourg Court in 2016, in which Italy was sentenced for illegal detention in the first reception centres.[9]

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bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even when that Member State is not in principle responsible.

[7] For further information on the topic see E. SANTORO, *Diritto alla salute e prevenzione in carcere: problemi teorici e pratici di gestione del coronavirus negli istituti di pena*, in *La legislazione penale*, 4 May 2020, available online.

[8] During the health emergency, there should be no legal basis for detention in the repatriation centres, as international mobility has been suspended. See in particular art. 15, par. 4, Return Directive (Directive 2008/115/EC): «when it appears that a reasonable prospect of removal no longer exists […], detention ceases to be justified and the person concerned shall be released immediately» according to which, detention is exclusively preparatory to repatriation and if repatriation is not possible, then detention should be deemed illegitimate. In addition to this, the so-called "relaunch decree", in introducing the regularization procedures, had ordered the suspension of expulsion proceedings until 15 August, the deadline for submitting the application for regularization following the extension agreed in Legislative Decree No. 52 of 16 June 2020: an additional reason for holding detention illegal. From this point of view, the contribution of the Courts was crucial, because many have not validate detention for some foreign citizens, including the Court of Rome, (g.r. No. 15892/2020, 18 March 2020 and g.r. No. 16573/2020, 27 March 2020) and the Court of Trieste (g.r No. 980/2020, 18 March 2020).

[9] See ECHR Grand Chamber, *Khlaifia and others v. Italy*, appeal No. 16483/12, 15 Decem-

2. *The inter-ministerial decree No. 150/2020 and the decree of the Head of the Civil Protection Department No. 1287/2020*

All things considered, the border control, immigration and asylum policy was overwhelmed by the emergency. To understand in what way this could have been avoided it is useful to retrace the steps of this "ordeal", starting with numbers.

In March 2020, when Italy enters lockdown, there is an initial decrease in arrivals: 241, compared to 1211 in February and 1342 in January. At first, the landings were handled without any major difficulties, in compliance with the procedures provided for by Decree Law 17 March 2020, No. 18 and the circular of the Department for Civil Liberties and Immigration of 18 March

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ber 2016, with which the ECHR condemned Italy for the unlawful detention of three Tunisian nationals who arrived in Italy in September 2011. The three applicants were detained in the first aid and reception centre (CPSA) in Lampedusa until a violent revolt broke out, which led them to being transferred to military ships docked in the port of Palermo due to the reception centre being unusable. After a few days, having been served a deferred refoulement order, the applicants were repatriated to Tunisia after a summary assessment of their identity, according to the Italian-Tunisian readmission agreement of 5 April 2011.

The ruling of the Grand Chamber partially reformed the decision of the second section on 1 September 2015, which had fully upheld the complaints regarding violations of article 5, paragraphs 1, 2 and 4 and article 4 of ECHR protocol 4, and in part, those relating to violations of article 3 ECHR. In fact, only the violation of Article 5, paragraphs 1, 2 and 4 and of Article 13 of Article 3 of the ECHR was confirmed due to the total absence of any body to which migrants could have lodged their respective complaints relating to the conditions of detention.

Following this ruling, the Committee of Ministers of the Council of Europe started the process of oversight the implementation of the Court's decision. During this process, in response to the requests of the Committee, the Italian Government presented three communications (September 2017, March 2018, September 2018) and in February 2019, finally requested the closure of the supervision procedure, stating that it had adopted all the measures necessary to prevent the recurrence of violations related to detention in hotspots with the law 132/2018 and, even before, with Decree Law No. 13/2017. On the contrary, according to many jurists and some associations that intervened during the proceedings, the issues relating to the illegal detention in hotspots are not resolved by the new regulations.

In May 2021, the Committee of Ministers determined that respect for fundamental rights in hotspots needs further review in December, following two communications by "ASGI", "A Buon Diritto Onlus" and "Cild", in which violations still occurring in italian hotspots are widely documented.

For further information see A. MASSIMI, F. FERRI, *L'attualità del caso Khlaifia. Gli hotspot alla luce della legge 132/2018: la politica della detenzione extralegale continua*, in *Questione giustizia*, 12 June 2019; A. GILIBERTO, *La pronuncia della Grande Camera della Corte EDU sui trattenimenti (e i conseguenti respingimenti) di Lampedusa del 2011*, in *Diritto penale contemporaneo*, 23 December 2016; F. TUMMINELLO, *L'Italia e la gestione dei migranti: il caso Khlaifia c. Italia*, in *Ius in itinere*, 4 March 2019.

2020, according to which people entering the country have to undergo health monitoring and fiduciary isolation for fourteen days. However, the situation began to change in April, when landings[10] resume and consequently the number of people in *hotspots* and first reception centres[11] increases. Due to the lack of space, *ad hoc*[12] facilities start to be identified in order to allow people arriving during the health emergency to quarantine.

It is in this context[13] that on 7 April the inter-ministerial decree No. 150/2020, the so-called "closed ports" decree was adopted. It states that «for the entire duration of the national Covid-19 health emergency, Italian ports will not meet the necessary requirements to be classified and defined as a Place of Safety as provided for by the Hamburg Convention, for maritime search and rescue, for foreign ships rescuing outside the Italian SAR (Search and Rescue) zone».

The measure comes as a further example of a ministerial directive on closed ports,[14] despite the change of government in September 2019: it was the "security bis" decree (Legislative Decree No. 53/2019, converted into law

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[10] According to figures from the Ministry of the Interior, the number of arrivals in April was 671 and increased over the following months: 1654 in May and 1831 in June, making a total of 6950 arrivals in the first half of 2020.

[11] This reached a peak between the end of April and the beginning of May when a total of 273 arrived at Lampedusa, Messina and Pozzallo.

[12] It should be noted that the activation of temporary health zones by the relevant regional authorities was already provided for in the "Cura Italia" decree (Article 4 of Legislative Decree No. 18 of 17 March 2020), as well as the requisition of hotels or other suitable property by Prefects to house people for health monitoring and self isolation (art. 6, paragraph 7, of Legislative Decree No. 18 of 17 March 2020).

[13] More precisely, the decree comes after the request for safe haven by the ship Alan Kurdi operated by the German NGO Sea Eye, with 150 migrants on board rescued in the Libyan SAR zone in two different operations on 6 April. A week later, the *Aita Mari*, a ship flying a Spanish flag with 39 people on board, was also denied landing.

[14] Remember, for example the case of the *Aquarius* (June 2018); the *Diciotti* ship that was blocked in the port of Catania with 177 migrants on board (August 2018) by the Italian Coast Guard; the *Sea Watch 3* and the *Sea Eye* ships, which were forced back into the open sea for, 20 and 13 days respectively between December 2018 and January 2019. In June 2019, when the so-called security decree bis came into force, the *Sea Watch 3* was again forced to remain at sea for 17 days. In July 2019 the sailing ship *Alex* of the NGO Mediterranea Saving Humans and the *Ocean Viking* in August 2019, operated by Sos Mediterranée and Doctors Without Borders, were forced to remain in the open sea between Malta and Lampedusa with 356 people on board for 13 days, while the *Open Arms* remained without a port with over 100 people on board for 19 days. The *Eleonore* of the NGO Lifeline, after 8 days of waiting, forced the ban on entry into territorial waters and landings and the ship *Mare Jonio*, after days at sea, was hit by sanctions of the decree.

77/2019), wanted by the former Minister of the Interior Salvini, that revised the consolidated act on immigration with paragraph 1-*ter* of art. 11 and on the basis of which the Minister of the Interior, in compliance with Italy's international obligations, «may limit or prohibit the entry, transit or mooring of ships in territorial waters [...] for reasons of order and public safety [...]».[15]

Despite the fact that the next government declared from start that it wanted to repeal the Salvinian-style security decrees, its ministers (Minister of Infrastructure and Transport, in agreement with the Minister of Foreign Affairs and International Cooperation, the Minister of the Interior and the Minister of Health) issued a provision that substantially applied it.[16] However, from a formal point of view, the legal basis of the provision is art. 83 of the maritime code (referred to in the "visas", unlike Article 11, paragraph 1-ter of Legislative Decree No. 286 of 25 July 1998,), which gives the Ministry of Transport the power to ban the transit and mooring for ships for reasons of public order, in this case the highly questionable risk – considering the small number of arrivals – compromising the «functionality of national health, logistics and security facilities aimed at containing the spread of infection and providing assistance and care for Covid-19 patients», indicated in one point of the decree.

A few days later, on 12 April, the Head of the Civil Protection Department signed decree No. 1287/2020, which entrusts the management of procedures related to fiduciary isolation and the quarantine of foreign nationals rescued at sea or who landed autonomously in Italy to the Ministry of the Interior, «with reference to people rescued at sea and for whom it is not possible to indicate a "Place of Safety"». The provision also provides for the possibility of placing migrants on ships indicated by the Ministry of Infrastructure and Transport outside Italian ports during the period of quarantine and indicates the Red Cross as being responsible for providing health care and any other basic services for foreign nationals on board (personal assistance, distribution of goods, administrative management). In implementing the decree of the Head of Civil Protection, the Ministry of the Interior and the Ministry of Infrastructure and Transport signed contracts to hire vessels from private companies following fast-tracked assignment procedures permitted by the special powers delegated to the Civil Protection for dealing with the health emergency. The ferry "Rubattino" owned by Tirrenia[17] was the first ship to be employed in this

[15] Now repealed by Decree Law No. 130/2020, converted with Law No. 173 of 18 December 2020.

[16] In this respect, see A. PELLICONI, M. GOLDONI, *La banalità dei porti chiusi per decreto. Osservazioni sui profili di legittimità del decreto interministeriale 150/2020*, in *Diritto, immigrazione e cittadinanza*, issue No. 2/2020, p. 220.

[17] The ship, anchored off the port of Palermo, initially housed 183 migrants, including 33

manner. This was followed in May by the Moby Zazà owned by Gruppo Onorato.[18] Since then, the Ministry of the Interior has hired six quarantine ships (Adriatico, Allegra, Azzurra, Rhapsody, Suprema and Aurelia) using the new simplified procedures.[19]

3. *The relationship between decrees and international and European legislation on the law of the sea and the right of asylum: conformity or contrast?*

Let's pause for a moment on these two measures, which must be read together in order to reconstruct the regulatory framework that is in force and

unaccompanied minors, 26 Red Cross workers and 40 crew members, none of whom tested positive for Coronavirus. Note that the first news about the quarantine ship was released on April 27 because during the first period not even the Red Cross press office was authorized to make statements. The following day, the National Guarantor for the Rights of Persons Detained or Deprived of Liberty condemned the situation: «The implementation of quarantine measures in extraordinary and exceptional places cannot result in a 'limbo' situation: foreign nationals migrating to Italy are to be considered under the Italian State jurisdiction for the purposes of health care measures imposed on them. Yet – for many days – they do not have the opportunity to exercise the rights that our country grants and protects. They cannot claim asylum, they are not in fact – at least temporarily – protected as victims of trafficking or as unaccompanied minor migrants, nor can they promptly access the procedures for family reunification under the Dublin Regulation. Obviously, to these protective measures the fundamental guarantee of every person deprived of freedom to receive clear and exhaustive information on the reasons behind the restrictive measure is to be added. To this extent, hesitation showed by the Authority concerned in providing reliable information as to the destination of the people on board the ship is not reassuring. From this point of view, a compulsory quarantine placed on people for whom it is not currently possible to indicate a housing solution appears contradictory and critical» (Bulletin of 28 April 2020).

[18] After the period of isolation of the migrants on the Rubattino ship ended on May 4 in two different phases (first the 33 unaccompanied minors are disembarked, then the remaining 150 migrants are transferred to the Cara di Bari, with the exception of two people who are arrested following orders issued by the Judicial Authorities), the Moby Zazà, takes on the first group of 53 people on May 14 who landed in Lampedusa, and another 68 on 17 May, including 26 women and two children. The following day, the ship docks in the port of Porto Empedocle to allow specialized personnel of the Red Cross to board (23 people including operators, doctors, nurses, cultural mediators, psychologists and personnel trained in emergency management). For further information, see CILD, *Detenzione migrante ai tempi del Covid*, 13 July 2020, pp. 22-23, available online.

[19] All notices are published on the Civil Protection website. It should be noted that in the tender published on 10 September 2020, reference is made to the use of quarantine vessels also for migrants arriving via land borders. The last tender was published on 19 April 2021.

understand whether it constitutes a breach of international maritime law and fundamental rights, in particular the right to asylum.

At first glance, in fact, there appear to be numerous issues associated with the inter-ministerial decree of 7 April 2020 and it appears to be in contrast with international obligations to protect fundamental human rights, in particular regarding articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment) and 5 (right to liberty and security) of the ECHR, as well as limiting the constitutional right to access the territory of the State to seek asylum pursuant to art. 10 paragraph 3 of the Constitution,[20] which, according to the Court of Cassation, means at least the subjective right of the foreign national to enter the territory of the State to apply for asylum.[21] In addition, the automatic refusal to grant safe harbour for those rescued at sea under certain circumstances, provided for by the decree, is contrary to the principle of *non-refoulement* pursuant to art. 33 of the Geneva Convention[22] and the prohibition of collective expulsions in art. 19 of the Charter of Fundamen-

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[20] See ASGI press release, *ASGI chiede l'immediata revoca del decreto interministeriale del 7 aprile 2020. L'Italia è sempre vincolata all'obbligo di fornire un porto sicuro alle persone salvate in mare*, 15 April 2020, available online.

[21] See Cassazione, sez. I, 25 November 2005, sent. n. 25028/2005, which rules that: «the right to asylum must be understood not so much as a right to enter the territory of the State, but rather, and above all, as the right of foreign nationals to access it in order to be admitted to the procedure for examining the application for recognition of the status of a political refugee». This was also confirmed more recently by the Court of Rome with sentence No. 22917 of 4 November 2019, with which the «request for ascertaining the right to submit an application for international protection» presented by a group of foreigners who, after being rescued in international waters by the Italian Coast Guard, were pushed back to Libya was accepted. For an *excursus* on the evolution of jurisprudence in the field of constitutional asylum see M. BENVENUTI, *La forma dell'acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità*, in *Questione giustizia*, issue 2/2018.

[22] The principle of non-refoulement constitutes a *jus cogens* norm that cannot be derogated from under any circumstances, not even by the Covid-19 health emergency, as confirmed by the UNHCR. (See UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, 16 March 2020, available online, in which point 6 specifies that: «imposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards, in particular as linked to the principle of nonrefoulement. In case health risks are identified in the case of individual or a group of refugees or asylum-seekers, other measures could be taken, such as testing and/or quarantine, which would enable authorities to manage the arrival of asylum-seekers in a safe manner, while respecting the principle of non-refoulement. Denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk».

tal Rights of the European Union and art. 4 of Protocol No. 4 of the ECHR, as interpreted by the Court of Strasbourg.[23]

Secondly, by stating that Italian ports cannot be considered a POS «as provided for by the Hamburg Convention», the decree purports to unilaterally limit the scope of an international convention by an acceding State without following the procedures required by the other acceding states.[24] Also from the point of view of national law it is not possible for an inter-ministerial decree[25] to modify or suspend the effectiveness of the source with which our legal system has implemented the Hamburg Convention, despite the state of emergency, and in any case, even if it had been a primary source, it would have been susceptible to a declaration of unconstitutionality by contrast with article 10, first paragraph, and article 117, paragraph 1, of the Constitution.[26]

Lastly, in the SAR Convention the POS is understood as the place where the life-threatening situation of the shipwreck victim ceases in relation to his specific situation, therefore to cite the Covid-19 emergency as a pretext for the Italian territory being "unsafe" is not particularly coherent with the notion,[27] and, undoubtedly, the scope of application of the provision, which is limited to migrants rescued in non-Italian SAR areas by foreign ships, is unreasonable.

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[23] See ECHR, Grand Chamber, *Hirsi Jamaa and others v Italy*, Application No. 27765/09, 23 February 2012, which established that the prohibition of collective expulsions implies that the State is required to carry out an individual case-by-case assessment of the need for international protection and that this must also take place in the case of interception in open seas by the authorities of a State (points 177-180). In this regard, note how the decree attempts to circumvent the obligation by banning entry only for ships flying a foreign flag.

[24] Although the SAR Convention only governs the procedure to be implemented in the event of withdrawal, the International Maritime Organization, which acts as the Secretariat of the Hamburg Convention, should have at least received a communication to that effect.

[25] The inter-ministerial decree is a secondary source in the Italian legal system and is not subject to control by the President of the Republic. From a juridical point of view, pursuant to art. 134 of the Constitution, administrative acts, as sources of secondary law, are not subject to constitutional review. The competent jurisdiction therefore remains that of the administrative courts.

[26] According to which «The Italian legal system complies with the generally recognized rules of international law» and «Legislative power is vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU law and international obligations».

[27] The Guidelines on the treatment of persons rescued at sea in paragraph 6.12 annexed to the SAR Convention: «a place of safety is a location where rescue operations are considered to terminate. It is also a place where the survivors' safety is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination». (See IMO, *Resolution MSC. 167(78), Guidelines on the Treatment of Persons Rescued at Sea*, 20 May 2004, available online).

From this point of view, the measure appears discriminatory because if the problem is the current health emergency, how can Italy be considered a "safe place" for migrants rescued in our SAR zone or by Italian ships?

The answer, more than in the *rationale* of the law, lies in the fact that this was the only possible wording in order for it not to openly conflict with the Hamburg and Montego Bay Conventions. In fact, there is no provision that obliges a contracting State to provide a POS when the rescue takes place outside its SAR zone, unless the State itself voluntarily assumes responsibility. In fact, point 3.1.9.[28] of the aforementioned SAR Convention provides: «Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization (International Maritime). In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable». Paragraph 2.5. of the Guidelines on the Treatment of Persons Rescued at Sea states that the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered. Therefore, in reality, the fact that the ship that carried out the rescue subsequently entered the Italian SAR zone does not imply, according to a literal interpretation, that Italy is required to provide a POS under the Convention, because the obliged State is the one in whose SAR zone the rescue took place. It follows that Italy must act, at most, as First RCC pursuant to paragraph 3.6.2. of the IAMSAR Manual, i.e. temporarily assume responsibility for the coordination of the rescue, and then pass the coordination and identification of the POS to the RCC of the appropriate State as soon as possible. On the other hand, those who argue that Italy would be bound to provide a POS by virtue of a rule of customary international law,[29] forget that this obligation rests on the flag State of the ship that carried out the rescue[30] and

[28] Amendment adopted in May 2004 and effective from July 2006.

[29] This appears to be the position of the Court of Cassation. See Cassazione, sez. III, 16 January 2020, sent. n. 6626, par. 9, which will be discussed in detail later.

[30] See art. 98, par. 1, United Nations Convention of the law of the Sea (UNCLOS): «Every

not on the coastal State, which is otherwise bound by the UNCLOS Convention to operate search and rescue systems and to cooperate in rescue operations.[31]

However, the peculiarity of the situation in the Mediterranean – in which Libya is unable to provide a POS[32] and Malta has not adhered to the amendment that binds the State responsible for the SAR area to provide a POS – places Italy in a complicated position regarding the possibility of denying a port of call for rescues that also took place outside its own SAR zone.

This consideration allows us to get to the bottom of the true rationale behind the inter-ministerial decree, with which our Government has basically informed the other States that it will take a non-collaborative position with foreign NGOs with respect to providing a POS, by trying to force them to turn to their flag states,[33] and consequently failing to comply with the obliga-

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State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call».

On the nature of the duty to rescue as a rule of customary international law, see *ex multis*: C. RUGGIERO, *Dalla criminalizzazione alla giustificazione delle attività di ricerca e soccorso in mare. Le tendenze interpretative più recenti alla luce dei casi Vos Thalassa e Rackete*, in *Diritto, immigrazione e cittadinanza*, issue No. 1/2020, p. 187; I. PAPANICOLOPULU, *Immigrazione irregolare via mare, tutela della vita umana e organizzazioni non governative*, in *Diritto, immigrazione e cittadinanza*, issue No. 3/2017, pp. 8-10; B.H. OXMAN, *Human Rights and the United Nations Convention on the Law of the Sea*, in *Columbia Journal of Transnational Law*, 1998, p. 415.

[31] See art. 98, par. 2, UNCLOS: «Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose».

[32] Despite having ratified the Hamburg convention, Libya did not declare its specific SAR zone of responsibility until 2018 (an initial statement sent to the IMO was revoked in 2017). From the point of view of international law, however, it is undisputed that the inability to comply with a Convention for material reasons can only lead to it being suspended for the contracting State and, in the specific case of Libya, the UNHCR has also expressed its opinion. (See *UNCHR position on returns to Libya (Update II)*, available online, especially p. 21).

[33] In this regard, the section in the decree according to which it is believed that «the assistance and rescue activities to be carried out in the "safe harbour" can be ensured by the country whose flag the naval units fly where they have conducted operations outside the Italian SAR area, in the absence of the coordination of the IMRCC Rome» is emblematic.

It is recent news that on 28/05/2021 during a meeting, the Ministry of the Interior Lamorgese has asked the representatives of NGOs to put pressure on their flag states to assume their responsibilities in indicating a port of disembarkation for ships that carry out rescues in the

tion to cooperate in good faith according to the Hamburg Convention, but cannot in any way rule out the possibility of entry into the territory and the relative duties of reception and protection of the rights of foreign nationals under European Union legislation and the relevant international conventions, that indeed, are generically referred to in the "visas".[34] On the other hand, even if the intention of the government had been to limit the fundamental rights of the individual,[35] as has already been seen, it is not possible for this to happen through an inter-ministerial decree.

The above seems to be supported by the subsequent decree of the Head of the Civil Protection Department, which states that the Head of the Department for Civil Liberties and Immigration of the Ministry of the Interior, appointed as the implementing body, «provides housing assistance and health monitoring for people rescued at sea or who landed autonomously in the country and for whom it is not possible to indicate the "Place of Safety". With reference to people rescued at sea and for whom it is not possible to indicate the "Place of Safety" […], one can use ships for the health monitoring period». It follows, especially in the absence of specific provisions, that the measures related to medical isolation do not involve exceptions to current leg-

Mediterranean Sea. (See A. ZINITI, *Migranti, Lamorgese alle Ong: «I vostri Stati di bandiera devono condividere la responsabilità dei soccorsi»*, in *la Repubblica*, 28 May 2020).

[34] This refers specifically to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Geneva Convention relating to the Status of Refugees of 1951, although it was noted that in fact these Conventions «are violated by the measure and certainly do not constitute a legal or logical premise» (See. F. VASSALLO PALEOLOGO, *Il governo inasprisce il decreto sicurezza bis di Salvini e criminalizza il soccorso umanitario*, in *Associazione diritti e frontiere*, 8 April 2020, available online).

[35] In this regard, it should be considered that the signatory Ministries also refer to the Decree Law No. 6 of 23 February 2020 (Urgent measures regarding the containment and management of the epidemiological emergency from Covid-19), converted, with amendments, by Law No. 13 of 5 March 2020, which should be remembered, provides for the possibility of adopting, by decree of the President of the Council of Ministers or other competent authorities, measures that affect certain constitutional norms including freedom of movement and residence (article 16 of the Constitution), freedom of assembly (article 17 of the Constitution), the freedom of religion (article 19 of the Constitution), the right to education and culture (articles 9-33-34 of the Constitution), personal liberty (article 13), right to establish a business (article 41 of the Constitution), the right to work (articles 4 and 35 et seq. of the Constitution), specifying however that the list of measures – and therefore the rights on which they could have an impact – is not exhaustive. It also refers to Decree Law No. 19 of 25 March 2020, converted with amendments with the conversion Law No. 35 of 22 May 2020, whose art. 2, second paragraph, reads: «Pending the adoption of the decrees of the President of the Council of Ministers referred to in paragraph 1 and with limited effectiveness until that moment, in cases of extreme necessity and urgency for supervening situations, the measures referred to in Article 1 can be adopted by the Minister of Health pursuant to article 32 of law No. 833 of 23 December 1978».

islation and that the rescued persons must be granted assistance, the possibility of expressing their wish to apply for asylum and given access to reception facilities in the country at the end of the quarantine period.

The question, however, is whether, by using quarantine ships for migrants rescued from foreign ships outside the Italian SAR zone, Italy is actually providing a POS and in doing so bypassing the controversial inter-ministerial decree that is still in force. On this point, we have already seen how international Conventions and European legislation[36] express themselves, but it is also useful to recall the sentence of the Supreme Court in the *Rackete case*.[37]

First of all, the Court's approach appears to be acceptable, according to which «the obligation to provide assistance prescribed by the Hamburg international SAR convention does not end in the act of rescuing the shipwrecked from the danger of becoming lost at sea, but involves the accessory and consequent duty to land them in a "place of safety"». The definition of "place of safety" is given in the aforementioned Guidelines on the treatment of persons rescued at sea,[38] but if this is not clear enough to explain that the duty of rescue cannot be considered fulfilled by the simple transfer of the survivors to the ship that carried out the rescue,[39] the consideration of the Supreme Court

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[36] See articles 3 and 9 of EU regulation No. 656/2014, establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union in OJEU L. 189 of 27 June 2014.

[37] Cassazione, sez. III, 16 January 2020, sent. n. 6626, par. 9. This episode involves the rescue of 53 people in the Libyan SAR region by the humanitarian ship *Sea Watch 3*, flying the Dutch flag, on the morning of 12 June 2019. After more than two weeks of standby, the captain of the ship, disobeying the express ban to enter territorial waters, steered the boat to the port of Lampedusa and was arrested on charges of resisting a public official (Art. 337 of the Italian criminal code), as well as resistance and violent acts against warships (art. 1100 of the naval code), in particular for having repeatedly disregarded the order to stop on route to the port, and ended up hitting a patrol boat of the Guardia di Finanza during docking manoeuvres.

[38] See note 27 above. Also relevant is par. 6.13 of the IMO guidelines: «Even if a ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made».

[39] This position is supported by the Public Prosecutor of Agrigento in the appeal against the failure to validate the arrest of Carola Rackete, captain of *Sea watch 3*, by the GIP (judge in charge of preliminary investigations). According to the applicant, the place of safety does not imply the need to transfer the survivors ashore. The Sea Watch3 should have been considered a "place of safety", since the survivors had been properly made safe and assisted pending a definitive identification of the place of disembarkation. Although bringing the survivors ashore is the optimum option, it could nevertheless not be excluded, as the judge would surely have ruled in this specific case, as they were already adequately protected at the moment they were transferred to the vessel, and that consequently, the duty of rescue at that moment, is to be considered fulfilled (Cassazione, sez. III, 16 January 2020, sent. n. 6626, par. 2).

is absolutely clear, according to which «it cannot therefore be considered a "safe place", due to the obvious lack of this prerequisite, a ship at sea which, in addition to being at the mercy of adverse weather events, does not allow the fundamental rights of the people rescued to be respected. Nor can the duty of rescue be considered fulfilled by rescuing the survivors by ship and by their stay on-board, since such persons have the right to apply for international protection under the 1951 Geneva Convention, which certainly cannot be carried out on the ship». A further confirmation of this interpretation is what is also called «the resolution 1821 of 21 June 2011 of the Council of Europe (The interception and rescue at sea of asylum seekers, refugees and irregular migrants), according to which: "the notion of "place of safety" should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights" (point 5.2.)». Therefore, the Court has basically inferred a real right to disembarkation for rescued migrants in order to be able to apply for international protection.

Having therefore ascertained that the possibility of applying for international protection is an essential requirement to qualify as a POS, we must ask ourselves whether the practice of self isolation on board quarantine ships allows one to exercise this fundamental right, at least from a formal point of view. In this regard, it should be borne in mind that the Red Cross personnel on board the ships are not actually in charge of providing legal information.[40] However, if information were provided, it would be, pursuant to Article 6, paragraph 1, second paragraph, of the Directive procedures 2013/32,[41] one of the "other authorities responsible" for receiving the application for international protection even if it is not competent for its registration, so the State must in any case oversee the application.

If this were the case, the right to seek asylum is apparently satisfied, but the following analysis will show that in practice, the lack of or insufficient legal information coincided with the denial of this fundamental right, with the re-

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[40] With regard to this, it is useful to refer to the framework agreement signed on 26 May 2020 between the Head of the Department for Civil Liberties and Immigration of the Ministry of the Interior and the Red Cross and the "Convenzione per la gestione dei servizi di assistenza e sorveglianza sanitaria dei migranti giunti nel territorio nazionale a seguito di sbarchi" available online.

[41] Which reads: «If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made». This approach was recently confirmed with a ruling by the Luxembourg Court: see EU Court of Justice, IV section, 25 June 2020, case C-36/20 PPU.

sult that in no way can the practice of using quarantine ships be considered consistent with Italy's obligation provide assistance, according to the meaning that has just been defined.

In light of the foregoing considerations, it is worth remembering that the ARCI Association appealed to the Regional Administrative Court of Lazio (TAR) to obtain the annulment of the inter-ministerial decree for breaking the law, in particular international maritime law, the right of asylum, and the abuse of power caused by manifest injustice,[42] as well as having requested the suspension of the effects of the decree as a precautionary measure. With a single decree, the presiding judge rejected the appeal on 22 April 2020,[43] maintaining that the act adopted by the ministers «is motivated by arguments that are not implausible regarding the current Covid-19 emergency and the consequent impossibility of providing a "place of safety", without compromising the functionality of national health, logistics and security facilities aimed at containing the spread of infection». The Regional Administrative Court (TAR) then confirmed the rejection of the interim relief in the collegiate hearing held in the Council Chamber on 20 May 2020,[44] fully acknowledging the reasons contained in the decree, and postponed the substantive discussion to the hearing on the merits to 20 July 2020. On that day, however, the Regional Administrative Court (TAR) effectively avoids assessing the compliance of the decree with international norms and declares the appeal inadmissible due to the lack of active legitimacy by the applicant Association to bring proceedings, maintaining that the fundamental rights alleged to have been violated by the inter-ministerial decree do not represent widespread or collective interests, «since "the migrants", as a category of persons, are not relevant on the basis of the same provisions invoked by the applicant, as a community or group that ARCI can qualify itself as an "exponential body", but rather as persons with individual subjective rights that are specific to each of them». Nor can ARCI be the bearer of the interests of NGOs operating in the Mediterranean, again by virtue of the prohibition of procedural substitution pursuant to art. 81 c.p.c. (civil procedure code) according to which «Apart from the cases expressly provided for by the law, no one can assert the right of others in the court hearing in their own name».[45]

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[42] The provision is considered vitiated due to manifest injustice when the act is so unfair that it results in an irremediable conflict with the principles of equity and law.

[43] Lazio Regional Administrative Court (TAR), III section, decree No. 3066/2020.

[44] Lazio Regional Administrative Court (TAR), III section, ordinance No. 02855/2020.

[45] Lazio Regional Administrative Court (TAR), III section, sentence No. 10152/2020.

4. *Quarantine ships: a practice in violation of fundamental rights*

The establishment of quarantine ships brought with it numerous critical issues in relation to the protection of the rights of the people on board, with respect to the effectiveness of containing the infection[46] and for the related economic expenditure,[47] which was accompanied by a lack of transparency in the disclosure of information. The spotlights were turned on, as often happens, by some tragic events, such as that of Abou Diakite, a minor from the Ivory Coast who died in hospital in Palermo after disembarking from the Allegra quarantine ship. Before him was Bilel Ben Masoud, a 22-year-old Tunisian quarantined on the Moby Zazà, who died after jumping overboard, and Abdallah Said, a Somali minor, who died on September 15 at the Cannizzaro hospital in Catania, after being detained on board the quarantine ship Azzurra. There have also been several cases reported of acts of self-harm on board the same ships.[48]

Here we are interested in analysing what the legal issues are in relation to the practices that have characterized quarantine ships: after having extensively discussed the legitimacy of establishing them, which in any case seems to be confirmed by the aforementioned guidelines of the European Commission of 16

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[46] See J. ROCKLÖV, H. SJÖDIN, A. WILDER-SMITH, *COVID-19 outbreak on the Diamond Princess cruise ship: estimating the epidemic potential and effectiveness of public health countermeasures*, in *The Journal of Travel Medicine*, Vol. 27, Issue 3, April 2020. The article reports on the results of a study on the "Diamond Princess" cruise ship, on which the second outbreak of Covid-19 in the world, after the one in Whuan, was discovered in February 2020. It demonstrates how confining people to ships is not effective to limit the infection, indeed, in this case the evacuation of the ship would have led to about an eighth of the cases found at the end of the quarantine period on board (from 712 to 76).

[47] Due to the lack of transparency of the information (not) disclosed by the Ministry of Transport, it is not possible to calculate the real cost of the quarantine ship model. Nevertheless, based on the public notices that were published in order to identify suitable vessels, it can be calculated that the overall cost of managing preventative quarantine at sea is at least four times that of the most expensive notices for hosting migrants on land. See AA.VV., *Document on the use of the quarantine-ship system for migrants rescued at sea or landing in Italy: critical analysis and requests*, 10 December 2020, pp. 12-13 and D. FACCHINI, *Navi quarantena: i silenzi del ministero delle Infrastrutture e i costi per i servizi di Croce Rossa*, in *Altraeconomia*, 10 July 2020, on civic access requests submitted to the Civil Protection and the Ministry of Transport.

[48] At the end of October, nine migrants swallowed razor blades and shards of glass to protest against the conditions of prolonged detention experienced on board the Rhapsody, docked in the port of Palermo. See again the report signed by over 150 organizations, *Document on the use of the quarantine-ship system for migrants rescued at sea or landing in Italy: critical analysis and requests*, cit., pp. 8-9 and the report by Borderline Sicilia, *I migranti in quarantena e le vite ineguali*, 18 November 2020.

April 2020,[49] it is important to assess whether the practices on board quarantine ships are in compliance or otherwise with the constitutional order and the obligations to protect fundamental rights according to European and international law.

First, what emerges from the experience of quarantine ships is the lack of guarantees during quarantine periods on ships.[50] If it is true that the need for people who landed in Italy during the Covid-19 emergency to quarantine is indisputable, it is equally indisputable that it must be arranged in compliance with the principle of proportionality and non-discrimination. As previously mentioned,[51] initially there was no information available on the procedures that were implemented on the ships, about the type of support provided to foreign nationals or about any police investigations that were carried out on board. This is why a request for access to the documents was submitted to the Ministry of the Interior and the Ministry of Health to find out about the procedures implemented on board, how they were carried out and the subjects involved. From the first answers we received from the Department of Civil Liberties and Immigration, as the implementing body, it emerged only that the Italian Red Cross is responsible for health care, cultural linguistic mediation, social assistance, psychological support and the identification of vulnerabilities.[52]

After an initial period, various organizations and associations in Sicily have collected numerous testimonies from which a rather distressing picture emerges. People on the quarantine ships are often confined in structurally degrading conditions, due to inadequate space, the lack of health protection devices and even clean linen,[53] without taking into account the psychological dis-

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[49] EU Commission, *Covid-19 Communication: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement*, cit., point 1: «As regards reception conditions, Member States may make use of the possibility under Directive 2013/33/EU (hereafter "the Reception Conditions Directive") to exceptionally set, in duly justified cases and for a reasonable period that should be as short as possible, different modalities for material reception conditions from those normally required. Such modalities must in any event cover the basic needs including health care. Measures of quarantine or isolation for the prevention of the spreading of COVID-19 are not regulated by the EU asylum acquis. Such measures may be imposed also on asylum applicants in accordance with national law, provided that they are necessary, proportionate and non-discriminatory».

[50] CILD, *Detenzione migrante ai tempi del Covid*, cit., p. 29.

[51] See note 16 *above*.

[52] ASGI – Progetto Inlimine, *Le navi "quarantena": servizi, sorveglianza sanitaria, convenzioni, respingimenti, richieste asilo*, 6 August 2020, available online.

[53] As was also reported in the text of the parliamentary inquiry *Chiarimenti e iniziative in merito ai trasferimenti sulle navi-quarantena dei migranti e richiedenti asilo risultati positivi al Covid-19 – 3-01828*, presented by Members of Parliament Palazzotto and Fornaro to the Minister of the Interior on 21 October 2020.

tress of still being in the middle of the sea despite having faced traumatic journeys in the Mediterranean sea and that some of them were also survivors of shipwrecks or victims of torture who require immediate assistance.[54] The witnesses, including people with serious vulnerabilities, complain about the lack of any type of legal information, as well as it not being possible to contact lawyers, doctors or associations. The lack of information in particular made access to asylum procedures difficult and, considering that many people (especially, but not only Tunisian nationals[55]) received a deferred refoulement or expulsion order once their period of on board isolation ended.[56] It is evident that the individual situation of those in quarantine was not been adequately taken into consideration and that they have not been put in a position, for example, to submit a request for asylum or family reunification in accordance with the Dublin Regulation. In addition, many cases emerged in which migrants were forced to endure a quarantine period that lasted months – despite

[54] As was also pointed out in the press release by Mediterranea Saving Humans, *Bene stop alla deportazione migranti nelle navi quarantena. Misura giusta anche se tardiva*, 20 October 2020, available online, which also gives the opinion of its medical and psychological support team on the impact of quarantine at sea on the mental health of migrants.

[55] The case of the repatriation on 3 November 2020 of 40 Tunisian migrants from the quarantine ship Rhapsody who were transferred to the Gradisca d'Isonzo pre-return detention centre (CPR) without any access to legal protection is emblematic (See *Document on the use of the quarantine-ship system for migrants rescued at sea or landing in Italy: critical analysis and requests*, cit., p. 10). The repatriation agreements between Italy and Tunisia are controversial because, despite the Italian media having talked about an agreement signed on 17 August 2020, when ASGI submitted a request for civic access to the documents on 22 September, the Italian Ministries of the Interior and Foreign Affairs stated that no agreement had been signed and that «the necessary assessments on possible initiatives to be financed are still ongoing». See A. MASSIMI, D. AGRESTA, *Italia-Tunisia e quell'accordo fantasma*, in *Fondazione Nigrizia*, available online.

[56] Lo Sportello Sans-Papiers run by Arci in Palermo has collected various testimonies: «When they got off the day after the swab, they were told to join a long queue on the dock, at the end of which there was an official from the Immigration Office who made them sign a sheet of paper of which they had no idea of meaning of the content. It goes without saying that even on that occasion they did not receive any legal information. […] We learn from "LasciateCIEntrare" that Tunisian nationals with repatriation orders were taken to the Court of Palermo. After a hearing, during which they did not understand anything, they were left overnight night in a police station to be transferred the following day to the Ponte Galeria pre-return detention centre (CPR) in Rome, where their mobile phones were taken away. The following morning, without having had access to the right of defence and without having seen the justice of the peace who was appointed to validate the detention, they were transferred to the airport to board the plane for repatriation». (G. GIANGUZZA, *Gli sbarchi a Palermo e le navi quarantena*, in *Arci Porco Rosso*, 28 October 2020, available online). For further information: G. GIANGUZZA, K. EL KARKOURI, *El babour: il modello delle "navi quarantena" e il suo impatto sulla vita delle persone trattenute a bordo*, in *L'altro diritto. La Rivista*, issue 4/2020, available online.

negative swab tests[57] – followed by deportation, without the opportunity to express or formalize a request for international protection, effectively turning a ship intended for medical isolation into a place of detention for the purpose of repatriation.

Another serious violation of human rights, which continued up to the first half of October 2020, was the on board detention of unaccompanied foreign minors, in conditions that were totally inadequate with respect to the specific reception criteria that were established for their care.[58] Furthermore, when quarantine ships were first used, none of the minors present had been appointed a legal guardian during the period of isolation, whereas by law, this should have happened as soon as Italian authorities became aware of their presence in Italy. In this sense, the deaths of Abou Diakite and Abdallah Said constitute «an unacceptable precedent on the protection of UASCs during the pandemic».[59] As a result of these tragedies, a number of associations lodged an official complaint with the relevant public Prosecutors in Palermo and Catania requesting the immediate disembarkation of all minors from quarantine vessels.[60] Following this complaint, on 4 November the minors were boarded onto the "Cossyra" ship and taken to Porto Empedocle where they were transferred to Covid centres in Agrigento and other provinces, where the local mayors were assigned as their guardians.[61]

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[57] This practice was also found in reception centres: «we found that quarantine continued even after repeated negative swabs, effectively turning it into unjustified detention. In particular, quarantine times can last for months in the so-called "Covid area" of the Pian del Lago Reception centre for asylum seekers in Caltanissetta. Here, the sanitary conditions are critical and for a certain period the migrants were forced to sleep outdoors on mattresses, in conditions of complete health insecurity and wantonness». (Borderline Sicilia, *I migranti in quarantena e le vite ineguali*, cit.).

[58] Governed by Article 19 of Legislative Decree No. 142 of 2015 (the so-called reception decree), as amended by Law. No. 47 of 2017 (the so-called Zampa law).

[59] AA.VV., *Document on the use of the quarantine-ship system for migrants rescued at sea or landing in Italy: critical analysis and requests*, cit., p. 11.

[60] Borderline Sicily, Borderline-Europe, the Ciss / South-South International Cooperation and the "Noureddine Adnane" Observatory against racial discrimination filed the complaints on 13 October 2020. The associations state that up to a few days before the complaint was lodged, 181 minors were present on the ships (See *Press Release – Esposti presso le Procure minorili di Palermo e Catania. Le associazioni siciliane chiedono lo sbarco immediato dei MSNA dalle navi quarantena*, 15 October 2020, available online). After having lodged the complaint, the associations also wrote a letter to the Public Guardian of minors in Palermo asking him to intervene publicly and at the Palermo Juvenile Court (See *Lettera aperta di associazioni ed enti della società civile sulla presenza dei minori stranieri soli sulle navi quarantena nel territorio di Palermo*, 21 October 2020, available online).

[61] Borderline Sicilia, *I migranti in quarantena e le vite ineguali*, cit.

Another unlawful practice regarding quarantine ships occurred in October 2020, when foreign nationals, including people entitled to international protection or asylum seekers legally residing in the country and in reception centres, were transferred to quarantine ships exclusively on the basis of the assumption that they were positive to the virus. Moreover, according witnesses,[62] people were always collected at night and transferred using vehicles managed by Red Cross personnel, without having been given any prior information and regardless of any assessment of possible vulnerability, integration in the territory or the presence of family ties. This practice, implemented by some Prefectures with the operational support of the Red Cross, is not reflected in any legal provision or administrative act, given that the use of ships as places for carrying out medical isolation is provided for by the decree of the Chief of the Civil Protection for foreigners rescued at sea or who landed autonomously in the country and not for foreign nationals already officially residing in the country. It is therefore unlawful and highly detrimental to the rights people affected by it. In particular, it violates the personal freedom, guaranteed to all by Article 13 of the Italian Constitution, as the deprivation of personal freedom is implemented outside the cases provided for by law and in the absence of legal provisions required to activate judicial guarantees and duties of information provided for by law. Furthermore, this practice appears discriminatory as it implements medical isolation measures differently to those envisaged in most cases.[63] Lastly, the transfers involve uprooting people from the area without notice, the loss of their place in the reception centres, moving them away from police headquarters and from the contact people for requesting international protection. It also involves the suspension of social inclusion programs and healthcare in the case of physical or psychological disorders, without considering that among the people transferred there were some cases of serious vulnerability which, as already pointed out above, required timely and ongoing psychological-medical care, especially for the victims of torture and shipwreck survivors.[64]

The protests of the associations of the Asylum Forum led to a meeting with the Ministry of the Interior that took place on 15 October 2020, during which

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[62] One of the first reports came from a lawyer Mrs. Tortorella, a member of ASGI, regarding one of her clients. For further information, see T. FUSCO, *Il trasferimento di uomini e donne già presenti sul territorio italiano sulle navi quarantena è illegale*, in *Open Migration*, 9 October 2020.

[63] ASGI, *Illegali e discriminatori i trasferimenti coercitivi sulle "navi quarantena"*, 9 October 2020, available online.

[64] MEDU, *Sconcertante il trasferimento dei richiedenti asilo dai CAS alle navi quarantena*, 13 October 2020, available online.

Minister Lamorgese ensured that the practice of transfers from the reception centres to the quarantine ships for fiduciary isolation would have been suspended.[65] A few days later, following a parliamentary inquiry, the Minister reiterated that the alleged practice was a temporary solution «to an exceptional need in view of the impossibility of finding, in the contingency, the necessary places in the facilities of the territory intended for reception and health compliance» and that the Ministry of the Interior had in the meantime located the necessary land based facilities so that these transfers would no longer take place.[66]

Currently, it seems that the practice of transfers, in violation of the rights of legally resident foreign nationals, as well as the detention of unaccompanied foreign minors on board ships, has actually been abandoned. In both cases however, all we have to rely on are the official statements issued by the institutions and the monitoring of the situation by the associations that are involved in supervising the protection of rights on quarantine ships.

In the light of the above, the only practice that complies with the law if conditions are unsuitable for adopting quarantine measures in the reception centres is to transfer the residents who tested positive for Covid-19 to suitable isolation facilities, as for those who do not have a home in which to quarantine, and not on special ships. Regarding this, two factors have to be taken into account, which demonstrate that formal compliance with the law is not a sufficient condition to prevent the violation of rights and that indeed, much depends on the practices that develop when the measures are applied.

The first factor that needs to be highlighted is the general confusion in the reception sector during the first few months of the pandemic, as evidenced by the first assessment carried out by the Asylum Forum and the Immigration and Health Forum in 200 facilities,[67] which underlines how, in the absence of

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[65] A. CAMILLI, *Navi quarantena, stop ai trasferimenti dai centri. Il Viminale rassicura le organizzazioni*, in *Il Redattore sociale*, 15 October 2020, available online.

[66] See *Chiarimenti e iniziative in merito ai trasferimenti sulle navi-quarantena dei migranti e richiedenti asilo risultati positivi al Covid-19 – 3-01828*, cit. Specifically, the minister announced that the Ministry of the Interior would find 25 facilities on land with a capacity of 2700 places.

[67] A. CAMILLI, *Covid19. Prassi improvvisate e difformi: ecco cosa è successo nei centri d'accoglienza*, in *Il Redattore sociale*, 1 July 2020, available online: «In general, one finds poor coordination with the territory and the absence of supervision by the central institutions, which results in the lack of monitoring and the consequent failure to adopt the guidelines and protocols to be followed in emergencies. […] Among the aspects investigated by the study are also those relating to the structure and organization of the centres for self isolation. Only half of the facilities say they can provide adequate spaces to isolate a person in a room with en-suite bathroom (52%)». The report *Dossier Covid 19 – Procedure, condizioni di sicurezza, criticità nei sistemi di accoglienza in Italia*, February 2021, is available online.

national guidelines, practices have been different and improvised. The second factor to consider – ignoring the blatantly illegitimate practice of detaining migrants for the purpose of sanitary isolation that happened with people from the Balkan route[68] – is that even in cases where hotels and confiscated assets have been arranged for the isolation of migrants that tested positive in applying the "Relaunch Decree", this has not always meant better conditions for people compared to isolation on quarantine ships. Think of the "Covid Hotels", which were set up from the beginning of April 2020 in agreement with the public service companies (ASP) – and therefore in a regional context[69] – whose organizational regime and therefore the status of the "guests", in the absence of specific regulations, is left to the administrative measures of the public service companies or the regional authorities. The social and health assistance services provided also depend largely on contractual agreements, so that even the "Covid Hotels", like quarantine ships, from a legal point of view are considered grey areas, places of limbo where the protection of rights is not guaranteed.[70]

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[68] It refers to the shameful practice of quarantine buses in Udine. For further information, see A. CAMILLI, *Migranti. Bus quarantena a Udine, "condizioni deprecabili, a bordo anche minori"*, in *Il Redattore sociale*, 18 September 2020 and ASGI, *Udine, migranti "accolti nei bus", la lettera delle associazioni: "Inumano e degradante"*, 15 September 2020, available online. Starting from 5 September, thirty foreign citizens who had just arrived in Italy were forced to quarantine on board a bus, without bathroom facilities to wash themselves and under the constant supervision of the police who prevented them from leaving. ActionAid, ASGI, Intersos and numerous local associations have condemned this practice in a letter sent on 14 September 2020 to the Prefect of Udine and the Head of the Civil Protection Department. A copy was also sent to the Deputy Minister of the Interior, the Ministry of the Interior, the Prevention Department of the Udine Local Health Authority and the UNHCR, reminding the institutions of the alternative options that can be adopted by the Prefects pursuant to the "Cura Italia" Decree, in force since 17 March 2020, such as the requisition of hotels or other facilities suitable for self isolation.

[69] The public services companies (ASP) are set up by the Regions as part of the reorganization and transformation program of the IPAB (charity and public assistance institutions). The services companies are public companies of municipalities that operate at the district or subdistrict level. They are established in order to ensure the unified management and quality of social services and social-assistance services provided to people of all ages. The process is based on the autonomy and under the responsibility of the Municipalities of the district bound by a system of regulations defined by the Region, which are essential for ensuring the homogeneity of access and quality of services for all citizens.

[70] See F. VASSALLO PALEOLOGO, *Navi quarantena e Covid Hotel, nuove forme di trattenimento amministrativo. Quali basi legali?*, in *ADIF*, 22 December 2020, available online. In addition, note the participation of the National Guarantor for the rights of persons deprived of personal liberty at conference in which the aforementioned *Document on the use of the quarantine ship system for migrants rescued at sea or landing in Italy: critical analysis and requests*, was presented, which took place on 22 December 2020 and whose registration is available on the Facebook pages of the

5. *Conclusion*

In light of the analysis, it is clear that inter-ministerial decree No. 150 of 2020 is part of a regulatory vacuum, caused by a gap in international law. In particular, one should note the absence, both in the Treaties relating to rescue at sea and in customary law, of «a substantive or procedural rule that allows you to specifically identify the place where rescued people should be disembarked», especially in the event of a lack of agreement between states.[71] In fact, migrants rescued in the Maltese SAR zone are the subject of negotiations between the member states every time, which would not happen if Italy were automatically responsible for being the closest coastal state. Faced with this gap, therefore, there are two possible alternatives: a broad interpretation of Italy's cooperation obligations as a signatory State of the SAR Convention, which would entail an obligation to indicate a port of disembarkation when, in any case, a rescue ship enters the Italian SAR zone, or that the flag States that should assume responsibility for providing aid to which they are bound by principle of customary international law and by virtue of art. 98 of the UNCLOS Convention.

This last option would certainly be welcomed by the Southern States that are already structurally burdened by the (mal)functioning Dublin system. In fact, as we have already said, the provision contains a not so subtle invitation to the Governments of the States of the European Union to take up the discussion on the obligations of solidarity between Member States pursuant to Article 80 TFEU, precisely at the moment in which the Commission was working on the new European pact on migration and asylum. It is no coincidence, therefore, that immediately after Italy, Malta also declared its ports "unsafe"[72] and ordered the use of quarantine vessels 13 miles off the coast,

promoting organizations (Forum Antirazzista Palermo and Ciss Ong). The Guarantor, Mauro Palma, says that paradoxically, the situation on quarantine ships is more sustainable than that of some Covid Hotels, which are not always able to allow an hour of fresh air to be given. This makes the situation particularly dramatic for the people who find themselves confined for over 40 days due to them being persistently positive to the virus, even after numerous swab tests.

[71] See I. PAPANICOLOPULU, *Le operazioni di search and rescue: problemi e lacune del diritto internazionale*, in *Rivista trimestrale di diritto pubblico*, issue 2/2019, p. 518.

[72] In a letter to Brussels of 10 April 2020, the government of Malta writes: «In consideration of the public health emergency resulting from the spread of the coronavirus and the extraordinary burden faced by the national health services for the care and assistance to COVID-19 patients, it is not possible to ensure the availability of such places of safety on the Maltese territory without compromising the efficiency/functionality of the national health, logistic and security structures aimed at containing the spread of infection providing assistance and care for Covid-

outside territorial waters, for migrants rescued in its SAR zone.[73] On the other hand, the approach according to which the flag State should provide a POS, even if more solidarity oriented, could realistically jeopardize the operations of NGOs, also because it is not certain that the ships that have rescued the migrants are then able to reach the flag country safety and autonomously with their "human cargo", especially if the agreements are made even weeks after the SAR event, as in fact happens in practice.

This consideration leads us to believe that the only way to overcome the impasse would be an intervention by the European Union on the Dublin system, which would overcome the reluctance of coastal states to provide a POS, due to the fact that the criterion of the State of first entry makes them responsible for examining the asylum application and receiving or repatriating migrants who cannot be transferred to another Member State under the Dublin Regulation. Unfortunately, even on this front there does not seem to be any prospect for improvement, given that the new European Pact on Migration and Asylum proposed by the Commission in September 2020 accurately reflects the criterion of the State of first entry and does not provide for a compulsory relocation mechanism,[74] which had been advocated by the Southern States. In any case, the need to regulate the aspects in question emerges, considering the quasi-public functions that NGOs have found themselves having to carry out due to the inertia of the States.

That said, the problem remains that inter-ministerial decree No. 150/2020 effectively indicates that the relevant authorities should not assign a port for foreign vessels that have saved people at sea, leading to high risk of *de facto* derogation from international standards through regulatory instruments, which according to the criteria of hierarchy of sources, could not affect the fundamental principles of constitutional norms. In this sense, given that the state of emergency continues to persist[75] and the decree has never been re-

19 patients». See *Malta chiude porti ai migranti, non c'è sicurezza*, in *Rai News*, 10 April 2020, available online.

[73] The first vessel used in April 2020 by the Maltese government was the Captain Morgan, a cruise ship in which up to 425 migrants – with a capacity of 250 – were detained in various SAR operations in Maltese waters, for a total cost of 1.7 million Euros. See D. CACCIOTTOLO, *Malta charters Captain Morgan boat to house rescued migrants off shore*, in *Times of Malta*, 30 April 2020, available online (and subsequent articles).

[74] See Communication from the Commission to the European Parliament, the Council, to the European Economic and Social Committee and the Committee of the Regions, *New Pact on Migration and Asylum*, COM/2020/609 final, par. 2.2.

[75] The latest extension was with Decree Law No. 52 of 2021, which ordered a state of emergency to be extended until 31 July 2021.

voked (even if it has never been published in the Official Gazette), at least a periodic reassessment should be made to establish whether the conditions of adequacy and proportionality on which it was based (read: on which it should have been based[76]) exist or not, especially in light of the low number of arrivals.

In relation to this, do not forget to take into consideration the context in which the measures analysed here were issued. With the decree of the Head of Civil Protection, in fact, it is clear that the Government sought consensus on the domestic front that was necessary to comply with the restrictive measures imposed on the population and in preparation for the local elections that would take place a few months later. The establishment of quarantine ships seems to meet the security needs of Italian citizens,[77] who are particularly sensitive to the narrative of the migrant-infector,[78] but at the expense of the rights of those involved and with a very high cost for the state. Over the last few months, in fact, about 10,000 people have passed through the quarantine ships,[79] despite the fact that human rights associations continue to demand for

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[76] Regarding the non-compliance of the decree with the criteria of reasonableness and proportionality, see A. ALGOSTINO, *Lo stato di emergenza sanitaria e la chiusura dei porti: sommersi e salvati*, in *Questione giustizia*, 21 April 2020.

[77] It is the same Minister of the Interior who will later declare it in a television interview with "Quarta Repubblica" on 8 September 2020 (the video can be found on Repubblica.it), that the quarantine ship solution has been found to respond to the security demands of the community.

[78] With regards to this, one should note: Associazione Carta di Roma, Osservatorio di Pavia, *Notizie di transito, VIII rapporto Carta di Roma*, 16 December 2020, available online. The report analyses the press account of the migration phenomenon in 2020, on p. 32 it reads: «From the analysis of the press headlines it emerges that 53% of those concerning the immigration issue fall within the "Immigration-Alarm" conceptual-semantic cluster» representing «the emotional dimension of concern, if not open refusal, towards migration on aspects ranging from landings, to international tensions, to the (presumed) health emergency due to the spread of Covid-19» and characterized by the «use of a war lexicon and war metaphors» which «helps to fuel, if not determine, the cognitive perception of invasion, as well as to amplify divisive views».

[79] V. AA.VV., *Document on the use of the quarantine-ship system for migrants rescued at sea or landing in Italy: critical analysis and requests*, cit., p. 6. The latest official figures, dating back to 20 November 2020, show that 2448 people were restricted, of which 197 were positive to the virus (see Bollettino No. 5 del Garante nazionale, available online). On 22 December 2020, during the aforementioned conference presenting the document (see note 70 above), the Guarantor stated that there were about 280 people on board. On 5 January 2021, however, the 265 survivors rescued by Open Arms were transferred to the Rhapsody quarantine ship. Before transferring the survivors, Italian Red Cross doctors took swabs and the 51 unaccompanied minors on board were transferred to Italian Coast Guard patrol boats. (see Puglia, *Trasferimento di 265 naufraghi su nave quarantena Rhapsody*, Vita, 5 January 2021, available online).

this model[80] to be abandoned and complain about the difficulties involved in monitoring them, the lack of information and the impossibility of civil society organizations to have access.

Ultimately, the ongoing epidemiological crisis has to lead to critical reflection on current migration policies based on the externalization and widespread detention of migrants, the effects of which have been amplified by the security approach and by the critical issues associated with the health emergency.

First, the institutions have paid insufficient attention to reception facilities during this period, while a prevention plan would have been necessary that included national guidelines in order to preserve the objective recognition of fundamental rights and to avoid different practices in violation of them. Secondly, it would have been desirable to introduce primary legislation that clearly recognizes the rights of people detained in the various "administrative prisons" and legal remedies to prevent these rights from just being formal statements but so that they are also substantially recognized. Lastly, it is evident that quarantine ships are structurally inadequate for carrying out medical isolation, but above all, what made these places the «legal limbo that characterizes the Mediterranean in 2020»[81] were the practices implemented in the absence of control by the institutions. As also noted by the National Guarantor for the rights of persons deprived of personal liberty,[82] two main issues have emerged. First, the lack of or insufficient legal information and the consequent difficulty in accessing the procedures for requesting asylum, especially in cases where this has led to repatriation measures, using methods that sadly follow those for which Italy was condemned by the ECHR with the *Khlaifia* sentence; secondly, the inadequate care of the most vulnerable people, who would have needed specialist medical support and who should never have had to pass through the quarantine ships, as evidenced by the tragic deaths that took place. In addition to this, there is the

[80] The latest press release regarding this was issued by Doctors Without Borders: MSF, *Stop alle navi quarantena e verità per Abdallah Said*, 8 January 2021, available online.

[81] See ARCI, *Finanziare il confine: fondi e strategie per fermare l'immigrazione, Quarto rapporto sull'esternalizzazione*, December 2020, p. 21, available online.

[82] See Bollettino of 28 October 2020 – point No. 1: «Alongside the legislative evolution, however, practices must be considered. As is well known, the National Guarantor, following a visit on a ferry used for quarantining people who have just arrived in a fortunate manner on the national territory, expressed a positive opinion on the housing material conditions (especially when compared to the unmanageable overcrowding conditions of first reception centres on the ground). However, the National Guarantor pinpointed two critical aspects. The effectiveness of the information on the rights that can be given by the Red Cross staff on the ferry, when it is not supported by any written material and shown in multiple languages, and administered to a very large number of migrants housed there. The difficulty of relating with people in such a way as to recognise their often traumatic past and consequently develop a concrete support plan».

concern, expressed by several parties[83] that the use of quarantine vessels will transform from a temporary solution to a standard model for the management of arrivals by sea, in particular for the purpose of making a preventive division between asylum seekers and economic migrants.

As demonstrated by the immigration policies in recent years, major improvements have been made in the emergency phase: in particular, the hotspot approach introduced by the 2015[84] European Agenda on Migration as an extraordinary measure and which, even after the end of the emergency, has remained one of the cornerstones of the European Union's policy on immigration. Even the quarantine ship model, as well as the hotspot approach, risks being a "practice experimentation system" to which provide a legal basis through changes in legislation aimed at legitimizing situations that are outside the law. In fact, extralegal detention in hotspots is still a current issue and is completely independent of the emergency caused by the health crisis. It is precisely for this reason, that it must be considered a wake-up call with respect to what could happen – and what in part has already happened – with the quarantine ships model.

Despite the many years that have gone by since the incident related to the *Khlaifia* ruling, Italy has continued to detain people in the centres for identification purposes or also when just waiting to find appropriate accommodation for their status as asylum seekers, for which detention is not even conceivable. The hotspots, loosely defined by Law No. 46 of 2017 as "critical points" and first reception centres for asylum seekers,[85] have in fact become detention centres that operate outside the specific safeguards provided by law in the event of restriction of personal freedom.

The 2018 reform sought to formally overcome the problem by introducing paragraph 3-*bis* to article 6 of the Reception Decree, which, for the first time, provides that asylum seekers may be restrained in hotspots or other reception centres for the time strictly necessary for completing the identification procedure and in any case for no more than thirty days.[86] It should be noted that in

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[83] See ASGI – Progetto Inlimine, *Diritti in rotta. Le "navi quarantena" tra rischi e criticità*, 17 June 2020, available online and CILD, *Detenzione migrante ai tempi del Covid*, cit., p. 29.

[84] Communication from the Commission to the European Parliament, the Council, to the European Economic and Social Committee and the Committee of the Regions *European agenda on migration*, COM/2015/240 final, Brussels, 13 May 2015, p. 7.

[85] Art. 10-*ter* of Legislative Decree No. 286 of 1998, added by art. 17, par. 1, Decree Law No. 13 of 17 February 2017, converted, with amendments by Law No. 46 of 13 April 2017.

[86] Art. 3 of Decree Law No. 113 of 4 October 2018, converted with amendments by Law No. 132 of 1 December 2018.

no way the regulatory framework as it stands, amended *ex post* with the aim of legalizing the practice of detention in *hotspots*, can be considered compliant with article 13 of the Constitution.[87] The fact that the Ministry of the Interior, specified with circular No. 22146 of 27 December 2018, that detention for identification purposes must be carried out «after validation by judicial authorities» is of little value.[88] In addition, our legal system continues to be lacking even with respect to the existence of judicial remedies available for detained persons, as no further remedy has been introduced in addition to the urgent appeal that already exists pursuant to art. 700 Code of Civil Procedure that, contrary to what is claimed by the Italian Government in the communications sent to the Committee of Ministers of the Council of Europe,[89] has to be considered inadequate in the light of sentence No. 222/2004, with which the Constitutional Court established that the judgement of validation of a restrictive measure regarding personal freedom (in that case accompaniment to the border) must be carried out in a court of law with the guarantee of defence. Consequently, detention in hotspots for identification purposes, which is prolonged for weeks or even months, constitutes an infringement of article 13 of the Italian Constitution and article 5, paragraphs 1 and 4, of the ECHR, but this does not prevent it from continuing to be practised, as the appeals that have recently been lodged in Strasbourg demonstrate.[90]

It is clear that these problems would also arise regarding detention on quarantine ships if – as it is reasonable to suspect – they were to become a permanent system. It is therefore imperative to ensure that a provisional measure justified by the health emergency does not lead to the institutionalization of "floating hotspots".

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[87] Which states that: «Personal liberty is inviolable.

No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law.

In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within forty-eight hours to the Judiciary for validation and which, in default of such validation in the following forty-eight hours, shall be revoked and considered null and void. […]».

[88] On this point see: *L'altro diritto*, *Third Party Intervention – M.J. v. Italy*, 4 November 2020, available online.

[89] See note 9 above.

[90] Among these: H.B. v. Italy, appeal No. 33803/18, H.L. v. Italy, appeal No. 52953/18, C.L. v. Italy, appeal No. 53788/18, M.J. v. Italy, appeal No. 53790/18.

CONTACT AND CONTAGION. THE USE OF CRIMINAL LAW AS A MEANS TO CONTAIN THE SPREAD OF CORONAVIRUS IN ITALY

by *Federica Helferich*

1. *Introduction. Between containment and confinement*

Nature and humans are engaged in a long and challenging dialogue. In this context, the numerous attempts that have been made to regulate human behaviours and withstand the unforeseeable spread of Sars-CoV-2 virus seem to be the only, and belated, answers that humans are able to develop. Once we learned – as Leopardi's Icelander did – that, as far as Nature is concerned, "the intent of [its] matters, orders and operations, with a few exceptions, has never been humans' happiness or unhappiness",[1] it seems clear that the measures of "containment", although made to contain the virus, end up containing and restraining persons.

In the context of a longstanding declaration of a situation of emergency,[2] the above-mentioned containment has primarily been put into place by means

[1] G. LEOPARDI, *Dialogue of Nature and an Icelander*, in *Operette Morali*, Napoli, 1835.

[2] The ending date of the state of emergency was initially set at July 31st 2020. Then, following multiple Resolutions of the Council of Ministers, the state of emergency was ulteriorly extended until January 31st, April 30th, and, lastly, July 31st, 2021, on the grounds that "*the*

of criminal law. According to the extension and the intensity of the use of this branch of law, "containment" in Italy[3] has taken on two meanings.

At the very beginning, corresponding to the enactment of Decree Law no. 6/2020, "containment of the virus" meant confinement of people, to the point that a use of criminal law to purely control physical and social movements was being feared[4] – thus encouraging and exploiting the tendency to abuse that the *ius terribile* conceals.[5]

Subsequently, *i.e.*, starting from March 26th, 2020, "containment" implied a less intrusive limitation to individual freedoms and rights, since the severity of the newly shaped punitive mechanism depended on the gravity of the criminal behaviour.

Before delving into the legislative fragments that compose the Italian strategy in the "war"[6] on Covid-19, it is necessary to underline two main features of the Coronavirus-related criminal legislation, which seems to revolve around two opposite poles.

On the one hand, punishment was threatened for those behaviours that failed to comply with the anti-Covid measures and thus seemed to be able to determine "contact and contagion" among people. Indeed, the main characteristic of this very epidemiological emergency is that – unlike what usually

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emergency cannot be considered as terminated" and "*the current risk situation imposes the prosecution of extraordinary measures*". In this regard, it has been wisely highlighted that the emergency itself risks becoming the virus, starting from the moment "the emergency narratives become an essential part of our mental space": A. VISCONTI, *Venti di tempesta e foreste del diritto. Il discorso della legge come argine alla sopraffazione delle narrative emergenziali*, in G. FORTI (a cura di), *Le regole e la vita. Del buon uso di una crisi, tra letteratura e diritto*, Milano, 2020, p. 55 s., p. 62.

[3] This essay focuses on the Covid-related criminal legislation enacted in Italy during April and December 2020. In the interim, further legislative acts have been issued that we will not be dealing with. For a complete overview of the Italian legislation to tackle the spread of Coronavirus, see G.M. CHIESI, M. SANTISE (a cura di), *Diritto e Covid-19*, Torino, 2020 and S. RANDAZZO, R. MARINO, V. DONATIVI, A. PANZAROLA, L. LAURETI (a cura di), *Il diritto di fronte all'emergenza. Un percorso interdisciplinare*, Napoli, 2020. With specific regard to constitutional issues, F.S. MARINI, G. SCACCIA, *Emergenza Covid-19 e ordinamento costituzionale*, Torino, 2020. Also, see the collection of all Covid-related provisions created by the Italian Chamber of Deputies: https://www.camera.it/temiap/documentazione/temi/pdf/1203754.pdf?_1588279335853.

[4] S. FIORE, during the Web Seminar "*Emergenza Covid-19 fra diritto e processo penale*", University of Verona, April 29th, 2020.

[5] R. BARTOLI, *Il diritto penale dell'emergenza "a contrasto del Coronavirus": problematiche e prospettive*, in www.sistemapenale.it, April 24th, 2020, p. 4, fears a "risk of a negligence-based authoritarianism".

[6] On the use of a warlike narrative frame in the telling of the emergency see G. FORTI, *Introduzione*, in ID., *Le regole e la vita*, cit., p. 23 s.

happens in the case of a terrorist, economic or organised crime-related emergency – it threatens the *whole* of society with a *ubiquitous* danger.[7] Indeed, this virus can be embodied and carried by everyone and especially by the *same* person who, later on, can be a victim or a carrier. Hence, the decision to assign the role of defending the anti-contagion measures to criminal penalties likely aims at dismantling the plot the "waves of life"[8] arrange every day, by avoiding an excessive and dangerous interconnection between human handlings, and by assuring that the allowed interconnections are modelled on solidarity.[9]

On the other hand, the sanctions that make up the mosaic of rules constructed since February 2020 can be analysed purely in terms of "mechanisms that every normative system uses for its own conservation".[10] Especially during the most critical phase of the emergency, the dissuasive strength of these mechanisms could have been intensified precisely by the fact that *no one* or, on the contrary, *anyone*, including the transgressor himself, can be a victim of noncompliant behaviour.[11]

All in all, the likely scenarios seem to be four: the person having contracted Covid-19 can transmit the Sars-CoV-2 virus both while violating (a) and observing (b) the national and/or local containment measures; in the same way, the same person, having contracted Covid-19, may (c) or may not have been (d) victim of a breach of anti-contagion measures. As a result of this innovative relationship between behaviour and unpredictability, the function of social *Steuerung* that criminal law is traditionally expected to perform may go towards a renewal.[12] Indeed, on the one hand, the deterrent effect played by the penalty for the transgression of containment measures may be implemented by a virtuous cycle in which "the respect of rules increases their very regu-

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[7] D. CASTRONUOVO, *I limiti sostanziali del potere punitivo: modelli causali vs modelli ispirati a logiche precauzionali*, in www.lalegislazionepenale.eu, May 10th, 2020, p. 9.

[8] K. BINDING, *Lehrbuch des gemeinen deutschen Strafrechts – Besonderer Teil*, Bd. 1, 2. Aufl., Leipzig, 1902, p. 20.

[9] On this topic see, with reference to the German legal system, M. JAHN, C. SCHMITT-LEONARDY, *Solidarität durch Recht?*, in *Frankfurt Allgemeiner Zeitung*, April 23rd, 2020.

[10] N. BOBBIO, *Sanzione*, in *Novissimo Digesto italiano*, Torino, 1969, p. 530 s., p. 531.

[11] G. DE FRANCESCO, *Dimensioni giuridiche e implicazioni sociali nel quadro della vicenda epidemica*, in www.lalegislazionepenale.eu, April 23rd, 2020, p. 1, refers to a "sameness and substantial equivalence of the Coronavirus's victims".

[12] Indeed, it has been rightly said that the criminal system that has thus been shaped "seems destined to appear, to a certain extent, as a *quid novi* compared to the repressive dynamics of social control" so far engaged in case of emergencies: G. DE FRANCESCO, *Dimensioni giuridiche e implicazioni sociali*, cit., p. 2.

latory strength on a behavioural level".[13] On the other hand, by contrast, this very effect may be undermined by the unavoidable randomness in the transmission of the virus, which can happen regardless of the violation or of anti-contagion measures.

2. *Italian criminal legislation and Covid-19*

Faced with an unprecedented health emergency, the Italian Government opted for mass recourse to the power of enacting decrees that the Prime Minister is entrusted with, in cooperation with the Presidents of the Italian Regions, the President of the Regions' Conference and the Minister for Health,[14] pursuant to the Civil Protection Code (Legislative Decree no. 1/2018).

As far as criminal law is concerned, it seems possible to distinguish between an "explicit criminal law", which is embodied by the numerous criminal features specially created to fight noncompliance with the anti-Covid measures; an "implicit criminal law", embodied by the multiple possible forms of criminal liability for negligence connected to the fight against the Sars-CoV-2 virus;[15] and, lastly, a "silenced criminal law", concerning the measures that have *not* been undertaken to protect inmates, although clearly exposed to the outbreak and spreading of the virus.[16]

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[13] G. ROTOLO, *Senza pietre non c'è arco. A proposito di osservanza delle regole per solidarietà, responsabilità ed empatia*, in G. FORTI, *La vita e le regole*, cit., p. 69 s., p. 72.

[14] Lazio's Administrative Court decided, on July 22nd, 2020, that the President of Ministers has the obligation to consent to discovery and consultation of the minutes of the advice given by the Technical-Scientific Committee, on whose basis D.P.C.M.s have been issued on March, 1st and 8th, and April, 10th, 2020. For a general reflection on the use of sources of law in Italy during the pandemic see, *ex multis*, A. CARDONE, *La "gestione alternativa" dell'emergenza nella recente prassi normativa del Governo: le fonti del diritto alla prova del Covid-19*, in www.lalegislazionepenale.eu, May 18th, 2020.

[15] On this topic, R. BARTOLI, *La responsabilità medica e organizzativa al tempo del Coronavirus*, in www.sistemapenale.it, July 10th, 2020.

[16] On this topic, see the proposals promptly drafted by the Board of Directors of AIPDP (Italian Association of Professors of Criminal Law) on https://www.aipdp.it/documenti/AIPDP_Proposte_emergenza_carceraria_da_coronavirus.pdf. For a thorough examination of this issue, see A. PULVIRENTI, *Covid-19 e diritto alla salute dei detenuti: un tentativo, mal riuscito, di semplificazione del procedimento per la concessione dell'esecuzione domiciliare della pena (dalle misure straordinarie degli artt. 123 e 124 del D. L. 18/2020 alle recenti novità del D. L. 29/2020)*, in www.lalegislazionepenale.eu, May 26th, 2020 and V.G. DARIO, *Emergenza epidemiologica da Covid-19 e sistema penitenziario*, in *Diritto penale e processo*, 7/2020, p. 933 ss. Recently, D. L.

This paper only deals with the "explicit criminal law", *i.e.*, with the changeful and multi-level criminal regulation that has been put in place since February 2020 as a means to tackle contagion. Since the adoption of the first legislative text containing criminal provisions (Decree Law, February 23rd, 2020, no. 6), it is already possible to talk about a "microsystem"[17] and a stratification of regulatory "phases", sources and interventions. In this regard, it is remarkable that the sequence of these normative acts follows the local and global trend of infections – which is a *natural* criterion, rather than normative or a social one.

Indeed, as soon as this "microsystem" came to be inserted into the criminal and constitutional system, several issues arose. We will try to account for these by distinguishing four "punitive moments" that compose the Italian response to Coronavirus, covering the period from the month of March to the month of December 2020: Decree Law no. 6/2020 (2.1.); Decree Law no. 19/2020 (2.2.); Decree Law no. 33/2020 (2.3.) and, lastly, Decree Laws no. 125, no. 158 and no. 172/2020 (3.).

A common element to all of these Decrees (from now on "D. L.") is that they provide a new relationship between exercise and limitation of some fundamental and constitutional rights, as well as the assignment of a "*pro quota* management of the risk"[18] to all citizens.

In particular, during the first phase of the emergency (covered by D. L. no. 6 and no. 19/2020), this "management" could be reduced to the "stay-at-home" rule as the main contribution every individual could make to fighting the pandemic.[19] Later on, starting with D. L. no. 33/2020, and even more with D. L. no. 172/2020, it turned into a new way of controlling individual movements and gatherings.

To that end, three different categories of criminal provisions have been put in place: although all rooted in the *same* conduct (infringement of the anti-

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no. 56/2021, issued on April 30th, 2021, has prorogated until July 31st the special regulation of the prison system put in place by D. L. no. 137/2020. For a commentary, see M. PERALDO, *Licenze, permessi e detenzione domiciliare "straordinari": il decreto "ristori" (D. L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, in www.sistemapenale.it, November 16th, 2020.

[17] A. CASTALDO, F. COPPOLA, *Profili penali del Decreto legge n. 19/2020 "coronavirus": risolto il* rebus *delle sanzioni applicabili*, in www.archiviopenale.it, April 2nd, p. 8.

[18] D. CASTRONUOVO, *I limiti sostanziali del potere punitivo*, cit., p. 9.

[19] A. SIMONI, *Limiting freedom during the Covid-19 emergency in Italy: short notes on the new "populist rule of law"*, in *Global Jurist,* 2/2020. On this topic see also, interestingly so, A. SOMEK, *Necessity, Or: The Tyranny of Goals*, in *Coronajournal*, https://crisis-diary.net/2020/04/14/necessity-or-the-tyranny-of-goals/, April 14th, 2020.

contagion measures), the criminalised behaviours diverge according to the health situation of the violator, even if it may *not* be decisive for contagion.

2.1. *Decree Law no. 6/2020: the principle of legality in the face of the pandemic*

Starting from February 23rd and until March 26th, 2020, the infringement of an anti-Covid measure was sanctioned according to the newly shaped provision of Article 3, paragraph ("par.") 4, of D. L. no. 6/2020 ("*Urgent measures regarding containment and management of the Covid-19 epidemiological emergency*" and converted, with modifications, into Law no. 13 of 5 March), which states: "*unless it constitutes a more serious crime, the infringement of the containment measures comprised in this Decree shall be punished in accordance with Article 650 of the Criminal Code*".

Sources of the abovementioned "*measures of containment*" could not only be the Decrees issued by the Prime Minister (from now on "D.P.C.M." and, in the plural form, "D.P.C.M.s"), pursuant to Article 3, par. 1 of D. L. no. 6/2020,[20] but also the other decrees mentioned in Article 3, par. 2 of the same legislative text, *i.e.*, ordinances issued by the Minister for Health and by the Regions' Presidents, as well as urgent ordinances that Mayors can issue under certain circumstances.

Indeed, while Article 1 of D. L. no. 6/2020 states that "*the competent authorities shall adopt any measure of containment and managing of the virus that is adequate and proportional to the evolution of the epidemiologic situation*" and provides a list of measures (lit. *a-o*) that can thus be adopted, on the other hand Article 2, by using broad and elastic wording, granted the same authorities with the power to adopt "*further measures of containment and management of the emergency to prevent the spread of Covid-19, also outside the cases regulated in Article 1, paragraph 1*".

The legal issues that affected this normative technique can be illustrated as follows.

First of all, considering that the infringement of these measures constitutes a *crime*, the use of such a mechanism to identify the area of criminally relevant behaviours entailed some relevant tensions with the principle of legality and the rule of law in criminal matters. Constitutionally enshrined freedoms (not only freedom of movement, residence and expatriation, guaranteed by Article

[20] Subsequently, D.P.C.M.s were issued on March 4th, 5th, 8th, 9th and 11th, all of them entitled "*Further implementations of Decree Law of February 23rd, no. 6*".

16 of the Italian Constitution, but also all freedoms and rights whose exercise is hindered by the blocking of freedom of movement: freedom of assembly, Article 17; freedom to religious practice, Article 19; right to receive education, Article 33 and 34; freedom of economic enterprise, Article 41)[21] were sensibly compressed by D.P.C.M.s. Indeed, D.P.C.M.s are *administrative* orders that do not have the legal force of a proper law nor are they subject to an *ex post* control of constitutionality; nevertheless, it is these acts that are ultimately entrusted with the crucial task of identifying what is lawful and what is not, and what falls within "freedom" and what does not.[22]

This deflection from Article 25 of the Italian Constitution[23] was even more clear – and problematic – concerning the second par. of Article 3 of D. L. no. 6/2020, since it legitimised ordinances issued by Mayors and Region Presidents to adopt further prescriptions in the matter of freedom of circulation, although more restrictive than the ones already in force on a national level.[24]

Furthermore, some Authors have pointed out that the "*measures*" referred to by Articles 1 and 2 of D. L. no. 6/2020 only concerned the so called "*red zones*" (*i.e.*, the "*municipalities or areas in which at least one person tested positive to Covid-19 and the source of the transmission is unknown, or in which there is anyway a case that cannot be tracked down to a person coming from an already infected area*"), and that the subsequent extension of those same measures *nationwide* (Article 1 of D.P.C.M. of March 9th, 2020) lacked an adequate legal basis.[25]

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[21] D. PULITANÒ, *Problemi dell'emergenza. Legalità e libertà*, in www.lalegislazionepenale.eu, May 18th, 2020, p. 2.

[22] G.L. GATTA, *Coronavirus, limitazione di diritti e libertà fondamentali, e diritto penale: un deficit di legalità da rimediare*, in www.sistemapenale.it, March 16th, 2020.

[23] See R. BARTOLI, *Legalità e coronavirus: l'allocazione del potere punitivo e i cortocircuiti della democrazia costituzionale durante l'emergenza*, in *Osservatorio sulle fonti*, special supplement 2020, p. 453 ss.

[24] According to C. RUGA RIVA, *Il D. L. 25 marzo 2020, n. 19, recante "Misure urgenti per fronteggiare l'emergenza epidemiologica da Covid-19": verso una "normalizzazione" del diritto penale dell'emergenza?*, in www.lalegislazionepenale.eu, April 6th, p. 3, this was an attempt to try and balance the need for an uniform and nationwide application of Covid-19 measures and regard for related regional or local peculiarities.

[25] G.L. GATTA, *Coronavirus, limitazione di diritti e libertà fondamentali*, cit. *Contra*, C. RUGA RIVA, *La violazione delle ordinanze regionali e sindacali in materia di coronavirus: profili penali*, in www.sistemapenale.it, March 24th, 2020. Before March 9th, the only identified clusters of the contagion were some Municipalities in the Regions of Piedmont, Lombardy, Emilia-Romagna, Friuli-Venezia Giulia, Veneto and Liguria (see Minister of Health, six Ordinances dated April 23rd, 2020 and the D.P.C.M.s issued on February, 25th and March, 1st, 4th and 8th, 2020).

Lastly, in spite of the unanimous consent on the existence of the character of "*necessity and urgency*" that Article 77 of the Italian Constitution requires for the adoption of Decree Laws, the indefinite nature of the "*measures*", especially the "*further*" ones (legitimised by Article 2 of D. L. no. 6/2020), raised quite a few problems. This flexible legislative technique, although certainly functional to the unknown and unforeseeable trend of the virus, ended up inflicting serious harm on the principle of determinacy and precision of criminal law.[26]

As for the criminal offence regulated by Article 3, par. 4, of D. L. no. 6/2020, its subject was, as mentioned earlier, the "*containment measures*" provided for by D.P.C.M.s and ordinances issued by the Minister for Health, by the Region Presidents and, under certain circumstances, by Mayors. The criminal conduct consisted in "*not complying with*" these measures and was punished "*pursuant to Article 650 of the Criminal Code*".[27]

The absolute majority of scholars considered Article 3, par. 4, of D. L. no. 6/2020 as a new and autonomous criminal offence, with its own preceptive force,[28] in the context of which the reference to Article 650 of the Criminal Code only served the purpose of establishing the type of penalty.[29]

Nevertheless, this reference to the provision of the Criminal Code for penal purposes raised some questions. First of all, the actual ability of Article 650 of the Criminal Code to exert a deterrent effect has always been doubted,[30] since it clearly consists in a petty offence, which moreover does not open the way to a flagrant arrest.[31] Also, and most importantly, Article 650 falls

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[26] On this topic see A. PROVERA, *Peste e gride. La vaghezza dei precetti utilizzati per la regolamentazione dell'emergenza*, in G. FORTI, *La vita e le regole*, cit., p. 125 ss., p. 128.

[27] Article 650 of the Criminal Code, "*Noncompliance with an authority's orders*" states that: "*Failure to comply with an order legally issued by an authority on grounds of justice or public security, order or health, shall be punished with detention for up to three months or with a fine of up to 206 Euros, unless it constitutes a more serious crime*".

[28] G. PIGHI, *La trasgressione delle misure*, cit., p. 7; C. RUGA RIVA, *Il D. L. 25 marzo 2020, n. 19*, cit., p. 233; G.L. GATTA, *Un nuovo assetto del diritto dell'emergenza Covid-19, più aderente ai principii costituzionali, e un nuovo approccio al problema sanzionatorio: luci e ombre nel D. L. 25 marzo 2020, no. 19*, in www.sistemapenale.it, March 26th, 2020.

[29] *Ex multis* A. CASTALDO, F. COPPOLA, *Profili penali del Decreto legge n. 19/2020*, cit., p. 2; D. PIVA, *Il diritto penale ai tempi del coronavirus: troppo su inosservanza e poco su carcere*, in www.archiviopenale.it, April 2nd, 2020 p. 5; D. CECI, *Covid-19: le condotte vietate dalla legge e le sanzioni irrogabili*, in *Penale, diritto e procedura*, March 2nd, 2020, p. 4 (highlighting that the person can also be punished for negligence, "in spite of the voluntary character of the violation of restrictive measures"); C. RUGA RIVA, *Il D. L. 25 marzo 2020, n. 19*, cit., p. 2.

[30] A. BERNARDI, *Il diritto penale alla prova della Covid-19*, cit., p. 444.

[31] D. PIVA, *Il diritto penale ai tempi del coronavirus*, cit., p. 3.

within the scope of the settlement provided for by Article 162 of the Criminal Code: hence "the message that was conveyed to citizens was that they actually could maintain *any* behaviour, at the only cost of risking a fine of 103 Euros, which substantially produced a monetisation of the criminal risk".[32]

Secondly, despite the abovementioned self-sufficiency of Article 3 of D. L. no. 6/2020, the reference it made to Article 650 of the Criminal Code appeared to be problematic also with respect to the different operational requirements and conditions underlying the two provisions. As has been noted, indeed, the "*legally issued orders*" referred to by Article 650 of the Criminal Code and the "*containment measures*" mentioned by Article 3 of D. L. no. 6/2020 cannot be considered as perfectly overlapping notions. Indeed, whereas the second and newest provision only seems to cover violations of *general and abstract* rules, Article 650 of the Criminal Code punishes any transgression of an individual and specific order, given to a particular person by the competent authority,[33] and as such external to the criminal provision itself.[34]

Lastly, many scholars have firmly objected to the absence of a proper legal basis for the measure of the "*quarantine*" (Article, 1, lit. *h*, of D. L. no. 6/2020) and, consequently, for the incrimination of its violation.[35] Since it does not seem possible to consider quarantine as an equivalent of the so called "mandatory health treatment" (T.S.O.) regulated by Law no. 883 of December 23rd, 1978,[36] no legal framework has been put in place to regulate its requirements, extension and competence. Now, this lack of legal framework (only partially mitigated by the following legislative acts) becomes even more problematic when considering that the D.P.C.M. issued on March 8 imposed an "*absolute prohibition*" on leaving one's home if subject to quarantine measures or having tested positive for Covid-19.

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[32] A. PROVERA, *Peste e gride*, cit., p. 128. Indeed, the contravention referred to by Article 650 of the Criminal Code is alternatively punishable by detention (up to three months) or a fine (up to 260 Euros).

[33] G. PIGHI, *La trasgressione delle misure*, cit., p. 5; G.L. GATTA, *Un nuovo assetto del diritto*, cit., p. 4. *Contra*, B. ROMANO, *Il reato di inosservanza dei provvedimenti dell'Autorità al tempo del Coronavirus*, in www.ilpenalista.it, March 16th, 2020, according to whom orders, statutes and general ordinances are also included in the notion of "*legally given orders*".

[34] G. MARINUCCI, E. DOLCINI, *Diritto penale. Parte generale*, Milano, 2020, p. 69.

[35] Article, 1, lit. *h*, of D. L. no. 6/2020 foresees the "*application of the measure of quarantine with active surveillance to those who have had narrow contacts with people whose positivity to the infection has been proved*", without, however, establishing a legal regime for the actual content and application of the measure itself.

[36] *Ibid*.; R. BARTOLI, *Il diritto penale dell'emergenza*, cit., p. 9, agrees on this point.

2.2. *Decree Law no. 19/2020: the new constitution-oriented criminal laws to fight Covid-19*

The legal structure put in place regarding "contact and contagion" in Italy changed path with the issue of D. L. no. 19/2020 on March 25th (subsequently converted, with modifications, into Law no. 35 of 22nd of May 2020).[37] This legal provision abolishes the previous Decree Law (with the exception of Articles 3, par. 6 *a*, and 4) and is entitled "*Urgent measures* to face *the Covid-19 epidemiologic emergency*", rather than to "*contain and manage*" it.

D. L. no. 19/2020 has two main aspects.

Firstly, from the point of view of the means of repression of the pandemic, D. L. no. 19/2020 provides a legal basis for the extension of containment measures to the whole Italian territory, where applicable, which was formerly based on the sole D.P.C.M. issued on March, 9th and only concerned the so-called "*red zones*".

Furthermore, this Decree Law formulated a strict and precise list of containment measures (Article 1, par. 2, lit. *a-hh*), this time *without* entrusting the "*competent authorities*" to adopt "*further measures*". Also, Article 2 of D. L. no. 19/2020 established that the containment measures at issue shall comply with the principles of adequacy and proportionality and designed a detailed procedure for their adoption and implementation.

Secondly, from the point of view of the criminal penalties, D. L. no. 19/2020 has adequately adjusted the nature of the criminal liability of the person who "*does not respect*" the anti-contagion measures. Therefore, a mechanism based on a scale of progressive seriousness, ranging from a simple administrative fine to a proper crime (Article 4) is put in place. Scholars have largely welcomed the choice to abandon criminal law as the essential means to punish non-compliance with the containment measures, and actually had already proposed resorting to a similar scheme of a scale of criminal liability.[38] By choosing to criminalise behaviours that are only *abstractly* dangerous, as they are far away from the risk, the new provisions introduced by the Italian Government, although certainly amendable, seem to strike a balance between

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[37] D.P.C.M.s issued on April 1st, 10th and 26th bear the title "*Implementations*" of this D. L.; so do the D.P.C.M.s issued on June, 11th, July, 14th, August, 7th and September, 7th (on this topic see *infra*, 2.3.).

[38] For this proposal see D. CECI, *Covid-19: le condotte vietate*, cit., p. 6, and G. PIGHI, *La trasgressione delle misure*, cit., p. 4, who draw inspiration from the punitive-administrative offence foreseen for entrepreneurs who do not comply with the prohibition of gathering (closing of the commercial activity for five to thirty days, Article 15 of D. L. no. 14/2020, supplementing Article 3, par. 4, of D. L. no. 6/2020).

self-responsibility and intimidation.[39] Indeed, in this very matter "criminal sanctions on the one hand cannot be excessively strict, on the other hand have to be sufficiently intimidating, which firstly means ready and certain".[40]

Turning to the illustration of this "model of simplification based on growing complexity",[41] it seems useful to start from the legislative hypothesis regulated by Article 4, par. 1, of D. L. no. 19/2020. This article affirms that: "*unless it constitutes a more serious crime, non-compliance with the containment measures referred to by Article 1, paragraph 2 […] shall be punished with an administrative fine consisting in the payment of a fine between 400 and 3,000 Euros and the penalties provided for by Article 650 of the Criminal Code or by any other legislative provision enabling powers for health-related reasons […] shall not be applicable*".

We are dealing with a punitive-administrative offence, subject as such to the legal framework set out by Law no. 689 of November 24th, 1981.[42] The introduction of this punitive-administrative offence comes together with the abolition, with retroactive effect,[43] of the criminal offence contained in Article 3, par. 4 of D. L. no. 6/2020, that was – as a matter of fact – already playing a leading role in Prosecutors' offices. To this regard, some scholars have been speaking of "improper decriminalisation" to highlight the fact that the Government has not actually *transformed* a contravention into a punitive-administrative offence, but rather abolished the first one and introduced, *in its place*, a punitive-administrative offence *and* a crime.[44]

This new legal regulation expressively excludes the applicability of both Article 650 of the Criminal Code and Article 260 of the Royal Decree no. 1265 of July 27th, 1934 (from now on "T.U.L.S."). Indeed, during the period of validity of D. L. no. 6/2020, several Public Prosecutors' offices started to

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[39] R. BARTOLI, *Il diritto penale dell'emergenza*, cit., p. 9.

[40] A. BERNARDI, *Il diritto penale alla prova della Covid-19*, cit., p. 444.

[41] A. CASTALDO, F. COPPOLA, *Profili penali del Decreto legge n. 19/2020*, cit., p. 4.

[42] For a survey of this regime see L.G. GATTA, *Un nuovo assetto del diritto dell'emergenza*, cit.

[43] Par. 8 of Article 4 states that "*the provisions of this article substituting criminal sanctions with administrative fines shall also be applicable to violations that have been put in place before the entry into force of this very Decree, but in this case the amount of the administrative fines shall be the minimum amount, reduced by a half* […]". This provision has been welcomed by scholars because, if absent, the temporary and extraordinary nature of provisions issued during the pandemic would have prevented the retroactive application of Article 4 of D. L. no. 19/2020 (as stated by Article 2, par. 5, of the Criminal Code). On this issue, see A. NATALE, *Il decreto legge n. 19 del 2020: le previsioni sanzionatorie*, in www.questionegiustizia.it, March 28th, 2020.

[44] G.L. GATTA, *Un nuovo assetto del diritto dell'emergenza*, cit., p. 10.

apply Article 260 of T.U.L.S., since this contravention cannot be regulated by resorting to settlement provided for by Article 162 of the Criminal Code.

With regards to the subsidiarity clause at the opening of Article 4, par. 1, of D. L. no. 19/2020, it is meant to regulate the potential situation in which the violation of one of the containment measures of Article 1, par. 2, of D. L. no. 19/2020 constitutes *per se* a crime.[45] Scholars have raised questions about the possible coexistence of Article 4, par. 1, of D. L. no. 19/2020 and those offences related to the infringement of containment measures, such as false self-certification and false declarations to a public official.[46]

Instead, coexistence of the offence referred to by Article 4, par. 1, and Article 4, par. 6, of D. L. no. 19/2020 is not possible, and the criterion to distinguish between them is to be identified in the subjective knowledge and awareness of one's infectiousness.

Indeed, par. 6 of Article 4 of D. L. no. 19/2020 regulates a new criminal contravention, based on prior knowledge and intent[47] and specifically sanctioning the breach of the quarantine measure (Article 1, par. 1, lit. *e*).[48] To this effect it is stated that: "*unless it constitutes a violation of Article 452 of the Criminal Code or a more serious crime*", violation of Article 1, par. 1, lit. *e* of D. L. no. 19/2020 "*shall be punished in accordance to Article 260 of the Royal Decree no. 1265 of July 27th, 1934, as modified by paragraph 7 of this very Decree*".[49] On the contrary, this new sanction does not apply to the breach of the measure of the so-called precautionary quarantine (Article 1, par. 1, lit. *d*).[50]

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[45] For example, in case of evasion of home arrest and the simultaneous breach of the precautionary quarantine, as proposed by C. RUGA RIVA, *Il D. L. 25 marzo 2020, n. 19*, cit., p. 5.

[46] On this matter, Courts tend to deny that false declarations made on the self-certification movement form fall under the scope of Article 438 of the Criminal code ("*False statement in a public document*"), on the grounds that these declarations solely represent the *intention* of the person, without reference to real events (Judge for Preliminary Investigations of Milan, November 16th, 2020; for a commentary, E. PENCO, *Autodichiarazione Covid-19 e reati di falso: inapplicabile l'articolo 438 c.p. se la dichiarazione mendace consiste nella mera manifestazione delle proprie intenzioni*, in www.sistemapenale.it, January 12th, 2021); or be it because Article 438 does not contain a *general* obligation to tell the truth (Judge for Preliminary Investigations of Milan, March 21st, 2021).

[47] D. PIVA, *Il diritto penale ai tempi del coronavirus*, cit., p. 5.

[48] We are dealing with the already mentioned "*absolute prohibition on leaving one's residence for persons subject to quarantine measures, having tested positive for the virus*".

[49] Par. 7 of Article 4 of D. L. no. 19/2020 increases the minimum penalties of Article 260 T.U.L.S. (now detention from three to 18 months and a fine from 500 up to 5,000 Euros).

[50] In this period, the so-called precautionary quarantine shall also be applicable to "*those who have had narrow contact with confirmed cases of infection or with persons who return from abroad*".

The newly introduced criminal provision is based on a reasonable presumption of abstract danger for public health[51] and on a rather complex structure. Indeed, in order to identify the applicable penalty, Article 4, par. 6, of D. L. no. 19/2020 refers not only to the provisions of the T.U.L.S. (which does not fall within the scope of Article 612 of the Criminal Code, as previously mentioned), but also to the D.P.C.M. issued on March 8th, 2020. Since the latter introduced, as we have seen, the "*absolute prohibition*" of leaving one's home after testing positive for Covid-19, it is finally up to this very D.P.C.M. to delimitate the criminally relevant behaviour.[52]

In addition, no mechanism of judiciary control over the application of the quarantine measures is provided for, a circumstance which seems to clash with the judicial guarantee regulated by Article 13 of the Constitution.[53]

The level of seriousness of behaviours (and consequently of the severity of punishment) furthermore contains the crime of negligent contagion (Article 452 of the Criminal Code) or an even more serious crime, whether it be caused negligently or intentionally (*i.e.*, intentional contagion, Article 438 of the Criminal Code; serious or extremely serious injuries, Articles 582-583 of the Criminal Code; voluntary and involuntary manslaughter, Articles 575 or 589 of the Criminal Code), as far as it the source of a proven outbreak of Covid-19. These criminal hypotheses are alternative to Article 4, par. 6, of D. L. no. 19/2020, whose wrongfulness is absorbed by the more offensive ones.[54]

Nevertheless, scholars are quite sceptical about whether it is actually possible, on an objective level already, to imagine the contagion crimes regulated

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[51] G.L. GATTA, *Un nuovo assetto del diritto dell'emergenza*, cit., p. 8; A. NATALE, *Il decreto legge n. 19 del 2020*, cit., p. 4.

[52] It would have been easier and more appropriate to establish that "*whoever, having tested positive for Covid-19, leaves the place specified by the health personnel for them to stay, shall be punished*". This "non-compliance offence", put forward by R. BARTOLI, *Il diritto penale dell'emergenza*, cit., p. 10. V. VALENTINI, *Profili penali della veicolazione virale: una prima mappatura*, in www.archiviopenale.it, April 8th, 2020, p. 6, suggests that the transition from crime to contravention is determined not only from the conscious and voluntary breach of the abovementioned "*absolute prohibition*" by a person who is aware of their infectiousness, but also by so-called virus-spreading conduct, which is *further* negligent and noncompliant.

[53] Cfr. A. NATALE, *Il decreto legge n. 19 del 2020*, cit., pp. 5-6, who suggests either a disapplication of the administrative act or the raising of a question of constitutionality on the legal regime for adopting this act.

[54] See the thorough analysis carried out by E. PERROTTA, *Verso una nuova dimensione del delitto di epidemia (art. 438 c.p.) alla luce della globalizzazione delle malattie infettive: la responsabilità individuale da contagio nel sistema di* common but differentiated responsibility, in *Rivista italiana di diritto e procedura penale*, 1/2020, p. 179 ss.

by Articles 452 and 438 of the Criminal Code coming into place. We will hereby try to quickly examine the reasons for these doubts.

The applicability of the crime of contagion[55] seems problematic primarily with respect to the punishable behaviour. Whereas the conduct of someone who is able to directly control the pathogenic elements (that they are a carrier of themselves) and willingly "uses" them to cause an outbreak of the virus can easily be subsumed under the provision of Article 438 of the Criminal Code,[56] questions may arise regarding the situation of someone who is simply positive and carries the virus, without any control over it nor intention to spread it.[57] Indeed, in this case a criminal liability would solely be based on a subjective status and way of being ("infected and contagious") rather than on a material behaviour; unless we would want to imagine that everyone should be the guarantor of his/her own health with respect to others[58] …

Secondly, the "*diffusion of pathogenic germs*" required by both Article 438 and 452 of the Criminal Code does not seem fit to produce the necessary result of the offence (*i.e.*, the effective contagion), nor to respond to the scheme that the (rare, indeed) case-law in this matter has designed.[59] From this point of view, "contagion" is considered to be a spreadable und untameable disease that, in a short amount of time, spreads among a large number of persons,[60] by creating and transmitting a chain of infection.

It has also been pointed out that, even if an actual contagion as meant by Articles 438 and 452 of the Criminal Code occurs, it would be extremely difficult,

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[55] On this matter see S. ARDIZZONE, *Epidemia*, in *Digesto discipline penali*, IV, Torino, 1990, p. 250 ss.; A. GARGANI, *Reati contro l'incolumità pubblica*, Tomo II – *Reati di comune pericolo mediante frode*, Milano, 2013, p. 2013 ss.; A. GARGANI, *Incolumità pubblica (reati contro la)*, in *Enciclopedia del diritto*, 2015, p. 571 ss.

[56] For example, a father who knows perfectly well that his son is infected, and sends him to see his grandmother in a retirement home: A. VALLINI, *Responsabilità penale da contagio*, Contribution to the Web Seminar "*Emergenza Covid-19 fra diritto e processo penale*", University of Verona, April 29th, 2020.

[57] R. BARTOLI, *Il diritto penale dell'emergenza*, cit., p. 10.

[58] A. VALLINI, *Intervento*, cit.

[59] See R. CASTALDO, F. COPPOLA, *Profili penali del D. L. 19/2020*, cit., p. 3, based on the decision handed down by the Court of Bolzano on March 13, 1979.

[60] Cass. pen., Sez. I, n. 48014, 30.10 – 26.11.2019, in *Diritto e giurisprudenza*, affirming that "*the crime of epidemy comes into place when the spreading of pathogenic germs, possibly via human contact, reaches an undetermined number of persons, rapidly, in the same place, with capacity for further expansion*". Also, the Supreme Court of Cassation has ruled that the event of the epidemic phenomenon is characterised by "*un uncontrollable diffusivity among a significant number of persons, thus by a contagious disease rapidly and autonomously spreading among an undetermined number of persons and for a limited amount of time*" (Sez. U., n. 576, 11.01.2008).

not to say impossible, to assert and demonstrate beyond any reasonable doubt the exact causal connection to its origin. In fact, it would be necessary to this end to "sift through the life of any infected person […] to exclude alternative causes".[61] The same issue arises with regard to the crimes of grievous bodily harm and homicide, considering that the demonstration of the causal connection would currently be undermined by the lack of scientifically valid alternative explanations[62] (except for rare cases of extreme and verified isolation).[63]

Lastly, although D. L. no. 19/2020 has certainly introduced a higher degree of rationality in the whole anti-Coronavirus penal system by making it compliant with the *extrema ratio* principle, the persistent lack of legal framework concerning the quarantine measures keeps raising questions. The abovementioned transition from punitive-administrative offence to crime presupposes, as an implicit requirement, the *legality* of the quarantine measures (Article 1, par. 1, lit. *e* of D. L. no. 19/2020). Nevertheless, absent a specific regulation of the individual and specific orders that impose this measure, its legality continues to appear doubtful.[64]

2.3. *Decree Law no. 33/2020: the longstanding issues in regulating the quarantine*

During the month of May, 2020, the trend of infections in Italy slowed down, so that the containment measures and limitations on personal freedoms could be rethought and eased.

On May 16th, 2020, D. L. no. 33 ("*Urgent measures for facing the Covid-19 emergency*") was issued, followed by a D.P.C.M. issued on May 17th ("*Implementing provisions of Decree Laws issued on March, 25th, no. 19, and May, 16th, no. 33*").[65] D. L. no. 33/2020, whose validity has been extended until October 15th (instead of July 31st, as initially stated by its Article 3), has subsequently been converted into Law no. 74 of July, 14th, modifying the so-called precautionary quarantine regime.

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[61] V. VALENTINI, *Profili penali della veicolazione virale*, cit.

[62] *Ibid.*

[63] On this topic, see L. MASERA, *Accertamento alternativo ed evidenza epidemiologica nel diritto penale*, Milano, 2007.

[64] Exhaustively, G.L. GATTA, *I diritti fondamentali alla prova del Coronavirus. Perché è necessaria una legge sulla quarantena*, in www.sistemapenale.it, April 2nd, 2020.

[65] Whose first Article has been furthermore modified by the D.P.C.M. issued on May, 18th, 2020. The D.P.C.M. of May, 17th supersedes the D.P.C.M. issued on April, 26th.

Contrary to what happened with D. L. no. 19/2020, which was issued along with the substantial abrogation of the previous Decree (no. 6/2020), D. L. no. 33/2020 is not meant as a replacement for D. L. no. 19/2020. On the contrary, the two Decrees coexist and form an integrated system and represent the ground on which all following normative acts are adopted. Indeed, D. L. no. 19/2020 keeps on representing the milestone of the whole criminal-law legal framework to fight the Sars-CoV-2 virus: all of the D.P.C.M.s issued from the month of May 2020 onwards, indeed, serve the purpose of "*Implementing provisions*" both for D. L. no. 19/2020 and for D. L. no. 33/2020.[66]

D. L. no. 33/2020, for its part, contributes to shaping the Coronavirus-related new legal system by defining a new means of cohabitation, both with the Sars-CoV-2 virus and amongst people themselves. By elastically yet prudentially trying to strike a balance between individual rights and those of society as a whole, D. L. no. 33/2020 inaugurates a new technique of controlling individual movements, which will be developed by the following Decree Laws.

Starting from May 18th, 2020, indeed, "*the limitations to the freedom of movement inside the Region put in place by Articles 2 and 3 of D. L. no. 19/2020 shall no longer be applicable*", unless a D.P.C.M. or a regional order re-establishes the above-mentioned limitations in "*specific areas affected by a worsening of the epidemic situation*" (Article 1, par. 1 of D. L. no. 33/2020).

As far as movements between the Italian regions are concerned, the altered relationship between freedom and limitation stayed in force until June 2nd, 2020: which means that, until that day, the rule is the prohibition of movement outside ones' Region ("*except for verified needs related to work or health of absolute urgency*"). Starting from June, 3rd, instead, the movements at issue could only be restricted by a D.P.C.M. regarding specific areas of the national territory, "*in accordance with principles of adequacy and proportionality to the actual epidemiological risk in those areas*" (Article 1, par. 2 of D. L. no. 33/2020).

The exertion of this freedom of movement is once again prohibited to those who, having tested positive to Covid-19, are subject to quarantine (whose legal basis is Article 1, par. 2, lit. *e*, of D. L. no. 19/2020 for measures already in force and Article 1, par. 6, of D. L. no. 33/2020 for measures to be applied[67]). Indeed, Article 1, par. 6, of D. L. no. 33/2020 states that "*it is pro-*

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[66] G.L. GATTA, *Emergenza Covid-19 e "fase due": misure limitative e sanzioni nel D. L. 16 maggio 2020, n. 33 (nuova disciplina della quarantena)*, in www.sistemapenale.it, May 18th, 2020, to whom we make reference for a thorough examination of the innovations introduced by D. L. no. 33/2020.

[67] *Ivi*, p. 4.

hibited to persons who are subject to quarantine on the basis of an order of the health authority, having tested positive for Covid-19, to leave their own residence until it is proven that they have recovered or are being treated in a healthcare structure or in another structure serving the same purpose".

As we can see, the content of the prohibition (although no longer "*absolute*") has stayed the same as in D. L. no. 19/2020, as well as the prerequisite for the application of quarantine; nevertheless, some important requirements have been added so that the new legal framework seems somehow more compliant with the constitutional requirements.

On the one hand, Article 1, par. 6, of D. L. no. 33/2020 eventually designated the competent person and the nature of the order that applies for quarantine: the mentioned "*sanitary authority*" is likewise the Mayor.[68] As a result, the "*order*" at issue is an administrative, individual and specific act. This circumstance, though, raises the problem of the persistent absence of the "warranty of a jurisdictional control of this order, which, as such, falls under the administrative jurisdiction and is devoid of a validation procedure carried out by a judge",[69] in compliance with Article 13 of the Italian Constitution. Furthermore, it is possible to imagine that the existence of a specific order asserting and establishing infection may reflect on the knowledge and awareness of the person breaching the quarantine.

On the other hand, Article 1, par. 6, of D. L. no. 33/2020 identifies a final term of the quarantine, *i.e.*, the moment when "*it is proven that* [infected persons are] *healed or recovered*" – thus ceasing to constitute a danger for the community, either because they are healed or because they are isolated.

As for the so-called precautionary quarantine (Article 1, par. 7 of D. L. no. 33/2020), this measure contains two new elements and has furthermore been heavily modified by Law no. 74/2020.

First of all, this type of quarantine shall be applied by means of an administrative order issued by the health authority as well; its addressees are "*those who have been in close contact with confirmed Covid-19 positive cases*" and, most problematically, the "*other persons*" that a sublegislative source is thus allowed to identify. The two quarantine measures also (unreasonably) differ as far as their duration is concerned:[70] considering that Article 1, par. 7, of D. L. no. 33/2020 remains silent on this topic, we can presume that the precautionary quarantine will always have to last fourteen days at least.

Secondly – and this is the core innovation of Law no. 74/2020 – par. 7 of

[68] On this issue see A. NATALE, *Il decreto legge n. 19 del 2020*, cit., p. 7 s.

[69] G.L. GATTA, *Emergenza Covid-19 e "fase due"*, cit., p. 5.

[70] *Ibid.*

Article 1 now specifies that the above-mentioned health authority may apply, instead of the precautionary quarantine, "*every other measure having a similar effect, provided that it has been approved by the Technical-Scientific Committee regulated by the Ordinance no. 630 issued on February, 3rd, by the Chief of Civil Protection*".

As we can see, the actual content of this new quarantine is not regulated at all, and the measure itself is solely identified on the basis of its effects. Since these effects are the restriction of personal freedom, the previous approbation by the Technical-Scientific Committee clearly cannot guarantee the legality of the measure. Furthermore, it is again D.P.C.M.s which are entrusted with the task of identifying the persons who can be subject to this "equivalent quarantine", since Article 1, par. 7 of D. L. no. 33/2020 refers to Article 2 of D. L. no. 19/2020. This circumstance is, once again, remarkably problematic with regard to the respect of the principle of legality.[71]

As for the penalties, D. L. no. 33/2020 somehow appears to be a merger between D. L. no. 19/2020 and D. L. no. 6/2020: while shaping the sanctions just like the first one, it reproduces the issues affecting the second one. Indeed, the criminal penalties D. L. no. 33/2020 provides for are destined to be applied to violations of provisions (and anti-contagion measures) contained not only in the D. L. no. 33/2020 itself, but *also* in sublegislative acts, such as D.P.C.M.s, regional ordinances and ordinances of the Minister of Health.

The measures at issue once again lack a legal basis, since they are not comprised either in the list of Article 1, par. 2, of D. L. no. 19/2020 nor in the D. L. no. 33/2020 itself. Consequently, the latest Decree operates a "blank reference" to undetermined sublegislative sources[72] (only partially mitigated by the fact that the basis sanction is a punitive-administrative fine, in accordance with Article 4, par. 1, of D. L. no. 19/2020). In this respect, it has been pointed out that the provision of Article 1, par. 1, lit. *a* of D.P.C.M. issued on May, 17th is particularly problematic. The latter states that "*persons having a respiratory infection with temperature higher than 37.5° shall stay at their own residence and contact their doctor*", thus directly compressing these persons' freedom of movement. Also, this very provision does not actually seem to be simply "*implementing*" those of D. L. no. 33/2020;[73] in spite of this, it has been reproduced in the texts of the D.P.C.M.s issued on June 11th (Article 1,

[71] Cfr. G.L. GATTA, *Covid-19 e misure limitative: convertito in Legge il D. L. 33/2020 e introdotta una nuova disciplina della quarantena precauzionale, di dubbia legittimità costituzionale*, in www.sistemapenale.it, July, 16th, 2020.

[72] *Ivi*, p. 8.

[73] *Ibid.*

par. 1, lit. *a*), August 7th (Article 1, par. 7, lit. *a*),[74] October 13th (Article 1, par. 6, lit. *a*), October 24th (Article 1, par. 9, lit. *a*) and December 3rd (Article 1, par. 10, lit. *a*).

Instead, pursuant to Article 2, par. 3 of D. L. no. 33/2020, those who are aware of having Covid-19 and who breach the quarantine measures referred to by Article 1, par. 6, of D. L. no. 33/2020 shall be punished "*in accordance*" with Article 260 of T.U.L.S., "*unless* [the fact] *constitutes a crime punishable in accordance with Article 452 of the Criminal Code or an even more serious crime*" (*i.e.,* negligent or intentional contagion; serious or extremely serious injuries; homicide).

In this regard, it has been pointed out that the behaviour that is criminalised by means of Article 4, par. 6 of D. L. no. 19/2020 and the one that is criminalised by Article 2, par. 3 of D. L. no. 33/2020 are not exactly equivalent. Indeed, the first provision concerns breaches of the "*absolute prohibition of leaving ones' residence*" (referred to by D.P.C.M. issued on March 8th), whereas the latter deals with the "*prohibition of moving from one's residence or home*" (as stated by Article 1, par. 6 of D. L. no. 33/2020 itself).[75]

3. *A new management of individual movements and gatherings. Decree Laws no. 125, no. 158 and no. 172/2020*

Starting from the second half of August 2020, the dialogue between humans and Nature has intensified, since the goal of controlling the Sars-CoV-2 virus, though strongly pursued, proved to be almost out of reach, and constantly subject to turnover.

The provisions adopted from August to December 2020 clearly aim to establish a new and complex frame of coexistence with the virus; therefore, they can be seen as the fourth "punitive moment" in the Italian strategy to tackle the epidemic. Thus, they are meant to manage and control individual move-

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[74] Whose validity has been extended until October, 7th, by the latest D.P.C.M., issued on September 7th, 2020.

[75] Some scholars have suggested that only the "*prohibition of moving*" referred to by Article 1, par. 6 of D. L. no. 33/2020 should be taken into account, rather than the "*absolute prohibition of leaving*". Indeed, the "*prohibition of moving*" appears to be more consistent with the interest that is at stake here, *i.e.*, public health: a "*movement*", rather than a "*leaving*", can truly, although even abstractly, represent a risk for public health. On this topic see, interestingly so, S. FIORE, "*'Va', va', povero untarello, non sarai tu quello che spianti Milano'. La rilevanza penale della violazione della quarantena obbligatoria*", in www.sistemapenale.it, November 3rd, 2020.

ments, both "macro" (from and to foreign countries) and "micro" (the daily movements of citizens within their own city and within Italy as a whole).

They also keep on reproducing the legislative scheme consisting of a Decree Law (D. L., subsequently converted into a Law) establishing the legal framework and then referring to Decrees issued by the Prime Minister (D.P.C.M.) for further and more detailed measures.[76]

This tendency, although embedded within D. L. no. 33/2020, was officially inaugurated with the D.P.C.M. dated August 7th, 2020. It would be furthered by the regulations issued during the frantic months of September and October 2020, and definitely sealed by D. L.s no. 125, no. 158 and no. 172/2020, as well as by the D.P.C.M.s issued on October, 13th (as modified by D.P.C.M. of October 18th and 24th), November 3rd and December 3rd.

We will hereby focus on what we called "micro-movements".[77] In particular, Article 1, par. 1 of the D.P.C.M. issued on August 7th, 2020, introduces the "*obligation to use a respiratory protective device, across the entire national territory, in indoor spaces open to the public, including public transportation, and in any case on all occasions in which it is not possible to continuously maintain an interpersonal safety distance*".[78] Par. 2, for its part, introduces the obligation to "*maintain at least one meter of social distancing*". Also, the Ordinance of the Minister of Health dated August 16th, 2020, adds the obligation

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[76] From January to May 2021, following D. L. and D.P.C.M.s concerning, *inter alia*, criminal law, have been enacted: D. L. no. 2/2021, issued on January 14th and implemented by the D.P.C.M. issued on the same day; D. L. no. 12/2021, issued on February 2nd; D. L. no. 15/2021, issued on February 23rd, and implemented by the D.P.C.M. issued on March, 2nd; D. L. no. 44/2021, issued on April 1st, and, lastly, D. L. no. 65/2021, issued on May, 18th. Interestingly so, Article 3 of D. L. no. 44/2021 exonerates health workers from being held criminally responsible "*for the offences of manslaughter and causing actual bodily harm through negligence committed during the emergency period, provided the vaccination has been carried out in compliance*" with the authorization provisions and with the administrative circulars issued by the Minister of Health. On this topic, see E. PENCO, *"Norma-scudo" o "norma-placebo?" Brevi osservazioni in tema di (ir)responsabilità penale da somministrazione del vaccino anti Sars-CoV-2*, in www.sistemapenale.it, April 13th, 2021, and E. PENCO, *Esigenze e modelli di contenimento della responsabilità nel contesto del diritto penale pandemico*, in *Diritto penale contemporaneo – Rivista trimestrale*, 1/2021, p. 16 ss. Furthermore, Article 4 of D. L. no. 44/2021 introduces a compulsory vaccination for health workers: for a general overview from a constitutional law standpoint, see A. VALLINI, *Quarantena, restrizioni, obblighi vaccinali: equilibri tra libertà e salute pubblica nell'era della pandemia*, in *Toscana medica*, 5/2021, p. 13 ss.

[77] As for "macro-movements", the number of countries from which return is not allowed, as well as the number of countries from which one can only return from after testing and/or observing a quarantine period, is subject to constant changings according to the trend of the infections.

[78] An exception is made for children under six years and for people unable to wear a mask because of a health condition.

to use such masks even when in "*open spaces* […] *whose physical features encourage the creation of gatherings, including spontaneous and/or occasional ones*". The D.P.C.M. issued on September 7th, 2020 extended the validity of the measures adopted with the D.P.C.M. of August 7th and the Ordinances of August 12th and 16th until October 7th, 2020.

Indeed, October 7th was quite the turning point. On that day, first of all, the Council of Ministers established an extension of the state of emergency until January 31st, 2021 (instead of October 15th, 2020), on the grounds that "*the emergency cannot be considered as terminated*" and "*the current risk situation imposes the prosecution of extraordinary measures*".[79] This being said, the current end date for the state of emergency is actually July 31st, 2021, since a new extension was decided in April.[80]

In close order, D. L. no. 125/2020 was adopted ("*Urgent measures connected to the extension of the state of emergency and for the continuity of the alert system, as well as for the transposition of EU Directive 2020/739 of June, 3rd*"). This decree (turned into Law no. 159/2020, issued on November 27th) immediately changes the provisions concerning the end date of the emergency both in D. L. no. 19/2020 (Article 1, par. 1, lit. *a*) and in D. L. no. 33/2020 (Article 1, par. 2, lit. *b*). Secondly, it modifies Article 1, par. 16, of D. L. no. 33/2020, thus banning Regions from adopting expansion measures other than the ones provided for by the D.P.C.M.s.

Most importantly, Article 1, par. 1, lit. *b* of D. L. no. 125/2020 adds litt. *hh-a* to Article 1, par. 2, of D. L. no. 19/2020, according to which it is compulsory to "*always have on one's person a respiratory protective device*" (RPD) and the "*possibility to provide for its mandatory use in indoor spaces expect for private homes* […]" is introduced.

Indeed, the breach of containment measures listed by Article 1, par. 2, of D. L. no. 19/2020, as we saw, is subject to an administrative fine (Article 4, par. 1, of D. L. no. 19/2020). As a consequence, starting from October 8th, 2020, the simple fact of not "*always having a respiratory protective device on one's person*" may be punished with a fine from 400 to 3,000 Euros. Even though we do not intend to criticise the importance of a continuous use of RPDs, such a penalty seems excessive. Indeed, based on a purely literal reading, the offence that is at stake here does not consist of "not wearing" an RPD, but simply "not having it on one's person".

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[79] Resolution of the Council of Ministers of October 7th, bearing the title "*Extension of the state of emergency subsequent to the health risk of transmission of virus agents*", in *Gazzetta Ufficiale*, no. 284 of October 7th.

[80] Resolution of the Council of Ministers of April 21st, 2021, in *Gazzetta Ufficiale*, no. 103 of April 30th.

This being said, this provision only remained in force from October 8th to October 13th: as of this date, indeed, Article 1, par. 1, of a newly adopted D.P.C.M. formally introduced the obligation to "*always have a respiratory protective device on one's person [and to] wear it in all indoor places, except private homes, as well as in all outdoor spaces* […]".

So, it seems that, starting from the month of May, and then from August onwards, the axis of control switched from to "if" to "how" to exercise individual freedom of movement: the point is no longer to prohibit movements *as such*, but to control them and subordinate them to compliance with certain conditions (*e.g.*, always wearing a D.P.R.; not crossing a certain border; not meeting more than a certain number of persons; not moving without a valid reason). So, we witness a process of fragmentation and parcelling up of personal freedom of movement: such freedom can be exerted, but only to some ends and to a certain extent, according to the decisions taken by the Government depending on the trend of infections.

Another step is taken with D.P.C.M. issued on October, 18th, which intervenes in the matter of freedom of assembly as well. Indeed, rather than regulating personal movements, this Decree concerns the management of possible situations of contact and contagion on the occasion of gatherings. This D.P.C.M. adds to Article 1, par. 2 of D.P.C.M. of October 13th a new par. 2-*bis*, establishing that "*streets and squares in which gathering is possible, may be closed to the public after 9 p.m.* […]"; this provision was later on reinforced by Article 1, par. 9 of the D.P.C.M. issued on October, 24th.

On the opposite side, concerning the measure of quarantine and fiduciary isolation, neither D. L. no. 125/2020 nor the D.P.C.M.s issued in October have changed anything. On October 12th, 2020, however, the Minister of Health adopted an Administrative Circular bearing the title "*Indications for the length and the time-limit of isolation and quarantine*" and making a proper distinction between asymptomatic carriers (they may "*re-enter the community*" after a ten-day period of isolation starting from the first day of positivity, and only following a negative nasal swab) and symptomatic sufferers (they may "*re-enter the community*" after a ten-day period of isolation starting from the first day of symptoms, and only following a negative nasal swab taken three days after the first day without symptoms). Lastly, long-term symptomatic and asymptomatic carriers may interrupt their isolation if they do not show symptoms 21 days from the first day of symptoms; people who have had "*close contact with two confirmed and identified Covid-19 positive cases*" should observe a 14-day isolation period starting from the last contact with the infected person or 10-days isolation following a negative nasal swab.

In spite of the provisions adopted from August onwards, the pandemic sit-

uation continued to worsen and needed to be drastically handled. So, anther D.P.C.M. was issued on November 3rd, 2020, thus replacing the previous provisions and dramatically changing gear. In particular, the measures set out in this D.P.C.M. concerned two different scopes.

On a *national* level, Article 1, par. 3 of D.P.C.M. of November 3rd establishes a nationwide curfew from 10 p.m. to 5 a.m., except for movements needed for work, necessity or health reasons. In addition, it is "*strongly suggested*" to stay at home also for the rest of the day, if not for work, study, health and other necessities.

On a *regional* level, Articles 2 and 3 of this D.P.C.M. provide for two special scenarios, imposing different rules and restrictions according to the intensity and gravity of the pandemic in the single Region.

Article 2 applies in case of "*high intensity and risk*" of contagion: all displacements in and out of these territories (which are identified by the Minister of Health[81]) are prohibited, except those based on proven work-related reasons, necessity or health; also, all displacements towards a different municipality are not allowed. Except for Article 3, all the remaining provisions of D.P.C.M. of November 3rd are applicable, if more rigorous than the ones in place in the concerned Region.

Article 3 concerns Regions with "*maximum intensity and high risk*" of contagion. In these situations, *inter alia*, all kind of movements are prohibited, and the majority of productive activities are suspended. All other measures of D.P.C.M. of November 3rd can be applied, if more restrictive.

The measures adopted in the month of November proved to be working, and infections slowed. Nevertheless, it was deemed necessary to develop a framework for the crucial months of December and January, especially in light of the Christmas holidays.

Therefore, D. L. no. 158/2020, bearing the title "*Urgent provisions to tackle the health risks related to Covid-19*", was adopted on December 2nd; we will hereby focus on its Article 1.

First of all, Article 1, par. 1 of D. L. no. 158/2020 modifies Article 1, par. 1, of D. L. no. 19/2020, thus extending the period of validity of the future restrictions adopted by means of the D.P.C.M. from 30 to 50 days.

Secondly, Article 1, par. 2 of D. L. no. 158/2020 forbids any movement between Italian regions from December 21st 2020 until January 6th 2021. Also, during the days of 25th-26th of December 2020 and the 1st of January 2021,

[81] Upon consulting the Presidents of the Regions involved, based on the scientific results of the monitoring of the epidemic situation and following advice from the Technical-Scientific Committee.

travel between different municipalities is not permitted, except for work, health or other necessities.

Eventually, the third par. of Article 1 of D. L. no. 158/2020 allows D.P.C.M.s based on Article 2 of D. L. no. 19/2020 to provide for specific measures (among those provided for by Article 1, par. 2 of D. L. no. 19/2020 itself), even *regardless* of the classified risk of contagion, for the period from December 21st 2020 to January 6th 2021.

In order to implement D. L. no. 19, no. 33 and no. 158/2020, a further D.P.C.M. was enacted on December 3rd, 2020. Its provisions supersede those of the D.P.C.M. of November 3rd (except for Article 8, par. 6) and stay in force until January 15th, 2021.

In particular, Article 1, par. 3 of the D.P.C.M. issued on December 3rd reiterates the curfew already established by the previous D.P.C.M. and adds a "special curfew" (from 10 p.m. to 7 a.m.) for the days of December 31st and January 1st. The restrictions on movement already contained in D. L. no. 158/2020 are reproduced in Article 1, par. 4.

The last pandemic-related normative act that we will be dealing with is D. L. no. 172/2020, issued on December 18th, 2020, and bearing the title "*further measures to tackle health risks related to the spread of Covid-19 virus*".[82] This decree specifically focuses on the Christmas holiday period and provides an even more detailed and specific regulation for personal movements during those days. In so doing, D. L. no. 172/2020 strongly contributes to the above-mentioned process of fragmentation of personal freedom of movement.

Thus, its Article 1, par. 1 establishes that the provisions referred to by Article 3 of the D.P.C.M. issued on December 3rd are valid nationwide from December 24th to January 6th. As a consequence, the whole country shall be considered as subject to a "*maximum intensity and risk*" of contagion.[83] As for the days of December 28th, 29th, 30 and January 4th, the provisions applicable nationwide are those contained in Article 2 of D.P.C.M. issued on December 3rd, which concerns a territory subject to a "*high intensity and risk*" of contagion.[84]

Lastly, and most importantly, Article 1, par. 2 of D. L. no. 172/2020 contains two – actually unnecessary – statements indirectly and directly concerning criminal law.

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[82] Converted, with modifications, into Law no. 6 of January 29th, 2021. This Law also abolishes D. L. no. 158/2020.

[83] Nevertheless, between 5 a.m. and 10 p.m. a maximum of two people is allowed to pay visit to a private home, provided they do not go beyond the borders of the region.

[84] However, personal movements within 30 km of one's home municipality are allowed, in cases where the population of said municipality did not exceed 5,000 persons.

This branch of law is indirectly affected by Article 1, par. 2 of the above-mentioned decree, which states that "*all measures taken on the grounds of Article 2, paragraph 1, of Decree Law no. 19/2020 remain in force*". This simply means that the anti-contagion measures that have so far been taken on those grounds retain their validity. As a consequence, the adoption of such measures via D.P.C.M.s – although problematic in respect to the principle of legality in criminal matters, as we have tried to point out – is further legitimised. Indeed, pursuant to Article 2, par. 1 of D. L. no. 19/2020, "*the measures referred to by Article 1, paragraph 1, are adopted by means of one or more Decrees issued by the Prime Minister* […]".

Secondly, Article 2, par. 1 of D. L. no. 172/2020 directly concerns criminal law insofar as it asserts that "*violations of the present Decree Law shall be punished pursuant to Article 4 of Decree Law no. 19/2020*".

From the point of view of its normative force, this statement[85] is absolutely superfluous, since it simply reaffirms the validity of a provision which has never been doubted. In light of the above-mentioned slight difference between the criminal conduct outlined in Article 4, par. 6, of D. L. no. 19/2020 and that provided for by Article 2, par. 3 of D. L. no. 33/2020, we could suggest that the provisions of Article 2, par. 1 of D. L. no. 172/2020 establish a "supremacy" of the "*absolute prohibition on leaving*" (Article 4, par. 6 of D. L. no. 19/2020) above the "*prohibition on moving*" (Article 2, par. 3 of D. L. no. 33/2020).

Also, we could seek the real meaning of Article 2, par. 1 of D. L. no. 172/2020 elsewhere, and precisely in its communicative capacity. Indeed, by merely reaffirming that "*violations of the present Decree Law shall be sanctioned pursuant to Article 4 of Decree Law no. 19/2020*", the provision at issue actually aims to create a deterrent effect on society as a whole. In other terms, it is once again asserted that criminal law keeps watching over the precarious relationship between "freedom" and "risk".

[85] A statement that can be found also in Article 2 of D. L. no. 2/2021 (Law no. 6/2021); Article 2 of D. L. no. 12/2021; Article 3 of D. L. no. 15/2021; Article 1, par. 7 of D. L. no. 44/2021 and Article 15 of D. L. no. 65/2021.

THE USE OF CRIMINAL LAW TO FIGHT COVID-19-RELATED EMERGENCIES AND THE DANISH CASE: *PLACEBO* OR *PANACEA*?

by *Alice Giannini*

1. *Introduction: On panpenalism, penal populism and war-like metaphors*

The purpose of this paper is to conduct an analysis of the role of criminal law in the fight against the Covid-19 emergency in Denmark. By adopting reflections typical of the Italian criminal legal scholars on *panpenalism*,[1] i.e. the pathological expansion of the field of application of criminal law, the investigation will focus on the interplay between how criminal sanctions have been used and portrayed as an efficient tool to fight the pandemic in the Danish legal system, and the role played by the *media discourse*.[2]

To begin with, it is undoubted that the Covid-19 crisis poses unprecedented risks which lead to legal responses. Yet, when it comes to criminal law and

[1] The word (*panpenalismo* in Italian) is derived by attaching the Greek prefix "*pan-*", which means "all, every, whole, all-inclusive" to "*penalismo*" which in Latin-derived languages means "inherent to the criminal area", as in referring to that specific branch of law. It can be referred to as "criminal law hypertrophy" or "criminal maximalism".

[2] «*Media discourse refers to interactions that take place through a broadcast platform, whether spoken or written, in which the discourse is oriented to a non-present reader, listener or viewer*» in A. O'KEEFFE, *Investigating Media Discourse*, Londra, 2006, p. 31.

its basic principles, certain questions arise: is "criminal maximalism" the way to go, or has criminal law been used as a palliative to quiet concerned citizens? What was the role of media discourse in the depiction of the "criminal law vs. coronavirus" conflict? This paper will explore such questions, using Danish Covid-19 emergency law as a paradigm for a broader investigation into the tangled idea of using criminal law to deal with emergencies.

At the outset, it can be observed that many countries, including Italy,[3] have adopted emergency law and regulations correlated with criminal sanctions in case of noncompliance, as a fast-response to compel people to comply with lockdown measures. As a matter of fact, the spread of the virus has been accompanied by a more subtle – and likely characterized by longer-lasting side effects – expansion of a phenomenon referred to as *panpenalism*: a distorted usage of criminal law as the cure-all in the fight against new emerging issues.[4]

Indeed, *panpenalism* is nothing new. Italian academics, for example, have been denouncing the tendency of Italian legislators to regulate with a populist

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[3] The sanction in Italy was established by article 3, paragraph 4 of Decree Law no. 6 of 23 February 2020 (*Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19*, d.l. 23 febbraio 2020, n. 6, converted with modifications by l. 5 marzo 2020, n. 13, in GU n. 61 del 9 marzo 2020) and was later confirmed by article 4, paragraph 2 of Decree of the President of the Council of Ministers of 8 March 2020 (*Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19*, in GU Serie Generale n. 59 dell'8 marzo 2020). The application of article 650 of the Italian Criminal Code was then repealed and noncompliance with the containment measures is today punishable with an administrative fine from €400 to €3,000 in accordance with article 4 of Decree Law no. 19 of 25 March 2020 (*Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19*, d.l. 25 marzo 2020, n. 19, converted with modifications by l. 22 maggio 2020, n. 35, in GU Serie Generale n. 79 del 25 marzo 2020). Afterwards, Decree Law no. 33 of 16 May 2020 was adopted (*Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19*, in GU Serie Generale n. 125 del 16 maggio 2020), providing implementing provisions for Decree Law no. 19/2020. In the last few months, Italy has been facing a stratification of new norms. Nevertheless Decree Law no. 19/2020 and Decree Law no. 33/2020 still represent the core of the criminal response to the spread of the virus in Italy. See Decree Law no. 125 of 7 October 2020 (*Misure urgenti connesse con la proroga della dichiarazione dello stato di emergenza epidemiologica da COVID-19 e per la continuità operativa del sistema di allerta COVID, nonché per l'attuazione della direttiva (UE) 2020/739 del 3 giugno 2020*, in GU Serie Generale n. 248 del 7 ottobre 2020); Decree Law no. 158 of 2 December 2020 (*Disposizioni urgenti per fronteggiare i rischi sanitari connessi alla diffusione del virus COVID*, in http://www.gazzettaufficiale.it/eli/gu/2020/12/02/299/sg/pdf GU Serie Generale n. 299 del 2 dicembre 2020) and Decree Law no. 172 of 18 December 2020 (*Ulteriori disposizioni urgenti per fronteggiare i rischi sanitari connessi alla diffusione del virus COVID-19*, in GU Serie Generale n. 313 del 18 dicembre 2020).

[4] D. PULITANÒ, *Lezioni dell'emergenza e riflessioni sul dopo. Su diritto e giustizia penale*, in *Sistema Penale*, 2020.

sentiment for a long time now, through norms directed at stimulating fear and uncertainty in citizens together as hatred of a common enemy.[5] In Denmark, the anti-terrorism legal packages introduced after 9/11 and subsequent terrorist attacks were defined as "far-reaching forms of criminalization with indeterminate scope", "pre-active in nature" with vague *actus reus* and *mens rea* requirements and therefore problematic from a rule-of-law point of view.[6] In the international arena, where significant debate is taking place, concepts such as populist punitiveness and penal populism were coined.[7]

Moreover, it is undoubted that criminal law hypertrophy, penal populism and the media discourse are deeply intertwined.[8] Indeed, if we focus on the last few months, this peculiar use of criminal law has gone hand in hand with extensive media coverage of both Corona-related news and norms: a situation that has been described with a play on words as "Communication Virus Disease".[9] Interestingly, what can be noticed is that the combination of these fac-

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[5] «*A criminal legislation which is employed in essence: a) more for its symbolic role than for its suitability to manage concrete problems; b) more for its ability to satisfy the expectations of the public than for its suitability to respond effectively to the social issues that are being raised; c) more for its suitability to spread an idea of order and security in the public than for its effective ability to control and repress criminal phenomena.* [Author's translation]». R. BIANCHETTI, *Sentimenti, risentimenti e politica criminale: un'indagine quali-quantitativa in tema di legislazione penale compulsiva*, in *Archivio penale*, n. 1, 2019, pp. 6-11. For an overview on criminal populism in the Italian scene, see *ex multis*: G. FIANDACA, *Populismo politico e populismo giudiziario*, in *Criminalia*, 2013; L. FERRAJOLI, *L'illusione della sicurezza,* Intervento al Festival del Diritto, 26 settembre 2018, available (in Italian) at: http://www.festivaldeldiritto.it/2008/pdf/interventi/ferrajoli.pdf.

[6] J. VESTERGAARD, *Pre-Active Anti-Terrorism Legislation: The Case of Denmark*, in *Scandinavian Stud.*, vol. 60, 2015, p. 1.

[7] For an overview of current crime policy, see J. PRATT, *Penal populism*, London, 2007. For an analysis of transformations of criminal law in the main English-speaking countries, see: J. PRATT, M. MIAO, *Risk, populism, and criminal law*, in *New Crim. L. Rev.*, vol. 22(4), 2019. For a critical analysis of the scholarly debate on punitiveness and penal populism, see: R. MATTHEWS, *The myth of punitiveness*, in *Theoretical Criminology*, vol. 9, 2005. Proposing a restricted definition of penal populism, R. CORNELLI, *Contro il panpopulismo. Una proposta di definizione del populismo penale*, in *Diritto penale contemporaneo*, vol. 4, 2019, pp. 128-142.

[8] R. BIANCHETTI, *Sentimenti, risentimenti e politica criminale: un'indagine quali-quantitativa in tema di legislazione penale compulsiva*, cit., p. 10. More on this theme: F. PALAZZO, *Mezzi di comunicazione e giustizia penale*, in *Politica del diritto*, vol. 2, 2009; R. BIANCHETTI, *La paura del crimine. Un'indagine criminologica in tema di mass media e politica criminale ai tempi dell'insicurezza*, Milano, 2018; F. PALAZZO, *Paura del crimine, rappresentazione mediatica della criminalità e politica penale (a proposito di un recente volume*), in *MediaLaws. Rivista di diritto dei media*, vol. 3, 2018.

[9] M. PAPA, *Decreti e norme vaghe tradotti sui media: la comunicazione che inquina il diritto*, in *Il Dubbio*, 21 April 2020, available (in Italian) at: https://www.ildubbio.news/2020/04/21/decreti-e-norme-vaghe-tradotti-sui-media-la-comunicazione-che-inquina-il-diritto/.

tors has led to the creation of a new vocabulary of terms referring specifically to the interaction of criminal law and Covid-19 (an occurrence which is not new to languages of Germanic nature, which often, and pragmatically so, create new idioms through the pairing of existing words). For example, newspapers in Denmark started referring to "*corona-kriminelle*" and "*coronaregler*".[10] Similarly, Dutch criminal courts started dealing with the first "*coronamisdrijven*",[11] in particular cases of life-threatening behavior with reference to acts of "*coronahoester*" and "*coronaspurger*".[12-13]

Likewise, it can be observed how often these criminal tools and, in general, government responses to the virus, have been associated with war-like metaphors. «*Vi er i krig*» stated the Danish Justice Minister Nick Hækkerup.[14] As brilliantly expressed by a journalist, «*The Covid-19 emergency is almost everywhere addressed with war-like language: there is talk of the trenches in hospitals, of the virus front line, of war economy [...] according to the consolidated tradition of populists who thrive only when there is an external enemy to repel, if possible by force*».[15] As a consequence, citizens are led to blindly comply with norms posing as saviors of the society. Similarly, the combination of the new "Corona-vocabulary" with war metaphors leads us to isolate different enemies: first and foremost Covid-19, but also corona-criminals such as plague-spreaders and thieves of face masks. This depiction of those who do not follow through with restrictions (or who take advantage of the emergency situation) as enemies of the state who should be punished with criminal sanctions could be nothing less than another example of "criminal law of the enemy".[16] In the following paragraph, these reflections will be used to analyze Denmark's criminal response to corona-crimes.

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[10] Respectively Danish for "corona criminals" and "corona rules".

[11] Dutch for "corona crimes".

[12] Literally translated as "corona-spitting" and "corona-coughing".

[13] For a categorization of "corona-crimes", see the decision of the Rotterdam District Court (Case number 10 / 077803-20), 30 march 2020.

[14] «We are at war». RANDAHL FINK ISAKEN, *Skal Danmark forandres på grund af coronavirus?*, in *Ekstra Bladet*, 28 March 2020, available (in Danish) at: https://ekstrabladet.dk/opinionen/randahfinkisaksen/skal-danmark-forandres-paa-grund-af-coronavirus/8069591.

[15] D. CASSANDRO, *Siamo in guerra! Il coronavirus e le sue metafore*, in *Internazionale*, 22 March 2020, available (in Italian) at: https://www.internazionale.it/opinione/daniele-cassandro/2020/03/22/coronavirus-metafore-guerra.

[16] The basis of this doctrine will not be analyzed in this paper, due to editorial restrictions. For a reconstruction of the international debate on criminal law of the enemy, see *ex multis*: M. DONINI, M. PAPA (eds), *Diritto penale del nemico. Un dibattito internazionale*, Torino, 2007.

2. *The legal framework for management of epidemics in Denmark*

Before addressing the core of this analysis, it is relevant to briefly introduce the Danish legal framework[17] with regards to health-related emergency situations. The management of epidemics in Denmark is disciplined by the *epidemielov* (Act on Measures against Infectious and Other Communicable Diseases, in short Epidemic Act),[18] which was modified by the Danish Parliament (*Folketinget*) first in March[19] and then again in April.[20]

The law, before the amendments, provided for a system based on five regional commissions (*epidemikommissioner*) which would come into being in the event of an epidemic. These commissions consist of police representatives (specifically, a police director appointed by the National Chief Police acting as chairman of the commission), health authorities and three local politicians elected by the regional council (§3). The *epidemielov* grants a number of far-reaching powers (Kapitel 3) to the commission, such as the possibility of or-

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[17] According to the Danish Constitutional Act, a Bill must be read three times in the Chamber before it can be passed. The following procedure is typical. First reading: At this stage, the main principles of the Bill are discussed, and spokespersons of the various political parties present their party's position on the Bill. Most Bills are sent on to one of the Parliament's committees, where Members of Parliament (MPs) debate the Bill in detail and produce a report on the basis of their deliberations. Second reading: The Bill is debated in full and in detail. The contents of the committee report form part of the debate and, if amendments have been proposed, these will be discussed as well. Following the debate, MPs vote on any amendments proposed. After the second reading, a Bill can be referred back to a committee, but in most cases it goes straight to the third reading. Third reading: Initially, MPs debate and vote on proposed amendments. If an MP wishes to take the floor, the Bill will be debated in its entirety. If no amendments have been proposed, MPs debate and vote on the Bill immediately. For the vote to be valid, half of the MPs (i.e. at least 90) must be present and take part in the voting. Bills are passed by a simple majority, i.e. more MPs must vote for the Bill than against it. When a Bill has been passed, it must be signed by the Queen and a Minister and then published on the website www.lovtidende.dk. Once this has been done, the Bill becomes law. FOLKETINGET, *The Tasks and Responsibilities of the Danish Parliament*, in *www.thedanishparliament.dk/en*, s.d.

[18] *Lov om foranstaltninger mod smitsomme og andre overførbare sygdomme* nr. 814 af 27. august 2009, med de ændringer, der følger af § 5 i lov nr. 656 af 8. juni 2016, jf. lovbekendtgørelse nr. 1026 af 1. oktober 2019, som ændret ved bekendtgørelse nr. 156 af 27. februar 2020, bekendtgørelse nr. 157 af 27. februar 2020, lov nr. 208 af 17. marts 2020 og lov nr. 359 af 4. april 2020.

[19] *Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme (Udvidelse af foranstaltninger til at forebygge og inddæmme smitte samt sikring af kapacitetsmæssige ressourcer m.v.)* nr. 208 af 13. mars 2020.

[20] *Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare* nr. 359 af 4. april 2020.

dering mandatory isolation, hospital observations and even forced hospitalization of individuals, or the banning of public events and group gatherings. The act also regulates crimes connected to the violation of its provisions in chapter 6. Article 29 provides for punishment with a fine or up to six months of imprisonment – unless the act constitutes a more serious crime – for a series of actions including: violation of the duty to report to the police or to a doctor that a person is suffering from a generally dangerous illness (§21); violation of the order of the Epidemic Commission to be examined by a doctor and/or admitted for observation at a hospital (§5, stk. 1); violation of a compulsory isolation and hospitalization order by the Epidemic Commission (§ 6, stk. 1 and 3) and violation of the of the Epidemic Commission's order of lockdown of an area (§7).[21] On this matter, it should also be noted that the Criminal Code of Denmark criminalizes the transmission of dangerous contagious diseases:

> §192 *Anyone who, in violation of the regulations given by law or pursuant to law to prevent or counteract a contagious disease, causes the danger that such a disease will gain entry or spread among humans, shall be punished by imprisonment for up to 3 years.*
> *Stk. 2. If the illness is such that according to the law it must be subjected to, or at the time when the act is committed, is subject to public treatment, or if special measures against its introduction have been taken in the kingdom, the punishment shall be imprisonment for up to 6 years.*
> *Stk. 3. Anyone who, in the manner specified, causes danger of a contagious disease finding its way into or spreading among livestock or cultivated plants, shall be punished by a fine or imprisonment for up to 2 years.*
> *Stk. 4 If the crime is committed with negligence, punishment shall be a fine or imprisonment of up to 6 months.*[22]

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[21] «*Kapitel 6 Straffebestemmelser m.v.*
§ 29. Medmindre højere straf er forskyldt efter anden lovgivning, straffes med bøde eller fængsel indtil 6 måneder den, der
1) overtræder § 21,
2) overtræder forbud eller undlader at efterkomme påbud meddelt efter § 5, stk. 1, § 6, stk. 1 og 3, § 7, § 11, stk. 2 og 3, § 12, stk. 1, og § 16, stk. 1.
Stk. 2. I forskrifter, der udfærdiges i henhold til loven, kan der fastsættes straf af bøde eller fængsel indtil 6 måneder for overtrædelse af bestemmelserne i forskrifterne».
Lov om foranstaltninger mod smitsomme og andre overførbare sygdomme nr. 814 af 27. august 2009, med de ændringer, der følger af § 5 i lov nr. 656 af 8. juni 2016, jf. lovbekendtgørelse nr. 1026 af 1. oktober 2019, som ændret ved bekendtgørelse nr. 156 af 27. februar 2020, bekendtgørelse nr. 157 af 27. februar 2020, lov nr. 208 af 17. marts 2020 og lov nr. 359 af 4 april 2020, available (in Danish) at: https://www.retsinformation.dk/eli/lta/2009/814.

[22] «*§ 192. Den, som ved overtrædelse af de forskrifter, der ved lov eller i medfør af lov er givet*

As the numbers of the spread of the infection started to rise, and as criticism towards the more "liberal" approach adopted by its neighbor Sweden began to attract the eyes of international media,[23] the Minister of Health (*Sundheds- og Ældreministeren*) proposed a bill to amend the Epidemic Act. These 'fast-tracked' amendments, which were approved unanimously,[24] shifted a consistent number of powers (*rectius*: all) from the regional Epidemic Commissions to the Government, and features a sunset clause, with expiration date on March 1st, 2021.[25] The bill also repealed the economic compensation measures directed at individuals hurt by the restrictions to their individual rights as a consequence of the Epidemic Commissions' decisions. As a reme-

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til forebyggelse eller modarbejdelse af smitsom sygdom, forvolder fare for, at sådan sygdom vinder indgang eller udbredes blandt mennesker, straffes med fængsel indtil 3 år.

Stk. 2. Er sygdommen en sådan, der ifølge lovgivningen skal undergives eller på den tid, da handlingen begås, er undergivet offentlig behandling, eller mod hvis indførelse i riget der er truffet særlige forholdsregler, er straffen fængsel indtil 6 år.

Stk. 3. Den, som på den angivne måde forvolder fare for, at smitsom sygdom finder indgang eller udbredes blandt husdyr eller nytte- eller kulturplanter, straffes med bøde eller fængsel indtil 2 år.

Stk. 4. Begås forbrydelsen uagtsomt, er straffen bøde eller fængsel indtil 6 måneder».

Straffeloven, lovbekendtgørelse nr. 976 af 17. september 2019, som ændret ved lov nr. 1425 af 17. december 2019, lov nr. 1426 af 17. december 2019 og § 3 i lov nr. 1563 af 27. december 2019, available (in Danish) at: https://www.retsinformation.dk/eli/lta/2019/976. For a comparative analysis of Criminal reaction to Covid-19 in Europe, see: TURANJANIN V., RADULOVIĆ D., *Coronavirus (COVID-19) and Possibilities for Criminal Law Reaction in Europe: A Review*, in *Iran J. Public Health*, vol. 49, suppl. 1, 2020, pp. 4-11.

[23] For an overall analysis of the legal foundations of the Swedish 'Pragmatic Approach' to Covid-19 and its interaction with Swedish legal culture, see A. SIMONI, *L'emergenza Covid-19 in Svezia: le basi giuridiche di un approccio pragmatico*, in *DPCE Online*, vol. 43, n. 2, 2020, available (in Italian) at: http://www.dpceonline.it/index.php/dpceonline/article/view/985.

[24] The expression "fast track" was used by the Danish Institute for Human Rights in the European Union Agency for Fundamental Rights (FRA) Report, *Coronavirus COVID-19 outbreak in the EU, Fundamental Rights Implications*, 20 March 2020, available at: https://fra.europa.eu/sites/default/files/fra_uploads/denmark-report-covid-19-april-2020_en.pdf. As reported by K. CEDERVALL: «The Parliament adopted the amendments unanimously in just 12 hours. This is highly unusual. Both because unanimous decisions are rare in a parliament with 14 parties and a strong tradition of minority governments (we have had only one very short-lived majority government since 1973), and because 12 hours to debate a step of this magnitude is far from normal (normal lawmaking procedure dictates 30 days», K. CEDERVALL, *Something is forgotten in the State of Denmark: Denmark's Response to the COVID-19 Pandemic*, in *Verfassungsblog: On Matters Constitutional*, available at: https://verfassungsblog.de/something-is-forgotten-in-the-state-of-denmark-denmarks-response-to-the-covid-19-pandemic/.

[25] *Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme*, nr. 208 af 17. marts 2020, available (in Danish) at: https://www.retsinformation.dk/eli/lta/2020/208.

dy, the Government provided for a series of *hjælpepakker* (aid packages) aimed at compensating both employers and employees who suffer economic damages from the health emergency.[26]

Lastly, on December 22, 2020 the Minister of Health (Magnus Heunicke) presented a proposal for a new Epidemic Act, which is currently undergoing consultation.[27] The new law will replace the current epidemic law and the annexed emergency laws (which, as mentioned above, will cease to be applicable after the 1st of March 2021) and is meant to change Denmark's general overall approach to the handling of epidemics. Remarkably, in an early draft the Government had introduced an amendment imposing compulsory vaccination but the provision was quickly expunged after heated protests.[28]

Amongst the most significant amendments in the version of the draft that is currently being discussed, it is worth mentioning the reinstatement of an Epidemic Commission (with an "advisory" role) and the establishment of mandatory parliamentary scrutiny before the government can implement a number of restrictions (§ 9). The latter will be carried out by a specific committee appointed in the *Folketinget* which will have to approve the most intrusive measures proposed by the Minister of Health (unless there is an imminent and acute danger or threat to public health, § 9 stk. 2). Notably, one of the newly introduced powers contained in the bill regards the possibility for the Minister to forcibly isolate and test groups of people who have participated in a specific event or assembly in the event an infection is discovered (currently this is possible only with regards to individuals) (§ 28).[29] Positively so, the draft pro-

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[26] For a broad overview of the economic measures adopted by the Danish Government see *inter alia*: M. SOESTED, N. VIDEBAEK MUNKHOLM, *COVID-19 and Labour Law: Denmark*, in *Italian Labour Law e-Journal*, vol. 13, no. 1S, 2020, available at: https://illej.unibo.it/article/view/10803/10710.

[27] Sundheds- og Ældreministeriet, *Forslag til lov om epidemier m.v. (epidemiloven)*, nr. 134 af 22. december 2020, available (in Danish) at: https://www.ft.dk/ripdf/samling/20201/lovforslag/l134/20201_l134_som_fremsat.pdf.

[28] Sundheds- og Ældreministeriet, Udkast til Forslag til Lov om epidemier m.v. (epidemiloven), 9 October 2020, available (in Danish) at: https://www.ft.dk/samling/20191/almdel/SUU/bilag/591/2253666.pdf. §5. See also O. BATCHELOR, A.F. SCHEEL, *Tvangsvaccination slettet i aftale om ny epidemilov, der giver mere magt til Folketinget*, in *DR*, 18 December 2020, available (in Danish) at: https://www.dr.dk/nyheder/politik/tvangsvaccination-slettet-i-aftale-om-ny-epidemilov-der-giver-mere-magt-til.

[29] For a valuable summary of the main concerns regarding the new draft raised by civil society, M. BORRE, *Høringssvar viser stribevis af indsigelser mod ny epidemilov: »Der er tale om vidtgående indgreb i den enkelte borgers privatliv og frihed«,* Berlingske, 19 January 2021, available (in Danish) at: https://www.berlingske.dk/politik/hoeringssvar-viser-stribevis-af-indsigelser-mod-ny-epidemilov-der-er-tale. For a criticism on the introduction of the power to isolate

vides for the right to judicial review of injunction measures resulting in deprivation of liberty of individuals (§64, stk. 1) and the establishment of a Board of Appeal able to judge decisions taken under the Epidemic Act (§61).

Thus, this analysis will not focus on the constitutional and human rights aspects raised by the modification of the Epidemic Act, or on the adoption of the following lockdown measures by the Danish Prime Minister, Mette Frederiksen.[30] Rather, the emphasis will be placed on a connected piece of urgent legislation which has not – yet – attracted the spotlight of the academic scene, adopted on April 2, 2020. The law is titled "*Increased punishment for offences based on or committed in the context of Covid-19*" and amended the Danish Criminal Code, the Danish Code of Criminal Procedure and the Aliens Act in a pursuit to contrast the so-called *corona-kriminelle*[31] (corona criminals).[32] The

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and test groups of people, J. SCHNEIDER, *Ét smittetilfælde vil kunne tvinge en hel forsamling i isolation: »Jeg vil opfordre til, at man ikke vedtager den her lov«*, in *Berlingske*, 18 January 2021, available (in Danish) at: https://www.berlingske.dk/politik/et-smittetilfaelde-vil-kunne-tvinge-en-hel-forsamling-i-isolation-jeg-vil. For a more in-depth analysis of the relevant legal questions, see JUSTITIA-DANMARKS UAFHÆNGIGE JURIDISKE TÆNKETANK, *Høringssvar til forslag til lov om epidemier m.v. (epidemiloven)*, 15 January 2021, available (in Danish) at: http://justitia-int.org/wp-content/uploads/2021/01/Hoeringssvar-til-forslag-til-lov-om-epidemier-m.v.-epidemiloven.pdf; INSTITUT FOR MENNESKERETTIGHEDER, *Høringssvar til ny Epidemilov*, in https://menneskeret.dk, 15 January 2021; INSTITUT FOR MENNESKERETTIGHEDER, *Høringssvar vedr. udkast til Forslag til lov om epidemier m.v. (epidemiloven)*, in https://menneskeret.dk, 12 November 2020.

[30] For a general overview of Covid-19 Constitutional challenges in Denmark see K. CEDERVALL, *Something is forgotten in the State of Denmark: Denmark's Response to the COVID-19 Pandemic*, cit.; M. MAZZA, *Alcune osservazioni su diritto costituzionale, fonti primarie e contrasto al Coronavirus nell'esperienza danese*, in *DPCE Online*, vol. 43, n. 2, July 2020. For a global analysis of key legal certainty and human rights challenges in connection with the Danish Government initiatives' to prevent the spread of Covid-19 in Denmark see: ADVOKATSAMFUNDET-INSTITUT FOR MENNESKERETTIGHEDER, *COVID-19-tiltag i Danmark – retssikkerhedsmæssige og menneskeretlige konsekvenser*, 5 June 2020, available (in Danish) at: https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/monitorering/rapport_covid-19.pdf. For an overview of global legal responses to the pandemic in a comparative perspective, *inter alia*: *Comparative Covid Law – Osservatorio Covid Diritto Comparato*, available at www.comparativecovidlaw.it; *DPCE Online*, vol. 43, n. 2, July 2020, available at: http://www.dpceonline.it/index.php/dpceonline/article/view/1014.

[31] The words "corona-kriminelle" and "corona-kriminalitet" were coined by the press after the minister of Justice, Nick Hækkerup, announced the proposal of the bill. See, *inter alia*: L. DALSGAARD, N.S. NIELSEN, *OVERBLIK: Sådan har corona-kriminelle udnyttet krisen i Danmark*, in *DR*, 25 March 2020, available (in Danish) at: https://www.dr.dk/nyheder/indland/overblik-saadan-har-corona-kriminelle-udnyttet-krisen-i-danmark; L.K. SKOV, *Minister advarer coronakriminelle: Højere straffe på vej*, in *TV 2*, 25 March 2020, available (in Danish) at: https://nyheder.tv2.dk/samfund/2020-03-25-minister-advarer-coronakriminelle-hoejere-straffe-paa-vej; A.S. ALLARP, *Folketinget sviner straffeloven til med dets coronastraffe*, in *Information*, 8 April 2020, available (in Danish) at: https://www.information.dk/debat/2020/04/folketinget-sviner-straffeloven-dets-coronastraffe.

following paragraph will focus on the provisions of law no. 349/2020 as well as the process leading to its adoption in a criminal policy perspective. Specifically, special attention will be paid to the question of whether there was in fact the need for new criminal legislation to deal with a threat of public interest, or whether we can characterise this event as a prong of the general *panpenalism* phenomenon as previously explained.

3. *'Dropping the hammer': law no. 349/2020 – Increased punishment for offenses based on or committed in the context of Covid-19 (Lov om ændring af straffeloven, retsplejeloven og udlændingeloven – Skærpet straf for lovovertrædelser med baggrund i eller sammenhæng med Covid-19)*

Just as the news about the Epidemic Act started to be subject to vast media coverage, Danish national newspapers started picking up local news on thefts of hand sanitizer and other PPE from hospitals. Words like "corona-criminality" and "corona-crimes" started surfacing in media discourse.[33] Consequently, on the 26th of March, Danish Justice Minister Nick Hækkerup proposed an urgent bill to increase existing punishments in the criminal code for offenses based on or committed in the context of Covid-19. The urgent law was adopted by the *Folketinget* on 2 April 2020 and it consists of four articles which introduce modifications to the Criminal Code,[34] the Code of Criminal Procedure[35] and the Aliens Act.[36] The law was not adopted through the normal leg-

[32] *Lov om ændring af straffeloven, retsplejeloven og udlændingeloven (Skærpet straf for lovovertrædelser med baggrund i eller sammenhæng med covid-19)* nr. 349 af 2. april 2020, available (in Danish) at: https://www.retsinformation.dk/eli/lta/2020/349.

[33] See *supra* no. 10.

[34] *Straffeloven*, lovbekendtgørelse nr. 976 af 17. september 2019, som ændret ved lov nr. 1425 af 17. december 2019, lov nr. 1426 af 17. december 2019 og § 3 i lov nr. 1563 af 27. december 2019, available (in Danish) at: https://www.retsinformation.dk/eli/lta/2019/976.

[35] *Retsplejeloven,* LBK nr. 938 af 10. september 2019 med de ændringer, der følger af § 1 i lov nr. 1540 af 18. december 2018, § 2 i lov nr. 1541 af 18. december 2018, lov nr. 1544 af 18. december 2018, § 15 i lov nr. 1711 af 27. december 2018, § 2 i lov nr. 1719 af 27. december 2018, § 2 i lov nr. 329 af 30. marts 2019, lov nr. 370 af 9. april 2019, § 1 i lov nr. 463 af 29. april 2019, lov nr. 485 af 30. april 2019, § 5 i lov nr. 497 af 1. maj 2019 og § 2 i lov nr. 505 af 1. maj 2019 available (in Danish) at: https://www.retsinformation.dk/eli/lta/2019/938.

[36] *Udlændingeloven*, jf. lovbekendtgørelse nr. 1022 af 2. oktober 2019, som ændret senest ved lov nr. 1591 af 27. december 2019, available (in Danish) at: https://www.retsinformation.dk/eli/lta/2019/1022.

islative process (which mandates three readings and a minimum processing time of 30 days in the *Folketinget*), but rather through the emergency procedure (*hastelovgivningsproces*). This procedure entails the bill being subject to a shorter processing time and stakeholders (such as organizations) are not consulted.[37] As with the law amending the Epidemic Act, law no. 349/2020 is subject to a sunset clause providing for its repeal on 1 March 2021, and that the Minister of Justice submit a proposal for its revision by the 30th November 2020 (§4, stk. 3). For these reasons, on the 25th of November the Danish Minister of Justice proposed a draft bill to repeal the aforementioned art. 4 paragraph 3,[38] and subsequently, on the 13th of January 2021, it presented a second draft bill tackling the validity of the sunset clause. Such bill, which abolished § § 4, paragraph. 3, therefore repealing the sunset clause, was approved on its third reading on the 2nd of March 2021.[39]

The core of law no. 349/2020 is contained in §1. Art. 1 creates a new article § 81-d composed of four paragraphs in the 10th chapter of the Danish Criminal Code, which is dedicated to the determination of the punishment (*straffens fastsættelse*). The first subsection of the new §81d provides that punishment for a considerable number of crimes (theft and robbery, of course, but also falsification of official documents, unauthorized access to computer or data, extortion, violence and threats against public officials, to mention a few) may be increased by up to double if the crime was based on or committed in connection to the Covid-19 epidemic in Denmark. In the general remarks delivered when presenting the proposal, Justice Minister Nick Hækkerup provided the following practical example of application of the law: the theft of hand sanitizer from a pharmacy or a hospital for a total worth of 200 DKK (roughly €27) before the adoption of the bill would have been sanctioned with a fine of minimum 500 DKK (roughly €86) pursuant to § 276 of the Criminal Code. After law no. 349/2020, the same conduct could be punished with a prison sentence, which as a starting point, should be unconditional.[40]

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[37] For a deeper analysis of concerns raised by the adoption of the bill through the emergency procedure, see: ADVOKATSAMFUNDET-INSTITUT FOR MENNESKERETTIGHEDER, *COVID-19-tiltag i Danmark – retssikkerhedsmæssige og menneskeretlige konsekvenser*, cit., pp. 23-24.

[38] JUSTITSMINISTEREN, *Forslag til Lov om ændring af lov om ændring af straffeloven, retsplejeloven og udlændingeloven-Ophævelse af revisionsbestemmelse nr. 110*, 25. november 2020, available (in Danisht) at: https://www.ft.dk/ripdf/samling/20201/lovforslag/l110/20201_l110_som_vedtaget.pdf. For an overview on the Danish legislative process, see no. 17.

[39] JUSTITSMINISTEREN, *Forslag til lov om ændring af lov om ændring af straffeloven, retsplejeloven og udlændingeloven nr. 136*, 13 January 2021, available (in Danish) at: https://www.ft.dk/ripdf/samling/20201/lovforslag/l136/20201_l136_som_fremsat.pdf.

[40] *«Som et eksempel kan fremhæves den situation, hvor en person stjæler håndsprit fra f.eks.*

The second paragraph of §81-d provides for a further aggravation of the aforementioned circumstance, establishing that when one of the crimes listed in the first paragraph takes place in such circumstances that it results in an unjustifiable seeking or obtainment of one of the governmental *hjælpepakker*[41] (loan, credit, aid, subsidy or similar compensation from aid packages to counteract the harmful effects of the Covid-19 epidemic), punishment may be increased up to four times.

The third paragraph of §81-d dictates that the judge, when deciding whether to impose a fine as a punishment additional to another type of punishment pursuant to §50 co. 2 of the Criminal Code to the conducts prescribed in § 1 para 2 of law no. 349/2020, must place emphasis on the obtained or intended financial gain of the accused. Lastly, the fourth paragraph of §81-d establishes that the judge must always include as an aggravating circumstance for *any* offense (i.e. not just the one mentioned in art. 1 para 1 law no. 349/2020) the fact that the conduct took place with a background or in connection to the Covid-19 epidemic in Denmark.

With regards to the code of criminal procedure, the law (§2) extends the scope of §791-d, which regulates the blocking of websites through which certain criminal offenses are committed, to crimes based on or committed in connection with the Covid-19 epidemic in Denmark. Finally, the law (§3) modifies the rules regarding deportation of immigrants who have held legal residence in Denmark for more than eight years, providing that such individuals can be expelled from the country in the event they are sentenced to an unconditional custodial punishment determined in application of the aggravated circumstance prescribed by art. §81-d of the Criminal Code.

At the time that the bill was proposed, the Danish police districts had received 45 reports of fraud committed in connection to the coronavirus epidemic and sixteen reports of burglary, theft or attempted theft of PPE.[42] Interestingly, after the sensationalist news titles which created the figure of the "corona-criminal" character, calling for harsher punishments, not much was said

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en lægepraksis eller et hospital til en værdi af i alt 200 kr. Et sådant tilfælde vil udgøre tyveri efter straffelovens § 276 og vil som udgangspunkt skulle sanktioneres med en bøde på 500 kr., som er mindstebøden efter straffelovens § 287. Med lovforslaget forudsættes det, at der fremover for en sådan overtrædelse som udgangspunkt vil skulle fastsættes en kortere fængselsstraf, der som udgangspunkt bør være ubetinget». JUSTITSMINISTER NICK HÆKKERUP, *Almindelige bemærkninger – Forslag til lov om ændring af straffeloven, retsplejeloven og udlændingeloven*, 26 March 2020, available (in Danish) at: https://www.ft.dk/samling/20191/lovforslag/l157/20191_l157_som_fremsat.htm.

[41] See *supra*, par. 2.

[42] L. DALSGAARD, N.S. NIELSEN, *OVERBLIK: Sådan har corona-kriminelle udnyttet krisen i Danmark*, cit.

after the bill was adopted. «*One can safely say that the Folketing has found a big hammer and will drop it on those who deceive and swindle,*» stated the Danish Justice Minister Nick Hækkerup.[43] When asked for the reasons justifying the urgency behind the bill, the response of the Justice Minister was «[…] *there are cases where exceptional situations mean that the ordinary processing of a bill cannot be awaited. Recent weeks have brought several examples of criminals exploiting the serious and extraordinary situation we as a country find ourselves in for their own personal gain. Among other things, we have seen examples of criminals exploiting the citizens' trust in the authorities. It is absolutely crucial that we put an end to these forms of crime, as citizens' trust is essential in a time of crisis like this one. […] If we do not act now and act quickly, there is a risk that we as a society will subsequently be able to state that we should have imposed and tightened the penalties. That is a situation the government does not want to be in*».[44]

Concerns were raised, especially by those who will be directly involved with the practical consequences of the application of the law: the Danish Bar Council (*Advokatsamfundet*),[45] the Danish Institute for Human Rights,[46] and

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[43] «*Så man kan roligt sige, at Folketinget har fundet den store hammer frem og svunget den over for dem, som snyder og svindler*», FOLKETINGET, *Speech during the second reading of Bill No. 157*, available at: https://www.ft.dk/samling/20191/lovforslag/L157/BEH2-90/forhandling.htm.

[44] «*Der er dog tilfælde, hvor ekstraordinære situationer medfører, at den almindelige behandling af et lovforslag ikke kan afventes. De seneste uger har bragt flere eksempler på, at kriminelle udnytter den alvorlige og ekstraordinære situation, vi som land befinder os i, for deres egen vindings skyld. Der er bl.a. set eksempler på kriminalitet, som udnytter borgernes tillid til myndighederne. Det er helt centralt, at vi kommer disse for- 3 mer for kriminalitet til livs, da borgernes tillid er afgørende i en krisetid som den foreliggende […] Hvis vi ikke handler nu og handler hurtigt, er der en risiko for, at vi som samfund efterfølgende vil kunne konstatere, at vi burde have sat ind og skærpet straffene*». Spørgsmål nr. 102 fra Folketingets Retsudvalg vedrørende forslag til lov om ændring af straffeloven (Skærpet straf for lovovertrædelser med baggrund i eller sammenhæng med Covid-19) (L 157/2019), available (in Danish) at: https://www.ft.dk/samling/20191/lovforslag/L157/spm/102/svar/1648400/2173492.pdf. As observed by the Danish Bar Council and the Danish Institute for Human rights, «*Denmark is undoubtedly in a health crisis situation, where it may have been necessary within reasonable limits to legislate in an urgent manner with the errors and shortcomings that this may entail. One can, however, raise the question of whether there has been an extraordinary situation in relation to the crime picture, which has been able to justify a urgent implementation of the changes. When the government and the Folketing later evaluate the process, one should therefore reflect on whether all the changes that § 81 d sec. 1 entailed, was so urgent that they should be dealt with immediately, or whether a larger proportion of the changes should have been subject to the ordinary legislative procedure; with associated deadlines and better legal quality – and thus more long-term sustainable legislation as a result* [Author's translation]». ADVOKATSAMFUNDET-INSTITUT FOR MENNESKERETTIGHEDER, *COVID-19-tiltag i Danmark – retssikkerhedsmæssige og menneskeretlige konsekvenser*, cit., p. 24.

[45] The Danish Bar Association (*Advokatsamfundet*) submitted comments on the law proposal to the Committee on Legal Affairs of the Parliament. ADVOKATSAMFUNDET, *Bemærkninger til*

the Association of Danish Judges (*Dommerforeningen*).[47] In a letter sent by the Danish Bar Council to Parliamentary Legal Affairs Committee on March 31, the council highlighted how «*the bill challenges some important principles for the Danish rule of law*» since «*there is a big difference in the necessity of adopting emergency legislation to prevent theft of sanitizer and face masks from a hospital and to counteract the exploitation of NemID access information [common log-in internet credentials to all Danish banks and other governmental services] on the Internet, where the damage is not a matter of life and death*».[48]

Similar concerns were raised by the Danish Judges' Association, which labelled the law as an expression of an inappropriate form of criminal "detail-regulating" (*detailregulering*)[49] also referred to as "criminal justice micromanagement" (*strafferetlig micromanagement*) by Vestergaard.[50] Specifically, they pointed out how the Danish Criminal Code already offers the tools for judges to adjust punishments to the specific case through a system of mitigating and

forslag til lov om ændring af straffeloven (Skærpet straf forlovovertrædelser med baggrund i eller sammenhæng med covid-19), Retsudvalget 2019-20, L 157, bilag 11, available (in Danish) at: https://www.ft.dk/samling/20191/lovforslag/L157/bilag/11/2173300/index.htm.

[46] ADVOKATSAMFUNDET-INSTITUT FOR MENNESKERETTIGHEDER, *COVID-19-tiltag i Danmark – retssikkerhedsmæssige og menneskeretlige konsekvenser*, cit.

[47] The Judges' Association had expressed its concerns on the content of the bill with a letter to the Justice Minister (DOMMERFORENINGEN, *Brev til Justitsministeren i forbindelse med coronarelateret hastelov*, 26 March 2020, available in Danish at: http://dommerforeningen.dk/meddelelser/2020/brev-til-justitsministeren-i-forbindelse-med-coronarelateret-hastelov/) and was then officially requested by Committee on Legal Affairs (*retsudvalget*) of the Parliament to comment on the draft (DOMMERFORENINGEN, *Dommerforeningens bemærkninger til hastelov om corona-smitte*, Retsudvalget 2019-20, L 157, bilag 3, available in Danish at: https://www.ft.dk/samling/20191/lovforslag/L157/bilag/3/2170885.pdf).

[48] «*Lovforslaget udfordrer imidlertid nogle vigtige principper for den danske retsstat […] er er dog efter Advokatrådets vurdering stor forskel på nødvendigheden i at vedtagehastelovgivning for at modvirke tyveri af håndsprit og mundbind fra et hospital ogfor at modvirke udnyttelse af ex NemID-oplysninger på internettet, hvor skaden altandet lige ikke er et spørgsmål om liv og død*». ADVOKATSAMFUNDET, *Bemærkninger til forslag til lov om ændring af straffeloven (Skærpet straf forlovovertrædelser med baggrund i eller sammenhæng med covid-19)*, cit.

[49] «*Lovforslaget er efter Dommerforeningens opfattelse udtryk for en uhensigtsmæssig form for strafferetlig detailregulering, som i praksis risikerer at give anledning til besværlige fortolkningsproblemer*». DOMMERFORENINGEN, *Dommerforeningens bemærkninger til hastelov om corona-smitte*, cit.

[50] Prof. Jørn Vestergaard in U. DAHLIN, *Jurister om Hækkerups hastelov: Overlad strafudmålingen til domstolene*, in *Information*, 27 March 2020, available (in Danish) at: https:// www.information.dk/indland/2020/03/jurister-haekkerups-hastelov-overlad-strafudmaalingen-domstolene.

aggravating circumstances. In other words, courts could have imposed harsher sanctions on corona-criminals even without an *ad hoc* aggravating circumstance. One must not forget that modern criminal codes are organized ("fine meshed"[51]) systems where norms are intertwined and follow a logical scheme. As a consequence, criminal norms, by nature, have a tendency of being closed towards external influences.[52]

With regards to the content of the bill, the Bar Council noted how the wording "based on or in the context of" is too broad and vague, therefore threatening the principle of legality. This is enhanced by the fact that the remarks accompanying the bill state that such a condition implies «*that the offense in question must have been wholly or partly motivated by or aimed at exploiting the situation in the country*», therefore calling for a difficult assessment of an offender's interior motives.[53]

Moreover, according to the Justice Minister, the violation of § 81-d, hence the realization of the aggravating circumstance of having committed a crime "based on or in the context of the Covid-19 Epidemic in Denmark", should be presumed when the violation regards aid packages to counteract the harmful effects of the Covid-19 epidemic or PPE such as hand sanitiser and bandages or other resources which are scarce in the current situation. Similarly, «*it should generally be assumed that the violation is based on or has been committed in the context of the covid-19 epidemic in Denmark if the defendant, under the pretext of the covid-19 epidemic, pretends to represent the health authorities or other similar subjects, in order to gain access to a citizen's home, social security number, NEM-ID and other similar information*».[54] On this matter, the Pres-

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[51] «*Her vil jeg blot pege på, at straffeloven og de deri indeholdte strafferammer udgør et finmasket system, hvor strafferammerne hænger indbyrdes sammen. Hæver man strafferammen meget i en bestemmelse for særlige forhold, skal man holde sig ikke mindst proportionaliteten for øje. Hvordan ser straffen ud for stort set lignende tilfælde bare i andre sammenhænge?*». DOMMERFORENINGEN, *Brev til Justitsministeren i forbindelse med coronarelateret hastelov*, cit.

[52] For a reflection on criminal legal systems as "networks" of norms and the impact of decodification, see: M. PAPA, *Fantastic Voyage. Attraverso la specialità del diritto penale*, II ed., Torino, 2019, pp. 159 ff.

[53] «*Betingelsen om, at overtrædelsen har baggrund i eller sammenhæng med covid-19-epidemien i Danmark" indebærer, at den pågældende lovovertrædelse helt eller delvis skal have været motiveret af eller have til formål at udnytte den situation i landet, som covid-19-epidemien i Danmark har medført*». JUSTITSMINISTER NICK HÆKKERUP, *Almindelige bemærkninger-Forslag til lov om ændring af straffeloven, retsplejeloven og udlændingeloven*, 26 March 2020, available (in Danish) at: https://www.ft.dk/samling/20191/lovforslag/l157/20191_l157_som_fremsat.htm.

[54] «*Det må dog i almindelighed antages, at en overtrædelse af de i den foreslåede § 81 d, stk. 1, nævnte bestemmelser har baggrund i eller sammenhæng med covid-19-epidemien i Danmark, hvis overtrædelsen vedrører hjælpepakker til imødegåelse af skadevirkninger ved covid-19-epidemien*

ident of the Danish Judges' Association, Mikael Sjöberg, enucleates an interpretation problem: if, on the one hand, the expression "based on or in the context of" entails that there must have been an element of exploitation of the situation by the defendant, then the newly introduced § 81-d would be punishing a specific deplorable conduct. On the other hand, if it were only necessary that crimes be motivated by the situation in Denmark as a consequence of Covid-19, then the application would be challenging. Think of the trivial case of a person stealing a small number of face masks in order to be able to care for her infected mother without risking infecting her whole family.[55] Finally, the *Dommerforening* addressed the fact that the Ministry of Justice accompanied the proposal of the bill with a list of very specific examples,[56] an action regarded «*pedagogically perhaps very good, but a somewhat inappropriate way of legislating*» since examples are not adequate to reflect daily life as they do not allow for reasonable exceptions.[57]

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eller værnemidler såsom håndsprit og mundbind eller andre knappe ressourcer i den aktuelle situation. Ligeledes må det i almindelighed antages, at overtrædelsen har baggrund i eller sammenhæng med covid-19-epidemien i Danmark, hvis den tiltalte under påskud af covid-19-epidemien udgiver sig for at repræsentere sundhedsmyndighederne eller lignende med henblik på at få adgang til en borgers hjem, CPR-nummer, NemID eller lignende». JUSTITSMINISTER NICK HÆKKERUP, *Almindelige bemærkninger – Forslag til lov om ændring af straffeloven, retsplejeloven og udlændingeloven*, cit.

[55] «*Hvis bemærkningen derimod kan læses sådan, at den også går på forbrydelser, der er motiveret af, menso ikke har karakter af ud yttelse, helt eller delvis skal have været otiveret af…den situation i landet,som covid-19-epdemien i Danmark har medført)kan man overveje, om den ikke kommer til at rammeskævt. For eksempel kunne man forestille sig, at en person, hvis 85-årige mor er Coronasyg, begår et tyveriaf (et mindre antal) værnemidler for at kunne pleje moderen uden risiko for at selv at blive smittet eller forat risikere at smitte sin egen familie. Tilsvarende kunne man forestille sig, at to personer i et supermarkedkom op at slås om at få fat i den sidste flaske håndsprit eller lignende. I sådanne situationer, hvor denstrafbare handling ikke begås for at udnytte Covid 19-situationen, men ikke desto mindre er motiveret afsituationen, nemlig den desperation, den forårsager, forekommer det umiddelbart mindre rimeligt atanvende de så stærkt forhøjede strafferammer. Omvendt kan man også i disse tilfælde sige, at der tale ombeskyttelse af knappe ressourcer i en særlig situation*». DOMMERFORENINGEN, *Dommerforeningens bemærkninger til hastelov om corona-smitte*, cit.

[56] JUSTITSMINISTER NICK HÆKKERUP, *Almindelige bemærkninger – Forslag til lov om ændring af straffeloven, retsplejeloven og udlændingeloven*, cit.

[57] «*Forslaget er så vidt jeg ved – for dommerne har ikke set det – fyldt med eksempler. Det er pædagogisk måske meget godt, men en noget uhensigtsmæssig måde at lovgive på. Eksempler kan aldrig dække dagligdagens virkelighed. Med eksempler risikerer man at snævre, hvor det er utilsigtet, og åbner ikke for rimelige undtagelser. Lad mig give et eksempel på det sidste: Hvordan stiller man sig til den sygeplejerske, der fra sin arbejdsplads – hospitalet – tager en flaske håndsprit med hjem for at beskytte sig og familien ? Skal hun for dette arbejdspladstyveri – for det er det –*

As of 22nd of July 2020, the Danish Police reported that out of 50 total reports of theft of hand sanitizer and protective masks filed since March, they charged 29 subjects, with the vast majority of cases referring to March and April.[58] In the period from the 2nd of April 2020 to the 14th of November 2020, according to the statements of the Danish Attorney General (*Rigsadvokat*), 30 judgments have been handed down where the punishment was determined according to the harsher rule provided in § 81-d, stk. 2.[59] Likewise, the Special Prosecutor for Exceptional Economic and International Crime (*Statsadvokaten for Særlig Økonomisk og International Kriminalitet, SØIK*) stated that, as of the 8th December 2020, it had received 178 reports of fraud relating the Covid-19 relief packages. In the Ministry of Justice's view, «Danish society is still looking at a crime picture that corresponds to that which, in the spring of 2020, called for the adoption of law n. 349/2020».[60] Interestingly, the main argument in the bills' proposals of the Justice Minister justifying the request to extend the application of the sanctions contained in law no. 349/2020 is the continuation of the Covid-19 epidemic in Denmark, rather than the continuation of a worrisome criminal scenario (which, as some argued, never existed in the first place[61]). As was stated by Kristian Hegaard, spokesperson of Danish Social Liberal Party (*Radikale Venstre*): «It makes no sense. Denmark is in a health crisis – not a crime crisis. The infection rates are high – not the number of crimes. Hand sanitizer has not been a scarce resource for months, so the basis on which the law

idømmes en fængselsstraf?». DOMMERFORENINGEN, *Brev til Justitsministeren i forbindelse med coronarelateret hastelov*, cit.

[58] A. HECKLEN, E. SØNDERGÅRD INGVORSEN, *Politiet har fået 50 anmeldelser om tyveri af håndsprit og værnemidler: 'Kan give straf som ved knivvold'*, in *DR*, 22 July 2020, available (in Danish) at: https://www.dr.dk/nyheder/penge/politiet-har-faaet-50-anmeldelser-om-tyveri-af-haandsprit-og-vaernemidler-kan-give.

[59] «*Under covid-19-epidemien i Danmark er der desværre set en række eksempler på kriminalitet, som har baggrund i eller sammenhæng med epidemien. Det gælder ikke mindst svigagtig udnyttelse af hjælpepakkerne, hvor myndighederne modtager et stadigt stigende antal anmeldelser. Dette indebærer efter Justitsministeriets opfattelse, at det danske samfund grundlæggende stadig ser ind i et kriminalitetsbillede, som svarer til det, der i foråret 2020 nødvendiggjorde lov nr. 349 af 2. april 2020*». JUSTITSMINISTEREN, *Forslag til Lov om ændring af lov om ændring af straffeloven, retsplejeloven og udlændingeloven-Bemærkninger til lovforslaget*, 13 January 2021, 1, available (in Danish) at: https://www.ft.dk/samling/20201/lovforslag/l136/20201_l136_som_fremsat.htm.

[60] JUSTITSMINISTEREN, *Forslag til lov om ændring af lov om ændring af straffeloven, retsplejeloven og udlændingeloven*, cit., 2.1.2.

[61] «*Vi har ikke en kriminalitetskrise, vi har en sundhedskrise, og lad os stå sammen om at løse den*», S.E. AMMITZBØLL-BILLE (UFG), *Speech during the second reading of Bill no. 157*, 4 April 2020 available (in Danish) at: https://www.ft.dk/samling/20191/lovforslag/L157/BEH2-90/forhandling.htm.

was introduced no longer exists».[62] That brings up the following question: was there really an emergency situation calling for such urgent criminal legislation?

4. *Closing remarks: placebo or panacea?*

After examining the contents of the most recent amendments to the Danish Criminal Code, it is now possible to formulate a few final remarks of a wider scope. As it was cleverly claimed, the use of criminal law by national legal systems during the pandemic has been shifting between opposite poles: from a pathological (*panpenalistic*) or symbolic expansion of criminal punishment, on the one hand, to an approach based on a modulation of the offenses[63] on the other. One could argue that it is reasonable for any legal system to introduce norms directed at ensuring that life-saving equipment (such as respirators, hand sanitizer and face masks) is available to the community. Similarly, legislators could be justified in attaching a specific stigma, through the tightening of sanctions, to those who took advantage of the Covid-19 emergency situation. Nevertheless, such decisions can be justified only in situations of actual criminal crisis, especially when the tool used to affect the criminal legal system is a fast-track legislative process. When this factual factor is missing, the result is a maximalist use of criminal law.

Italy, as a matter of fact, bounced from one extreme to the other in a matter of twenty days: from expressly tying violations of the lockdown norms im-

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[62] «*Det giver ingen mening. Danmark står i en sundhedskrise – ikke en kriminalitetskrise. Smittetallene er høje – ikke antallet af forbrydelser. Håndsprit har ikke været en knap ressource i månedsvis, så grundlaget, loven blev indført på, er der ikke længere*». RITZAU, *Regeringen vil have hårde coronastraffe året ud*, POLICY WATCH, 15 January 2021, available at: https://policywatch.dk/nyheder/christiansborg/article12693115.ece.

The representatives of the Red-Green Alliance party (*De Rød-Grønne-Enhedslisten*) and of the Danish Social Liberal Party (*Radikale Venstre*) voted against the adoption of law no. 249/2020 and were against the extension of its validity. See also K. HEGAARD, *Speech during the first reading of draft Bill no. 110,* 11 December 2020, available (in Danish) at: https://www.ft.dk/saming/20201/lovforslag/l110/beh1/forhandling.htm#t68924C542233449782137DDB3807CA3Atab3.

[63] «*Il ricorso alla sanzione "punitiva" si mostra, inoltre, oscillante tra una risposta sanzionatoria panpenalistica o simbolico-espressiva e una più equilibrata valorizzazione della scalarità dell'offesa (da noi, questa seconda via è stata imboccata almeno dal d.l. n. 19 del 2020)*». D. CASTRONUOVO, *Il diritto penale "al tempo della peste"*, in *Diritto virale. Scenari ed interpretazioni delle norme per l'emergenza Covid-19*, p. 70, available at: http://www.giuri.unife.it/it/coronavirus/allegati/VIRALECastronuovo.pdf/at_download/file.

posed by the Decrees of the President of the Council of Ministers[64] to article 650 of the Italian Criminal Code[65] (failure to comply with an authority's provision), to specifying an administrative fine, unless the fact constitutes a criminal offence.[66] In the Danish case, it could be claimed that prescribing a specific aggravating circumstance in relation to corona-crimes is an adequate tool to fulfil both general prevention and retribution as purposes of punishment. Nonetheless, it is possible to conclude that the criminal scenario in Denmark from the beginning of the Covid-19 emergency did not give rise in the first place to the need to fulfil them. In other words, there was no criminal emergency, hence there was no need for emergency criminal law.

In conclusion, it is possible to formulate the following reflections. *Panpenalism* is nothing new, it is just changing form. The diffusion of this phenomenon is indeed worldwide, like the pandemic, and the fact that the risk is a common one provides very fertile ground for legal comparisons. At the same time, politicians and consequently the media around the globe depict criminal law as an adequate and fast tool to ensure public safety in a criminal emergency: criminal law as the *panacea* for gaining consensus from worried citizens. Although there is no real criminal emergency, criminal punishment is portrayed as the way to eradicate the fear of corona crimes – without any attention to the tools provided by existing criminal legal frameworks, which are the result of a democratic process.[67] The result? A *placebo* effect.

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[64] See *supra* no. 3.

[65] Misdemeanor which can be punished with imprisonment of up to 3 months or with a fine of up to € 206.00.

[66] For a more in-depth analysis with regards to Italy, see *ex multis*: A. BERNARDI, *Il diritto penale alla prova del Covid-19*, in *Diritto penale e processo*, n. 4/2020, pp. 441-451.

[67] «*The tendency of criminal lawmakers to obtain social consensus by flattening themselves on media representation is at the origin of the well-known phenomenon of symbolic criminal legislation, i.e. lacking a real rationality of a safeguarding purpose. [...] First of all, given the "instantaneousness" of the media representation and its "wave-like" progress, the legislator is always struggling to keep up with the solicitations coming from the media system: numerous legislative initiatives mount up, rarely well analyzed in their premises, in their development and in their consequences. [...] But beyond that I would like to emphasize another consequence produced by the media system on criminal legislation. We are alluding to the phenomenon [...] of the so-called "photocopy laws": that is those laws that provide for new criminal cases built so to speak in the image and likeness of concrete criminal cases that have had a particular media resonance. These are cases that, far from filling in non-existent legislative gaps, have as their only intent to achieve the immediate conversion of the media representation in normative representation of crime, creating a normative snapshot of those particular criminal manifestations to which the media have given greater prominence* [Author's translation]», F. PALAZZO, *Mezzi di comunicazione e giustizia penale*, cit., p. 208.

MITIGATING THE COVID-19 PANDEMIC, BUT AT WHAT COST? HUNGARY'S EMERGENCY MEASURES IN LIGHT OF THE RULE OF LAW AS A EUROPEAN VALUE

by *Martina Coli*

1. *Introduction*

The unexpected and unprecedented challenge of the Covid-19 pandemic in the first months of 2020 obliged many European countries to resort to measures that, while containing the spread of the virus and mitigating its consequences, threatened consolidated principles of our societies, such as respect for fundamental rights and freedoms, democracy and the rule of law. In the context of the European Union, Hungary – the country that has departed the most from European values over the last ten years – set itself apart with the seriousness of the measures enacted, emerging once again the pioneer of rule of law regression. The series of emergency measures adopted to deal with the pandemic, starting with the introduction of the "state of danger" and the subsequent legislation expanding the government's powers, were in stark contrast with the rule of law and are difficult to reconcile with the founding values of the EU entrenched in Article 2 of the Treaty on the

European Union (TEU).[1] Those emergency measures are problematic in themselves, as they amount to a sort of legislative *carte blanche* granted to the executive, but also when read in light of the blueprint for an "illiberal state" pursued by the Orbán government over the last decade and the consequent fragile constitutional context of Hungary.

This work submits that the process of progressive departure from democracy, liberalism and the rule of law started by the Fidesz government in 2010 that has brought the country to the verge of authoritarianism has reached a new peak with the reorganisation of powers during the management of the Covid-19 pandemic. The dimension of this problem is not only national but indeed European, the rule of law being a foundational European value entrenched in Article 2 TEU, which, according to the case-law of the Court of Justice of the EU, requires separation of powers among the different branches of government.[2]

The first section will briefly summarise the constitutional dismantling in Hungary that has taken place since 2011. The real extent of the reforms adopted to tackle the Covid-19 pandemic must be appreciated in light of the process that removed the proper checks and balances constraining the executive power. The constitutional provisions providing for emergency powers, in particular the state of danger, will also be described.[3]

The second section will then address the Covid-related measures adopted by Hungary in the first year of the pandemic, namely in the period from March 2020 to March 2021.[4] The focus of the analysis will be on the measures that have had an impact on the constitutional structure and the distribution of powers in Hungary, resulting as a blank check for delegating powers to the government. The section will be divided in three parts that will discuss the different phases of emergency measures according to the legal regime in force.

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[1] Article 2 TEU states as follows: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

[2] Order in case C-791/19, *Commission v Poland*, para 66; Judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, para. 36.

[3] This chapter examines the constitutional provisions on the special legal orders as in force in 2020 as the relevant framework in which the Covid-related measures were adopted. Accordingly, it does not examine the constitutional amendment adopted on 16 December 2020 as it will enter into force in 2023 and thus falls outside the scope of the present analysis.

[4] This chapter was submitted for review on 31st January 2021. However, then the author updated the text with the most relevant facts that occurred until March 2021.

It is submitted that such measures are incompatible with the rule of law as a European value under Article 2 TEU.

Finally, the third section will look at the reaction of the EU institutions to the Hungarian situation and discuss whether some room exists for improvement.

2. *The constitutional context: a decade of democratic decay in Hungary*

2.1. *The fragile constitutional system of Hungary*

The current Hungarian constitution – the Fundamental Law of Hungary – was adopted in April 2011 as a priority of the new (overwhelming) parliamentary majority sustaining the government led by Viktor Orbán. It entered into force on the 1st of January 2012,[5] and replaced the previous constitution of 1989 which, through a series of amendments, had significantly transformed the communist constitution of 1949 in order to establish a liberal democracy based on a pluralistic society.[6] Those steps allowed Hungary to become firstly a member of the Council of Europe in 1990 and then also of the European Union with the enlargement towards East in 2004. By contrast, the 2011 constitution reversed this process by eliminating many of the checks and balances and the necessary guarantees befitting a European democracy, entailing a sort of "constitutional counter-revolution".[7] To date, the Fundamental Law has been amended several times, and each of those amendments introduced controversial new changes. Moreover, these reforms have been accompanied by a huge series of legislative measures with the aim of achieving "the systemic capture (or dismantlement) of all national checks and balances which may constrain the will of the ruling party".[8] The result of this process is that, at present, in Hungary the checks and balances necessary to uphold a democratic regime are no longer in place.

From a substantive point of view, there are weak guarantees of fundamen-

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[5] The English translation of the Fundamental Law is available on the website of the Constitutional Court of Hungary, at: https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary_20201223_fin.pdf.

[6] K. KOVÁCS, G. TÓTH, *Hungary's Constitutional Transformation*, in *European Constitutional Law Review*, 2011, n. 7, pp. 183-203.

[7] G. HALMAI, *From the 'Rule of Law Revolution' to the Constitutional Counter-Revolution in Hungary*, in *European Yearbook of Human Rights*, 2012, p. 367.

[8] P. BÁRD, L. PECH, *How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The Hungarian model'*, Reconnect Working Paper, 2019, n. 4, p. 16.

tal rights protection. Several provisions of the Fundamental Law[9] are indeed inspired by a "Christian-conservative ideology" and entail limitations to fundamental rights.[10]

The Fundamental Law also rules out the minority opposition from nomination of high offices and law-making.[11] By heavily resorting to laws which require a two-thirds majority of the members of the Parliament to be approved (so-called *cardinal acts*),[12] the Fundamental Law makes it difficult for future parliaments to modify the legislation adopted by the first supermajority. Cardinal acts are delegated to the definition of detailed rules in several matters, including those which could be better dealt with at the level of simple majority to allow the necessary flexibility in the legislative process.[13] As a result, the role of the Parliament is restrained, with the exception of the one that passed the first cardinal acts.[14] Needless, to say, the two-thirds majority supporting Orbán easily adopted them.

Moreover, although the previous form of government – a parliamentary republic with a unicameral Parliament (the National Assembly) – was maintained, structural features such as the one-chamber system and the unitary state with no vertical separation of powers rule out the possibility to have other checks and balances acting as a counterpower to the will of the majority.[15]

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[9] Examples are the right to marriage and family (Article L), the protection of embryonic and foetal life (Article II) and the prohibited forms of discrimination that do not include sexual orientation and gender identity (Article XV).

[10] G. HALMAI, *From the 'Rule of Law Revolution'*, cit., pp. 376-377.

[11] Procedures for appointing the President of the Republic (in the first round – Article 11(3)), the judges and President of the Constitutional Court (Article 24(8)), the President of the National Office for the Judiciary (Article 25(6), the Prosecutor General (Article 29(4)), and the Commissioner for Fundamental Rights (Article 30(3)) are based on a two-thirds majority vote.

[12] Article T(4) of the Fundamental Law.

[13] Cardinal laws regulate numerous sectors, including citizenship (Article G), family policy (Article L), operation of political parties (Article VIII), asylum (Article XIV), minority rights (Article XXIX), electoral rules (Article 2), designation of ministries and organs of public administration (Article 17), establishment of independent regulatory organs (Article 23), the judiciary (Articles 25-26), the pension system (Article 40), Central Bank organisation and tasks (Article 41), operation of the State Audit Office (Article 43), organisation of police and defence forces (Articles 45-46). See in this respect the Opinion of the Venice Commission on the new Constitution of Hungary, 2011, paras. 24-27.

[14] M. BÁNKUTI, G. HALMAI, K.L. SCHEPPELE, *From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions*, in G. TÓTH (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, Budapest, 2012, pp. 237-268, p. 267.

[15] K. KOVÁCS, G. TÓTH (2011), *op. cit.*, p. 185.

Lastly, a huge group of provisions weakens the Constitutional Court, which was probably "the most crucial check on power" in the system established by the 1989 constitution.[16] The *ex-post* constitutionality review of budgetary and taxation matters is limited to violations of an exhaustive list of rights.[17] Moreover, the standing before the Constitutional Court was restricted, by abolishing the *actio popularis*, and its composition altered.[18] New electoral rules adopted by constitutional amendment allowed judges to be nominated only by a two-thirds parliamentary majority and increased their number in order to fill the Court with new (and loyal) judges.[19] Afterwards, the fourth amendment to the Fundamental Law allowed the review of future constitutional amendments only as regards procedural requirements, thus excluding substantial grounds.[20] It also repealed the Constitutional Court rulings delivered prior to the entry into force of the Fundamental Law.[21] Although they do not lose their binding force, previous judgments can no longer be a source of inspiration for the Court itself and also ordinary courts. This affected the continuity of the Constitutional jurisprudence, which was based on the principles of democracy and the rule of law and was at the origin of the recognition in Hungary of many human rights principles.[22]

In a nutshell, the result of all these reforms is that, since 2013,[23] the Constitutional court of Hungary is packed and can no longer act as a counterpower to the will of the executive.

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[16] *Ibid*, p. 249.

[17] The respect of the rights to life and human dignity, the protection of personal data, freedom of thought, conscience and religion or with rights related to the Hungarian citizenship. Article 37(4) of the Fundamental Law. See also the Opinion of the Venice Commission on three legal questions arising in the process of drafting the New Constitution of Hungary, 2011, para. 9.

[18] Article 32/A of the 1989 Constitution allowed every person to initiate proceedings for ex-post judicial review before the Constitutional Court regardless of their direct involvement in the matter.

[19] O. LEMBCKE, C. BOULANGER, *Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court*, in G. TÓTH, *op. cit.*, p. 280.

[20] Article 12 of the Fourth Amendment to the Fundamental Law, now Article 24(5) of the Fundamental Law.

[21] Article 19(2) of the Fourth Amendment to the Fundamental Law, now point 5 of the closing provisions to the Fundamental Law.

[22] Opinion of the Venice Commission on the fourth amendment to the Fundamental Law of Hungary, 2013, paras. 88-99.

[23] Thanks to the retirement of some judges and the increase in their total number, in 2013 Fidesz could count on the loyalty of eight out of fifteen judges. K.L. SCHEPPELE, *Constitutional Coups and Judicial Review*, in *Transnational Law & Contemporary Problems*, 2014, n. 51, pp. 85-86.

The process of "constitutional dismantling" must be read together with the illiberal measures and actions that have further undermined the rule of law in Hungary in subsequent years. While it is outside the scope of this work to review those measures,[24] what must be retained is that, thanks to those reforms, Hungary is now the most visible case of *rule of law backsliding* within the EU.[25] The Fundamental Law itself reflects "Orbán's vision for a new constitutional order – one in which his political party occupies the centre stage of Hungarian political life and puts an end to debates over values".[26] Actually, Hungary is deliberately pursuing "an illiberal state", a model which, in the words of Orbán himself, "does not reject the fundamental principles of liberalism such as freedom (…), but it does not make this ideology the central element of state organisation, but instead includes a different, special, national approach".[27]

2.2. *The special legal order(s) under the Fundamental Law*

Before moving on the analysis of the emergency measures adopted, it is appropriate to take a look at the constitutional framework of the special legal orders, as one of them was actually triggered for the purposes of pandemic management. This system is due to change in July 2023, when the ninth amendment to the Fundamental Law will enter into force.[28] However, for the

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[24] The literature on the democratic regression of Hungary is quite extensive. See, *inter alia*: P. SMUK (ed.), *The Transformation of the Hungarian Legal System 2010-2013*, Budapest, 2013; G. HALMAI, *From a Pariah to a Model? Hungary's Rise as an Illiberal Member State of the EU*, in *European Yearbook on Human Rights*, 2017; P. SONNEVEND, A. JAKAB, L. CSINK, *The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary*, in A. VON BOGDANDY, P. SONNEVEND (ed.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford, 2015, pp. 33-100.

[25] L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, n. 19, 2017, pp. 3-47, p. 8.

[26] G. HALMAI, *A Coup against Constitutional Democracy? The case of Hungary*, in M. GRABER, S. LEVINSON, M. TUSHNET (ed.), *Constitutional Democracy in Crisis?*, Oxford, 2018, pp. 243-257, p. 245.

[27] Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp, 26 July 2014, available at: https://hungarianspectrum.org/2014/07/31/viktor-orbans-speech-at-the-xxv-balvanyos-free-summer-university-and-youth-camp-july-26-2014-baile-tusnad-tusnadfurdo/.

[28] The ninth amendment, once in force, will reduce the special legal orders to three: state of war, state of emergency and state of danger. See the article "*Special legal order rules streamlined*" on the website of the Hungarian government of the 16th of December 2020 at https://abouthungary.hu/news-in-brief/special-legal-order-rules-streamlined. See, for a comment: V. KAZAI,

purposes of our analysis – that is, to discuss the measures adopted by Hungary in the first year of the Covid-19 pandemic – it is important to take into account the system of special legal orders as in force in 2020 and 2021.

At present the Fundamental Law regulates in detail the situations in which normal functioning of the constitutional order is not possible. Depending on the emergency state triggered, either the President of the Republic or the government are entitled to adopt decrees derogating from ordinary law and to take extraordinary measures. These situations are regulated under the title "special legal order" and provided for under Articles 48-54 of the Fundamental Law. There are six types of special legal orders: the state of national crisis, the state of emergency; the state of preventive defence; the state of terrorist attack; unexpected attacks and the state of danger. However, until the triggering of the state of danger in March 2020, due to the pandemic, none of the special emergency situations had ever been declared.

According to Article 53 of the Fundamental Law, the state of danger is declared by the government, which subsequently adopts the extraordinary measures and derogatory decrees, in order to respond to a situation of natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences. By means of a decree, the government is empowered to suspend the application of certain laws, derogate from legislative provisions, and take other extraordinary measures. In the absence of an express extension by the Parliament, those decrees remain in force for only fifteen days. Article 53 provides that the detailed rules regulating the state of danger and the kind of extraordinary measures that may be adopted shall be regulated in cardinal acts. These rules were laid down in Act CXXVIII of 2011 on disaster management (hereafter, the Disaster Management Act).

The cessation of a special legal order is declared by the same organ entitled to introduce it (Article 54(3)). Thus, in the case of the state of danger, its termination is decided by the government.

When a special legal order is in place, the exercise of fundamental rights may be suspended or restricted. The sole exceptions are the right to life and human dignity, the prohibition of torture, inhuman or degrading treatment and eugenics practices, and the right to trial, defence and the protection of legitimate expectations. Conversely, the application of the Fundamental Law may not be suspended, and the Constitutional Court must continue its operations. However, as we saw above, this cannot be considered a proper safeguard, as the Constitutional Court is no longer an independent body. Signifi-

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Power Grab in Times of Emergency, in *VerfBlog*, 12 November 2020: https://verfassungsblog.de/power-grab-in-times-of-emergency/.

cantly, in July 2020 the Constitutional Court declined jurisdiction over a claim asking for a review of the emergency measures adopted during the first state of danger.[29]

3. *The corona-turn: the capitalisation of emergency measures to further consolidate the government's powers*

3.1. *Phase 1: The first declaration of the state of danger and the Authorisation Act*

In order to deal with the situation linked to the first wave of the coronavirus epidemic, on the 11th March 2020, the Hungarian government made use of Article 53(1) of the Fundamental Law to declare a state of danger across the entire national territory and thus acquired the relevant emergency powers.[30] Even though Article 53 does not directly mention pandemics, the decree was issued "in order to mitigate the consequences of the human epidemic endangering the safety of life and property, for the protection of health and life of Hungarian citizens".

The constitutionality of the decree was subject to a lot of debate. A reference to pandemic can be found only in the Disaster Management Act, which specifies that an emergency situation under Article 53 may be triggered in three circumstances, the last of which includes epidemics.[31] According to some commentators, there was "no constitutional authorisation" for the decree, which was also unnecessary since the government could already count on the support of a two-thirds parliamentary majority.[32] Consequently, the government could have relied on emergency powers such as those envisaged in the Disaster Management Act or in Act CLIV of 1997 on Healthcare (hereafter, the Health Act). However, the real problem lies elsewhere. The main

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[29] Decision of the Hungarian Constitutional Court no. 3234/2020. (VII. 1.) AB.

[30] Decree 40/2020.

[31] Article 20(c)(ca) of the Disaster Management Act.

[32] Such a position has been largely supported by Halmai and Scheppele. See: G. HALMAI, *How COVID-19 Unveils the True Autocrats: Viktor Orbán's Ermächtigungsgesetz*, in *Int'l J. Const. L. Blog*, 1 April 2020: http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/ and G. HALMAI, K.L. SCHEPPELE, *Don't Be Fooled by Autocrats!: Why Hungary's Emergency Violates Rule of Law*, in *VerfBlog*, 22 April 2020: https://verfassungsblog.de/dont-be-fooled-by-autocrats.

source of concerns was not so much the declaration of the state of danger in itself, but rather the legislation subsequently adopted, first and foremost the Authorisation Act. As acknowledge by Drinóczi, "whatever position we take on the constitutionality of the declaration of the emergency, it does not matter as it does not alter the constitutional deficiencies of the Coronavirus Act".[33] The declaration of the state of danger was only a first step in the management of the emergency, which was necessary to give a formal constitutional approval to the government's activity.

On the 30th March 2020, the National Assembly adopted Act XII of 2020 "On the containment of coronavirus" (hereafter, the Authorisation Act), immediately renamed by some commentators as the "Enabling Law" with reference to the 1933 *Ermächtigungsgesetz*.[34] The Act had a twofold function. The National Assembly conferred on the government powers in addition to those provided for in the Disaster Management Act. The government was indeed authorised to legislate by decree "in order to guarantee that life, health, person, property and rights of the citizens are protected, and to guarantee the stability of the national economy" (Section 2). In addition, the Act generally extended the applicability of government's decrees adopted during the state of danger beyond the fifteen days provided for in the Fundamental Law.

The Authorisation Act entailed several problems from a rule of law perspective, amounting to a legislative *carte blanche* granted to the executive.

Firstly, the scope of the government's action was defined in an extremely broad manner. The Act specified that the executive shall legislate to the extent necessary and in proportion to the desired objectives. Yet, the subject matter of the delegation included not only the protection of health but also property, the rights of the citizens, and the stability of the national economy, thus leaving too much room for arbitrariness and discretion in the hands of the government.

Secondly, the Act did not contain a sunset clause. It allowed for an indefinite extension of government decrees, at least as long as the state of danger remained in force. Even though the Fundamental Law seems to require an *ad hoc* extension of the validity of each decree,[35] the Act was a general delegation in this respect, covering both past and future decrees. Consequently, it empow-

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[33] T. DRINÓCZI, *Hungarian Abuse of Constitutional Emergency Regimes Also in the Light of the COVID-19 Crisis*, MTA Law Working Papers, 2020, n. 13.

[34] R. UITZ, *Pandemic as Constitutional Moment: Hungarian Government Seeks Unlimited Powers*, in *VerfBlog*, 24 March 2020: https://verfassungsblog.de/pandemic-as-constitutional-moment/.

[35] According to Article 53(3) of the Fundamental Law "The decrees of the Government referred to in paragraph (2) shall remain in force for fifteen days, unless the Government, on the basis of authorisation by the National Assembly, extends those decrees".

ered the executive to itself extend the temporal scope of its own decrees until the end of the state of danger, whose repeal is up to the government itself.

Thirdly, the Act provided for weak supervision by the National Assembly of the exercise of government's extraordinary powers. The executive had a mere duty to "regularly" inform the National Assembly, without a clear definition of how "regular" the information should be. Apart from that, no real parliamentary check (*ex ante* or *ex post*) was provided for. As a safeguard, the National Assembly could withdraw the authorisation extending government decrees before the end of the state of danger. Yet, the remaining parts of the decree would have remained in force until the government's decision to end the period of emergency. It was not by chance that, in the end, the Act was repealed the day after the decree terminating the state of danger. The other institution supposed to monitor the actions of the executive, the Constitutional Court, was prevented from doing so as it lacks the appropriate independence and impartiality. In this respect, the Act's reference to the fact that the Constitutional Court would continue to operate during the state of danger (Section 5) was a mere paper exercise.

Fourthly, the Act suspended elections and referenda until the end of the state of danger and extended the mandates of representative bodies (Section 6). Since the government had to terminate the state of danger, it was also responsible for allowing the elections to be held again.

In light of the above, considering the extent and vagueness, both in time and scope, of the legislative powers conferred on the executive, the limited parliamentary checks and the suspension of instruments of democratic participation, the National Assembly handed the government a blank cheque to legislate during the period of the state of danger. Actually, since the Authorisation Act was approved by the two-thirds of the members of the National Assembly, we can talk of an act of parliamentary self-marginalisation. In this respect, the fact that the preamble of the Act expressly envisages that "the National Assembly might be unable to hold sittings" is extremely indicative.

Although the emergency powers ended upon the termination of the state of danger, and the decrees ceased to have effect, several measures introduced were *permanent* and survived the special legal order. An example can be found in the Authorisation Act itself, which, on top of the above, amended the criminal code and introduced two new felonies related to the obstruction of epidemic containment and fearmongering during a special legal order, both punishable with imprisonment (up to three or five years).[36]

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[36] Articles 322/A and 337 of *Act C of 2012* on the Criminal Code (as in force on 16 July 2020), available at: https://njt.hu/translation/J2012T0100P_20200716_FIN.PDF.

Other changes, subsequently repealed by the end of the first state of danger, were nonetheless problematic and detrimental for the rule of law, as they were meant to consolidate the powers of the executive. Those measures were either *disproportionate* to the protection of public health, as they had an adverse effect on fundamental rights,[37] or had *little to do* with the fight against the pandemic. As regards the former, it is worth mentioning interference in the area of personal data,[38] and the series of discriminatory travel restriction which not only limited fundamental rights but also displayed several incompatibilities with EU free movement law.[39]

Measures that appeared unrelated to pandemic management included the interference with private citizens' activities[40] and the attempts to strengthen the position of economic actors close to Fidesz through public procurement contracts.[41] The introduction of new rules to the asylum procedure also appears problematic in this respect, especially since it was later transposed into the Transitional Act, which, as we shall see shortly, entered into force the day after the end of the state of danger.[42]

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[37] For an overview, see the report of the Fundamental Rights Agency "Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications" of 4 May 2020.

[38] During the state of danger, the Minister for Innovation and Technology was authorised "to access and process any available data with no judicial authorisation required" (Decree 46/2020, Section 10) and the rights guaranteed under Articles 15-22 of the GDPR with respect to data processing were suspended (Decree 176/2020, Article 1(2)). See, in this regard, the statement of the European Data Protection Board of 2 June 2020, available at: https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_art_23gdpr_20200602_en.pdf.

[39] Decree 41/2020 (as modified by Decrees 45/2020 and 81/2020) prohibited access to non-Hungarian citizens arriving from abroad with the sole exception of EEA nationals holding a permanent residence permit. This appears to be in contrast with both the principle of equal treatment of EU citizens residing in another Member State with the citizens of that country and the non-discrimination provisions concerning the rights of entry and residence set out in the Citizens' Rights Directive (Articles 24 and 27 of Directive 2004/38/EC). In order to comply with EU law, Hungary should have allowed access at least to EU citizens residing in the country.

[40] Decree 128/2020. For a commentary, see: P. BÁRD, S. CARRERA *Showing true illiberal colours-Rule of law vs Orbán's pandemic politics*, in *CEPS Policy Insights*, 2020, n. 10, p. 8.

[41] According to a report of the CRCB, during the months of the pandemic, the corruption risk in Hungarian public procurements reached its peak since 2005. Report of the Corruption Research Centre Budapest (CRCB), *New Trends in Corruption Risk and Intensity of Competition in the Hungarian Public Procurement from January 2005 to April 2020*, Flash Report 2020, 1.

[42] It obliges asylum seekers to submit a "statement of intent" at Hungarian embassies in neighbouring countries in order to be able to lodge an asylum application. See: Decree 233/2020.

3.2. *Phase 2: from the state of danger to "pandemic preparedness"*

On the 17th June 2020, the Hungarian government issued a decree terminating the state of danger.[43] The following day, the National Assembly repealed the Authorisation Act.[44]

In parallel, however, the government declared a state of *medical crisis* introducing *pandemic preparedness* across the entire national territory.[45] The legal basis for such a declaration can be found in Articles 247(1)(b) and 228(1) and (2)(a) of the Health Act, as modified by a new law passed by Parliament which entered into force on the same 18th June and concerned transitional arrangements after the cessation of the state of danger (hereafter, *Transitional Act*).[46] These provisions empowered the government, acting upon proposal of the Chief Medical Officer, to declare a state of medical crisis and introduce pandemic preparedness in the event of an epidemiological emergency or other emergencies endangering life and health or disrupting medical care. New paragraphs (2a)-(2c) were also added to Article 228, providing for monitoring powers entrusted to the Chief Medical Officer and a maximum duration of the state of medical crisis of six months. However, nothing prevents the government from renewing it at its will. Moreover, a new provision of the Health Act, Article 232/D, granted fresh powers to the government during the state of medical crisis. It can restrict or prohibit a variety of activities of institutions and businesses and introduce specific provisions on public education. Moreover, it is allowed to introduce several epidemiological measures – such as those related to social distancing, wearing of protective equipment, epidemiological separation – and, in order to preserve medical supplies, it can also deploy the Police or the Hungarian Armed Forces. On top of that, it can "adopt other provisions specified by an Act of Parliament". It is stated that the government can exercise these powers "to the extent necessary and proportionate to the objective pursued", and it may not introduce a lockdown. Despite this *caveat*, the broad and general powers conferred on the government are such as to raise serious concerns.

The Transitional Act not only made possible the state of pandemic preparedness, but also introduced some permanent amendments to the Disaster Management Act and the Health Act. Indeed, the extension of government powers during a state of danger provided for in the Authorisation Act was made permanent in legislation. Article 353 of the Transitional Act inserted a

[43] Decree 282/2020.

[44] Act LVII of 2020.

[45] Decree 283/2020.

[46] Act LVIII of 2020.

new provision into the Disaster Management Act that precisely follows Section 2 of the Authorisation Act. Now, during a state of danger, the government is *always* empowered to adopt decrees introducing measures additional to those already set forth in the Disaster Management Act, in order to suspend the application of legislative acts, derogate from their provisions and take other extraordinary measures "to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy".

In some respects, the Transitional Act appears even more problematic than the previous Authorisation Act. As regards the state of pandemic preparedness, it sets up an emergency framework without the constitutional guarantees inherent in the special legal order. There is indeed no approval or supervision by the Parliament of the government decrees. And the fact that the Chief Medical Officer is entrusted with proposing a state of medical emergency is of no comfort, since this officer is nominated by the minister responsible and thus dependent on the government itself.[47] As regards the new provisions governing the state of danger, on the other hand, they crystallise the problematic extension of the government powers of the Authorisation Act into a permanent piece of legislation.

For all these reasons, it is not surprisingly that the Transitional Act was immediately renamed by some scholars as "Enabling Act II".[48] They feared that it could allow replicating the framework already used for the state of crisis due to mass migration,[49] which, initially declared for the whole national territory in March 2016,[50] has been renewed every six months and never terminated.[51] In effect, although the original decree declaring the state of pandemic preparedness was due to be repealed on 18th December 2020, the government has already extended its validity until 18th June 2021.[52]

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[47] Hungarian Helsinki Committee, explanatory note for the bills on terminating the state of danger and on related transitional provisions, 12 June 2020, p. 4.

[48] G. HALMAI, G. MÉSZÁROS, K.L. SCHEPPELE, *From Emergency to Disaster: How Hungary's Second Pandemic Emergency Will Further Destroy the Rule of Law*, in *VerfBlog*, 30 May 2020: https://verfassungsblog.de/from-emergency-to-disaster/.

[49] The State of Crisis due to Mass Migration is not one of the special legal orders regulated by the Hungarian constitution but finds its legal basis in the Asylum Act (Article 80A of Act LXXX of 2007). See for an analysis: N. BOLDIZSÁR, *Hungarian Asylum Law and Policy in 2015-2016: Securitization Instead of Loyal Cooperation*, in *German Law Journal*, 2016, n. 6, pp. 1033-1082.

[50] Decree 41/2016.

[51] At the time of writing, the last extension of the state of crisis in connection with mass migration was on the 27th February 2021 and thus it will remain in place at least until September 2021.

[52] Decree 283/2020 as modified and in force on 17 December 2020.

3.3. *Phase 3: the second wave of the pandemic and the renovation of the state of danger*

On top of the above, on the 3rd November 2020, the Hungarian government declared for the second time the state of danger due to the second wave of the pandemic.[53] However, the state of pandemic preparedness was not repealed; rather, it was prolonged, with the result that the two regimes are currently in force at the same time.

A week later, the National Assembly adopted Act CIX of 2020 "on the containment of the second wave of the coronavirus pandemic", which can be referred to as "Authorisation Act II". Like its predecessor, it generally extended the applicability of government decrees adopted during the state of danger beyond their validity period of fifteen days. This time, the decree does not specify the extension of government powers because there is no need to: the new regime of the amended Disaster Management Act is in place and already provides in this sense.

This time the Authorisation Act II contains a sunset clause as it "shall be repealed on the 90th day following its promulgation". Thus, government decrees cannot last indefinitely but only for that timeframe. However, there is not yet an *ad hoc* extension of the validity of government decrees, as the Fundamental Law requires, but one of general nature. Secondly, the general extension of decrees once again applies not only to those already adopted, but also to forthcoming ones. Lastly, nothing prevents the National Assembly from issuing another law generally extending the validity of all those decrees for a further period of time.

On the 8th February 2021 the second state of danger was terminated,[54] but the government immediately ordered a new, third, state of danger that entered in force on the very same day.[55] Moreover, on the 22nd February 2021, the Parliament adopted a third Authorization Act.[56] The latter is modelled over the Authorization Act II and thus has a sunset clause of 90 days and contains a general and prospective extension of government decrees adopted during the state of danger.[57] Moreover, at the time of writing, the state of pandemic preparedness is also in effect in Hungary.

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[53] Decree 478/2020.

[54] Decree 26/2021.

[55] Decree 27/2021.

[56] Act I of 2021 on the Containment of the Coronavirus Pandemic.

[57] At the time of writing, a proposal is pending to extend the validity of Authorisation Act III until autumn 2021. See for the updates the briefing papers of the Hungarian Helsinki

The facts that the major controversial features of the regime of the first state of danger were maintained shows that Hungary is repeating the same mistakes. This supports the view that the executive has seized the opportunity offered by the Covid-19 pandemic to further consolidate its powers, to the detriment of the Parliament. Indeed, due to the *ad hoc* constitutional framework and the past authoritarian reforms, the executive in Hungary was already free enough to manage the health emergency without resorting to those emergency measures.[58]

4. *What (in)action on the side of the European Union?*

Against this background, a reaction by the European Union was much needed. Indeed, in a context of major deviation from the rule of law such as the Hungarian one, and in the absence of meaningful internal checks and balances, the sole actor who could act as a (external) counterpower is the EU. However, the first response of the Union was quite unsatisfactory. This was particularly worrying as the traditional "wait and see" approach of the EU against rule of law violations in Hungary has proven to be totally ineffective in the past.[59]

Statements by EU institutions and Member States in reaction to the first the state of danger did not mention Hungary directly, with the result that the government could simply ignore them. For instance, after the adoption of the first Authorisation Act, the President of the Commission made a statement where, implicitly referring to Hungary, she stressed that emergency measures must "be limited to what is necessary and strictly proportionate", "not last indefinitely", and be "subject to regular scrutiny".[60] Such general declarations that avoid calling a violation of the rule of law by its name can hardly obtain effective results. In this respect, the joint statement issued by thirteen Member

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Committee, *Overview of Hungary's emergency regimes introduced due to the COVID-19 pandemic* (updated regularly), available at: https://helsinki.hu/en/emergency-regimes-in-hungary-under-the-pandemic/.

[58] J. WEILER, *Editorial: Orbán and the Self-asphyxiation of Democracy*, in *International Journal of Constitutional Law*, 2020, n. 18(2), pp. 315-318.

[59] See, in this regard: Z. SZENTE, *Challenging the Basic Values: Problems with the Rule of Law in Hungary and the Failure of the EU to Tackle them*, in A. JAKAB, D. KOCHENOV (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, 2017.

[60] Statement by President von der Leyen on emergency measures in Member States, 31 March 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_567.

States calling for emergency measures to respect the rule of law is emblematic.[61] Since the statement did not mention Hungary directly, the Orbán government could simply sign it itself, thus making the diplomatic attempt totally ineffective.[62]

Things started to change only in Autumn 2020, where the EU took some initiatives aimed at reacting to the attacks on the rule of law disguised as measures to allows for a swift response to the pandemic. First, the Commission took into account the Hungarian measures in its 2020 Rule of Law Report. Second, it also started an infringement procedure for at least one of the most disproportionate measures adopted by the Hungarian government in 2020, the new asylum procedure. Third, the rule of law conditionality regulation was approved.

Despite these improvements, the EU did not take advantage of its instruments to the fullest. The EU is actually empowered with a rule of law toolbox specifically aimed at addressing this kind of challenges, which has been enhanced and improved in the last few years. The toolbox now includes soft-law, hard-law and even allegedly "nuclear" instruments.[63] Hence, the EU could fulfil the role of a counter-power in Hungary through a variety of actions. Accordingly, this concluding part will provide an assessment of what the EU has done to react to the emergency measures adopted by Hungary, and offer some suggestions on how it could better use the instruments at its disposal.

4.1. *Naming and shaming. The use of soft law and peer pressure*

The strategy to try to get Hungary back on track by making general and not targeted calls and statements has proven to be largely ineffective. This inertia was also recognised by former Commission President Junker who, after

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[61] Diplomatic statement by Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden, 1 April 2020, available at: https://www.government.nl/documents/diplomatic-statements/2020/04/01/statement-by-belgium-denmark-finland-france-germany-greece-ireland-italy-luxembourg-the-netherlands-portugal-spain-sweden.

[62] Hungary joined the statement on 2nd April 2020. See the updated statement at: https://www.auswaertiges-amt.de/en/newsroom/news/statement-rule-of-law/2330296.

[63] The expression "nuclear" refers to the misnomer traditionally attributed to the procedures under Article 7 TEU because of the political discretion and the high thresholds involved in its activation. See: D. KOCHENOV, *Busting the Myths Nuclear: A Commentary on Article 7 TEU*, EUI Working Papers, 2017, n. 10.

the adoption of the Authorisation Act I, advised the EU to adopt "plain language" on Hungary's rule of law violations.[64] More than ever, it is now necessary that the EU directly condemn the attacks to the rule of law by qualifying them as such. This could be done at different levels.

First, it is time for other Member States to exercise real peer pressure against violations of the rule of law by the Hungarian government. As suggested by Casolari, this could include the issuing of diplomatic sanctions against Hungary,[65] following the model adopted to respond to the Austrian Haider affair back in 1999.[66]

Second, political parties at the European level can play a role. In the past, Fidesz's membership of the European People's Party (EPP) has protected Hungary from the EU's intervention, as its centre-right allies chose to prioritise party ties over rule of law violations.[67] Things started to change only in March 2019, when the EPP decided to suspend Fidesz's membership as it questioned its commitment to European values.[68] However, Orbán's party remained a member of the EPP group in the European Parliament, with the resulting participation in parliamentary activities as member of the largest political group in the EP.[69] Finally, in March 2020 the EPP group voted to amend its rules of procedure and allow suspension or expulsion of an entire national party, rather than single MEPs.[70] After the amendment was adopted – and without waiting for a formal vote expelling its party –, Orbán left the

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[64] F. EDER, *Jean-Claude Juncker urges 'plain language' on Hungary's state power grab*, in *Politico*, 13 March 2020: https://www.politico.eu/article/coronavirus-jean-claude-juncker-urges-plain-language-on-hungary-state-power-grab/.

[65] F. CASOLARI (in Italian), *La protezione dello stato di diritto nell'unione europea ai tempi del coronavirus: se non ora, quando?*, in *SIDIblog*, 7 April 2020: http://www.sidiblog.org/2020/04/07/la-protezione-dello-stato-di-diritto-nellunione-europea-ai-tempi-del-coronavirus-se-non-ora-quando/.

[66] Back then, a government coalition formed by the centre-right People's Party and the far-right populist party led by Jörg Haider, the Freedom Party (FPÖ), raised several concerns across Europe because of the xenophobic and racist positions of the latter.

[67] R. KELEMEN, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, in *Government and Opposition*, 2017, n. 52(2), pp. 211-238.

[68] Decision of the EPP Political Assembly regarding the EPP membership of Fidesz, 20 March 2019.

[69] M. DE LA BAUME, *Fidesz MEPs remain in the EPP group, for now*, in *Politico*, 26 March 2019: https://www.politico.eu/article/fidesz-meps-remain-in-the-epp-group-for-now/.

[70] Amendments to the EPP Rules of Procedure adopted by the EPP Group meeting on the 3rd March of 2021, available at: https://www.eppgroup.eu/sites/default/files/attachments/2021/03/epp-group-rules-of-procedure-adopted-texts-03032021.pdf.

EPP group on the 3rd March 2021.[71] However, it is still regrettable that such a development happened ten years after the adoption of the new constitution, as Hungary had left liberal democracy many years earlier.

Third, it is valuable that the first rule of law report on Hungary issued by the Commission in September 2020 took into account its management of the emergency.[72] This report is part of the Rule of Law Mechanism and provides for an annual assessment of the rule of law situation in each Member State, evaluated according to four pillars: justice system, anti-corruption framework, media pluralism, and other institutional issues related to checks and balances.[73] The report on Hungary stressed the breadth of emergency powers conferred by the declaration of the first state of danger and the Authorisation Act I.[74] However, several problematic aspects were not discussed, including the content of the Transitional Act and the state of pandemic preparedness.[75]

At the more general level, the effectiveness of mechanism such as the rule of law report to tackle situations such as the Hungarian one is likely to be very limited.[76] The mechanism is designed "to promote the rule of law and to prevent problems from emerging or deepening".[77] Thus, it is not suitable to address situations where those problems have not only already arisen, but also reached a systemic level. Clear confirmation comes from the fact that the rule of law report did not prevent the Hungarian government from declaring the state of danger for the second time. That said, the Commission's effort is still welcomed as it offers an opportunity to directly blame Hungary for the disproportionate use of emergency powers. It is thus desirable that the Commission ameliorate this instrument in the next few years by going to a deeper level

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[71] EPP Statement on Fidesz of 3rd March 2021. On the 18th March 2021 Fidesz left also the European People's Party.

[72] These remarks were also anticipated in the context of the 2020 European Semester in the Council Recommendation on the 2020 National Reform Programme of Hungary, 2020/C-282/17, in particular at recitals 27 and 32.

[73] Commission Communication, 2020 Rule of Law Report: The rule of law situation in the European Union, COM/2020/580 final.

[74] Commission 2020 Rule of Law Report: Country Chapter on the rule of law situation in Hungary, SWD(2020) 316 final, p. 16.

[75] The report only refers to the termination of the state of danger and the declaration of the state of epidemic preparedness.

[76] S. PRIEBUS, *Too Little, Too Late: The Commission's New Annual Rule of Law Report and the Rule of Law Backsliding in Hungary and Poland*, in *VerfBlog*, 10 February 2020: https://verfassungsblog.de/too-little-too-late/.

[77] COM/2020/580 final, cit., p. 3.

in the analysis. In this respect, the choice to limit the extension of the government decrees in the Authorisation Acts II and III to ninety days may be seen as an effort to observe the Commission's remarks at least formally.

4.2. *Hard and nuclear options should be on the table*

The traditional approach of the EU institutions in response to the Hungarian rule of law backsliding has been a road paved with good intentions and failure. To discontinue that situation, it would be pivotal for the EU to make use of the hard instruments at it is disposal: values-related infringement proceedings, the conditionality mechanism and, possibly, the Article 7 TEU procedures.

As regards the use of infringement proceedings under Articles 258-260 TFEU, the situation has recently changed slightly, not so much in terms of results but at least in terms of initiative. There is an increasing tendency of the Commission to bring Hungary before the Court of Justice for failure to fulfil its duties under EU law in matters linked, at least indirectly, with the rule of law. This marks a clear difference from the previous use of the infringement procedure as an instrument for values enforcement. Past infringement procedures launched against Hungary fell short of addressing the general rule of law problems and had only a limited focus on a few technical issues.[78] In recent years, the Commission has instead started some "values-related infringements procedures" against Hungary. This is the situation, for instance, with the cases concerning the so-called "Lex NGO",[79] the higher education law,[80] and a series of infringements related to non-compliance with EU asylum law.[81] These kinds of actions are of outmost importance for the enforcement of the rule of law, as direct condemnation by the Court of Justice has proven effective from the compliance side as well.[82] However, when it comes to drafting

[78] See, in particular, the judgment of 6 November 2012, *Commission v Hungary*, C-286/12, EU:C:2012:687. See, for a commentary: A. VINCZE, *The ECJ as the Guardian of the Hungarian Constitution: Case C-286/12 Commission v. Hungary*, in *European Public Law*, 2013, n. 19(3), pp. 489-500.

[79] Judgment of 18 June 2020, *Commission v. Hungary*, C-78/18, EU:C:2020:476.

[80] Judgment of 6 October 2020, *Commission v. Hungary,* C-66/18, EU:C:2020:792.

[81] Judgment of 2 April 2020, *Commission v. Hungary*, Joined Cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257 and judgment of 17 December 2020, *Commission v. Hungary*, C-808/18, EU:C:2020:1029.

[82] For instance, Hungary abolished the transit zone after the Court declared it in contrast with EU asylum law in the judgment of 14 May 2020, *FMS*, Joined Cases C-924/19 PPU and

the claims, the Commission often avoids mentioning the breach of EU values as such.[83] It is instead necessary that Hungarian measures in contrast with Union law, including those adopted through emergency powers, are subject to infringement actions where the specific breach of EU law is inserted within the broader context of rule of law violations and disregard of Article 2 TEU.[84] In this respect, the two infringement actions started in October and December 2020 against the new asylum procedures set out in the Transitional Act might be a step in the right direction.[85]

As concerns the use of sanctions against Hungary for breaches of the rule of law, the EU took an important step in December 2020, when it upgraded its rule of law toolbox with a new instrument. The so-called conditionality regulation introduced a new horizontal mechanism that allows the Union to suspend EU funds in the event of violations of the rule of law that have an impact on the sound financial management of the EU budget.[86] However, in order to reach a final agreement on the regulation and ensure its approval, the Union had to come to terms with Hungary (and Poland) and reassure them that the mechanism will not be used until a judgment of the Court of Justice

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C-925/19 PPU, EU:C:2020:367. However, that judgment originated from a reference for preliminary ruling and not an infringement action.

[83] This is also a double standard in comparison with what the Commission is doing against Poland. Indeed, in responding to the reforms of the judiciary in Poland, the Commission is pursuing a strategy of accelerated infringement procedures, coupled with the request for interim measures, that directly refer to European values, also thanks to the possibility of using Article 19 TEU. See: L. PECH, S. PLATON, *The beginning of the end for Poland's so-called "judicial reforms"? Some thoughts on the ECJ ruling in Commission v Poland (Independence of the Supreme Court case)*, posted in Reconnect on 2 July 2019 and available at https://reconnect-europe.eu/blog/pech-platon-poland-ecj-rule-of-law-reform/.

[84] See, in this regard, my contribution published on SIDIblog (in Italian): M. COLI, *Quale strategia nell'utilizzo della procedura di infrazione a tutela dello stato di diritto in Ungheria? Prime riflessioni sulla sentenza della Corte di Giustizia sulla c.d. "lex NGO" (C-78/18)*, in *SIDIblog*, 29 June 2020: http://www.sidiblog.org/2020/06/29/quale-strategia-nellutilizzo-della-procedura-di-infrazione-a-tutela-dello-stato-di-diritto-in-ungheria-prime-riflessioni-sulla-sentenza-della-corte-di-giustizia-sulla-c-d-lex-ngo/.

[85] On the 30th October 2020 the Commission sent a letter to of formal notice to Hungary because it considered the new asylum legislation in breach of the Asylum Procedures Directive (Directive 2013/32/EU) interpreted in light of the EU Charter of Fundamental Rights. On the 18th February 2021 the Commission issued the reasoned opinion. On the 3rd December 2020 the Commission sent a letter of formal notice to Hungary as it found provisions of the Asylum Act in contrast with the EU public procurement rules (Directive 2014/24). Hopefully, the Commission will take advantage of these actions not only to blame Hungary for breaching asylum and public procurement law but also to denounce the major violations of the rule of law.

[86] Regulation 2020/2092 of 16th December 2020 on a general regime of conditionality for the protection of the Union budget.

confirms its validity.[87] This is a disappointing deal, as it made rule of law conditionality a blunt weapon for at least the whole 2021, thus allowing the Hungarian government to avoid being subject to it while the (second) state of danger is in place.

Finally, what has happened in Hungary in the past months once again confirmed the necessity to consider using the procedure under Article 7(2) TEU, that is, the mechanism that permits the Union to declare that there is a "serious and persistent" violation of Article 2 TEU by one Member State. Once such declaration is approved, the Council may also suspend certain membership rights of that country (Article 7(3) TEU). It is worth recalling that the Hungarian situation as regards Article 7 TEU is paradoxical. Hungary has been under an Article 7(1) TEU procedure since September 2018. However, that procedure – also known as the preventive arm of Article 7 TEU – is only for ascertaining whether there is a risk of a breach of European values in that country. This is bizarre, to say the least. After ten years of rule of law backsliding in Hungary, and especially after what happened during the pandemic, it is no longer possible to talk about the risk of a values breach. Hence, the Commission should consider the possibility of triggering Article 7(2) TEU.[88] In this respect, it is important to acknowledge that Article 7 TEU – as well as infringement procedures and the rule of law conditionality – are not about delegitimising an elected government, but just about recalling what the EU is about and what are the rules of the game.

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[87] Conclusions of the European Council of the 11th of December 2020, in particular point 2(c). See for a comment: A. ALEMANNO, M. CHAMON, *To Save the Rule of Law you Must Apparently Break It*, in *VerfBlog*, 1 December 2020: https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/.

[88] It may be objected that the triggering by the Commission of the procedure under Article 7(2) TEU would be pointless. Indeed, the declaration of a serious and persistent breach of the rule of law in a Member State under Article 7(2) TEU is to be taken by unanimous vote of the European Council. Even though according to Article 354 TFEU the representative in the European Council of the Member State subject to the procedure (i.e., Hungary in our case) shall not take part in the vote, it is likely that Poland – an ally of Hungary for what concerns rule of law backsliding – would vote against, thus rendering the whole procedure ineffective. However, as suggested in the literature, Article 354 TFEU could be interpreted as not admitting voting all Member States that are subject at the same time to the procedure under Article 7(2) TEU. Therefore, a combined triggering of Article 7(2) against both Hungary and Poland could solve the problem. See, in this regard: K.L. SCHEPPELE, R.D. KELEMEN, *Defending Democracy in EU Member States: Beyond Article 7 TEU*, in F. BIGNAMI (ed.), *EU Law in Populist Times: Crises and Prospects*, Cambridge, 2020, pp. 413-456, and D. KOCHENOV, *Article 7: A Commentary on a Much Talked-about "Dead" Provision*, in *Polish Yearbook of International Law*, 2018, XXXVIII, pp. 165-187.

5. *Conclusions*

The process which began in Hungary with the adoption of the Fundamental Law in 2011 has reached a point where the constitutional system no longer incorporates the internal checks and balances necessary to uphold a democratic regime. Not only is the parliamentary opposition ruled out of decision-making, but also high offices, including independent authorities, are selected by the current majority, which, moreover, has entrenched its will in cardinal acts that will be difficult to modify in the future. Besides, after several reforms, the judiciary, and especially the Constitutional Court, is not able to act as a meaningful counter-power.

Although the situation was already dramatic, the emergency measures adopted during the pandemic took it to a different level. The legislative *carte blanche* granted to the government by the first Authorisation Act was a major source of concern. The National Assembly granted the executive the power to legislate by decree for an indefinite period of time with the greatest scope and the minimal controls. The fact that state of danger was actually terminated cannot alter this conclusion. Some of the legislative changes were permanent, while others were transposed into the subsequent legislation.

Moreover, on the same day that the Authorisation Act was repealed, the Transitional Act entered into force. As stated, it introduced not only a state of pandemic preparedness that conferred fresh powers on the government, but also a new framework for the state of danger that extends government powers as was done with the Authorisation Act I. Thus, when the government declared a state of danger for the second and third time, the necessary derogation framework was already in place.

In other words, the coronavirus crisis has represented a window of opportunity for the Hungarian government to consolidate and expand its powers, especially to the detriment of the Parliament. In this respect, the lesson to learn is not whether the emergency measures adopted by Hungary have brought the country to the edge of autocracy. Rather, the government is already able to seize power at any time, regardless of whether it is actually willing to do so in practice.

In such a situation, the EU must act as a counter-power. The Hungarian situation is not only deplorable *per se*, but also incompatible with the rule of law as a European value under Article 2 TEU. So far, the reaction of the Union has been late and inadequate, even though during the second and third phases of the Hungarian emergency measures it took some initiatives. Both the Union and the (other) Member States have not lived up to the challenge

and defend EU values properly, especially considering the seriousness of the situation. More than ever, it is now necessary that the EU action be given fresh impetus by deploying all instruments, both soft and hard, which are available to enforce its values in order to avoid other cases like this and further backsliding of the rule of law in Hungary.

UNPRECEDENTED TIMES. CORONAVIRUS, LEGITIMACY, ENFORCEMENT AND MASS COMMUNICATION IN THE UNITED KINGDOM

by *Andrea Butelli*

1. *Legislative framework evolution: primary and secondary legislation*

Looking at the emergency legislation of one of the worst affected countries in Europe,[1] one comes across a chaotic proliferation of laws:[2] in this confusion it is necessary to distinguish the main features that could outline a summary, as a compass for the reader, useful in the analysis that will follow, without any ambition of going through the law in its entirety.

Briefly, it is possible to identify seven phases[3] in the evolution of the relevant legislation. On 10th February, 2020, the very first measures against the

[1] See e.g. B. BALMFORD *et al.*, *Cross-Country Comparisons of Covid-19: Policy, Politics and the Price of Life*, in *Environmental and Resource Economics*, 76, 2020, p. 529 ff.

[2] See also A. WAGNER who pointed out that the rules have changed 64 times in less than a year: report available at docs.google.com/document/d/1ne4zhPYAZK8G867D1Iz0Gg2ZJFLGmF2K.

[3] J. BROWN, *Coronavirus: A history of English lockdown laws*, House of Commons Library, 2020, pp. 2-3 available at commonslibrary.parliament.uk; the author divides it into six phases, without considering the first approach, which, however, seems essential for the reasons that will be seen below.

pandemic came into force:[4] during the initial phase, the lawmakers' approach, certainly cautious in resorting to more incisive restrictions on personal freedom, did not seem clearly defined, to the point of attracting harsh criticism, particularly aimed at the unclear communication method which negatively influenced compliance and, consequently, the enforcement of subsequent legislation.

The second phase corresponded to the first lockdown, introduced by the regulations of 26th March,[5] then gradually eased starting from 13th May:[6] this period is characterised by the heaviest restrictions on personal freedom, being indeed forbidden to leave home, except for the thirteen "reasonable excuses" set out by law.

Conversely, the third phase – from 4th July[7] to 13th September – was the most relaxed one:[8] e.g., in most of England it was allowed to leave home without particular justifications, and gatherings (no more than thirty people) were permitted.

The reintroduction of restrictions – as of 14th September[9] – started the fourth phase: firstly with the so-called "Rule of six", which limited meetings outside the family to a maximum of six people,[10] secondly by an increasing random application of local restrictions, later more coordinated by the system of three tiers: Medium, High, and Very High.[11]

Rising infections, which by the end of October set more and more areas in

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[4] The Health Protection (Coronavirus) Regulations 2020 (S.I. 2020/129). Every statutory instrument mentioned here is available at www.legislation.gov.uk.

[5] The Health Protection (Coronavirus, Restrictions) Regulations 2020 (S.I. 2020/350).

[6] The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020 (S.I. 2020/500).

[7] The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (S.I. 2020/684).

[8] However, local restrictions also started on the 4th July: see The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 (S.I. 2020/685). Thereafter, other territorial restrictions would be enforced in the areas of Blackburn, Darwen, Luton, Bradford, North of England, Bolton, Birmingham, Sandwell, Solihull, North East of England; it would precede the introduction of the tier system.

[9] The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020 (S.I. 2020/986).

[10] But also the early closure of pubs and restaurants.

[11] The three regulations dated 14th October: The Health Protection (Coronavirus, Local Covid-19 Alert Level) (Medium) (England) Regulations (S.I. 2020/1103); The Health Protection (Coronavirus, Local Covid-19 Alert Level) (High) (England) Regulations 2020 (S.I. 2020/1104); The Health Protection (Coronavirus, Local Covid-19 Alert Level) (Very High) (England) Regulations 2020 (S.I. 2020/1105).

"tier 2" and "tier 3", led – on 5th November – to the second national lockdown,[12] and therefore to the fifth phase: nevertheless, even though it was considered a lockdown in the strict sense, some exceptions worthy of mention are added, especially when compared to the March restrictions, e.g. including the so-called "support bubble",[13] or the chance to meet a person not belonging to such a bubble outdoors.[14]

The sixth phase started on 2nd December[15] with the reintroduction of the "tier system" – similar to the previous one, but more restrictive[16] – then further modified on 19th December[17] by adding one more tier ("tier 4"), also due to the growing concern raised by the discovery of the "B.1.1.7" virus variant,[18] suspected of being even more severely contagious.[19]

Early in the new year, the imposition of the third national lockdown: on 6th January 2021, an amendment[20] to the four-tier system regulations extended the restrictions previously in force only for tier 4 areas to the whole of England;[21] thus the seventh phase began, characterised by measures similar to the first lockdown, but providing important exceptions completely unrelated to the regulations of March 2020.[22]

Finally, in order to complete the legislative framework, a clarification on Acts and Regulations seems necessary: as regards the generic limitation on

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[12] The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 (S.I. 2020/1200).

[13] *Idem*, reg. 12.

[14] *Idem*, reg. 6 (2) (c) (iii).

[15] The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (S.I. 2020/1374).

[16] See e.g. Schedule 2 and Schedule 3, Part 2 concerning restrictions on businesses and premises.

[17] The Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England) (Amendment) Regulations 2020 (S.I. 2020/1611), regs. 1(2), 2(13).

[18] M. CHAND *et al.*, *Investigation of novel SARS-COV-2 variant – Variant of Concern 202012/01*, Public Health England, 2021, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947048/Technical_Briefing_VOC_SH_NJL2_SH2.pdf.

[19] N.G. DAVIES *et al.*, *Estimated transmissibility and severity of novel SARS-CoV-2 Variant of Concern 202012/01 in England*, Centre for Mathematical Modelling of Infectious Diseases, London School of Hygiene and Tropical Medicine, 2020, *passim*, available on www.medrxiv.org.

[20] The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021 (S.I. 2021/8).

[21] Reg. 3 (13) (b), see the abovementioned regulations.

[22] E.g. exercise with one person is allowed and religious services can be held.

freedom of movement, the Public Health (Control of Disease) Act 1984[23] provides the ministers of England and Wales with the delegated power to impose a lockdown through Regulations, while as far as Northern Ireland and Scotland are concerned, the same powers are conferred by the Coronavirus Act[24] 2020 (Schedules 18 and 19).

The measures against the pandemic have undergone evolution – both in terms of the legislative framework and its enforcement – as will be seen below. The growing list of exceptions has actually changed the very meaning of the term lockdown itself, although the imperative of early 2021 was once again "stay at home".

Moreover, taking into account the progressive introduction of new exceptions,[25] one could glimpse a slight evolution in the balancing of values by lawmakers: having set aside the early complete prevalence of the need to contain the pandemic as the only requirement, other interests, initially completely neglected, have naturally re-emerged, gradually acquiring importance; among these, the renewed focus on mental health stands out as a striking example.[26] Through the observation of legislative evolution, it seems clear that the more severe restrictions, certainly considered compatible with implementation in the short term, soon proved to be an unwalkable path in the long term, also due to the worrisome "behavioural fatigue", one of the main causes that delayed the imposition of the lockdown itself.[27]

1.1. *Coronavirus Act 2020*

The Coronavirus Act 2020 is the main primary legislative instrument for dealing with the pandemic: it received royal assent on 25th March 2020 and

[23] Also "PHA" or "PHA 1984"; as amended by the Health and Social Care Act 2008.

[24] Also "CA" or "CA 2020".

[25] See: as concerns the first lockdown, reg. 6 (2), (S.I. 2020/350); regarding the second one, reg. 6 (S.I. 2020/1200); and concerning the third one, Schedule 3A, sez. 2 (S.I. 2020/1374), as amended by the January Regulation (S.I. 2021/8).

[26] E.g. as regards the regulations, the "linked household" system and the possibility of exercising outdoors together with another person can be considered two signals in this sense and also the observation of the Coronavirus Act reveals the repeal (The Coronavirus Act 2020 (Expiry of Mental Health Provisions) (England and Wales) Regulations 2020 (S.I. 2020/1467) of a large part of Schedule 8, which previously suspended some guarantees provided for the treatment of subjects suffering from mental illness (Mental Health Act 1983).

[27] N. HARVEY, *Behavioral Fatigue: Real Phenomenon, Naïve Construct, or Policy Contrivance?*, in *Frontiers in Psychology*, vol. 11, 2020 available on www.frontiersin.org.

was subject to its six-month parliamentary review procedure on 30th September, as required by section 98 of the text. The approved version consists of 102 sections and 29 Schedules; in a nutshell, one can identify five key points around which it enables action:[28] simplifying legislation concerning the recruitment of health personnel (ss. 2-9), reducing the number of administrative tasks frontline staff have to carry out (ss. 18-21, 30-32), containing the pandemic (ss. 50-57, 37-38), managing the deceased with respect and dignity (s. 58), and, finally, financially supporting people,[29] also sustaining the food supply chain (ss. 25-29) in order to ensure continuity in providing basic necessities.

Approved in just four "sitting days", the government bill was passed through the so-called fast-track legislation procedure, i.e. a normal procedure for parliamentary approval, but completed on an expedited timetable; it is usually reserved for particular circumstances – various indeed[30] – when the lack of legal protection turned out to be suddenly necessary. To the British lawmaker it is a quite familiar way of legislating[31] and has historical precedents which are not always constitutionally compatible:[32] in this sense one could mention, as two counterposed examples, the Criminal Justice (Terrorism and Security) Act 1998, which intervened at the height of the Northern Irish Troubles,[33] and the Dangerous Dogs Act 1991, that the Constitution Committee itself[34] identifies as a way to show an immediate institutional response to a growing concern, rather than an instrument aimed at controlling an actual emergency. Furthermore, the Commission warned about the constitutional implications of this way of legislating,[35] nevertheless it places the health emergency among the exceptional circumstances in which it is undoubtedly necessary.[36]

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[28] See also its explanatory notes.

[29] See e.g. the extension of statutory sick pay: s. 39-44; pensions s. 45-47; and also s. 72-74, 81-83.

[30] A. GOODLAD *et al.*, *Fast-track legislation: constitutional implications and safeguards*, House of Lords, London, 15th Report, Paper 116, 2008-09, Chapter 2, box 1, available on www.publications.parliament.uk.

[31] *Idem*, "is not a new phenomenon", Chapter 2, par. 19.

[32] *Idem*, Chapter 2, par. 22.

[33] In particular, this Act was approved after the Omagh bombing (August 1998).

[34] A. GOODLAD *et al.*, *Fast-track legislation: constitutional implications and safeguards*, cit., Chapter 2, par. 24.

[35] *Idem*; see also CONSTITUTION COMMITTEE, *Coronavirus Bill*, *Parliament: House of Lords*, 4th Report of Session 2019-21, p. 1 available on publications.parliament.uk.

[36] *Ibid.*; see also W.A. TAYLOR *et al.*, *The Legislative Process: The Passage of Bills through Parliament*, House of Lords – Constitution Committee, 24th Report, Paper 393, Session 2017-19, p. 16.

The government had its powers widely extended by the Coronavirus Act, beyond what was already granted by the Public Health Act 1984: indeed, the delegated powers include limiting or prohibiting events and gatherings, as well as suspending activities in schools, but, above all, the so-called "Henry VIII powers", which even allow the government to amend parliamentary law.

Police forces also receive extensive enforcement powers from Schedule 21:[37] police officers, "public health officers" and "immigration officers" can detain and quarantine anyone considered – on reasonable grounds – "potentially infectious"; refusing to comply with the law or with an officer's command is considered a criminal offence punishable with a fine up to £ 1,000.[38]

Finally, Schedule 12 incisively affects social assistance, suspending several legal duties imposed on local authorities by the Care Act 2014, thus taking the risk of depriving the beneficiaries of some fundamental services guaranteed by the law.

1.1.1. *Temporariness and normalisation: risks of the sunset clause*

The emergency is the fundamental justification for this exceptional expansion of powers: therefore, the need for a "sunset clause" has become paramount to circumscribe the Coronavirus Act's validity within the boundaries of what is strictly necessary against the pandemic. Indeed, section 89 specifies that most of the powers conferred by the Act will expire after a two-year period; the provision is undoubtedly characterised by its long duration,[39] but it is possible to amend it, extending its validity for a further six months or even decreasing it (section 90).

However, the risk of emergency legislation remains its normalisation: rules necessary today that remain in force tomorrow, despite the actual length of the emergency that gave them legitimacy.[40] In addition, one may observe that

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[37] It is worth noting that "an immigration officer or constable must, before exercising the powers […], consult a public health officer to the extent that it is practicable to do"; see e.g. Schedule 21, 7 (5), 9 (3), 13 (8), or 14 (7).

[38] Among the enforcement issues – better described below – there is also the sanctioning errors, due to an unfortunate interpretative mix between the FPN provided by the regulations and the fines (not FPN, moreover) referred to in Schedule 21 of the Coronavirus Act; see also CROWN PROSECUTION SERVICE, *CPS announces review findings for first 200 cases under coronavirus laws*, 15 May 2020, available at cps.gov.uk.

[39] When compared, e.g., to the sunset clause of (Coronavirus (Scotland) Act 2020) which provides for a validity of six months, extendable by Parliament for additional six months, up to a maximum of eighteen months.

[40] On this question, see: A. GREENE, *States should declare a State of Emergency using Article*

identifying an emergency that requires the reduction of fundamental rights and recognising, on the contrary, the exact moment in which the same measures are no longer essential[41] involves two assessments of different levels of complexity. Moreover, the power of identifying the latter point in time – besides being not particularly simple and instantaneous[42] – can represent a substantial exercise of lawmakers' free will: indeed, misuses of emergency law are taking place at this time, risking the fall into a vortex of automatic renewals which maintain rules that became useful for other purposes.[43] Thus, sometimes parliamentary oversight through the sunset clause is the weak point of emergency legislation, as it can represent nothing more than a mere procedural fulfilment, rather than a chance for proper democratic scrutiny.

The matter is of primary importance and does not remain straitened into theoretical hypotheses, including rather recent examples as well: the sunset clause included in the Terrorism Prevention and Investigation Measures Act 2011[44] – as also highlighted by the Counter-Terrorism Review Project[45] – engaged the House of Commons for only 32 minutes in the review process of powers attributed to the Secretary of State;[46] similarly, during the parliamentary debate on the renewal of the controversial powers of unlimited detention of "foreign suspects" contained in the Anti-Terrorism, Crime and Security Act 2001,[47] only four Lords took part, including the proposing minister. Finally, even the parliamentary review of the powers provided for by the Prevention of Terrorism Act 2005 had scarce participation.

The aforementioned anti-terrorism legislation, notwithstanding its com-

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15 ECHR to confront the Coronavirus Pandemic, in *Strasbourg Observers*, 2020, available at www.strasbourgobservers.com.

[41] *Ibid.*

[42] The evaluations – even based on the best science – that governments are required to carry out during emergencies are naturally quite often uncertain; see also F. HOAR, *A disproportionate interference with rights and freedoms. The Coronavirus Regulations and the European Convention on Human Rights*, Field Court Chambers, 2020, p. 21 ff., available at www.fieldcourt.co.uk.

[43] The following examples, concerning anti-terrorism legislation, better clarify the point; for a comparative perspective see: E. BULMER, *Emergency Powers International IDEA Constitution-Building Primer 18*, International Institute for Democracy and Electoral Assistance, Stockholm, 2018, p. 12 ff.

[44] Even lasting five years, see section 21.

[45] D. FERGAL, C. GRAEME, *Coronavirus Bill: What is the sunset clause provision?*, House of Commons Library, 2020, available at commonslibrary.parliament.uk.

[46] See *Draft Terrorism Prevention and Investigation Measures Act 2011 (Continuation) order 2016*, House of Commons, Delegated Legislation Committee, Debated on Wednesday 26 October 2016, available at hansard.parliament.uk.

[47] *Idem*, Part 4.

pletely different purpose, serves as a valid comparative basis by sharing the same traits of urgency and necessity with pandemic laws, as well as similar intrusions into the terrain of the Human Rights Act 1998. The examples show that the sunset clause is as necessary as it is weak: democratic oversight might occur only superficially, therefore normalisation is much more than a remote eventuality. Furthermore, parliamentary involvement would be required even more consistently in the case of fast track legislation, in order to democratically scrutinise the legislative text more deeply after its approval, considering the previous one was quite rough or hasty; for this reason one wonders if even the amendment that introduced the parliamentary scrutiny after six months has provided a rather weak check.[48]

In addition, sunset clause misuse is a confirmed tendency also beyond English borders,[49] with various examples that further highlight how its use does not descend from its formal respect.

Whatever the reasons for this trend, e.g. the MPs' lack of information, or the constitutional relationships between the government and Westminster,[50] the use of this tool – sometimes deemed nothing more than a "spoonful of sugar", as a resort to approve bad regulations by ensuring their short validity[51] – cannot paradoxically end up in a sort of permanent temporariness through normalisation.

1.2. *Health Protection Regulations and the legitimacy of lockdown*

The actual national "lockdown" – i.e. restrictions on freedom of movement on a vast scale – announced for the first time by the Prime Minister on 23rd March, 2020,[52] has its legal basis in the government regulations of 26th

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[48] S. MOLLOY, *COVID-19, Emergency Legislation, and Sunset Clauses*, Political Settlement Research Programme, 2020, available at www.politicalsettlements.org; the author also points out the risk of politicisation of the parliamentary debate.

[49] For a comparative perspective see: N. MCGARRITY, R. GULATI, G. WILLIAMS, *Sunset Clauses in Australian Anti-Terror Laws*, in *Adelaide Law Review*, 33, 2012, p. 320 ff. and Patriot Act 2001 (USA) available at congress.gov/107/plaws/publ56/PLAW-107publ56.pdf.

[50] T. KONSTADINIDES, L. MARSONS, *Covid-19 and its impact on the constitutional relationship between Government and Parliament*, UK Constitutional Law Association, 2020, available at *ukconstitutionallaw.org* or A. LILLY, H. WHITE, *Parliament's role in the coronavirus crisis*, Institute for Government, 2020, available at www.instituteforgovernment.org.uk.

[51] N. MCGARRITY, R. GULATI, G. WILLIAMS, *Sunset Clauses in Australian Anti-Terror Laws*, cit., p. 307.

[52] Full text available at www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020.

March,[53] of 5 November 2020,[54] and in the amendment to the four-tier system dated 6th January 2021.[55] Indeed, excluding the measures adopted on 10th February 2020[56] – which contained provisions later more organically merged into the Coronavirus Act[57] – and without considering local restrictions,[58] the regulations in question are those which established that "no person may leave […] the place where they are living without reasonable excuse". Following the text's pattern, the list of exceptions legally considered to be "reasonable excuse" constantly comes after the part of the restrictions: as already mentioned, more and more have been gradually added to an initial short list made up of thirteen circumstances,[59] considerably expanding and detailing the rule's wording; at first, non-compliance was punishable with a fixed penalty notice of up to £ 960 (maximum for subsequent violations),[60] then increased up to a maximum of £ 6,400 by later regulations.[61]

The aforementioned regulations were made by the Secretary of State in the exercise of the powers conferred by section 45C of the Public Health (Control of Disease) Act 1984; in accordance with section 45R of the PHA, no draft has been laid before Parliament, taking into account the particularly urgent circumstances. However, the legitimacy of the regulations remains far from being undisputed.[62]

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[53] The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020/350), reg. 6 (1)

[54] The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 (S.I. 2020/1200), reg. 5 (1)

[55] Schedule 3A, 1 (1), The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (S.I. 2020/1374); please note the tier 4 extension to the whole national territory: reg. 3 (13) (b), The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021 (S.I. 2021/8).

[56] The Health Protection (Coronavirus) Regulations 2020 (S.I. 2020/129), revoked by CA 2020, Schedule 21, Part 2, 24 (1).

[57] See e.g. the continuum in the first regulations' text, also underlined by the Coronavirus Act's explanatory notes n. 91 and 92.

[58] It is not possible here – in the interests of brevity – to investigate the issues relating to local lockdowns enacted under the Public Health (Control of Disease) Act 1984 (s45G, s45I, s45J) as well as the other local restrictions, Health Protection (Local Authority Powers) Regulations 2010.

[59] The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, (S.I. 2020/350), reg. 6 (2).

[60] *Idem*, reg. 10 (7) (bb).

[61] The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, (S.I. 2020/1374), reg. 12 (1) (b) (v). Please note that the specified fines concern breaches by one person.

[62] Regarding the fundamental issue of proportionality test see: A. BRADY, *Proportionality*

The parent statute's complex structure is at the heart of the debate: Section 45C 4 (d) confers on the appropriate Minister the power to impose special restrictions as a response to a threat against public health (45 (3) (c), while section 45C (6) (a) – in order to specify what is considered "special restrictions" – refers directly to "a restriction or requirement which can be imposed by a justice of the peace" on individuals or groups of people. To further simplify the understanding, it may be said that through the mentioned sections, a considerable exemption to the limits imposed on executive power is allowed, devolving powers usually reserved for the courts to the appropriate Minister. Although there are no doubts about this point, given the fact that the circumstances fulfil the emergency requirements, the extension[63] to the entire nation of restrictions conceived for being applied to groups of people – through the joint reading of s. 45G 2 (j) and of s. 45J – seems a rather forced interpretation.

A critical point for the legitimacy of lockdown under the parent statute (PHA 1984) already arises from this passage: indeed, to confer powers usually meant for justices of the peace to the "appropriate Minister" does not imply the automatic equalisation of small groups to the whole of the English population:[64] there is a massive difference between the isolation of a group of potentially infectious tourists within a hotel and a nationwide lockdown. Furthermore, the main legal requirement for the exercise of the mentioned powers also contributes to highlighting the erroneousness of this interpretation, i.e. the well-founded suspicion that a person or a group may have been infected (45G 1 (a): indeed, the *sine qua non* needed under the PHA 1984 may be found by monitoring a small group of people, e.g. by tracing their movements out and through a reconstruction of their contacts, but not automatically presumable for an entire country.[65] Thus, the boundaries traditionally drawn by *Entick v Carrington*[66] may temporarily give in to urgency and necessity (45 3

and Deference under the UK Human Rights Act. An Institutionally Sensitive Approach, Cambridge, 2012 p. 50 ff.; J. WADHAM, H. MOUNTFIELD, E. PROCHASKA, R. DESAI, *The Human Rights Act 1998*, Oxford, 2015, p. 40; see also: F. HOAR, *A disproportionate interference with right and freedoms. The Coronavirus Regulations and The European Convention on Human Rights*, cit., p. 1, recalling different contemporary scholars' views.

[63] On the contrary, see: J. KING, *The Lockdown is Lawful Part I*, UK Constitutional Law Association, 2020, available at ukconstitutionallaw.org.

[64] PHA, Section 45J.

[65] In order to avoid ending up in a "repealing interpretation" (rather: *interpretatio abrogans*), it is necessary to prefer an overall interpretation compatible with the mentioned requirement.

[66] *Entick v Carrington [1765],* EWHC KB J9 available at www.lexisnexis.com/uk/legal (authentication required).

(c) PHA), but it is certainly not possible to create – out of nothing – a completely new power for the executive, since it seems legally non-existent even for the judges themselves.

Therefore, the question that stands out as most worthy of attention for legal experts does not seem a complex assessment about timing of the government's actions facing the evolution of the pandemic,[67] but rather the dubious legitimacy of the actions themselves under primary legislation and, in particular, under the parent statute recalled by every regulation.

1.2.1. *Considerations around the choice of the parent statute*

Another interesting point is the choice to not include all the restrictions on personal freedom in the Coronavirus Act,[68] which as a primary legislative instrument would not have entailed the above-mentioned problems or even the risk of judicial review. On the contrary, in the choice between old or new statutory instruments, the English legislator has decided to take both directions without apparent justification, other than – as conceivable – placing the lockdown measures in a regulatory framework which implies a shorter validity than the CA 2020.

Nevertheless – even having duration as a goal – another path would have been easier to follow: the Civil Contingencies Act 2004.[69] The government's decision, on the contrary, was clearly to identify the CCA as last resort,[70] linking the appropriateness of these powers to the occurrence of a natural catastrophe attributable to "third category" emergencies.

In truth, the three conditions required by the Act in order to exercise the special emergency powers seem to have been completely met (see section 21): the first condition is, obviously, the emergency,[71] whether in progress or about to occur; the second is that measures are needed to address it; finally, the third condition is urgency. The CCA's powers are better explained by section 22 and, due to their wide extension, it is evident that they would not have en-

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[67] See again: F. HOAR, *A disproportionate interference with rights and freedoms. The Coronavirus Regulations and the European Convention on Human Rights*, cit., p. 20 ff.

[68] Similarly to what has been noticed for the powers in Schedule 21 CA 2020; see also: J. GROGAN, *Right Restriction or Restricting Rights? The UK Acts to Address COVID-19*, in *Verfassungsblog*, 2020, p. 3, available at verfassungsblog.de.

[69] Also "CCA" or "CCA 2004".

[70] It was made clear in a Cabinet Office guidance available at www.gov.uk/government/publications/emergency-preparedness.

[71] For definitions, see CCA, section 19.

tailed problems concerning legitimacy.[72] Furthermore, even a narrow interpretation of "emergencies" would still have been consistent with the definition of s. 19 (1) (a) and s. 19 (2), due to its reference to threat to human life and interruption of health services.[73]

Therefore, one might research the motivation behind the choice to locate the national lockdown rules into the cramped space created by the Public Health Act 1984. Probably, on the one hand, the inclusion in the Coronavirus Act would have resulted in an excessively long validity of the rules, incompatible with the very mobile pandemic scenario; on the other hand, the periodic monitoring required by the CCA may have seemed like an excessive limitation as well as the broad duration. Indeed, section 27 of the CCA would have required parliamentary approval within seven days beginning with the date of laying ("positive procedure"), while section 26 states that the rules inevitably expire after thirty days. Conversely, the PHA allows a "negative procedure" (s. 45R), i.e. to maintain in force the regulations also in the absence of a contrary resolution by both Houses, setting their expirations after twenty-eight days, except for parliamentary approval (section 45R (4) that would further extend its validity up to a maximum of six months.

However, the choice among different instruments of primary legislation does not concern only the validity of the regulations, but involves wider considerations on the delicate relationship between Government and Parliament during an emergency.[74] In addition, the CCA itself clearly allows for the draft of new regulations containing the same emergency powers, once the first regulations have expired (section 26 (2) (a), thus repeating the necessary approval process from the beginning.

In a crisis situation that involves such a compression of rights and freedoms, the need for democratic oversight appears to increase: even regardless of any question about legitimacy, more frequent parliamentary involvement through the CCA would have been preferable.[75]

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[72] See in particular n. 3: "*Emergency regulations may make provision of any kind that could be made by Act of Parliament or by the exercise of the Royal Prerogative*".

[73] For completeness, see also section 19 (2) a, b, h.

[74] T. KONSTADINIDES, L. MARSONS, *Covid-19 and its impact on the constitutional relationship between Government and Parliament*, cit., or A. LILLY, H. WHITE, *Parliament's role in the coronavirus crisis*, cit.

[75] Also overcoming the concerning practical issues of the two Houses, as it happened then; for a comparative perspective see: R. KELLY *et al.*, *Coronavirus: changes to practice and procedure in the UK and other parliaments*, House of Commons Library, Briefing Paper n. 8874, 2020, available at commonslibrary.parliament.uk.

1.2.2. *Legitimacy through definitions*

As an introduction for the following paragraph, it is necessary to sketch out another crucial point: even the generic definitions contained in the Public Health Act place the legitimacy of the regulations on thin ice when it comes to distinguishing between "lockdown" and "quarantine". Indeed, section 45D (3) categorically excludes the power to impose a quarantine through regulations.

However – whilst neglecting the common daily usage of the term, sometimes used to express both quarantine in the strict sense and lockdown[76] without any distinction – it cannot be said that the limits on freedom of movement can be defined as quarantine on the basis of the regulations: the aforementioned exceptions ("reasonable excuses") are the distinction between lockdown and quarantine.

Thus, it is evident that the focus of the analysis must shift to enforcement, given that – taking into account that the legitimacy of restrictions derives also from the definition of lockdown obtained also by subtracting exceptions – it will be crucial to understand whether the exercise of freedom was actually granted under the "reasonable excuse" rule.

2. *The right to run and other enforcement issues*

One could distinguish two phases of the enforcement in England: the first one, right after the Prime Minister's speech of 23rd March 2020, characterised by a consistent recourse to criminalisation and shaming of even totally allowed behaviours; the second one, on the contrary, renewed by the NPCC – National Police Chiefs' Council and the College of Policing guidelines of 31st March 2020.

2.1. *Shaming and crime control*

On 26th March, Derbyshire Police published a video of their Constabulary Drone Unit: the images show some people walking in the Curbar Edge, a well-known hiking spot in the area; the video is captioned to condemn such behaviour since deemed "not essential".

Later, in a press conference, the Chief Constable of Northamptonshire Po-

[76] This point is stressed also by J. KING, *The Lockdown is Lawful: Part II*, UK Constitutional Law Association, 2020, available at ukconstitutionallaw.org.

lice even threatened to check baskets and trolleys in order to verify the essentiality of purchases.

These are just two examples[77] of the heavy-handed enforcement approach that certainly prevailed in the very early period, in addition to the singular use of communication, based on wide-ranging criminalisation, e.g. confirmed by the "naming and shaming" carried out by the Crown Prosecution Service, e.g. through a press release eloquently entitled:[78] "CPS brings coronavirus criminals to justice".[79]

Indeed, the CPS's alert level for Covid-related crimes was immediately high;[80] the crime control tendency also stands out through the absolute priority granted to "all Covid-19 related cases", also made explicit in the protocol adopted in conjunction with the National Police Chiefs' Council:[81] the official record establishes the priorities for police and crown prosecutors through a stringent selection of cases based on a classification into three categories of offences,[82] in order to avoid crowding the courts with less important trials. Thus, the placement in "type A" ends up equating Covid offences[83] with other far more serious crimes such as those related to terrorism, serious sexual offences, and homicide.[84]

These enforcement trends quickly raised criticism: in particular, the harsh words of the former Justice of the Supreme Court, Lord Jonathan Sumption, received public attention; according to Sumption, firstly, the government's actions seemed more led by concern than rationality[85] and, consequently, sometimes even worse practical results would derive from this confusion, as in the aforementioned Derbyshire enforcement practices.[86]

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[77] Since mentioned examples can easily be found, please refer to the main UK press sites.

[78] J. COLLINS, *Coronavirus and the Spread of Crime Control*, University of Bristol, Bristol, 2020, available at legalresearch.blogs.bris.ac.uk. The author herself points out that even the title reveals an attitude oriented towards criminalisation.

[79] CROWN PROSECUTION SERVICE, *CPS brings coronavirus criminals to justice*, 9 April 2020, available at cps.gov.uk.

[80] See the "violent crime" classification, for instance: CROWN PROSECUTION SERVICE, *'Coronavirus coughs' at key workers will be charged as assault*, 26 March 2020, available at cps.gov.uk.

[81] CROWN PROSECUTION SERVICE, *Interim CPS Charging Protocol – Covid-19 crisis response*, 31 March 2020, available at cps.gov.uk.

[82] *Idem*, n. 3: "a. immediate – custody and all covid-19 related cases / b. high priority cases – non-custody bail cases / c. other cases – released under investigation or no arrest require".

[83] *Idem*, see n. 10: "Other Covid-19 related offending e.g. fraud".

[84] *Ibid.*

[85] J. SUMPTION, *Coronavirus lockdown: we are so afraid of death, no one even asks whether this 'cure' is actually worse*, 5 April 2020, available at www.thetimes.co.uk.

[86] "Derbyshire Police have shamed our policing traditions"; see: *Coronavirus: Lord Sumption*

Indeed, in the trembling emergency dynamics, communication plays a crucial role in law enforcement, and one can therefore only take a negative view on the use of institutional communication channels that with the guidelines and FAQs have provided conflicting recommendations, even clashing with the regulations themselves. As a striking example, detailed restrictions on physical exercise can be found in the FAQs,[87] in the guidance,[88] and in the Prime Minister's statements,[89] even though they never had any legal basis within the regulations,[90] neither concerning how often nor the distance limit.[91] It seems a key issue: the well-known communication confusion of the British government has in fact produced equally chaotic enforcement feedbacks.[92]

Therefore, to enforce recommendations, instead of the law itself, is a serious interpretative error, but not entirely attributable to overzealous officers or the chief constable's directives, but partially linked to the fragmented institutional communication methods too; it was stressed that the dangerous mix between legal sources and the government's unenforceable recommendations was caused directly by those who should have promoted its clarity: on the contrary, nothing was done to specify what was a legally binding norm and what was a mere advice[93] ("*the difficulty is that what is being represented as rules are not rules*"[94]).

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brands Derbyshire Police "disgraceful", in *BBC News*, 30 March 2020, available at bbc.com/news/uk-england-derbyshire-52095857.

[87] Considering that on *gov.uk* FAQs are daily updated, please refer to Web Archive saved webpage (29 March 2020) available at https://web.archive.org/web/20200401085557/https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do.

[88] See 1 May 2020 guidance "1. Staying at home" available at gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others.

[89] "one form of exercise a day"; see e.g.: *Boris Johnson orders UK lockdown to be enforced by police*, in *The Guardian*, 23 March 2020, available at www.theguardian.com/world/2020/mar/23/boris-johnson-orders-uk-lockdown-to-be-enforced-by-police.

[90] Sometimes not even in guidance; see e.g. *Guidance on social distancing for everyone in the UK*, updated 30 March 2020, nowadays withdrawn, but still available at gov.uk/government/publications.

[91] This is further confirmed by the legislative evolution which, by governing the exceptions on "stay at home", has gone in the direction of expanding the right to exercise.

[92] J. BROWN, *Coronavirus: Enforcing restrictions*, House of Commons Library, Briefing Paper n. 9024, 2020, p. 23, available at commonslibrary.parliament.uk.

[93] R. HOGARTH, *The government must draw a clear line between law and guidance during the coronavirus crisis*, Institute for Government, 2020; S. NICKSON, A. THOMAS, E. MULLENS-BURGESS, *Decision making in a crisis. First responses to the coronavirus pandemic*, Institute for Government, 2020, both available at www.instituteforgovernment.org.uk.

[94] Also, as concerns FAQs: "The Coronavirus FAQs are a jumble of rules and guidance,

The first phase of enforcement certainly suffered from the distortions of communication, highlighting that – in the emergency context – the respect for fundamental rights, on the one hand, and the effectiveness of the legislation, on the other, pass through the synergy of the law and its correct disclosure.[95]

2.2. *"Engage, explain, encourage, enforce"*

The NPCC and College of Policing tried to fix the evident enforcement issues through the new guidance of 31st March 2020,[96] which settled on a progressive four-phase approach (four Es approach: "engage, explain, encourage, enforce"[97]) labelling the use of force as a last resort only. The guidelines aimed to bring enforcement back within the boundaries of the powers granted by primary and secondary legislation, also clarifying their content and excluding illegal practices.[98] In hindsight, the step-by-step approach laid down in the mentioned protocol seemed already to be outlined by the regulations of 26th March;[99] furthermore, the direction taken by the guidance was then confirmed both by the subsequent lockdowns' regulations[100] and by other guidelines is-

sometimes requesting, sometimes ordering, but with the underlying message that they represent legal obligation"; R. CORMACAIN, *Covid-19: When is a rule not a rule?*, in *Bingham Centre For The Rule Of Law*, 2020, available at binghamcentre.biicl.org.

[95] Not only by measures that are abstractly compatible with the Human Rights Act 1998 or the common law; for a more extensive discussion see again: F. HOAR, *A disproportionate interference with rights and freedoms. The Coronavirus Regulations and the European Convention on Human Rights*, cit., *passim*.

[96] The short version is still available at college.police.uk/What-we-do/COVID-19/Documents/Engage-Explain-Encourage-Enforce-guidance.pdf.

[97] 1. Engage: the public official must seek a dialogue in order to understand why a person is not at home and whether he is aware that it is a breach of regulations; 2. explain: following the negative outcome of the first step, an attempt is made to educate the person by emphasising the social importance of his/her actions; 3. encourage: persisting in non-compliance, he/she is encouraged to specific behaviours by following specific orders; 4. enforce: only as a "last resort" comes the use of force (and fines as well), which must still be necessary and proportionate.

[98] *Idem*, p. 6: see e.g.: "There is no power to "stop and account"; moreover, serious enforcement issues and confusion arouse also from Coronavirus Act rules, see CROWN PROSECUTION SERVICE, *CPS announces review findings for first 200 cases under coronavirus laws*, 15 May 2020, available at www.cps.gov.uk. As can be seen, all 44 cases under the Act were found to have been incorrectly charged, thus withdrawn or returned to court.

[99] The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, (S.I. 2020/350), reg. 8 (8).

[100] See e.g. the introduction of the so-called "Covid marshal".

sued by the NPCC and College of Policing,[101] according to the leading principles of enforcement deeply rooted in the British system.

Indeed, the British law enforcement tradition is based on the so-called "policing by consent": this expression encloses nine principles (Robert Peel's Principles of Policing[102]) that should constantly guide the *modus operandi* of law enforcement in a as interactive as possible way, in order to inspire spontaneous compliance through consent and understanding.[103] These principles are so embedded in tradition[104] that they are also mentioned in a rather recent judicial precedent (*Skenderaj v Secretary of State for the Home Department [2002]*): "*Effective policing depends heavily on policing by consent*".[105]

Nowadays, the aforementioned *obiter dictum*[106] plays more than ever its typical persuasive role, perfectly matching the need to contain the spread of disease through compliance; moreover, in a context in which maintaining police legitimacy can easily be complicated by the perception of appropriateness that people may have about restrictions.[107]

The NPCC's guidance, despite reducing enforcement interpretative issues, certainly was not a panacea.[108] Indeed, it must be stressed that the Brit-

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[101] See NATIONAL POLICE CHIEFS' COUNCIL, *Policing the pandemic: the Act, the Regulations and guidance*, 2020, Part 3, available at www.college.police.uk.

[102] For a brief overview see: *Definition of policing by consent*, FOI Release, 10 December 2012, available at gov.uk/government/publications.

[103] For a more in-depth study, see: S. GRACE, *Policing Social Distancing: Gaining and Maintaining Compliance in the Age of Coronavirus*, in *Policing: A Journal of Policy and Practice*, Oxford University Press, Oxford, 2020.

[104] For the sake of completeness, see an historical analysis providing another point about its roots: S.A. LENTZ, R.H. CHAIRES, *The invention of Peel's principles: A study of policing "textbook" history*, in *Journal of Criminal Justice*, 35, 2007, available at www.sciencedirect.com.

[105] Another author recalls the same precedent: N. DOBSON, *Police powers & COVID-19*, in *New Law Journal*, 10-17 April 2020, available at www.newlawjournal.co.uk; the mentioned judgement is available at www.lexisnexis.com/uk/legal (authentication required).

[106] By Lord Auld, judge of the court of appeal.

[107] S. GRACE, *Policing Social Distancing: Gaining and Maintaining Compliance in the Age of Coronavirus*, cit., *passim*; I. SHANNON, *Democratic Oversight and Political Direction of Chief Police Officers in England and Wales: Implications for Police Legitimacy*, in *Policing: A Journal of Policy and Practice*, Oxford, 2020, p. 11; D.J. JONES, *The Potential Impacts of Pandemic Policing on Police Legitimacy: Planning Past the COVID-19 Crisis*, Oxford, 2020.

[108] The two-phase division of enforcement (used here as convenient) should not be misleading; other examples show that the standardisation of police practices was not complete: see e.g. *Police apologise over virus lockdown arrest threat to SR News journalist*, in *SR News*, 2 April 2020, available at www.sr-news.com or *Derbyshire police to review lockdown fines after walkers given £200 penalties*, in *The Guardian*, 9 Jan 2021, available on www.theguardian.com.

ish strategy against Covid never completely abandoned a strong pre-emptive vocation – as it can be seen in the increasing amounts of FPN, in the expansions of tools provided by law, or looking at police departments' communication style – eventually, remaining on the verge between hard law and soft law.

3. *Conclusions*

A pandemic undoubtedly means unprecedented challenges for the law. However, this does not automatically imply the setting aside of suitable statutory instruments that may already exist: the British lawmakers do not seem to choose flawlessly between old and new legislation – as well as concerning the articulation between primary and secondary legislation – jeopardising the legitimacy of regulations, constrained into the narrow space permitted under the Public Health Act 1984. The Civil Contingencies Act 2004 would have cast *ultra vires* dark clouds away, granting, moreover, a much more frequent parliamentary scrutiny, recommended even during an emergency.

In addition, one of the questions about legitimacy is strictly connected to enforcement issues: the lockdown is confined to its definition only if the "reasonable excuses" exceptions are granted by correct enforcement; otherwise, the severity of the restrictions tends to convert it in quarantine, a hypothesis expressly prohibited by section 45D (3) of PHA. Indeed, the evolution of legislation has gone in the direction of expanding exceptions to the "stay at home" requirement, at various times reimposed, but with an increasingly weaker meaning.

It appears that enforcement methods are parallel symptoms of the British government's wavering adherence to different and conflicting behavioural theories.[109] The initial nudge theory approach – aimed at avoiding the so-called "behavioural fatigue"[110] through soft law – subsequently gave way to the actual lockdown; thus, to highlight the change in emergency strategy, the

[109] For this reason, it is necessary to take into account a first phase (or "phase zero") of the emergency legislation that other authors prefer to leave out; see e.g. J. BROWN, *Coronavirus: A history of English lockdown laws*, cit.

[110] For the sake of brevity, please refer to: A.L. SIBONY, *The UK COVID-19 Response: A Behavioural Irony?*, in *European Journal of Risk Regulation*, Cambridge University Press, Cambridge, 2020.

use of criminalisation and pre-emptive enforcement have played a key role from a communicative perspective.[111]

Informational dysfunctions are certainly among the causes of enforcement issues; the initial confusion – also originating in conflicting recommendations from institutional sources – required a subsequent behavioural redirection, in order to delete the very first strategies. Consequently, the risk of losing consent demanded standardisation of enforcement through the aforementioned guidance of 31st March 2020, however, without ever abandoning the path of statutory instruments for "self-regulation".

From the brief analysis, it emerges that in the context of the health emergency, the effectiveness of the rules depends heavily on correct communication and compliance, rather than enforcement in the strict sense; indeed, even appealing crime control methods – quick to show the hard side of law in moments of uncertainty[112] – are a misleading option in the long term, as well as potentially in conflict with art. 7 of the ECHR.[113]

[111] Indeed, as has been seen, the relationship between communication strategies and law enforcement is two-way; see also: J. COLLINS, *Coronavirus and the Spread of Crime Control*, cit.

[112] *Ibid.*

[113] See also: T. HICKMAN, *Eight ways to reinforce and revise the lockdown law*, in *UK Constitutional Law Association*, 2020, n. 1 and 3, available at ukconstitutionallaw.org.

THE COVID-19 PANDEMIC. POLITICAL TURMOIL AND (UN)CONSTITUTIONAL CONFINEMENT MEASURES IN KOSOVO

by *Bardhyl Hasanpapaj*

1. *Kosovo in a nutshell/country background*

Kosovo is a small, landlocked democracy in the heart of the Western Balkans, aspiring to join and integrate into the bigger Euro-Atlantic family of democracies.[1] The country officially entered the political arena with its successful declaration of independence in 2008 after eight years of United Nations administration following the war and secession from Serbia in 1999. This event marked the establishment of the newest state in Europe as well as the birth of an ongoing controversy surrounding the country's status of independence and sovereignty.

Kosovo is still considered a *sui generis* case, as its declaration of independence from Serbia countered two important international principles, that on territorial integrity and the right to self-determination of people, with a prevailing rule on the right of the people to secede in cases of continuous discrimination.[2] The UNSC Resolution 1244 and the vague and narrow approach of the ICJ decision[3] left the issue on the status of Kosovo unresolved and in

[1] Kosovo declaration of independence, http://news.bbc.co.uk/2/hi/europe/7249677.stm.

[2] A. ROHAN, *Kosovo's path to independence. European Council on Foreign Relations*, 2018, https://www.ecfr.eu/article/commentary_kosovos_path_to_independence.

[3] "General international law contains no applicable prohibition of declarations of independ-

the hands of international support.[4] As a result, the country continues to face strong divisions in the international arena regarding its recognition of statehood and independence.[5] To this day, only 116 states have recognised Kosovo's Independence,[6] of whom 114 are UN Member States, including the latest recognition by Israel as a part of an agreement reached at the US White House. The country still lacks the recognition of five EU Member States (i.e. Spain, Greece, Slovakia, Romania and Cyprus), and continues to face strong opposition from Serbia, and Serbia's strongest ally, Russia, both of whom are obstructing the country's sovereignty across the international arena.

As of the end of November 2018, relations with Serbia further deteriorated, as a result of a 100% tariff increase imposed on Serbian imports proclaimed to be waived by Kosovo Government,[7] upon the condition of the recognition of Kosovo's independence from Serbia.[8] Attempts by the EU have been made for the normalisation of relations through the EU-supported dialogue resulting into the signing of the Brussels agreement in 2013 which technically put an end to the Serbian parallel structures in north Kosovo and opened the ground for the establishment of an Association/Community of Serbian majority municipalities. However, contrary to the external narrative that the two sides remain fully committed to respecting the agreement in their pursuit for the EU integration path, the domestic reality continues to be completely different. In reality, the implementation of the agreement is very slow if not at a total standstill. Increased lobbying by Serbia for the de-recognition of Kosovo's independence, the blocking of Kosovo's memberships of various in-

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ence ... the declaration of independence of 17 February 2008 did not violate general international law" – International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, in *Kosovo: Four Futures*, 113 22 July 2010, https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf.

[4] E. SPYROS, J. KER-LINDSAY, D. PAPADIMITRIOU, *Kosovo: Four Futures, Survival*, 2010, 52:5, pp. 99-116, DOI: 10.1080/00396338.2010.522099.

[5] E. NEWMAN, V. GEZIM, *The Foreign Policy of State Recognition: Kosovo's Diplomatic Strategy to Join International Society*, in *Foreign Policy Analysis*, 2016, DOI: 10.1093/fpa/orw042.

[6] Ministry of Foreign Affairs – Kosovo, http://www.mfa-ks.net/politika/484/lista-e-njohjeve/484.

[7] On November 2018 Kosovo raised the custom tariffs for Serbian and Bosnian goods from 10 to 100 percent as retaliatory measures after the aggressive campaign obstructing the country's membership to Interpol, https://www.rferl.org/a/kosovo-slaps-100-percent-tariffs-on-serbia-bosnia-to-defend-vital-interest-/29613285.html.

[8] B92, *100% tax to remain until Serbia recognizes Kosovo*, 2018, https://www.b92.net/eng/news/politics.php?yyyy=2018&mm=11&dd=22&nav_id=105587; D. NEZIRI, *The government has not taken any action for the northern municipalities with resigned mayors*, in *Koha Ditore*, 2019, https://www.koha.net/arberi/142712/qeveria-nuk-ka-ndermarre-asnje-veprim-per-komunat-e-veriut-me-kryetare-te-dorehequr/.

ternational organisations, as well as retaliatory trade measures imposed by Kosovo authorities, show us that as there is one step forward, there are two, if not more, steps backwards in this quest for normalisation of relations between Kosovo and Serbia.

Despite the promising Western Balkans Enlargement Strategy launched by the EU Commission in 2018 and the Brussels Agreement reached in 2013 between Kosovo and Serbia for the normalisation of relations, the year 2020 found Kosovo and the Western Balkans at a crossroad. The impasse in the Kosovo-Serbia dialogue, and the ongoing campaigns for de-recognition by Serbia, coupled with the trade retaliatory measures imposed by Kosovo on Serbian goods, led to a resurgence of international pressure for revitalising the dialogue and reaching an agreement to end the Kosovo-Serbia standoff.

In an attempt to speed things up, the United States Administration appointed Richard Grenell as the Special Envoy tasked to deliver an "historic victory" in the Western Balkans.[9] Focusing more on "economic normalisation" as a means towards a political settlement, Grenell, together with the EU counterparts, mounted pressure on the Kosovar authorities to lift the 100% tariff on Serbian and Bosnian goods. At the beginning pressure was placed on both Pristina and Belgrade to reciprocally remove existing obstacles and resume talks for the normalisation of relations – for Pristina to remove the tariffs, and for Belgrade to stop the de-recognition campaign against Kosovo.[10]

This approach was met with some resistance from the newly established government in Kosovo, led by a coalition between the leftist-nationalist Vetevendosje (Self-Determination) party and the centre-right, Democratic League of Kosovo (LDK) formed on 3 February, 2020. The Kosovan Prime Minister, Albin Kurti, was fighting for equality in the negotiations with Serbia, and therefore refused to lift the tariffs without the introduction of reciprocity measures towards Serbia,[11] shaking the stability of the governing coalition and the long-standing US-Kosovo relations. Only after the fall of Kurti's Government and the establishment of the new one, on 4 September 2020 the Serbian President, Aleksandar Vučić, and the newly appointed Prime Minister of Kosovo, Avdullah Hoti, signed an Economic Normalisation Agreement in Wash-

[9] P. KINGSLEY, K.P. VOGEL, *Pushing for Serbia-Kosovo Peace Deal, U.S. Roils Allies*, in *The NY Times*, 20 June, 2020, https://www.nytimes.com/2020/06/20/world/europe/serbia-kosovo-peace-elections.html.

[10] P.E. JOSEPH, *Anatomy of a Kosovo Summit Catastrophe*, in *Foreign Policy*, June 24, 2020, https://foreignpolicy.com/2020/06/24/kosovo-serbia-summit-white-house-catastrophe-balkans-peace-process/.

[11] *Ibid.*

ington, DC at the invitation of the President of the United States Donald Trump, agreeing to 16 points related to economic normalisation, increasing their bilateral trade with the US and their respective relationships with Israel. There were elements of political theatre to the signing, but the negotiating process served to jumpstart the European-led dialogues seeking a final political solution to the impasse. The agreement envisaged mutual recognition of Israel and the Republic of Kosovo, while both countries committed to opening embassies in Jerusalem.[12] The Kosovo-Serbia agreement was criticised especially for the mere fact that was intended to be used for, and signed on the eve of, the US elections. EU member states and institutions were not great supporters of such agreements either. The real impact of this agreement is yet to be seen in light of the new administration of President Joe Biden, who is expected to define a new role for the US internationally.[13]

2. *Domestic power struggles during a global pandemic*

At a time when countries around the world were joining forces and redoubling their efforts to battle the ever-growing challenges posed by the Covid-19 pandemic, the youngest country in Europe was caught up in unprecedented political and legal turmoil. The internal political wangling during this time made Kosovo the first country in the world to see the collapse of its government during this time of global pandemic.

The political situation in Kosovo reached a dramatic state when, in the early stages of the coronavirus outbreak in early March, the President of Kosovo, Hashim Thaci, repeatedly stated the need to declare a "*State of Emergency*" to better tackle the coronavirus outbreak. These declarations were strongly opposed by PM Kurti, as he feared that there were ulterior motives to these declarations, leaning more towards the personal intentions of the President to consolidate more power, rather than worrying about the public emergency

[12] In the ceremony at the White House, President Trump said Serbia had also committed to moving its embassy to Jerusalem, and Kosovo and Israel had agreed to normalise ties and establish diplomatic relations, https://www.rferl.org/a/trump-says-serbia-kosovo-agree-to-normalize-economic-ties/30821454.html.

[13] In a letter sent by US President Joe Biden to the Serbian President Vučić, on the occasion of Serbian National Day, on February 15, it was stated that "*We remain firm in our support for Serbia's EU membership approval, as well as in the implementation of reforms and the achievement of a comprehensive normalisation agreement with Kosovo, which is focused on mutual recognition*", https://exit.al/en/2021/02/07/biden-urges-serbia-to-recognize-kosovo/.

and health of Kosovo citizens, at a time when there were only 19 active cases of infected patients in Kosovo, and zero recorded deaths.[14] To add more fuel to this debate, the Minister of Internal Affairs, from the junior coalition partner (LDK), sided with the President in support of declaring a state of emergency, a declaration that saw him dismissed the following day and paved the way for the dissolution of the governing coalition.[15]

Following the dismissal of the LDK Minister by Vetevendosje and several disagreements between the coalition partners regarding the Kosovo-Serbia Dialogue, the removal of the 100% import tariff on imports from Serbia and the management of the public health crisis, LDK MPs initiated a motion of no-confidence. The Assembly of Kosovo convened in an extraordinary session on 25 March, wherein the LDK MPs, backed by the opposition parties, with 82 votes in favour, 32 against, and 1 abstention, passed the no-confidence motion, dismissing the ruling coalition, after only 51 days in office.[16]

Overshadowing the importance of the pandemic management, after ongoing public debates on whether new elections should be organised or whether the President should move forward with paving the ground to the second political party for the formation of the new ruling government and upon a Constitutional review[17] of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April, 2020, a new government was appointed by the Kosovo Assembly on 3 June, 2020. Avdullah Hoti from the LDK party secured the 61 votes that elected him Prime Minister of Kosovo and established a new governing coalition, leaving Vetevendosje, the winner of the last elections, in opposition.[18] This opened up a new opportunity for the assembly and the government to function, but at the same time made ground for further deepening the political crisis.

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[14] F. BYTYCI, Reuters, *Kosovo to declare state of emergency to counter coronavirus*, March 16, 2020, https://www.reuters.com/article/us-health-coronavirus-kosovo/kosovo-to-declare-state-of-emergency-to-counter-coronavirus-idUSKBN21445J.

[15] ISPI, *Political Turmoil in Kosovo Amidst the Covid-19 Pandemic*, April 30, 2020, https://www.ispionline.it/en/pubblicazione/political-turmoil-kosovo-amidst-covid-19-pandemic-25901.

[16] F. BYTYCI, Reuters, *Kosovo lawmakers dismiss government in no-confidence vote*, https://www.reuters.com/article/us-kosovo-government/kosovo-lawmakers-dismiss-government-in-no-confidence-vote-idUSKBN21C3OO.

[17] Case No. KO72/20. Constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020. Constitutional Court of the Republic of Kosovo, https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-dekretit-te-presidentit-te-republikes-se-kosoves-nr-24-2020-te-30-prillit-2020/.

[18] *Kosovar Lawmakers End Months of Turmoil, Approve New Government With Hoti As PM*, in *Radio Free Europe*, https://www.rferl.org/a/kosovo-parliament-approves-new-governement-hoti-pm/30650516.html.

In addition to this complex situation, increasing pressure from the international partners for the start of the renewed dialogue with Serbia triggered additional dilemma and debates on the existence of potential secret agreements for territorial swaps as a potential solution for ending the historical dispute between the two countries.[19] Just prior to the no-confidence motion, the Kurti government lifted the tariffs against Serbia and enforced reciprocity measures, prompting the United States to unfreeze the $50 million in economic aid halted after the internal dispute between coalition partners over the lifting of the Serbia tariff.[20] The Vetevendosje party accused Washington, and the US Special Envoy, Mr. Grenell, of working in tandem with President Thaci in having PM Kurti removed from power in order to speed up talks with Serbia[21] and score an "historic victory" in the Balkans before the November elections in the US.[22]

The domestic power struggle continues especially after the CCK decided on a sensitive case regarding the legality of the election of the June 3 Hoti Government. In its decision KO95/20, the CCK found that the government of Prime Minister Avdullah Hoti was not elected in compliance with the Kosovo Constitution. With regard to the election of the Government, the Court notes that in order for the Government to be elected, in accordance with paragraph 3 of Article 95 of the Constitution, at least sixty-one (61) members of the Assembly must vote "for" the Government. In this case, according to official documents of the Assembly, the Court notes that on June 3, 2020, sixty one (61) deputies voted "for" the government in the challenged decision. This includes Etem Arifi, who voted in approval of the challenged decision. After the Court found that Etem Arifi's mandate had been invalid prior to the vote on the challenged Decision, that Decision had received only sixty (60) valid votes. Consequently, the procedure for electing the Government was not conducted in accordance with paragraph 3 of Article 95 [Election of the Government] of the Constitution, because the Government did not receive a majority vote of all members of the Assembly of the Republic of Kosovo. Thus, the CCK, in

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[19] X. BAMI, BalkanInsight, *Grenell: US to lead Kosovo-Serbia Talks on Economy, EU on Politics*, June 19, 2020, https://balkaninsight.com/2020/06/19/grenell-us-to-lead-first-part-of-serbia-kosovo-talks/.

[20] F. BYTYCI, Reuters, *Kosovo lawmakers dismiss government in no-confidence vote*, https://www.reuters.com/article/us-kosovo-government/kosovo-lawmakers-dismiss-government-in-no-confidence-vote-idUSKBN21C3OO.

[21] *Kosovar Lawmakers End Months of Turmoil, Approve New Government With Hoti As PM*, in *Radio Free Europe*, https://www.rferl.org/a/kosovo-parliament-approves-new-governement-hoti-pm/30650516.html.

[22] P. KINGSLEY, K.P. VOGEL, *The NY Times*, June, 2020, https://www.nytimes.com/2020/06/20/world/europe/serbia-kosovo-peace-elections.html.

this decision, concluded that the President of the Republic of Kosovo should announce elections, which must be held within 40 days. Based on this the early elections[23] were held on February 14, 2021. Vetevendosje managed to win, in a coalition with a new political initiative of "Lista Vjosa" (a political initiative by the Acting President Ms. Vjosa Osmani), some 50% of all votes and is expected to gain some 60 seats in the Kosovo Assembly. This majority is the first of its kind for elections in Kosovo, as no other party or pre-election coalition has ever managed to get such a large number of seats. Nevertheless, even this great victory is expected to face some difficulties especially for the election of the country's President, which requires 2/3 of the votes of the 120 MPs. Another legal battle is expected to be initiated in front of the Constitutional Court as a result of these elections pertaining to the reserved seats of the minority communities in Kosovo.[24] It is expected that a Serbian-backed voting list from the Bosnian community has infringed such constitutional guarantees and has received votes from the Serbian population with the intention of controlling such votes in the Assembly as well. As such, a Bosnian registered list for elections has gained votes from Serbs thus leaving the real Bosnian community without any representation in the parliament, infringing their guaranteed constitutional right to be represented through the reserved seats.

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[23] The Constitutional Court Decision KO95/20 triggered another huge political debate since the same decision interpreted very restrictively the constitutional 'right to be elected', thus directly impacting the right of Mr. Albin Kurti to stand for the election. The Central Election Commission refused the right of Mr. Albin Kurti to run for the February 14, 2021 elections based on the same argument introduced by the CCK decision that "*Article 29.1 (q) of the Law on General Elections, which is based on Article 71.1 of the Constitution, does not allow a person sentenced to imprisonment during the last three years before the elections to run for deputy and win the mandate of deputy*". This provision and narrow interpretation prohibited Mr. Albin Kurti (and some other candidates) from running for elections since he was also sentenced in September 2018 to 18 months conditional imprisonment. Kurti and other lawmakers were sentenced for using tear gas and other violent acts to disrupt Kosovo's parliamentary proceedings, unrest that broke out during votes on a border demarcation deal with Montenegro and an association for the ethnic Serb-dominated areas in Kosovo.

[24] According to the Kosovo Constitution, Article 64, "In the framework of this distribution, twenty (20) of the one hundred and twenty (120) seats are guaranteed for representation of communities that are not in the majority in Kosovo as follows: … *Kosovo Serb Community shall have the total number of seats won through the open election, with a minimum ten (10) seats guaranteed if the number of seats won is less than ten (10); … the other Communities shall have the total number of seats won through the open election, with a minimum number of seats in the Assembly guaranteed as follows: the Roma community, one (1) seat; the Ashkali community, one (1) seat; the Egyptian community, one (1) seat; and one (1) additional seat will be awarded to either the Roma, the Ashkali or the Egyptian community with the highest overall votes; the Bosnian community, three (3) seats; the Turkish community, two (2) seats; and the Gorani community, one (1) seat if the number of seats won by each community is less than the number guaranteed*".

While of great national and international concern, these issues are presented here simply to illustrate the contributing factors mounting up to the political turmoil in Kosovo at the time of the pandemic outbreak and as such will not be further elaborated on in the context of this analysis.

3. *Covid-19 preventive measures and findings of Kosovo Constitutional Court*

Kosovo's general legal provisions regarding the emergency powers in times of danger to public safety, such as a global pandemic, are defined by the Constitution as well as by *Law No. 02/l-109 for Prevention and Fighting against Infectious Diseases (PFID)* and the *Law No. 04/l-125 on Health*. These also made the basis for the many government decisions issued during this time in coping with Covid-19.

The country's Covid-19 response has been adjusted several times along the way, trying to keep up with the challenges posed by the corona-crisis in different sectors and different ways. Disregarding many calls for the need to declare a State of Emergency, in their efforts to curb Covid-19, on 23 March, following the declaration of a *Public Health Emergency*, the government imposed travel restrictions and a national curfew limiting the movement of private vehicles and citizens to times between 10:00-16:00 and 20:00-06:00 with Decision No. 01/15.[25]

Similar to many other constitutions, the Constitution of Kosovo requires the endorsement of the parliament, with a 2/3 majority, before enforcing a State of Emergency. The Constitution determines that a State of Emergency can be declared if there is a "*need for emergency defence measures*", "*natural disaster affecting all or part of the territory*", or cases when facing "*danger to the constitutional order or to public security*",[26] and in times like this the governing powers shift from the government to the Kosovo Security Council, which is chaired by the President. The President is mandated to issue a decree setting forth the nature of the threat and any limitations on rights and freedoms, which has to be approved by the Assembly.[27] However, following the

[25] Decision No. 01/15. Government of the Republic of Kosovo, https://kryeministriks.net/wp-content/uploads/2020/03/Vendimet-e-Mbledhjes-s%C3%AB-15-t%C3%AB-t%C3%AB-Qeveris%C3%AB-s%C3%AB-Republik%C3%ABs-s%C3%AB-Kosov%C3%ABs.pdf.

[26] Constitution of the Republic of Kosovo. Article 131 – State of Emergency. *Official Gazette of Kosovo*, https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=3702.

[27] *Ibid.*

political power struggles, the President never presented the decree for declaring a State of Emergency to the Assembly for approval.

Finding that the government measures gave grounds for creating great panic, confusion, uncertainty and fear among citizens,[28] the President approached the Constitutional Court of Kosovo (CCK), challenging the constitutionality of the government Decision No. 01/15. These developments kept the Kosovo Constitutional Court very busy during the time of the pandemic outbreak. There were two important judgements issued by the CCK, that will be analysed in detail in the section below:

1) *Judgement KO 54/20*, assessing whether the measures imposed by the government with Decision No. 01/15 limiting fundamental rights and freedoms guaranteed by the Constitution at the level of the entire Republic of Kosovo were in accordance with the law or beyond the powers provided by law, and
2) *Judgement KO 61/20*, assessing Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health on declaring the Municipality of Prizren a "quarantine zone"; and Decisions [No. 229/IV/2020], [No. 238/IV/2020], [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health on preventing, fighting and eliminating infectious disease Covid-19 in the territory of the Municipalities of Prizren, Dragash and Istog.

3.1. *Findings of Judgement KO 54/20*

According to the President's referral, the measures introduced at the level of the entire Republic of Kosovo exceed constitutional provisions, and as such were considered unconstitutional and in violation of fundamental rights and freedoms.[29] He claimed that with the failure to call on a State of Emergency, derogations from human rights went beyond the powers provided by law, and as such are not in compliance with Articles: 21 [*General Principles*], 22 [*Direct Applicability of International Agreements and Instruments*], 35 [*Freedom of Movement*], 43 [*Freedom of Gathering*], 55 [*Limitations on Fundamental Rights and Freedoms*] and 56 [*Fundamental Rights and Freedoms During a State of*

[28] *Kosovo's PM and President Clash Again over Virus Crisis*, https://balkaninsight.com/2020/03/24/kosovos-pm-and-president-clash-again-over-virus-crisis/.

[29] Case No. KO54/20. Constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020. Constitutional Court of the Republic of Kosovo. Page 2, paragraph 3. April, 2020, https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-vendimit-nr-01-15-te-qeverise-se-republikes-se-kosoves-te-23-marsit-2020/.

Emergency] of the Constitution of the Republic of Kosovo, and Article 2 [*Freedom of movement*] of Protocol No. 4 of the European Convention on Human Rights, Article 13 of the Universal Declaration of Human Rights, as well as Article 12 of the International Covenant on Civil and Political Rights.[30]

In its reasoning, the CCK focused on the assessment of the compliance of the restrictive measures with Kosovo law, specifically assessing the compliance with the powers established in the Constitution and Articles 41 and 44 of *Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases* and Articles 12 (1.11) and 89 of *Law No. 04/L-125 on Health*.[31]

As regards limitations and/or derogations of Fundamental Rights and Freedoms during the State of Emergency, Articles 55 and 56 of the Constitution clearly define that "*Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law*"[32] and that "*Derogation of the fundamental rights and freedoms … may only occur following the declaration of a State of Emergency*".[33] In this regard, the Court clarified the difference between "*limitations*" and "*derogations*" from human rights, clarifying *stricto sensu* that "*limitations*" present a lighter intrusion to human rights, whilst "*derogations*" present a heavier intrusion which can never be done without a declaration of a State of Emergency.[34] Since Kosovo imposed lighter intrusions to human rights, and did not officially derogate from them, the Court sided with the government in that the rights can be limited even without declaring a State of Emergency, for as long as the limitations of the rights are prescribed by law.[35] Nonetheless, according to the Court, the limitations imposed restricting freedom of movement, freedom of assembly, and the right to a private and family life, were not prescribed by law and, as such, were inconsistent with Article 55 of the Constitution.

It may be relevant to point out here that even though not a direct signatory, both the European Convention on Human Rights (ECHR) and the Inter-

[30] *Ibid.*

[31] *Ibid.*

[32] Constitution of the Republic of Kosovo Article 55 – Limitations on Fundamental Rights and Freedoms, *Official Gazette of Kosovo*, https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=3702.

[33] Constitution of the Republic of Kosovo. Article 56 – Fundamental Rights and Freedoms During a State of Emergency, *Official Gazette of Kosovo*, https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=3702.

[34] Case No. KO54/20. Summary of Judgement. Constitutional Court of Kosovo, https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-vendimit-nr-01-15-te-qeverise-se-republikes-se-kosoves-te-23-marsit-2020/.

[35] *Ibid.*

national Covenant on Civil and Political Rights and its Protocols (ICCPR), are guaranteed by the Constitution of Kosovo (Article 22) and have priority over Kosovo law. As such, since the government measures pointed out lighter intrusions to human rights, Kosovo did not derogate from human rights, and as such did not have to officially notify for any derogations to the ECHR or ICCPRR.[36]

The Court also made it clear that the Ministry of Health does not have the power to restrict freedom of movement at the state level, considering that this can be only be imposed upon approval from the Assembly via a special law. As it stands, the PFID Law and the Law on Health, which were referenced by the government for marking the legal basis for imposing the preventive and restrictions measures, do not authorise the government to restrict the rights and freedoms of Article 35, 36 and 43 of the Constitution.[37] Article 41 of PFID Law states that for the purpose of preventing the spread of infectious diseases the Ministry of Health is authorised to prohibit movement "*in the infected regions*", as in a specific village, region, or geographical area, and not in the whole territory of the country, as that can only be done so if prescribed by a specific law. Based on this, the Court clarified that the government can put a ban on travel only in places where the epidemic has spread and not in the entire territory of the country.

That is why, after a deliberate review, the Court, by Judgment KO54/20, ruled that the government measures were "not prescribed by law" and were as such deemed to be invalid effective 13 April. The Court found them to infringe unconstitutionally upon citizens' right to freedom of movement, freedom of privacy, and freedom of assembly (respectively articles 35, 36 and 43 of the Constitution), and also unanimously decided that the aforementioned decision was incompatible with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Article 2 (Freedom of movement) of Protocol No. 4, Article 8 (Right to respect for private and family life) and Article 11 (Freedom of assembly and association) of the ECHR.[38]

It is interesting to note that, in light of the need for protection of public health, the Court has set another date of entry into force of this Judgment (13

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[36] R. KIKA, *Constitutional Court decision shows state of emergency is not required*, Kosovo 2.0, April, 2020, https://kosovotwopointzero.com/en/constitutional-court-decision-shows-state-of-emergency-is-not-required/.

[37] Case No. KO54/20. Constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020. Constitutional Court of the Republic of Kosovo. April, 2020, https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-vendimit-nr-01-15-te-qeverise-se-republikes-se-kosoves-te-23-marsit-2020/.

[38] *Ibid*.

April, instead of 31 March) to give the government enough time to adjust their decisions to deal with the pandemic in line with the constitutional and legal framework and terms set out in the Judgement.

3.2. *Finding of Judgement KO61/20*

Following the Judgment KO54/20, the Ministry of Health issued thirty-eight (38) decisions for "prevention, fighting and elimination of the infectious disease Covid-19" for restriction of movement for all citizens of the Republic of Kosovo[39]. The restrictions on movement were tightened by prohibiting individuals from leaving their houses for more than 90 minutes per day, applying new measures for the prevention of the spread of the virus by taking separate decisions for each municipality, resulting in additional unconstitutional decisions and further deepening the legal uncertainty concerning the government measures.

Thirty (30) MPs of the Assembly of Kosovo submitted to the CCK their referral challenging four decisions of the government[40] on declaring the Municipality of Prizren a "quarantine zone" and three other decisions on preventing, fighting and eliminating the infectious disease Covid-19 in the territory of the Municipalities of Prizren, Dragash and Istog with the claims that these decisions infringe unconstitutionally on Articles 35 [*Freedom of Movement*] and 55 [*Limitations on Fundamental Rights and Freedoms*] of the Constitution, and Article 2 of Protocol No. 4 of the ECHR.[41]

The second Judgement of the CCK, Judgement KO61/20, declared that with these decisions the Ministry of Health exceeded the authorisations provided by PFID Law and consequently interfered with the right of freedom of movement of the citizens. The Court found that the Decisions "*for prevention,*

[39] Case No. KO54/20. Constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020. Constitutional Court of the Republic of Kosovo. April, 2020, https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-vendimit-nr-01-15-te-qeverise-se-republikes-se-kosoves-te-23-marsit-2020/.

[40] Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, on declaring the Municipality of Prizren a "quarantine zone"; and Decisions [No. 229/IV/2020], [No. 238/IV/2020], [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, on preventing, fighting and eliminating infectious disease Covid-19 in the territory of the Municipalities of Prizren, Dragash and Istog.

[41] Case No. KO61/20 Summary of Judgement. Constitutional Court of Kosovo, https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-vendimit-nr-214-iv-2020-te-12-prillit-2020-te-ministrise-se-shendetesise-per-shpalljen-e-komunes-se-prizrenit-zone-karantine-dhe-vendimeve-nr-2/.

fighting and elimination of the infectious disease COVID-19" in the municipalities of Prizren, Dragash and Istog, respectively, are in compliance with the Constitution (with the exception of the clauses determining administrative minor offences which were not prescribed by law and were found unconstitutional). However, the Court declared the decision unconstitutional for declaring the Prizren municipality a "quarantine zone".[42]

The PFID Law states that a "quarantine" may be ordered by the Ministry of Health, following the recommendation by the National Institute of Public Health in Kosovo (NIPHK), only for natural persons who are confirmed or suspected to have been in direct contact with the sick persons or suspected of infectious disease.[43] Thus, the Decision of the government for declaring the entire municipality of Prizren a "quarantine zone", was not prescribed by law and was therefore declared unconstitutional.

4. *Conclusions*

While Kosovo was facing a global emergency, threatening the lives of its citizens, national security, the economy, and self-sustainability, the growing political tensions shifted the focus from the fight against the pandemic to the competition for the increase of the personal power of the key political actors, thus bringing to a difficult test for the very core national capacities to deal with health and security crises. These moves left the people of Kosovo deeply distressed and with mounting concerns about the proper management of the situation.

While it is not entirely surprising that the pandemic served as a catalyst for accelerating political turmoil, the concurring impact of the consecutive decisions about the unconstitutionality of the measures, the fall of the government in the midst of the emergency, the inactive Assembly, and the lack of national capacities and resources, posed a serious threat to the stability of Kosovo.

The effects of the Covid-19 pandemic have clearly affected all spheres of social life. This notwithstanding, it is important to preserve the rule of law even in times of emergency, and while protecting public safety ensure that proper safeguards are in place for the respect of human rights. As Kosovo did not declare a state of emergency, and failed to react quickly in introducing proper legal instruments to address the global pandemic, it will be important to pur-

[42] *Ibid.*

[43] *Ibid.*

sue an analysis on the potential long term impact on democracy and rule of law produced by the *de facto* state of emergency.
Organising elections in February 2021, during a pandemic, was another source of serious concern for public health in Kosovo. The preliminary results of these elections show Vetevendosje as a clear winner together with Vjosa Osmani's list and are expected to be confirmed by the Central Election Commission. The formation of a stable government is yet to be seen, as are the real economic and social consequences of the Covid-19 pandemic. Nevertheless, there is a great sense of hope among the Kosovars after the elections, and the expectations on the 'Kurti 2 government', not yet appointed at the time of writing, are very high.

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COVID-19 AND ICT:
A NEW FRONTIER IN
THE LAW AND TECHNOLOGY DEBATE

THE ROLE OF TECHNOLOGY IN COVID-19 PANDEMIC

by *Carlo Botrugno*

1. *Introduction*

The advent of the Covid-19 pandemic devastated contemporary societies and upset our ways of living. In response to the health emergency, national governments adopted heavy restrictions, significantly constraining fundamental rights and individual freedoms. In parallel, multiple attempts were made to shift our lives towards a 'digital transition'. In such a context, information and communication technologies (ICTs) undertook a fundamental role in reshaping quantity, quality, and meaningfulness of our social and professional relationships.

For what concerns healthcare, the availability of digital healthcare services (DHSs) enabled healthcare continuity beyond the obstacles induced by the advent of pandemic and its management. Such obstacles include imposed restrictions such as social distancing, quarantine, and temporary closing of all 'non-essential' economic activities (i.e. so-called lockdown measures). In this context, relying on DHSs proved to be fundamental for protecting both healthcare professionals and patients from further risk of infection. ICTs also supported local authorities in controlling compliance with the restrictions through a wide array of connected devices and sensors (such as biometric bracelets, robots, and drones to check social distancing, as well as contact tracing apps)[1] (Khalil, 2020).

[1] See news reported by CNBC, https://www.cnbc.com/2020/03/27/coronavirus-surveillance-used-by-governments-to-fight-pandemic-privacy-concerns.html.

The implementation of these technologies raised a number of ethical, legal, and social issues (ELSI), the discussion of which has recently involved a larger part of society than ever before, when interest was mostly restricted to academic and expert debates. Speeding-up the adoption of ICT-mediated services contributed to raising awareness on the (ethical) ambivalence of new technologies (Fleming *et al.*, 2009), i.e. their potential to overcome distance barriers as well as to endanger the democratic values, principles, and fundamental rights that underlie the functioning of modern democracies.

Hereafter, I analyse the most relevant ELSI posed by the use of ICTs to manage Covid-19 pandemic by clustering them into three groups: the attempts to digitalise healthcare delivery (section 2), the weight of digital divides in ensuring equitable access to healthcare (section 3), and the emerging logic of healthcare and control, which is legally and socially legitimised on the grounds of public health protection (section 4).

2. *Fostering the digital transition of healthcare*

Since the declaration of the pandemic by the WHO on 12th March 2020, national governments adopted multiple strategies and attempts aimed at replacing in-person healthcare delivery with access to DHSs. Among these include telemedicine, telemonitoring, online educational tools, apps, and chatbots. Promoting their spread and accessibility by the population was deemed fundamental to overcome the significant hindrances induced by quarantine, lockdown, and self-isolation. As in former viral emergencies (Ohannessian, 2015), the availability of DHSs provided invaluable support to healthcare professionals. The benefits of DHSs were particularly evident with (digital) forward triage (Reiss *et al.*, 2020), i.e. sorting patients with Covid-19 symptoms to avoid unnecessary access to emergency departments, thus reducing risk of infection for both patients and healthcare professionals.

DHSs have also been pivotal for the remote monitoring of patients in intensive care units (ICUs) (Hollander and Brendan, 2020), and have allowed quarantined professionals to continue working from home, thus diminishing the overall burden on their colleagues. Not least, DHSs were also crucial in providing support to people affected by psychological distress symptoms (e.g. panic, anxiety, and depression), which were provoked by prolonged isolation, loneliness, and the economic impact of the pandemic (Zhou *et al.*, 2020).

It became clear that those countries with high level of deployment of DHSs before the pandemic were able to take advantage of their benefits and maxim-

ise their use by the population (Hollander and Brendan, 2020). Conversely, other countries were forced to adopt emergency actions in the attempt to digitalise healthcare delivery.

In the UK, the National Health Service Digital (NHSD) provided online tools aimed at helping the population contain viral transmission.[2] However, no action was undertaken by the NHSD regarding teleconsultation, the demand of which rose significantly during the health emergency (Greenhalgh *et al.*, 2020a; 2020b). Consequently, the biggest part of this demand was satisfied by for-profit companies,[3] meaning that access to teleconsultation was mostly limited to people that were able to pay for it.

Conversely, the French Government authorised the financial coverage of all remote consultations carried out with Covid-19 patients. As a result, the overall volume of teleconsultations throughout the country switched from less than 10,000 per week (prior to the emergency) to approximately 486,000 during the week of the peak of the infection, in spring 2020 (Ohannessian *et al.*, 2020).

In Italy, the Government launched a 'Fast Call on Telemedicine' in collaboration with the National Institute of Health and the WHO.[4] Its purpose was twofold: identifying technological solutions and software aimed at deploying a national strategy for providing 'emergency telemedicine', and selecting the best solution possible for the adoption of a proximity tracing app. For the first objective, the expected results were not obtained, as the government did not take any action to effectively enhance telemedicine delivery. This meant that, as was the situation before the pandemic, the availability of DHSs (especially teleconsultation services) rested upon the initiative of for-profit companies and a limited number of public hospitals that were at the forefront of technological innovation (Botrugno, 2020a).

In the U.S., the Federal Administration waived the limitations established for inter-state telemedicine delivery, aiming to maximise its use in daily practice. In particular, the Centers for Medicare and Medicaid Services were authorised to reimburse Medicare patients for any remote visits carried out during the health emergency (American Telemedicine Association, 2020). In ad-

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[2] According to information posted on the NHS Digital, the use of online resources such as NHS apps and other digital tools significantly increased during the pandemic, https://digital.nhs.uk/coronavirus.

[3] As reported within a comment posted by CNBC, https://www.cnbc.com/2020/04/09/telemedecine-demand-explodes-in-uk-as-gps-adapt-to-coronavirus-crisis.html.

[4] The 'Fast Call' was issued on 24th March 2020, https://innovaperlitalia.agid.gov.it/call2action/.

dition, some provisions of the Health Insurance Portability and Accountability Act were liberalised in order to allow the use of freely available (for-profit) video-communication software such as Skype®, Apple FaceTime®, Facebook Messenger®, and Google Hangouts® (Calton *et al.*, 2020; Portnoy *et al.*, 2020).

However, the effort to stimulate a massive use of DHSs was not always fruitful (Smith *et al.* 2020). In some cases, strategies resulted unsuccessful because of inadequacy or lack of national policies for the reimbursement of DHSs, unwillingness of healthcare professionals to shift to remote practice, and other obstacles reported in the attempt to re-convert the conventional healthcare setting to remote delivery (Smith *et al.* 2020). This adds to available evidence indicating that effective use of DHSs relies on appropriate regulatory frameworks that help professionals and patients to overcome practical obstacles (Fleming *et al.*, 2009; Botrugno, 2018; Kaplan 2020). From an ethical perspective, it must be stressed that the implementation of DHSs into pre-existing settings cannot lead to a complete replacement of in-person healthcare and cannot be intended as a means to cut costs. This would lead to a lowering of quality standards in healthcare delivery, which is unacceptable from an ethical standpoint (Botrugno, 2019a; 2019b). Rather, DHSs must be conceived as 'part of a wider strategy of remote care for Covid-19 that includes automated triage, isolation of potentially contagious patients within care facilities, and electronic monitoring in intensive care units monitoring' (Greenhalgh *et al.*, 2020b: 1).

3. *Digital health, vulnerability, and digital divides*

The pandemic drastically redrafted the landscape of risk (Beck 1992; Giddens 1990) to individual health, calling on an uninterrupted physical and mental effort in the attempt to manage a constantly evolving situation. Since the times of the 'theory of capital' of Pierre Bourdieu (1977; 1986), we are aware that the availability of formal and informal resources is key to managing and reacting to negative events, as well as preventing adverse outcomes. This also holds true in the health field. In a pandemic context, an individual's capacity to control the factors related to infection exposure and to adopt mitigation strategies proved to be fundamental for staying healthy.

Since the advent of the pandemic, it was clear that protecting the most vulnerable people arguably represented the main challenge to deal with. In all countries gravely affected by Covid-19, penal system subjects, refugees and undocumented migrants, homeless people, people with disabilities, and the

elderly housed in residences were exposed to higher physical and psychological harm than any other populations. This was due to the significant – and in some cases, extreme – compression of autonomy and agency levels, which is usually experienced by most of these people. In some cases, this even made it difficult to fulfil the basic norms against infection risk, such as social distancing, sanitising hands frequently, and using personal protective equipment (Bernardini, 2020; Botrugno, 2020b).

Protecting these categories of people from infection was unfeasible under many circumstances, and providing them due assistance in case of infection was even more complicated.[5] The severe pressure faced by healthcare systems led to a reduction in hospital admissions for those patients with acute symptoms. In parallel, most countries gravely affected by the pandemic restricted access to emergency departments and primary care services to avoid these places becoming infection hubs (Garattini *et al.*, 2020). In parallel, as highlighted above (section 2), multiple attempts were made to digitalise healthcare delivery, aiming at preventing physical contact between patients and healthcare professionals, unless unavoidable.

In such a context, it is evident that ICTs acted as a big watershed, strengthening the gap between people affiliated with healthcare systems and people who suffer the weight of inequalities: 'digital inequality research has shown that internet access is not evenly distributed among the general population. The basic idea of digital inequality stems from a comparative perspective of social and information inequality, as there are benefits associated with internet access and negative consequences of lack of access' (van Deursen, 2020).

Material access to the internet and related technologies (computer, tablet, smartphones, and other connected devices) still represents the primary digital divide (EPHA, 2014; Latulippe *et al.*, 2017). However, even before the insurgence of the pandemic, it was clear that the benefits of DHSs are significantly limited to certain populations, namely those 'who already possess a much broader set of 'health skills'– including awareness, attention, ambition and self-discipline – to use new technologies for better health outcomes. These capabilities are 'by-products' of formal education; they describe cognitive and behavioural habits learnt and adapted from peers in particular social contexts from an early age' (EPHA, 2014: 16). In other words, the use of ICTs leverages existing abilities, in particular the level of health and digital literacy, thus making DHSs particularly beneficial for well-educated and resourceful people but unusable for any others (Feng and Xie, 2015). This led some scholars to

[5] As reported by Amnesty International for what concern Italy, https://www.amnesty.it/situazione-esplosiva-carceri/.

talk about 'knowledge', i.e. the complex of knowledge-related abilities, in terms of a secondary digital divide (McAuley *et al.*, 2014; Kontos *et al.*, 2012).

Covid-19 gave a sharper relief to the interplay between social and health inequalities and digital divides. As has been argued, socially and economically disadvantaged people are among those 'more at risk of suffering from chronic health conditions and faces barriers to access health systems. Digital factors are likely contributing to this unequal distribution of vulnerability. As the use of technology massively increases during the Covid-19 crisis, so do the impacts of digital inequalities' (Beaunoyer *et al.*, 2020: 3). Some studies established a direct connection between digital inequalities and infection exposure:

> 'Individuals therefore vary in terms of what we call their COVID-19 exposure risk profile (CERPs). CERPs hinge on preexisting forms of social differentiation such as socioeconomic status, as individuals with more economic resources at their disposal can better insulate themselves from exposure risk. Alongside socioeconomic status, one of the key forms of social differentiation connected with CERPs is digital (dis)advantage. Ceteris paribus, individuals who can more effectively digitize key parts of their lives enjoy better CERPs than individuals who cannot digitize these life realms' (Robinson *et al.*, 2020: 1).

Digital inequalities therefore increased individual exposure to Covid-19, making certain people more vulnerable to both the infection and to the overall impact (social, psychological, and economic) of the emergency (Beaunoyer *et al.*, 2020: 3). Considering the prohibition of social contact together with quarantine and lockdown restrictions, it becomes clear that the internet acts as a crucial source for information, especially when considering

> 'the latest national and international developments, and guidelines on behavioral norms during the crisis. In this respect, the internet plays an important role in the great challenges facing governments regarding the transfer of knowledge and guidelines to the population at large. When individuals understand the need and rationale behind government-enforced measures, they are more motivated to comply and even adopt measures voluntarily. In addition to informational purposes, the internet enables individuals to share news and experiences with people they cannot meet face-to-face, remain in contact with friends and family, seek support, and ask questions of official agencies, including health agencies' (van Deursen, 2020).

As highlighted before (section 2), the availability of DHSs proved to be a fundamental tool for providing psychological support to mental health patients and people affected by the multi-dimensional impact of the health emergency. Therefore, the lack of internet access and related technologies, to-

gether with a lack of proper skills to use them, turned into an additional cause for vulnerability:

> 'With health systems already experiencing difficulties to adequately answer the burden of mental health disorders, social distancing measures increase the weight of technology to pursue psychological therapeutic services (either by phone communication or telepsychotherapy), reinforcing the negative impact of digital inequalities. Therefore, a new psychological distress burden could add pressure to already fragile mental health systems' (Beaunoyer *et al.*, 2020: 4).

From a different standpoint, available data show that the intersection of digital inequalities and the pandemic generated a racially oriented epidemiological distribution. As was argued, 'Black and Latino people have been disproportionately affected by the coronavirus in a widespread manner that spans the country, throughout hundreds of counties in urban, suburban and rural areas, and across all age groups' (Oppel *et al.*, 2020). The analysis provided by 'The Covid Racial Data Tracker' shows that Black or African Americans are dying at 1.7 times the rate of white people, and that they account for 17% of Covid-19 deaths when race is known.[6] Given that the epidemiological distribution of Covid-19 is not explainable in virtue of genetic factors, it must be framed in the body of knowledge of social determinants of health and health inequalities:

> 'digital inequalities and social inequalities are rendering certain subgroups significantly more vulnerable to exposure to COVID-19. Globally, it is already clear that low-socioeconomic status (SES) populations are becoming infected and dying at much higher rates than their privileged counterparts. Due to longstanding social inequalities, their risks are higher, and their communities are suffering disproportionate losses in terms of infection, death, and economic devastation due to the pandemic. Low-SES groups are also much more likely to labor in high-contact, public-facing jobs such as supermarkets; provide essential transportation services; and do essential work in congregate workplaces such as food-processing facilities' (Robinson *et al.*, 2020: 2).

In virtue of this, it was argued that digital exclusion must be analysed as an emerging form of social exclusion, as it contributes to worsening 'material and social deprivation. Being digitally excluded has consequences on health determinants such as education, work, and social networks, which impacts contribute in return to maintain limited access and use of technologies, a phe-

[6] Data provided by 'The Covid Racial Data Tracker' initiative, https://covidtracking.com/race/.

nomenon referred to as the "digital vicious cycle' (Beaunoyer *et al.*, 2020: 2). This adds to available evidence indicating that discrimination, racism, structural violence, and stigmatisation forces some groups to be excluded and condemns them to healthcare deprivation (Wilkinson and Marmot 2003; European Commission, 2013; Moor *et al.*, 2017; Marmot, 2017).

4. *The (e)merging logics of healthcare and control: towards an 'infra-penalty' system?*

As mentioned in the introduction, in most of the countries gravely hit by the pandemic, drastic measures adopted to curb the virus outbreak were accompanied by the adoption of a wide array of ICT-based services. These services were conceived with the purpose of checking compliance with imposed quarantine and other restrictions. Given the pervasiveness of these technologies, concerns have been raised about the power of public authorities to interfere in the enjoyment of fundamental freedoms such as circulation, meeting, and enterprise. The biggest concern, however, was represented by the exposure of individual privacy to the risk of data breaches. Indeed, a number of publications (both academic and others) were dedicated to the digital surveillance risk generated by technological solutions adopted during the pandemic (Sylvia IV, 2020; Kalpokas, 2020; Ahrens, 2020; Sfetcu, 2020; Sathyamala, 2020; Arminjon and Marion-Veyron, 2020; Deyev *et al.*, 2020).

As for the EU, it must be underscored that the General Data Protection Regulation (GDPR) prevented any attempts to leverage the ongoing health emergency to legitimise a lowering in data protection standards. The GDPR states that personal data can be collected without the data-subject's consent only in a limited number of circumstances, although this corresponds to a high spectrum of situations (GDPR: art. 9), including public health threats such as Covid-19. Indeed, the GDPR foresees that the data subject's consent is not required when data processing is necessary for

> 'reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy' (GDPR: art. 9, *sub* i).

Of course, the exceptional character of such circumstances does not mean that the fundamental principles for data processing established by the GDPR can be ignored. Such principles include lawfulness, correctness, and transparency, limitation of purpose, and minimisation (GDPR: art. 6).

At global level, the core of the data protection debate is focused on proximity (or contact) tracing apps, which aim to generate alerts to users who were in contact with (or close to) infected users. The alerts generated are also processed by public health departments. The degree of privacy intrusiveness of these apps is highly variable, as it rests upon their technical configurations and the software employed. The European Data Protection Board (EDPB) followed the development of these apps in the European Union and issued guidance documents to support policy-makers and national privacy authorities to comply with EU legislation, including the European Chart for Fundamental Rights. The EDPB highlighted that the adoption of these exceptional tools was only possible

> 'if it constitute[d] a necessary, appropriate and proportionate measure within a democratic society. These measures must be in accordance with the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, it is subject to the judicial control of the European Court of Justice and the European Court of Human Rights. In case of an emergency situation, it should also be strictly limited to the duration of the emergency at hand' (EDPB, 2020a: 1).

The EDPB also emphasised that the apps should be developed 'in an accountable way, documenting with a data protection impact assessment all the implemented privacy by design and privacy by default mechanisms, and the source code should be made publicly available for the widest possible scrutiny by the scientific community' (EDPB, 2020b).

The EDPB recommended the adoption of these apps on a voluntary basis, not only because the results are more compliant with EU legislation, but also as a 'token of collective responsibility' (EDPB, 2020b). Importantly, it stigmatised location tracking of individual users given that the purpose of the proximity tracing was not

> 'to follow the movements of individuals or to enforce prescriptions. The main function of such apps is to discover events (contacts with positive persons), which are only likely and for the majority of users may not even happen, especially in the de-escalation phase. Collecting an individual's movements in the context of contact tracing apps would violate the principle of data minimisation. In addition, doing so would create major security and privacy risks' (EDPB, 2020b).

Regardless of the technical fails, inefficiency, and delays reported in the implementation of these apps, they still form part of a multiple-source data collection system about Covid-19 patients. The primary objective of these data pools was enabling governments to take data-driven decisions regarding public health protection, and thus they were managed by public health departments. However, in several EU and US countries, these data were accessed by police officers to allow them to check compliance with quarantine orders (Molldrem *et al.*, 2020). In other words, personal health data collected for health purposes were further used for crime repression purposes. This is something unprecedented in the history of our democratic institutions, although it was deemed necessary to adopt the most effective decision to curb the spread of the virus. It must be noted that using personal health data for crime repression can constitute a dangerous precedent, especially when considering the current extent of datafication of our daily lives and healthcare. At a closer look, we already know about parallel forms of leveraging health data as a system of deterrence. For instance, consider the imposition of HIV tests to migrants and refugees as a condition for entering destination countries. Although this is a practice banned by international conventions (ILO, 2010) and highly stigmatised by the United Nations (UNAIDS, 2010), several national governments worldwide still deny foreign citizens entrance to their territory on the basis of HIV test results.

From a more subtle viewpoint, another form of intertwining health data with a form of punishment is currently represented by scoring systems in healthcare or health credit mechanisms (Andy, 2020: 175). These mechanisms allow healthcare insurance companies to reward the 'model patient' on the basis of attitudes, behaviours, and choices adopted within the health(care) field, thus discouraging any conduct which is deemed to be 'deviant' with respect to that model (Botrugno, 2020c: 201). Similarly, a combination of personal and non-personal data can be used to predict the risk of potential customers getting a disease in the future. What is new here is that ICTs tremendously facilitate the proliferation of logics that combine healthcare and control, given their voracity of data collection and processing and their intrinsic capacity to convert any input into new output, i.e. new data. In virtue of this, it is possible to argue that these (e)merging logics of healthcare and control seem to evoke a sort of 'infra-penalty' in healthcare which draws directly on Michel Foucault's *Discipline and Punish* (Foucault, 1995). In other words, they contribute to establish a governmental frame in which individuals can be ever more scrutinised, rewarded, and penalised on the basis of attitudes, choices, and behaviours related to their health(care).

At a closer look, this infra-penalty must be framed into a wider process of

shifting responsibility for health protection from a public function to an individual (and private) interest. This process is proven by the rise in relevance of the *homo medicus digitalis*, an individual who is expected to be responsible for their health through the consumption of an ever increasing number of DHSs. Behind the (commercial) charm of this figure, lies the consolidation of commodification forces in healthcare (Botrugno, 2020d; Botrugno and Re 2020). These appeal to an incremental rationale which could be detrimental for public healthcare systems, as it follows the idea that the higher the frequency of the control, the better the health protection.

To all this, it must be mentioned that there is a risk that this infra-penalty will not be limited to behaviours and attitudes but extended to statuses as well (i.e. the circumstance of being sick, as in the case of HIV). This can increase discrimination and stigmatisation already suffered by people whose lives are placed at the interplay of law and healthcare.

5. *Conclusions*

Covid-19 has unexpectedly accelerated the digital transition of contemporary societies. However, the increasing use of ICTs, and particularly of DHSs, raises a number of issues which require more attentive scrutiny at a political level. As seen above (section 3), the implementation of DHSs is exacerbating healthcare disparities experienced by some populations, namely the most marginalised and vulnerable. Notwithstanding, policy-makers continue to promote rhetorical views about the benefits of technological innovation for underserved communities, particularly in healthcare.[7] This confirms just how much policies for technological innovation are biased by a sort of determinism that depicts technology users as all-equal, free, autonomous agents, and thus evenly able to take advantage of technological advancements. Critical scholarship in the field of digital health has shown that technology is not a 'discrete and meaningful' factor (Botrugno *et al.*, 2019; Suchman and Bishop 2000; Suchman *et al.*, 1999). Rather, it is the relationship between technology and its users that confers meaningfulness to the functioning of technological devices and allows users to effectively take advantage of innovation processes. This

[7] The European Commission is champion in this, with his 'triple win' motto, according to which ICTs allow healthcare systems to 'Improving the health and quality of life of Europeans with a focus on older people; Supporting the long-term sustainability and efficiency of health and social care systems; Enhancing the competitiveness of EU industry through business and expansion in new markets', https://ec.europa.eu/eip/ageing/about-the-partnership_en.

awareness sheds light on the mechanisms that allow certain populations to take advantage of the digital transition while leaving others behind. This is especially true when considering the 'substitution effect' between conventional and digital services, which was triggered by the management of Covid-19 health emergency.

From a different standpoint, this also helps understand the potential of data to trace new (virtual) maps of medical knowledge as well as of the difference (Botrugno, 2020c). In a Foucauldian perspective, these maps not only refer to knowledge, but also to power relationships. Its emergence indeed seems to be guided by a 'principle of production', i.e. the creation of a new utility or new knowledge that can be used for health and health-related purposes. As argued by Foucault, 'We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces, it produces reality, it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production' (Foucault, 1995: 194).

However, the innermost nature of this production can be fully understood only from its (ethical) ambivalence. The impressive amount of data generated and processed by ICTs can be used for a range of valuable purposes, including enhancing data-driven biomedical research. In the meantime, they can also become objects of data misuse, i.e. undue access, appropriation, and usage of personal data for commercial purposes. In such a context, knowledge of users' personal circumstances, including states of need and vulnerability, can be leveraged to promote desirability of healthcare services.

In practical terms, the delimitation between lawful re-usage and misuse of data is very fluid, especially when corporations are able to access large personal data sets, integrating them into their 'optimisation processes'. Today, such delimitation seems to be destined to fade away by the meat grinder of ICT development. It is not news that private subjects have a substantive interest in having access and controlling as much data as possible. However, Covid-19 prompted a much more favourable scenario for the massive implementation of ICT-based services in healthcare and related fields. Indeed, even after Covid-19 is under control, notions of 'risk exposure' and 'emergency prevention' could be leveraged to strengthen the overlap between healthcare and control, and therefore to legitimise infra-penalty trends in healthcare. And nothing prevents the 'State' itself from promoting (or endorsing) this technology-driven 'healthism imperative'. As we have seen over the past months with hospital beds, ventilators, and vaccines, utilitarian perspectives aimed at ensuring the best allocation possible of scarce public healthcare resources can be

proposed to justify a (digital) scrutiny of individual attitudes, choices, and behaviours that have health repercussions.

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IT'S ALL ABOUT TRUST: THE UPS AND DOWNS OF COVID-19 CONTACT-TRACING APPS

by *Enza Cirone*[*]

1. *Introduction*

2020 was the unprecedented 'year of the outbreak of the pandemic', during which digital technologies proved essential in the public health response to the virus.

Among these tools, coronavirus Contact-Tracing Apps (CTAs) in particular raised a broad echo, even in general media, since they were unanimously considered a key instrument to contain the spread of Covid-19.[1]

Nevertheless, these apps also drew attention and concerns for their data protection implications.

It is worth recalling that contact tracing was defined by the World Health Organization (WHO) as «the process of identifying, assessing, and managing

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[*] This chapter was finalised on 31 January 2021.

[1] Covid-19 is the disease caused by a new coronavirus called SARS-CoV-2. WHO first learned of this new virus on 31 December 2019, following a report of a cluster of cases of 'viral pneumonia' in Wuhan, People's Republic of China. For further details visit the dedicated section on the WHO website, https://www.who.int/emergencies/diseases/novel-coronavirus-2019.

people who have been exposed to a disease to prevent onward transmission».[2] Traditional contact tracing[3] is carried out by public health authorities who interview people that have tested positive for an infectious disease. It is indeed a key strategy for mitigating the impact of infections like Covid-19 on health care systems specifically, and the health of the population in general. But even so, the Covid-19 pandemic[4] has proven to be a challenge for traditional contact tracing due to the speed at which the virus spreads,[5] and due to the fact that patients can be contagious while asymptomatic.[6]

Under the aforementioned circumstances, human contact tracing becomes a highly inaccurate process. On the one hand, often people cannot remember who they were in close contact with during the period in which they were infectious. On the other hand, for human beings it is virtually impossible to identify strangers who they have been in contact with in places like shops and public transportation. Additionally, contact tracing can be effective only if people are informed promptly that they have been exposed to the virus, so that they can self-isolate and avoid spreading the virus further.[7] However, human contact tracing is a slow and expensive process that can take many days, if not weeks.

Recently, the shortcomings of traditional contract tracing have provoked policymakers around the world to look to digital containment tools, including high-tech surveillance applications (i.e., contact-tracing apps, CTAs)[8] to curb the spread of Covid-19.

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[2] World Health Organization Contact tracing in the context of Covid-1, 2020, available at https://www.who.int/publications/i/item/contact-tracing-in-the-context-of-covid-19.

[3] The European Centre for Disease Prevention and Control lists the following generic steps in the document entitled *Contact Tracing: Public Health Management of Persons, Including Healthcare Workers, Having Had Contact with Covid-19 Cases in the European Union*, available at https://www.ecdc.europa.eu/en/covid-19-contact-tracing-public-health-management.

[4] In the opening remarks at the media briefing on Covid-19 given on the 11 March 2020, the WHO-Director-General defined the infection as a pandemic, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[5] P. BUONANNO et al., *Estimating the Severity of COVID-19: Evidence from the Italian Epicenter*, 2020, available at https://dx.doi.org/10.2139/ssrn.3567093.

[6] J. HELLEWELL et al., *Feasibility of controlling COVID-19 outbreaks by isolation of cases and contacts*, The Lancet Global Health, 2020.

[7] L. FERRETTI et al., *Quantifying SARS-CoV-2 transmission suggests epidemic control with digital contact tracing, Science*, 2020.

[8] See: *Communication from the Commission, Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection*, 17 April 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0417(08)&from=IT; *Contact tracing for*

In a nutshell, the basic idea is that people download a CTA on their phone that can inform them if they have come into contact with a person who has tested positive for Covid-19. In principle, CTAs can be the perfect complement to human contact tracing, as they can record contacts among people who do not know each other and can send notifications almost instantaneously.

Consequently, it is not surprising that most Member States have launched a CTA. In addition, the Commission and Member States have set up a service[9] allowing national apps to communicate with each other across borders in Europe, so that users can install a unique app which will allow them to be warned if they were in contact with someone who has tested positive for Covid-19.

While these digital applications are potentially faster and arguably more precise than traditional contact tracing, they have raised novel accuracy and data-protection issues attributable to their underlying technology. As a matter of fact, both traditional and digital proximity contact tracing involves the processing of health data which requires special protection.

Given this, the overarching aim of this article is to investigate whether, and if so to what extent, the use of tracking applications with the purpose of identifying and then alerting those who have come into contact with Covid-19 can be compliant with the right to the protection of personal data. In order to assess that, the paper will provide an in-depth analysis of the relevant GDPR provisions as well as of documents drafted by European institutions and the European data protection authorities (namely the European Data Protection Board and the European Data Protection Supervisors, hereinafter EDPB and EDPS).[10] These documents set out the requirements that such apps should

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COVID-19: current evidence, options for scale-up and an assessment of resources needed, www.ecdc.europa.eu/sites/default/files/documents/COVID-19-Contract-tracing-scale-up.pdf., April 2020, spec. p. 2.

[9] Currently, the service is "decentralised" and the calculations are carried out in the user's app. It has been adopted by the majority of Member States. Three national apps (Germany, Ireland, and Italy) were first linked on 19 October 2020, when the system came online. See https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/travel-during-coronavirus-pandemic/how-tracing-and-warning-apps-can-help-during-pandemic_en#:~:text=lives%20and%20livelihoods-,Tracing%20and%20warning%20apps%20can%20help%20break%20the%20chain%20of,does%20not%20stop%20at%20borders [last access 8 January 2021].

[10] The European https://edpb.europa.eu/about-edpb/about-edpb_en - EDPB Data Protection Board is an independent European body composed of representatives of the national Data Protection Authorities and the European Data Protection Supervisor. The latter is an independent supervisory authority whose primary objective is to ensure that European institutions and bodies respect the right to privacy and data protection when they process personal data and develop new policies.

comply with and provide basic instructions for ensuring the proportionality of the limitation to the right to data protection for the purpose of implementing contact tracing across Europe.

The more detailed structure of this piece is therefore as follows. First, the article provides an overview of the flood of contact-tracing apps around the world. Then, the current European data protection landscape (para 3) is scrutinised in its main parts. This analysis serves as the logical preparation for conceptualising what the constitutive elements of contact-tracing apps should be in order to comply with the limitations to the right to data protection as enshrined in the European framework (para 6). Before focusing on that, the paper clarifies that the division of competences in public health matters between European Union and Member States does not limit the construction of a comprehensive legal framework for contact-tracing apps (paras 4.1, 4.2). This article mainly examines the institutional requirements for building CTAs which are respectful of data protection principles. The reference is to the documents released by the European Commission, the EDPB and the EDPS (paras 5 and 6).

We are mindful that these apps have apparently not stopped the second wave of infections. For this reason, one may say that at this point the discussion on these tools is pointless. Nonetheless, the paper shows that the biggest inhibitor to wide uptake and use of tracing apps seems to be the lack of trust in their confidentiality. Therefore, improving the privacy features and increasing transparency about the risks and benefits of the apps may help to make them more useful in the future.

2. *Contact-tracing apps around the world: an overview*

Singapore was the first country to introduce a CTA. In March 2020 it released Trace-Together, which uses Bluetooth technology to inform users when they have been in contact with someone who tested positive for Covid-19.[11] The results produced by TraceTogether were not fully satisfactory. Only 20% of residents downloaded it,[12] and the app had some problems with Apple operating systems (iOS).[13]

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[11] *TechGovSingapore Two reasons why Singapore is sticking with TraceTogether's protocol*, 2020, available at https://www.tech.gov.sg/media/technews/two-reasons-why-singapore-sticking-with-tracetogether-protocol.

[12] C. CHONG, *About 1 million people have downloaded TraceTogether app, but more need to do so for it to be effective: Lawrence Wong*, in *The Straits Times*, 2020, available at https://www.

Despite these issues, many countries followed Singapore's lead and implemented their own app. For instance, Australia[14] introduced the app CovidSafe, which shares many features with the app TraceTogether, and many European countries, including Austria,[15] France,[16] Germany[17] and Italy,[18] did the same. Nevertheless, the success of these apps has been limited due to their low penetration rate. As previously mentioned, the reason is attributable to a trust deficit[19] stemming from the idea of potentially misleading management of contact tracing rather than from a lack of confidence in the contact tracing system *per se*: essentially, it is all about building trust.

Interestingly, the issue of 'user confidence' represents a key element when it comes to the relationship between effectiveness of contact-tracing apps and

straitstimes.com/singapore/about-one-million-people-have-downloaded-the-tracetogether-app-but-more-need-to-do-so-for.

[13] *EN24News the French authorities call again to install the StopCovid application*, 2020, available at https://www.en24news.com/en/2020/07/the-french-authorities-call-again-to-install-the-stopcovid-application.html.

[14] Over 6 million people – or about one quarter of the population – have downloaded this app but many have questioned its utility, given that the numbers of cases that it helped identify appears to be small. One of the reasons for this is that the app does not register proximity between two cellphones if the screen is locked. For further information, see C. JEE, *8 million people, 14 alerts: why some covid-19 apps are staying silent*, in *MIT Technology Review*, 2020, available at https://www.technologyreview.com/2020/07/10/1005027/8-million-people-14-alerts-why-some-covid-19-apps-are-staying-silent/.

[15] Austria was the first Member State to introduce a tracking application as early as March 25, 2020, the so-called Corona App. For further details, see L. LINKOMIES, *Privacy is the hot issue with Covid contact tracing apps in the EU. European responses vary depending on whether a centralised or decentralised contact tracing app is being deployed*, in *Privacy Laws&Business*, June 2020, p. 10.

[16] France released the app StopCovid in June but two months after its release fewer than two million people – or roughly 3% of the population – had downloaded it.

[17] The introduction of the CTA was sponsored by the most important leaders, and roughly 16 million people have downloaded Corona-Warn, which is about 20% of the population.

[18] By the 5th of August, the app Immuni had been downloaded 4.6 million times. I articulated the data protection issues related to this app in E. CIRONE, *L'App italiana di contact tracing alla prova del GDPR: dall'habeas data al ratchet effect il passo è breve?*, in *SidiBlog,* 13 May 2020, http://www.sidiblog.org/2020/05/13/lapp-italiana-di-contact-tracing-alla-prova-del-gdpr-dallhabeas-data-al-ratchet-effect-il-passo-e-breve/.

[19] H. PANDURANGA, L. HECHT-FELELLA, R. KOREH, *Government Access to Mobile Phone Data for Contact Tracing,* Brennan Center for Justice, May 21, 2020, https://www.brennancenter. org/sites/default/files/2020-05/2020_05_21_ContactTracingPrimer_Final.pdf; see also A.M. OLLSTEIN, D. TAHIR, *Contact Tracing Foiled by Conspiracy Theories, Lack of Federal Messaging*, in *Politico*, 3 September 2020, https://www.politico.com/news/2020/09/03/contact-tracing-conspiracy-theories-trump-messaging-408611.

concerns about misuse of data. It would be arguably a breach of user's reasonable expectations if certain information was used for purposes other than health protection.[20] This is why during the last few months the debate[21] on data protection implications of CTAs was very harsh. Many authors analysed those issues[22] and how to minimise them[23] as it was clear that publicising privacy protections would aid in restoring user trust and then help increase the use of contact-tracing programs.

3. *The right to data protection in a nutshell*

Before embarking on a discussion about data protection's implications, it is essential to briefly summarise how this right is regulated by European law and what restrictions may apply.

The right to the protection of personal data has recently gained considerable importance in the European legislative landscape. It is guaranteed by article 8 of the Charter of Fundamental Rights (CFR) which pursuant to Article 6(1) TEU has also acquired legal value. In the CFR it is enshrined that everyone has a right to access personal data relating to them, as well as it is stated that personal data «*must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law*». Article 16 TFEU moreover claims that everyone has the right to the protection of personal data concerning them, also providing that the Parliament and the Council «*shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institu-*

[20] At the beginning of 2021, Singapore said its police will be able to use data obtained by its coronavirus contact-tracing technology for criminal investigations, https://www.cpomagazine.com/data-privacy/police-have-access-to-singapores-tracetogether-app-data-in-spite-of-earlier-assurances-will-trust-in-contact-tracing-apps-be-undermined/?utm_campaign=coschedule&utm_source=linkedin&utm_medium=Wei%20Chieh%20Lim&utm_content=Police%20Have%20Access%20To%20Singapore%27s%20TraceTogether%20App%20Data%2C%20in%20Spite%20of%20Earlier%20Assurances%3B%20Will%20Trust%20in%20Contact%20Tracing%20Apps%20Be%20Undermined%3F.

[21] Some authors focused on the best way to develop and improve the apps from a technical perspective, see T. YASAKA AND OTHERS, *Peer-to-Peer contact tracing: development of a privacy-preserving smartphone app*, in *JMIR mHealth and uHealth*, 2020.

[22] H. CHO AND OTHERS, *Contact tracing mobile apps for COVID-19: Privacy considerations and related trade-offs*, 2020, available at https://arxiv.org/abs/2003.11511.

[23] R. RASKAR et al., *Apps gone rogue: Maintaining personal privacy in an epidemic*, 2020, available at https://osf.io/5wap8.

tions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data».

Based on this legal ground, on 27 April 2016 the Regulation 2016/679[24] (hereinafter GDPR) was adopted and became enforceable as of 25 May 2018. The GDPR protects the rights and freedoms of natural persons and in particular their right to data protection. It introduced for the first time a horizontal (i.e., applicable to every legal-economic area) and complete EU regulation[25] (relating to the sector as much public as well as private) for the protection of personal data.[26] Data protection cannot be ensured without adhering to the rights and principles set out in the GDPR (articles 5, 12 to 22 and 34).

All these rights and obligations are at the core of the fundamental right to data protection and their application should be the general rule. Particularly, any limitation to this right needs to meet the requirements set out in article 52(1) of the CFR, meaning that a proportionality assessment has to be conducted so that restrictions are limited to what is strictly necessary. Moreover, any limitation on the exercise of the rights and freedoms recognised by the Charter shall be 'provided by law'.[27]

It is against this background that article 23[28] should be read and interpreted, as it will be discussed below in para 4.1. This provision[29] states that, under

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[24] 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.

[25] In the European data protection framework, it is important to include also the EPrivacy directive relating to data processing and the protection of privacy in the electronic communications sector.

[26] The increased importance of data protection is witnessed by also some recent rulings of the European Court of Justice that pointed out the need to search a balance with other rights (copyright, economic initiative, freedom of information and expression) or interests of major importance (the fight against crime and national security) with which it may be in conflict: CJEU, *Digital Rights Ireland and Seitlinger and Others*, C-293/12, 8 April 2014, ECLI:EU:C:2014:238; CJEU, *Schrems*, C-362/14, 6 October 2015, ECLI:EU:C:2015:650; CJEU, *Facebook Ireland and Schrems*, C-311/18, 16 July 2020, ECLI:EU:C:2020:559; CJEU, *Tele2 Severige e Watson*, Joined Cases C-203/15 and C-698/15, 21 December 2016, ECLI:EU:C:2016:970; *Opinion of Advocate General Campos Sanchez-Bordona delivered on 15 January 2020, La Quadrature du Net and Others*, Joined Cases C-511/18 and C-512/18, ECLI:EU:C:2020:6; CJEU, *Privacy International*, C-623/17, 6 October 2020, ECLI:EU:C:2020:790.

[27] This expression echoes the one 'in accordance with the law' in article 8(2) of the European Convention of Human Rights.

[28] See European Data Protection Board, *Guidelines 10/2020 on restrictions under Article 23 GDPR*, version adopted for public consultation on 15 December 2020, https://edpb.europa.eu/our-work-tools/public-consultations-art-704/2020/guidelines-102020-restrictions-under-article-23_it.

EU or Member State law, the application of certain provisions of the Regulation, mainly relating to the rights of the data subjects and controllers' obligations, may be narrowed in the situations listed therein. However, even in exceptional situations, the protection of personal data cannot be restricted in its entirety. This means that any measure shall respect the general principles of law, the essence of the fundamental rights and freedoms, and shall not be irreversible, and data controllers and processors shall continue to comply with data protection rules.

The above premise is necessary since, when the Covid-19 outbreak started spreading, in the frenzy of trying to stop the pandemic, some held[30] that the data protection assessment would hinder the development of efficient measures to fight the pandemic. These commentators, however, were not aware that the European legal framework has been designed to be flexible and as such it is able to achieve an efficient response both in limiting the pandemic and in protecting fundamental human rights and freedoms.

4. *The European data protection framework for CTAs*

When it comes to applying data protection principles to CTAs, two kinds of observations and recommendations follow.

As matter of fact, the GDPR regulates the exercise of the right to data protection in a far-sighted way, balancing it with other rights and interests that clash or may clash with it. Therefore, on the one hand, it is clear that the right to data protection ought to be balanced with the right to health protection, which is obviously of major importance. As such, European data protection law may allow for the responsible use of personal data for health management purposes, while also ensuring that individual rights and freedoms are not eroded in the process.

Furthermore, since the right to data protection is fundamental at EU level, it is of pivotal importance to determine that laws providing for CTA adoption

[29] Art. 23, par. 1, let. e) GDPR states that EU law or the law of the Member State to which the controller is subject may limit, through legislative measures and within certain borders, the scope (only) of certain obligations and rights (those of Art. 12 to 22 and Art. 34 GDPR) «*to safeguard important objectives of general public interest of the EU or of a Member State in the field of public health*».

[30] D. BUSHAUS, *We will have to give up some privacy to combat Covid-19*, https://inform.tmforum.org/insights/2020/04/we-will-have-to-give-up-some-privacy-to-combat-covid-19/; V. VISCO, *La strana idea di privacy che ci lascia in balia della pandemia*, in *Domani*, 25 October 2020.

establish adequate, necessary and proportionate guarantees, for two reasons especially.

First, such instruments can restrict not only the right to data protection but also other fundamental rights such as freedom of movement, the right of enterprise, the right of association and assembly, and also the right of expression, opinion and freedom of religion. Identifying the political or religious association frequented by a particular person traced for the purpose of fighting the pandemic may in fact also identify political preferences or religious choices.

Thus, the use of data collected through a tracking application for purposes other than those behind its collection (i.e. combating a health emergency) may increase the risk of discrimination, stigmatisation or inequalities.

In its Communication of 17 April 2020,[31] the European Commission emphasised these risks as well. This document regards the characteristics that applications, especially tracking applications, must have in order to comply with EU legislation on data protection. However, certain rules provided therein – namely limitations on the type of data collected, data retention or the purposes for which they are used under the principles of minimisation, privacy by design and privacy by default – must in any case be considered as an obstacle to abusive conduct also in relation to other fundamental rights.

Secondly, in a context such as the EU where, in principle, there could be no obligation to install tracking applications, the effectiveness of such tools varies according to the number of individuals who voluntarily choose to use them.

In the face of this, as already stated, the effectiveness of tracking applications with voluntary installation depends on the number of users and the confidence that public opinion places in them.

The provision of necessary, proportionate and transparent safeguards could then be precisely the key to maximising the use and effectiveness of the instruments under consideration.

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[31] Communication from the Commission, *Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection*, 17 April 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0417(08)&from=IT.

4.1. *Boundaries of domestic and EU action in the light of the necessity and proportionality principles*

As anticipated, the question requiring investigation is not whether it is possible to use tracking tools under the GDPR, but under what conditions these can be used by Member States.

To complement the previous analysis, it is important to take into consideration that the term restriction is not defined in the GDPR. Article 23 and recital 73[32] GDPR only list a number of requirements which need to be met in order for a measure to be lawfully relied upon.

One of these requirements is that restrictions laid down by EU or Member State legislative measures ought to be clear to the data subject. When looking to adopt a legislative measure, restrictions must be carried out under the conditions stated in article 23 GDPR which include: «*(…) important objectives of general public interest of the Union or of a Member State, in particular (…) public health*».

Any legislative measure referred to in article 23(1) GDPR shall contain specific provisions as to, amongst others, the purposes of the processing or categories of processing, the categories of personal data, the specification of the controller or categories of controllers and the storage periods.

We argued that the mere existence of an emergency situation alone is not a sufficient reason to provide for any kind of restrictions on data protection rights. On the contrary, restrictions aimed at protecting public health are allowed since they clearly contribute to the safeguarding of an important objective of general public interest.

As regards the categories of personal data involved, it is clear that the discussion pertains to health data, a special category of personal data, the processing of which is prohibited in principle, according to art. 9(1) GDPR.

This general ban is mitigated by some exceptions, respectively, in art. 9(2) let. i) and in recital 46. According to these provisions, the processing of personal data can be considered lawful if necessary «*for reasons of public interest ... such as protection from serious cross-border threats to health*» or «*for humanitarian purposes, among other things to keep under control the evolution of epidemics and their spread*». This exemption does not mean that Member States are allowed to invoke the protection of public health to justify the adoption of any measure derogating from data protection law and the regulation (and

[32] This recital provides that restrictions should be in accordance with the requirements set out in the CFR and the ECHR.

achievements) of the GDPR. Conversely, art. 9 GDPR, read together with art. 6 and recital 46, establishes the conditions that allow the processing of data relating to health derogating from the general prohibition of processing of so-called sensitive data.

Specifically, it is provided for that such processing be allowed (i) if necessary for reasons of public health and (ii) if based on national legislation containing appropriate and specific measures to protect the rights of the data subject. Likewise, it is art. 23 GDPR, also in the light of recital 73, which specifies the limitations that EU or national legislations can bring to the common discipline for reasons of public health when such a restriction «*is a necessary and proportionate measure in a democratic society*».[33]

The application of the principles of necessity and proportionality in this area, already prescribed by art. 9 and 23 GDPR, would have been possible in any case by virtue of EU case law alone. In recent years, the Court has, in fact, repeatedly confirmed the application of the same principles to assess the compatibility of internal measures adopted in areas of national competence (to fight crime or for internal security needs) that are in contrast with the rights under Article 8 of the Charter. As already recalled by the CJEU in *Schrems* I,[34] generalised access – therefore by definition neither necessary nor proportionate – to the data of EU citizens by public authorities or companies, being detrimental to the essence of the fundamental right to the protection of personal data, can never be justified.

Article 52(1) of the Charter indeed specifies that any limitations to the exercise of rights must always respect the essential content[35] of those rights and freedoms.

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[33] Access to the information collected by the data controller (art. 13-15), rectification (art. 16) and/or cancellation of the data collected (art. 17), as well as in some cases the limitation of the processing of the same (art. 18); right to the data portability (art. 20), opposition (art. 21) and not to be subject to a decision based solely on automated processing (art. 22); obligation of the data controller to notify the data subject in case of rectification or cancellation of the data or in case of limitation of processing (art. 19); as well as to notify a data breach (art. 34) – and stating that such limitations in any case "must respect the essence of the fundamental rights and freedoms of the Charter and the ECHR in a democratic society and be necessary and proportionate".

[34] CJEU, *Schrems*, C-362/14, 6 October 2015, cit.

[35] M. BRKAN (ed.), *In search of the concept of essence of EU fundamental rights through the prism of data privacy*, Maastricht Faculty of Law Working Paper 2017-01.

4.2. *Is the division of competences between EU and Member States an obstacle to the effectiveness of CTAs?*

The idea underpinning this paper is that the distribution of competences within the European Union can in no way be an obstacle to the effective functionality and operability of contact-tracing apps.

It is important to remember that the European Union cannot claim significant competences in health matters since it has in this sector only a mere power of coordination and support of individual national initiatives under Articles 6 and 168 TFEU and Declaration 32 on Article 168(4)(c) TFUE.[36]

As for the GDPR, it has already been mentioned that its discipline is horizontal and the regulation accordingly applies to any data processing, not varying based on EU or national competences in a certain matter. Moreover, according to a now constant EU case law, even areas of exclusive competence of the member countries – in other words, not mentioned in the Treaties – do not completely escape compliance with EU law.

Therefore, even in this case, domestic legislation must consider – and respect – the common rules with which the European legal system comes into contact and possibly conflicts. This is to avoid the risk of jeopardising the proper operation of the common system which the member countries have chosen to be part of.

If this general principle regarding the relationship between EU and domestic law applies to areas of exclusive national competence that are not even mentioned in the Treaties, this necessarily applies also to health matters where the Union has the power to support and coordinate the actions of the Member States.

Applying the previous reasoning to the case in hand means that the exclusion of harmonisation of national health legislation laid down in Article 168 TFEU could then have been circumvented – as in the past[37] – through the adoption of measures for the approximation of national provisions relating to the functioning of the internal market laid down in Article 114 TFEU.[38]

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[36] «The Conference declares that the measures to be adopted pursuant to Article 168(4)(c) must meet common safety concerns and aim to set high standards of quality and safety where national standards affecting the internal market would otherwise prevent a high level of human health protection being achieved».

[37] ECJ, *Bickel e Franz*, C-274/96, 24 November 1998, ECLI:EU:C:1998:563, para 17; ECJ, *Garcia Avello*, C-148/02, 2 October 2003, ECLI:EU:C:2003:539, para 25; ECJ, *Schempp*, C-403/03, 12 July 2005, ECLI:EU:C:2005:446, para 19; ECJ, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*, C-145/04, 12 September 2006, ECLI:EU:C:2006:543, para 78; ECJ, *Rottmann*, C-135/08, 2 March 2010, ECLI:EU:C:2010:104, para 41.

[38] V. DELHOMME, *Emancipating Health from the Internal Market: For a Stronger EU (Legis-*

Interestingly, the importance of this aspect is borne witness to by the fact that the European Commission and the EDPB have been working to make these applications interoperable as soon as possible. As specified below, both the EDPB[39] and the European Commission[40] adopted initial guidance in that sense on 16 June 2020.

5. *The EU Commission's actions to ensure a consistent approach throughout the EU*

In order to accomplish the goal of this paper, the reflections that follow touch upon the approach taken by EU institutions with regard to safeguarding privacy while using contact-tracing tools.

Firstly, before focusing on the strategy adopted by the Independent Authorities, it is essential to bear in mind that the requirements set forth by them have embraced and confirmed the suggestions contained in the Recommendation[41] adopted by the European Commission on 8 April 2020 and the subsequent Communication of 17 April 2020. These documents, which are by their very nature non-binding, were meant to ensure a consistent approach throughout the EU. They also provide guidance to Member States and developers of tracking applications and translate the binding rules of the GDPR and the relevant EU case law into concrete terms. Explanations provided in these communications may help national judges clarify the meaning of some Union acts

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lative) Competence in Public Health, in *European Journal of Risk Regulation*, 2020, pp. 747-756. The author states that: «The use of internal market powers to conduct EU health policy has given rise to several problems, affecting the legitimacy of EU action and its capacity to adequately protect human health. Only a Treaty change can provide the EU with the clear competence and the solid legislative powers that it needs to tackle the various health challenges that Europe faces and will continue to face».

[39] EDPB, Statement on the data protection impact of the interoperability of contact tracing apps https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statementinteroperabilitycontact tracingapps_en_0.pdf.

[40] eHealth Network, *Guidelines to the EU Member States and the European Commission on Interoperability specifications for cross-border transmission chains between approved apps, Detailed interoperability elements between COVID+ Keys driven solutions V1.0*, adopted on 16 June.

[41] Commission Recommendation (EU) 2020/518 of 8 April 2020 on a *common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data*, https://ec.europa.eu/info/sites/info/files/recommendation_on_apps_for_contact_tracing_4.pdf.

and lead them to consider it unnecessary to make references for preliminary rulings.

Substantially, the purpose of the Recommendation was to support the gradual lifting of coronavirus containment measures by using mobile data and apps and provided key principles for the use of mobile applications used for social distancing measures, for warning, for prevention and for contact tracing. The Commission stressed that any use of apps should respect data security and EU fundamental rights, such as privacy and data protection.

The Recommendation was accompanied by Guidance on Apps supporting the fight against the Covid-19 pandemic in relation to data protection (2020/C 124 I/01).[42] The framework developed by the Commission specified that tracing apps must be voluntary, transparent, temporary, cybersecure, and use temporary and pseudonymised data. According to Commission's guidance, CTAs should rely on Bluetooth technology[43] and should not track people's locations; national health authorities should approve them, and finally interoperability across borders, as well as across operating systems, should be implemented.

Further, these suggestions were embraced and confirmed by the Council of Europe, which adopted a Joint Statement[44] regarding the compliance of track-

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[42] Communication from the Commission: Guidance on Apps supporting the fight against Covid-19 pandemic in relation to data protection 2020/C 124 I/0 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0417(08)&from=EN.

[43] As for the differentiation between BLT technology and GPS, Communication from the Commission, cit., p. 6: «[…] For the metering of proximity and close contacts Bluetooth Low Energy (BLE) communications between devices appears more precise, and therefore more appropriate, than the use of geolocation data (GNSS/GPS, or cellular location data). BLE avoids the possibility of tracking (contrary to geolocation data). The Commission therefore recommends the use of BLE communications data (or data generated by equivalent technology) to determine proximity. […]».

[44] Joint Statement on Digital Contact Tracing by Alessandra Pierucci, Chair of the Committee of Convention 108 and Jean-Philippe Walter, Data Protection Commissioner of the Council of Europe, 28 April 2020, https://rm.coe.int/covid19-joint-statement-28-april/16809e3fd7. As regards the lawfulness of personal data processing, it stressed that the processing of data can be carried out either on the basis of the data subject's consent or some other legitimate basis laid down by law. As explicitly provided by the Explanatory Report to Convention 108+, such a legitimate basis notably encompasses data processing that is necessary to protect the vital interests of individuals, and data processing that is carried out on the grounds of public interest, such as for the purposes of monitoring a life-threatening epidemic. According to Article 11 of Convention 108 +, exceptions to the right to data protection are to be «provided for by law, respect the essence of the fundamental rights and freedoms and constitute a necessary and proportionate measure in a democratic society. Where restrictions are being applied, those measures have to be taken solely on a provisional basis and only for a period of time explicitly limited to the state of emergency».

ing applications with Conventions 108[45] and 108+[46] on the protection of personal data. The alignment between the position of the EU and the Council of Europe confirms the repeated convergence between the ECHR Courts and the ECJ at least on data protection issues.[47]

It has been argued that the timely action of the European Commission was probably due to the fact that, in view of the progressive lifting of the measures taken to fight the Covid-19 pandemic planned for June/July 2020,[48] twenty Member States – Austria, Bulgaria, Belgium, Cyprus, Croatia, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, Portugal, Poland, Spain, Slovakia and the Czech Republic – taking as an example the experience of Asian countries such as Singapore and South Korea, started unilateral reflections on the adoption of tracking applications in March 2020.

At least by June 2020, these tools were operational in Austria, Bulgaria,[49] Cyprus,[50] Italy, France, Poland, Slovakia and Czech Republic. Yet, for the sake of completeness, it should be added that the Government of Sweden decided to withdraw the proposal for a Covid-19 symptom tracking application. This decision followed concerns expressed by national experts about adequate protection of data collected through these instruments. Similarly, the Lithuanian Data Protection Authority suspended the national application of its CTA.[51]

It was clear that in this context a common intervention establishing appropriate guidelines and safeguards was then not only appropriate but also necessary in order to avoid the proliferation of different – and perhaps not GDPR compliant – applications.

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[45] *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*; this is the first binding international instrument which protects the individual against abuses which may accompany the collection and processing of personal data and which seeks at the same time to regulate the cross-border flow of personal data.

[46] Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regar/16808b36f1.

[47] Generally speaking, it is important in view of the possible future accession of the EU to the ECHR as prescribed by Article 6 TEU.

[48] Communication from the Commission *on the third assessment of the application of the temporary restriction on non-essential travel to the EU*, COM(2020) 399 final, 11 June 2020, https://ec.europa.eu/info/sites/info/files/communication-assessment-temporary-restriction-non-essential-travel_en.pdf.

[49] On the *VirusSafe* App, see *Report* of the FRA Agency, April 2020, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu bulletin_en.pdf, p. 48.

[50] *CovTrace* app, see *ibidem*.

[51] Report of the FRA Agency, *op. cit.*, p. 39.

Since the virus knows no borders, the interoperability of these apps has also been urged by some DPAs, such as the Italian and French.[52] Probably also in view of this, on 16 June 2020 a series of technical specifications were agreed by DPAs to ensure the secure exchange of information between national tracking applications.[53]

Essentially, the European Commission was involved mainly in the adoption of recommendations on a common Union toolbox for the use of technology and data to combat and exit from the Covid-19 crisis.

As a matter of fact, Member States in the eHealth Network,[54] backed by the Commission, adopted an EU toolbox[55] on contact-tracing applications in the EU fight against Covid-19, setting out the foundations of a common pan-European approach to contact-tracing and warning apps. In addition, the eHealth Network adopted interoperability guidelines[56] on 13 May 2020. Finally, in June 2020, the eHealth Network adopted technical specifications and guidelines[57] establishing the architecture for a Federation Gateway Service which would allow the exchange of contact-tracing keys between Member States. The modalities for processing personal data in the Federation Gateway were adopted in July with the amendment of the Implementing Decision on the eHealth Network.[58] The development and deployment of the Federation Gateway was completed by the end of September 2020.[59]

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[52] CNIL, *Délibération n° 2020-056 du 25 mai 2020 portant avis sur un projet de décret relatif à l'application mobile StopCovid*, www.legifrance.gouv.fr/affichCnil.do?id=CNILTEXT000041940832, spec. para 79; Garante della *privacy* italiano, *Parere sulla proposta normativa per la previsione di una applicazione volta al tracciamento dei contagi da COVID-19 – 29 aprile 2020 [9328050]*, www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9328050, spec. p. 4.

[53] See footnote 31.

[54] The eHealth Network is a voluntary network created under article 14 of Directive 2011/24/EU. It provides a platform for Member States' competent authorities responsible for eHealth and is scientifically and technically supported by a Joint Action.

[55] Mobile applications to support contact tracing in the EU's fight against Covid-19, *Common EU Toolbox for Member States Version 1.0* of 15.04.2020, https://ec.europa.eu/health/sites/health/files/ehealth/docs/covid-19_apps_en.pdf.

[56] eHealth Network, *Interoperability guidelines for approved contact tracing mobile applications in the EU*, adopted on 13 May 2020 https://ec.europa.eu/health/sites/health/files/ehealth/docs/contacttracing_mobileapps_guidelines_en.pdf.

[57] *eHealth Network Guidelines to the EU Member States and the European Commission on Interoperability specifications for cross-border transmission chains between approved apps Basic interoperability elements between COVID+ Keys driven solutions V1.0*, adopted on 12 June 2020, https://ec.europa.eu/health/sites/health/files/ehealth/docs/mobileapps_interoperabilityspecs_en.pdf.

[58] Commission implementing decision 2020/1023 of 15 July 2020 amending Implementing Decision (EU) 2019/1765 as regards the cross-border exchange of data between national con-

6. *How to manage the pandemic through a fair and transparent data processing: the word to Data Protection Authorities*

Resuming the content of the previous pages, it is clear that, technically speaking, there is not a tension between the respect of data protection principles and an efficient response to the current crisis through CTAs, which may on the contrary play a very important role in the fight against the virus.

At EU level, the Data Protection Authorities – namely the EDPB and the EDPS – as responsible for giving concrete and practical guidance, made clear the conditions to be respected for a proportionate use of contact-tracing tools.

It is worth analysing the substance of the documents that these Authorities adopted, since they sum up the last year's debate on the privacy implications of CTAs. In particular, the considerations regard what type of technology to adopt and how to encrypt data; who would have access to the data collected; what categories of data would be collected; how long the data would be retained; the type of data storage (centralised or decentralised); the legal basis for the processing of data, and finally the choice between voluntary or mandatory use of contact-tracing apps.

In defining its approach to data protection during the pandemic, the EDPS has worked closely with the EDPB. Hence, taking into account their different roles, the following paragraphs will highlight the main points of the discussion which has seen the Authorities compensate each other for their positions.

6.1. *The EDPB Guidelines*

We have already mentioned the EDPB's line of reasoning, which may be summarised by the following statement: «*data protection rules (such as the GDPR) do not hinder measures taken in the fight against the coronavirus pandemic.* […] *It is in the interest of humanity to curb the spread of diseases and to use modern techniques in the fight against scourges affecting great parts of the world*».[60]

The Board underlines that, even in exceptional times, the right to personal data protection must be respected and the lawful processing of personal data

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tact tracing and warning mobile applications with regard to combatting the Covid-19 pandemic, https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32020D1023&from=EN.

[59] https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/travel-duringcoronavirus-pandemic/how-tracing-and-warning-apps-can-help-during-pandemic_en.

[60] https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf.

must be ensured. Emergency is a legal condition which may legitimise restrictions on freedoms, however personal data must be processed according to the principles set out by article 5 GDPR.

The Guidelines 04/2020[61] contain the EDPB's main indications on the use of contact-tracing tools. First, the *installation of such apps must be voluntary* and individuals refusing to use them should not suffer any disadvantage. The EDBP emphasises that the voluntary basis of the app does not mean that consent is necessarily the legal basis for processing, which it is important to remember must be identified by law. Such EU or Member State law must explicitly indicate (i) the purpose of the processing and limitation of further unrelated use, (ii) that processing is necessary to perform a public interest task, (iii) that the app must be operated on a voluntary basis, (iv) a clear identification of the controller(s), and (v) criteria to determine when the app will be dismantled and who is responsible for and accountable for such a determination.

The purpose of the app must be well defined and specific enough to exclude further processing for purposes unrelated to Covid-19 and to ensure that the use of personal data is adequate, necessary and proportionate.

One of the main suggestions concerns the so-called 'sunset clause' which means that the use of these technologies – and the data collected therein – should be limited to the current health emergency, since the tracking applications should be deactivated, and the personal data collected therein deleted «*at the latest when "return to normal" is decided by the competent public authorities*». Hence, the use of these tools would be possible as long as the health emergency is ongoing and the likelihood of future emergencies will not justify the maintenance of these applications, which should be no longer accessible at the end of the pandemic.

Furthermore, careful consideration should be given to the **principles** of data minimisation.[62] The app should not collect unrelated or unnecessary information such as civil status, communication identifiers, equipment directory items, messages, call logs, location data, device identifiers and «*data broadcasted by applications must only include some unique and pseudonymous identifiers, generated by and specific to the application. Those identifiers must be renewed regularly, at a frequency compatible with the purpose of containing the spread of the virus, and sufficient to limit the risk of identification and of physical tracking of individu-*

[61] European Data Protection Board, *Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak* adopted on 21 April 2020, https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf.

[62] Article 5(1)(c) GDPR: «Personal data shall be: (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed».

als».[63] Particularly, attention should be drawn to the principle of privacy by design which is a key element for managing data in a fair and compliant way.

The Board also recommends that the source code of the apps be made public and accessible and that independent authorities[64] review it. Then, it also suggested using proximity data (Bluetooth[65]) instead of tracking data (GPS). The former is indeed more accurate in enclosed spaces and more compliant with the principles of minimisation, privacy by design and privacy by default.[66]

At the time, the main focus of public discussion was on the architectural choice: centralised or decentralised. Deciding between these features has different privacy implications since it involves the storage of information about users of the app. The difference[67] between these approaches lies in the execution of certain key functionalities, such as the generation of unique identifiers and the calculation of epidemiologically effective risk scores based on contact risk data. Contact data centralisation, which is built into the centralised approach, can be replicated in the decentralised protocol by voluntarily transmitting the contact data to a backend server after it has been collected. On the

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[63] EDPB Guidelines, cit., p. 9.

[64] *Ibidem*, p. 14 and Communication from the Commission, *Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection*, cit., par. 3.8.

[65] Bluetooth technology uses the data generated by the exchange of signals between mobile devices at an epidemiologically significant distance (less than 1 or 2 meters depending on the application) for the epidemiologically relevant period (at least 15 minutes). It indeed allows contacts to be traced between individuals only on the basis of the signal's proximity. Conversely, GPS technology works on the basis of the exact location of the user and is therefore useful in cases where the scope is to track movements of individuals or to enforce requirements such as quarantine (location tracing). Furthermore, tracking applications that use GPS technology collect superabundant data (e.g., exact location of users) which reveal personal information on habits and preference thus violating fundamental rights different from the one under examination.

[66] Early results are optimistic if other conditions, such as infection testing capacities and broad technology adoption, are also guaranteed, see L. FERRETTI AND OTHERS, *Quantifying Sars-Cov-2 Transmission Suggests Epidemic Control with Digital Contact Tracing*, cit.; See, *Guidelines 4/2019 on Article 25 Data Protection by Design and by Default*, adopted on 20 October 2020, https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_201904_dataprotection_by_design_and_by_default_v2.0_en.pdf.

[67] The statement of the Pan-European Privacy-Preserving Proximity Tracing (PEPP-PT) organization made the distinction between the two approaches even more blurred. The manifesto, which explains the intention to create "well-tested proximity tracking technologies" that national authorities can use to create their own Covid-19 apps, also states that these technologies ensure "secure data anonymisation" and "cross-border interoperability".

The statement is available at the following link: https://404a7c52-a26b-421d-a6c6 96c63 f2a159a.filesusr.com/ugd/159fc3_878909ad0691448695346b128c6c9302.pdf.

other end, the decentralised protocol relies on servers to store and process certain voluntarily shared contact-tracing information.

The EDPB stated that both approaches were viable options. Conversely, the EDPS underlined[68] that data protection risks remained with centralised and decentralised matching.

Generally speaking, the major concerns raised about the centralised vs. decentralised communication protocols appeared to relate to a mix of security and privacy issues, technical limitations and the market positions of Google and Apple, the main smartphone operating system market players. In particular, these worries became more concrete after Apple and Google announced a joint effort[69] to enable the use of Bluetooth technology to help governments develop more efficient apps.

6.2. *The European Data Protection Supervisor's approach*

On 6 April 2020, the EDPS issued a call for a pan-European approach for a "Covid-19 mobile application" model,[70] coordinated at EU level. It stressed that ideally coordination with the World Health Organization should also take place, so as to ensure that data protection by design was implemented from the start.

The EDPS pointed out that the use of temporary broadcast identifiers and Bluetooth technology for contact tracing seemed to be a useful path towards achieving privacy and personal data protection effectively. Regarding data retention, it welcomed the idea that the data obtained from mobile operators would be deleted as soon as the current emergency came to an end. It also made clear that these special services were deployed due to the pandemic and they were temporary.

The EDPS noted that such developments usually do not allow for the possibility of "*making them the ordinary rules*" when the emergency is gone and that such a solution should still be recognised as extraordinary.[71]

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[68] TechDispatch #1/2020: Contact Tracing with Mobile Applications, 7 May 2020, https://edps.europa.eu/data-protection/our-work/publications/techdispatch/techdispatch-12020-contact-tracing-mobile_en.

[69] On 10 April 2020, Google and Apple announced a two-phase exposure notification solution that uses Bluetooth technology on mobile devices to assist with contact tracing efforts, https://covid19.apple.com/contacttracing.

[70] W. WIEWIÓROWSKI, *EU Digital Solidarity: a call for a pan-European approach against the pandemic*, 6 April 2020, https://edps.europa.eu/sites/edp/files/publication/2020-04-06_eu_digital_solidarity_covid19_en.pdf.

[71] European Data Protection Supervisor Comments on the European Commission's plan to

Additionally, what stems from the discussion within the EDPS is that, while clearly some of the expectations of the apps were exaggerated and impossible to match in reality, their effectiveness may be improved. Developers are paying more attention to privacy risks and rights of individuals, but at the same time, there are immense challenges in developing the science and practice of privacy engineering.

What is also clear is that 'less privacy' cannot be demanded. On the contrary, a more concrete adherence to data protection by design and by default requirements should be achieved. These principles play a crucial role in promoting privacy and data protection in society and accordingly require privacy and data-protection issues be considered from the design phase of any system, service and process and then throughout the lifecycle.

These are precisely the purposes at the core of the EDPS's activities which commenced some years ago with the launch of the Digital Clearinghouse,[72] a voluntary network of regulators involved in the enforcement of legal regimes in digital markets, with a focus on data protection, and consumer and competition law. The active involvement of these experts proves that the mixture of knowledge is the key factor to ensure that new technological solutions provide for effective and real protection to the right to personal data protection.

7. *Final remarks*

As the title makes clear, this article is an endeavour to look at the recent history of contact-tracing apps, which have experienced some ups and downs.

The roll-out of these apps in most European Member States proved to be a continuous challenge on how new technology can help to tackle the pandemic while protecting sensitive data.

However, some technical features of these apps made people reluctant to download them. That was actually due to the fear of a misleading management of data used by these contact-tracing apps.

In order to get to the root of this behaviour, the article provided readers with an overview of the implications for data protection that stemmed from

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access telecommunications data from telecommunications service providers to monitor the Covid-19 spread (of 25 March 2020) https://edps.europa.eu/sites/edp/files/publication/20-03-25_edps_comments_concerning_covid-19_monitoring_of_spread_en.pdf.

[72] https://www.digitalclearinghouse.org/.

developing these apps[73] under enormous time constraints while incorporating data protection requirements. Nonetheless, before highlighting the issues related to data protection, the first part of this paper summarises how the right to data protection is regulated by European law and what restrictions may apply.

It is essential not to forget that the right to data protection, although it is still a fundamental right, is not absolute, therefore it is possible to limit it without at the same time betraying its essence.[74]

Under specific conditions, article 23 GDPR allows national legislators to restrict, via a legislative measure, the scope of the obligations of controllers and processors and the rights of data subjects when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard important objectives of general public interest of the EU or of a Member State, such as in particular public health.

Substantially, as restrictions are exceptions to the general rules, they should be applied in limited situations. Consequently, even in pandemic circumstances, the right to data protection must be considered throughout and, in order to meet the foreseeability criterion, the principles of lawfulness, purpose limitation, period limitation and minimisation must be considered in every part of the processing chain. Thus, restrictions have to be provided for 'by law' and have to be foreseeable for persons subject to them (i.e., precisely limited in time and subject to defined conditions).

Borrowing the words of the EDPB: «[…] data subject rights are at the core of the fundamental right to data protection and Article 23 GDPR should be interpreted and read bearing in mind that their application should be the general rule. As restrictions are exceptions to the general rule, they should only be applied in limited circumstances».[75]

In essence, the European data-protection framework seems well equipped to protect data subjects from a deceitful use of data. The GDPR's principles offer a ready-made functional blueprint for system design that is compatible with fundamental rights. These principles are flexible enough to ensure a

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[73] The Norwegian coronavirus app, Smittestopp, was temporary suspended by the Norwegian Data Protection Authority because it violated privacy regulations in mainly two aspects: proportionality and data minimisation. For further details, see https://edpb.europa.eu/news/national-news/2020/temporary-suspension-norwegian-covid-19-contact-tracing-app_en.

[74] M. BRKAN, *In search of the concept of essence of EU fundamental rights through the prism of data privacy*, cit.

[75] https://edpb.europa.eu/news/news/2020/thirtieth-plenary-session-edpb-response-ngos-hungarian-decrees-and-statement-article_en.

complete response to the pandemic while fully respecting their essence. The right to data protection must, in fact, be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

These concepts have been recently reiterated by the EDPB which adopted a statement[76] on restrictions on data subject rights in connection with the state of emergency in Member States, in response to the Hungarian government[77] decree dated 4 May 2020.[78]

The Board recalls that any measures taken by Member States need to respect the general principles of law and the essence of the fundamental rights and freedoms.

Certainly, it is not necessary to choose between an effective response to the current crisis and the protection of fundamental rights, since European law provides the means to achieve both.

Therefore, *what is the reason for the failure of contact-tracing apps?*

Surely, almost all of them seem to have hit some technological hitch, however, another shared element is the general lack of users'trust.

This is because users fear that government authorities and the tech giants will inevitably use Covid-19 as an excuse to intensify surveillance, in an overbroad manner. The announcement of the partnership between Apple and Google, in particular, only increased these worries.

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[76] https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_art_23gdpr_20200602_en.pdf.

[77] The adoption of such legislation, clearly going beyond what is necessary to fight the pandemic, exposes this Member State to the concrete risk of infringement proceedings for violation not only of EU data-protection provisions (Article 8 of the Charter, GDPR and e-Privacy Directive, as well as EU case law), but also of Article 2 TEU. Moreover, the fact that they are contrary to the founding values of the EU, and in particular the rule of law, also exposes the latter to the proceedings under Article 7 TEU, in any case already initiated by the European Parliament and the Commission respectively against Hungary and Poland for repeated and previous violations.

[78] *Ibidem*: «Under Article 1, this Decree provides that, with respect to personal data processing for the purpose of preventing, understanding, detecting the coronavirus disease and impeding its further spread, including the organization of the coordinated operation of State organs in relation to it, all measures following data subject's request exercising the rights based on Articles 15 to 22 of the GDPR are suspended until the end of the state of danger promulgated by Decree 40/20203, and the starting date of such measures shall be the day following the day after the termination of the state of danger. Article 5 of the Decree 179/2020 provides that such suspension is also applicable to all requests to exercise the referred data subject rights, which were already pending at the date of entry into force of the Decree. The data subject has to be notified about this restriction without delay after the end of the state of danger and at the latest within ninety days after the request is received».

The questions raised were: *will data collected due to the health emergency be used by governments and corporations for manipulative purposes and predatory surveillance?* Concerns have focused on data security issues associated with the collection, use and storage of the data.

The European Union has already been confronted with particularly invasive national measures which allowed American intelligence to access and also collect data transferred from the EU.[79] That was an occasion to pinpoint how the ECJ's approach to the regulation of international data transfer is shaped around a high level of protection.

As stated in the GDPR, the processing of personal data should be designed to serve humankind[80] and, since technology is a human-made phenomenon, a balance between the values at stake and new technological solutions should be struck. Contact-tracing apps should be tailored before appearing operative thus complying with the existing data protection framework.

Essentially, trust can be built if clear information on the app's purposes and the data it requires are shared with the public. To achieve that, the principle of privacy by design should play a central role in building contact-tracing apps and technological solutions in general so as to guide software engineering and make sure that privacy is considered throughout the whole development process.

Ultimately, the analysis leads us to suggest that, even though digital contact-tracing apps have faced a wide range of difficulties, they should not be demonised. It is still possible to build ethical and trustworthy digital contact-tracing solutions, which are just one part of a toolkit rooted in trust and in relationship among users, governments and technologies themselves.

[79] CJEU, Schrems, cit.

[80] Recital 4 GDPR.

MANAGING THE PANDEMIC: BETWEEN INDIVIDUAL'S RIGHTS, TECHNOLOGY, AND SOVEREIGNTY

by *Valentina Pagnanelli*

Introduction

In the last few decades, the relationship between law and technology has become even closer, leading to an overarching review of agreed legal concepts such as sovereignty and protection of fundamental rights, while "territory" is no longer a reference to the borders of a nation. The Covid-19 outbreak offers us the opportunity to reflect on the evolution of these key categories. In fact, as we will see in the following paragraphs, both the use of technology and the repeated restriction of data protection rights have been the subject of major political decisions taken while trying to manage the pandemic.[1]

[1] Giorgio Resta talks about "*diritto dell'emergenza*", characterised by a simplified data protection regulation: "*Questa, composta da tasselli normativi promananti da fonti diverse e operanti su diversi registri (sovranazionale, nazionale, regionale), è essenzialmente preordinata a rendere più capillare ed efficace la sorveglianza epidemiologica, più agevole lo scambio di informazioni tra le autorità sanitarie, più rapido e meno oneroso il processo di sperimentazione clinica di nuovi medicinali e dispositivi medici, in ultimo più fluido ed effettivo l'intero sistema di gestione della crisi sanitaria in atto*", in G. RESTA, *La protezione dei dati personali nel diritto dell'emergenza Covid-19*, in *Giustizia civile.com*, 5 maggio 2020, p. 3.

1. *The impact of the Italian pandemic legislation (the* Cura Italia *Decree) on the protection of personal data*

Several Italian legislative measures during the pandemic have covered data protection, as in the case of Article 17 a, of the so-called "*Cura Italia decree*" (D.L. 17 March 2020, no. 18 which became law no. 2 of 24 April 2020), an act which regulates the processing of personal data during the Covid-19 emergency. In order to manage and contain the health emergency, Art. 17 a, of the *Cura Italia* decree gave to a variety of subjects permission to handle and communicate personal data, even sensitive personal data, as defined by articles 9 and 10 of the European General Data Protection Regulation (GDPR) no. 2016/679.

It is not possible here to delve into the matter of the GDPR "Privacy roles", because of the many legal issues raised by the interpretation of the relevant provisions and their application to concrete situations.[2] However, in brief, according to the definitions contained in Article 4 of the GDPR, public bodies, companies, and private-sector practitioners make up a composite network where each one has a different role: *controller*, *processor*, or *authorised person*. The latter, under the direct authority of the controller or processor, are authorised to process personal data. Art. 4 specifies the responsibilities of the controller and the processor; the controller, for example, is entitled to determine the purposes and means of the processing of personal data,[3] while the processor processes personal data on behalf of the controller, following the instructions.[4] Notably, the processor has to be appointed by the controller with a contract (Art. 28 of the GDPR).

Article 17 a, allows individuals belonging to the Italian National Health Service or Civil Defence, as well as the staff of public and private healthcare facilities, to handle the personal data of infected people. What's more, they

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[2] On 2 September 2020 the European Data Protection Board released its Guidelines on the concepts of controller and processor in the GDPR – version for public consultation, with the aim "*to clarify the different roles and distribution of responsibilities between these actors*"; Guidelines 07/2020 on the concepts of controller and processor in the GDPR, p. 7, available at the following link https://edpb.europa.eu/our-work-tools/public-consultations-art-704/2020/guidelines-072020-concepts-controller-and-processor_it.

[3] European General Data Protection Regulation no. 2016/679 (GDPR), Art. 4 no. 7: "'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data […]".

[4] GDPR, Art. 4 no. 8: "'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller".

are also permitted to communicate these data, including sensitive data, to other subjects, to make managing the emergency easier. Yet these individuals are only described in very general terms.

This regulation, although unquestionably necessary and urgent, creates a complicated web of public and private responsibilities for the processing of personal data that will be difficult to ascertain after the end of the outbreak, even if it is worth noting that the opening lines of this provision make it immediately clear that it will remain in force only until the end of the state of emergency.[5]

Furthermore, the Covid-19-outbreak legislation – in particular Art. 17 a, – restricts data subjects' rights: first of all, the right to be informed, which is a staple of data protection law. Article 23 of the GDPR allows restrictions on several obligations and rights listed in the European Regulation when those restrictions are needed to safeguard important objectives of general public interest, such as public health.[6] The *Cura Italia* decree restricts the data subject's right to information by allowing a huge number of individuals involved in the health service to only give information about the personal data processed to data subjects orally, or not to give it at all.[7]

The lack of information on data processing given to data subjects, together with the difficulty in ascertaining the responsibilities ascribed to the controller or the processors,[8] has significantly lowered the protection of data-subjects' rights.

2. *Digital contact tracing: when data protection meets technology*

When you add in technology, the complexity of the legal issues increases enormously. Article 6 of Decree law no. 28/2020, entitled "Covid-19 warning

[5] In its statement of 19 March 2020 the European Data Protection Board stressed the need for governments to respect proportionality and temporariness of the measures taken to fight the pandemic. The document is available at https://edpb.europa.eu/our-work-tools/our-documents/outros/statement-processing-personal-data-context-covid-19-outbreak_en.

[6] GDPR, Art. 23 par. 1 lett. e.

[7] G. RESTA, *La protezione dei dati personali nel diritto dell'emergenza Covid-19*, cit., pp. 8-9.

[8] "*The concept of controller and its interaction with the concept of processor play a crucial role in the application of the GDPR, since they determine who shall be responsible for compliance with different data protection rules, and how data subjects can exercise their rights in practice*", European Data Protection Board, Guidelines 07/2020 on the concepts of controller and processor in the GDPR, p. 7.

system", establishes a single national platform to host the alert system for users who install the contact tracing app "Immuni" on their phones. This warning system, installed on a voluntary basis, aims to protect those citizens who have come into close contact with individuals who have tested positive for Covid-19.[9] Article 6, in its general formulation, contains all the main traits of both Italian national and European privacy regulations. For instance, it sets the attribution of privacy roles, it requires a Data Protection Impact Assessment (with possible consultation of the Data Protection Authority) to be carried out, and it lists the information that must be provided to the data subjects. It also recalls the principles of both "privacy by design" and of "privacy by default" as well as data minimisation. In addition, the norm sets out a list of guarantees such as confidentiality, integrity, availability, and resilience of systems and services. Furthermore, it establishes the public ownership of the platform, that must be constructed with infrastructure located within Italy, in accordance with the recommendations of the Italian Data Protection Authority (see paragraph 3 below). Moreover, it states that the collection of proximity data must be "*made anonymous or, if this is not possible, pseudonymized*", and it requires that adequate measures be taken to avoid the re-identification of data subjects.

In the next few lines we will try to analyse the risks and strengths of pseudonymisation as an attempt to avoid re-identification. First off, we ought to clarify the term "*pseudonymisation*". Although it is often used as an alternative to "*anonymisation*" ("*dati … resi anonimi oppure, ove ciò non sia possibile, pseudonimizzati*"), this can be misleading.[10]

Anonymisation is a data processing technique that ensures irreversibility, that is, the impossibility to re-identify a person.[11] Generally speaking, obtain-

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[9] Among other comments, see: C. COLAPIETRO, A. IANNUZZI, *App di contact tracing e trattamento dei dati con algoritmi: la falsa alternativa fra tutela del diritto alla salute e protezione dei dati personali*, in *dirittifondamentali.it*, 10 giugno 2020, p. 803 ss.; E. CREMONA, *Contact tracing. Governance pubblico-privata e primi problemi di tutela dei diritti fondamentali*, in *Ianus – diritto e finanza*, 21 maggio 2020; V. PAGNANELLI, *Immuni: spunti per una riflessione privacy-oriented*, in *Questione giustizia*, 11 maggio 2020; M. PLUTINO, *"Immuni". Un'exposure notification app alla prova del bilanciamento tra tutela dei diritti e degli interessi pubblici*, in *dirittifondamentali.it*, 26 maggio 2020, p. 584 ss.

[10] See V. PAGNANELLI, *Immuni: spunti per una riflessione privacy-oriented*, cit.

[11] "*An effective anonymisation solution prevents all parties from singling out an individual in a dataset, from linking two records within a dataset (or between two separate datasets) and from inferring any information in such dataset*", Article 29 Data Protection Working Party, *Opinion 05/2014 on Anonymisation Techniques*, available at https://www.garanteprivacy.it/documents/10160/2133805/WP216+Opinion+05+2014+on+_Anonymisation+Techniques+onto+the+web.pdf/e93e26aa-6d98-4b79-b916-76ceb04160d1?version=1.2, p. 9.

ing full anonymisation is a very difficult task.[12] On the other hand, Article 25 of the GDPR defines pseudonymisation as a tool (a technical measure) to implement the key principle of privacy by design,[13] but the Article 29 Working Party clarified that it is not an anonymisation technique: "*Pseudonymisation reduces the linkability of a dataset with the original identity of a data subject; as such, it is a useful security measure but not a method of anonymisation*".[14]

This difference between pseudonymisation and anonymisation is not insignificant, from a legal viewpoint, since anonymous data are not subject to the GDPR, because they are not personal data.[15] Pseudonymised data, in contrast, are subject to the GDPR because they actually are personal data. Establishing appropriate technical and organisational measures to avoid re-identification of pseudonymised subjects can be hard, also because of the many possible correlations between personal data available through different sources. In fact, Recital 26 of the GDPR states that "*To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used*".

A practical example of the use of the digital contact tracing system should clarify this point. The Immuni app transmits pseudonymised identifying codes (Rolling Proximity Identifiers) to other devices. These codes are created automatically every ten minutes by a Temporary Exposure Key (TEK) and then transmitted via Bluetooth to the other nearby devices using the Immuni app,

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[12] *Ibidem*: Opinion 05/2014 offers an overview on several anonymisation techniques, also highlighting their weaknesses.

[13] GDPR, Article 25 par. 1.

[14] Article 29 Data Protection Working Party, Opinion 05/2014 on Anonymisation Techniques, p. 20.

[15] GDPR, Recital 26: "*The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes*".

as well as to a national centralised structure. When an Immuni user has tested positive to Covid-19, they can freely choose to send an alert[16] from their mobile phone to the devices in their contact register.

The problem has been raised that there are various technological means to achieve re-identification of the data subjects, made even easier by the publication of the source code of the app and by the use of B-LE (Bluetooth Low-energy) technology. Besides, technology's Big Players would not have any difficulty in turning their computational power on to this data to re-identify people, should they want to. But, in our opinion, it is worth noting any Immuni user could trace back to the contagious person simply by, for instance, matching up meeting someone in a park and the subsequent publication of a photo or geolocation information on a social network: "*il fatto che una persona cui si riferisce l'informazione venga identificata o meno dipende dalle circostanze del caso*"[17].

The Italian Data Protection Authority once decided, regarding a newspaper report of a domestic violence case, that as such an event took place in a small neighborhood, where basically everyone knows each other, someone would be able to trace back to the identity of the people involved. More specifically, even if the newspaper involved had avoided publishing the name and surname of the people under investigation, it had published other personal data, such as place of residence and composition of the family instead. The Authority decided that these data, taken as a whole, considering the small number of inhabitants of the municipality in which the events took place, were enough to identify the victim.[18]

Right from the start it emerged that the Immuni app had the same drawbacks as the above "analogical" example. In fact, many interviews have been published and broadcast in which healthcare personnel who, after having correctly followed the Immuni contact tracing procedure, provided information relating to the geographical area from which the person flagged by the app came, and also their age, previous pathologies, as well as their family make-up.

This should set alarm bells ringing. The current situation lays bare the imbalance between the high protection afforded to technological data processing

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[16] Following a definite procedure.

[17] Article 29 Working Party, Opinion 4/2017 on the concept of personal data, available at https://www.garanteprivacy.it/documents/10160/10704/ARTICOLO+29+-+WP+136.pdf/339f9753-f2bc-41ed-b720-0e12f0a56801?version=1.1, p. 13.

[18] Violenza sessuale e diritto di cronaca, 28 January 2010 [1696265] https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1696265.

(i.e. to Immuni) and the fundamental right it comes from: the protection of private and family life.[19]

The Italian Data Protection Authority stressed the importance of this point in its notes on the technological aspects of the Data Protection Impact Assessment made on Immuni. In the section related to access control, the Authority highlights that, besides the log-in procedures which keep track of computer access, other measures should be set up to keep track of all operators who intervene in the processing of tracking data, "*ad iniziare dalla delicata fase di raccolta delle informazioni sui casi positivi*".[20]

As previously mentioned, in the Immuni alert system, data are processed both in the user's mobile phone and in a central server (in a semi-decentralised-structure, according to the definition of the DPA[21]). This choice seems to be a consequence of Apple and Google having jointly created the Exposure Notification protocol, with a common Application Programming Interface, and the guarantee of interoperability between the operating systems of the two IT giants.

This initiative certainly simplified and sped up the development and usability of the app; thanks to the proactive action of these two giant US players, people can now download the contact tracing app Immuni simply by using one of the two most popular operating systems in the world. But still that raises some concerns due to the fact that the processing of sensitive personal data of a huge number of individuals strongly depends on two private, global, for-profit players.

This leads us to the last topic of the present essay: the concerns for the protection of State data sovereignty that have emerged during the Covid-19 pandemic.

3. *Covid-19, personal data and State sovereignty*

Several times during the last few months, the Italian DPA has spoken about the importance of reflecting on digital sovereignty. The DPA has stressed

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[19] For an overview of the evolution of the notions of privacy and personal data protection see S. CALZOLAIO, *Protezione dei dati personali, aggiornamento*, in *Digesto delle discipline pubblicistiche*, Torino, 2107, pp. 612 ss.

[20] Garante per la protezione dei dati personali, *Valutazione d'impatto sulla protezione dei dati personali presentata dal Ministero della Salute relativa ai trattamenti effettuati nell'ambito del sistema di allerta Covid-19 denominato "Immuni"– Nota sugli aspetti tecnologici* (doc. 9357972), available online at https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9357972.

[21] *Ibidem*.

the need to fully rethink public governance, in order to formulate a new concept of sovereignty: State sovereignty over data. Specifically, digital sovereignty should protect the State against growing global risks, such as pervasive communication strategies used to manipulate the votes of citizens,[22] microtargeting, national security risks, and even risks for the independence of sovereign nations.[23]

Moreover, during the consultations about the adoption of a digital contact tracing system, the Authority asked participants to make sure they chose reliable technological partners, who would correctly manage the app's IT infrastructure. The DPA also asked for technological partners located on Italian territory.[24] Similar concerns for ensuring the protection of national security were expressed by COPASIR (the Italian Parliamentary Committee for the Security of the Republic). In its report on the Immuni app sent to the Parliament after an investigation into the app's possible security risks,[25] the Committee also pointed out the need to store the collected data within Italian territory. So, in other words, both the Data Protection Authority and the Parliamentary Committee for the Security of the Republic highlighted the need to ensure Italian jurisdiction on the data, above all by collecting them within Italian territory.

Following these indications, the last paragraph of Article 6 of Decree law no. 28/2020 establishes that the single national platform for the Covid-19 alert system has to employ infrastructures exclusively located within Italian territory. But this may be hard to fully implement. For instance, for the ICT infrastructure to function correctly, traffic management services, called CDNs (Content Delivery Networks), are required. A CDN is a highly distributed server platform, located in different places; this ensures a fast response to content requests from a large number of an app's users in a brief period of time. A CDN works as a link between the central server and those who access the

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[22] Regarding the risks of surveillance-based business models, see Amnesty International, *Surveillance giants: how the business model of Google and Facebook threatens human rights*, available at https://www.amnesty.org/en/documents/pol30/1404/2019/en/.

[23] Garante per la protezione dei dati personali, *Primi riscontri alle ipotesi avanzate all'interno del Gruppo di lavoro datadriven per l'emergenza COVID-19*, 7 April 2020, available at the following link https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9316821.

[24] *Ibidem*.

[25] Comitato parlamentare per la sicurezza della Repubblica (COPASIR), *Relazione sui profili di sicurezza del sistema di allerta Covid-19 previsto dall'articolo 6 del decreto-legge n. 28 del 30 aprile 2020*, 13/05/2020, available at http://documenti.camera.it/_dati/leg18/lavori/documentiparlamentari/IndiceETesti/034/002/INTERO.pdf.

content, so that the server is not overloaded and the flow of information is not interrupted. The COPASIR underscored in its report that the CDN technology is not available in Italy, so it is necessary to obtain this from foreign companies,[26] in contrast with the requirement specified in Article 6.[27]

In addition, COPASIR expressed doubts regarding the company, Bending Spoons S.p.a., which owns the app chosen by the government. In fact, a minority share of the company belongs to a fund controlled by a Chinese businessman, who is potentially subject to Chinese cybersecurity legislation. This legislation imposes stringent obligations on citizens and organisations to collaborate with Chinese public security authorities and intelligence agencies ("*obbliga, in via generale, cittadini e organizzazioni a fornire supporto e assistenza alle autorità militari di pubblica sicurezza e alle agenzie di intelligence*").[28]

The conclusions of the COPASIR Report even explicitly and expressly refer to non-negligible and non-mitigable risks on a geopolitical level, mainly connected to the necessary and non-fungible presence of non-national private partners in the implementation of the contact-tracing information system. These subjects, COPASIR warns, could manipulate the data for purposes other than that for which they were collected, such as for actions of a "*political, military, health or commercial nature*".[29]

It is a fact that the topic of data localisation has become increasingly central in global political and juridical discussions. This is due to the clear bond between the control over data and the protection of national digital sovereignty. In fact, many initiatives have recently been taken by governments regarding their data storage, not only for managing the pandemic. As Vincenzo Zeno-Zencovich effectively summarised when commenting on the famous Schrems case:[30] "*stabilire come i dati personali raccolti attraverso le reti di telecomunica-*

[26] *Ibidem*, p. 9.

[27] *Ibidem*, p. 13.

[28] *Ibidem*, p. 11.

[29] *Ibidem*, p. 13.

[30] The well-known judgement by which the European Court of Justice declared the invalidity of the decision no. 2000/252/EC of the Commission about the Safe Harbour agreement on the transfers of personal data from the European Union to the US. On the Schrems case see, *ex plurimis*, G. RESTA, *La sorveglianza elettronica di massa e il conflitto regolatorio USA/UE*, in G. RESTA, V. ZENO ZENCOVICH (eds), *La protezione transnazionale dei dati personali. Dai "Safe Harbour principles al "Privacy Shield"*, Roma, 2016, pp. 23-48; M. BONINI, *Sicurezza e tecnologia, fra libertà negative e principi liberali. Apple, Schrems e Microsoft: o dei diritti "violabili" in nome della lotta al terrorismo e ad altri pericoli, nell'esperienza statunitense ed europea*, in *Rivista AIC*, 3/2016; V. FIORILLO, *Il principio di proporzionalità da parametro di validità a fondamento del diritto alla protezione dei dati personali nella recente giurisprudenza della Corte di giustizia*

zioni debbano e/o possono essere elaborati e a quali condizioni essi possano essere trasferiti ad altri paesi costituisce semplicemente l'espressione dell'esercizio di poteri sovrani da parte e secondo uno stato di diritto"[31].

The strong link between data governance and (digital) sovereignty will be clearer if we briefly look at the Chinese and US digital strategies. On the one hand, the Chinese Cybersecurity law,[32] approved in November 2016, sets out a list of principles, subsequently complemented with several additions – laws, regulations, and standards[33] – that provide technical indications for the implementation of the national cybersecurity system.[34] This Cybersecurity law, it is important to highlight, is not focused on protecting personal data (although it does contain rules protecting individuals' rights), but, rather, on the protection of the State's sovereignty, which is considered the highest priority.[35] Indeed, network operators are explicitly obliged to collaborate with the Chinese public security authorities in order to protect national security (Article 28).[36]

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dell'Unione europea, in *Federalismi.it*, 26 luglio 2017; V. ZENO ZENCOVICH, *Intorno alla decisione nel caso Schrems: la sovranità digitale e il governo internazionale delle reti di telecomunicazione*, in G. RESTA, V. ZENO ZENCOVICH (a cura di), *La protezione transnazionale dei dati personali*, cit., pp. 7-21. A new chapter was recently written with the publication, on 16 July 2020, of the judgement about the case C-311/18 Data Protection Commissioner / Maximilian Schrems and Facebook Ireland: the ECJ invalidated the decision no. 2016/1250/EC of the Commission on the adequacy of the Privacy Shield EU-US agreement on the protection of personal data transfers form the EU to the US. (The Schrems II ruling was published when this article was already in draft and therefore it is cited only in the essential references).

[31] V. ZENO ZENCOVICH, *Intorno alla decisione nel caso Schrems: la sovranità digitale e il governo internazionale delle reti di telecomunicazione*, in *La protezione transnazionale dei dati personali. Dai "Safe Harbour principles" al "Privacy Shield"*, cit., p. 11.

[32] For an analysis of the content of the Cybersecurity Law see L. HUANG, D. ILAN, K. MOONEY CARROL, Z. ZHOU, *Understanding the impact of China's far-reaching new Cybersecurity law*, in *Intellectual Property & Technology Law Journal*, Vol. 30 no. 2, February 2018, p. 15 ff.; Q. AIMIN, S. GUOSONG, Z. WENTONG, *Assessing China's cybersecurity law*, in *Computer Law & Security Review*, 34 (2018), p. 1342 ff.

[33] National standards and technical guidance are further divided by type into mandatory standards (GB Standards), voluntary standards (GB/T Standards) and technical guidance (GB/Z guidance).

[34] For an overview see G. GREENLEAF, *Asian data privacy law. Trade and Human rights perspectives*, Oxford, 2014, p. 192 ff.; J.R. LINDSAY, T.M. CHEUNG, D.S. REVERON, *China and cybersecurity espionage, strategy and politics in the digital domain*, Oxford, 2015, in particular, Cap. 10; G. AUSTIN, *Cybersecurity in China. The next wave*, Cham, 2018.

[35] Cfr. Q. AIMIN, S. GUOSONG, Z. WENTONG, *Assessing China's cybersecurity law*, cit., p. 1344. Italy has adopted its own cybersecurity law, the D.L. 21 September 2019 no. 105, which became law on 18 November 2019 no. 133, which established the national cyber security perimeter.

[36] Chinese law lays down stricter rules for Critical Information Infrastructures operators. A CII is defined as "*infrastructure that is used in public communications and information services, energy,*

On the other hand, the Clarifying Lawful Overseas Use of Data (CLOUD) Act,[37] approved in the United States in early 2018, allows US authorities to access information stored on US companies' servers located anywhere in the world. The aim of the regulation is to ensure the speed and effectiveness of investigations and the prosecution of offenses. The Cloud Act likewise allows foreign governments to access, for the above-mentioned purposes of investigation and prosecution, any set of data stored in the United States. This mechanism is based on a new system of bilaterally-negotiated executive agreements,[38] which overlap with the Mutual Legal Assistance Treaties system[39] that is nowadays considered inefficient by some scholars and politicians because allegedly too slow and cumbersome.

These Chinese and US political choices on access to data have led to several reactions. For example, other countries have since introduced new norms into their legal systems, so as to protect their national information assets with "defensive measures". At the same time, service providers have had to adapt to the imposed rules, in order to avoid being excluded from very large shares of the global market.[40] Not surprisingly, the IT giants quickly located their da-

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transportation, water conservancy, finance, public services or electronic governance or that, if it were destroyed, malfunctioned or leaked data, could seriously endanger national security, national welfare and the people's livelihood, or the public interest"; cf. L. HUANG, D. ILAN, K. MOONEY CARROL, Z. ZHOU, *Understanding the impact of China's far-reaching new Cybersecurity law*, cit., p. 17 ff.

[37] The Cloud Act is available at https://www.justice.gov/dag/page/file/1152896/download; the White paper published by the US Department of Justice in April 2019, available at https://www.justice.gov/opa/press-release/file/1153446/download, describes the background, characteristics and aims of the Act.

[38] Cf. *Cloud Act*, *supra*, *Sec. 105. Executive agreements on access to data by foreign governments*, which lists the requirements that the foreign government must meet in order to sign a bilateral agreement.

[39] "*A long-established way for the U.S. government to access private information held abroad is through Mutual Legal Assistance Treaties. These agreements permit a public authority seeking data to ask for the assistance of the country in which the data is held and require that country to cooperate in processing such requests under its domestic law. MLATs establish legal mechanisms for cooperation between signatory nations in criminal matters and proceedings, including the exchange of evidence and information during criminal proceedings*", P.M. SCHWARTS, *Legal access to the global cloud*, in *Columbia Law Review*, 118:1681, 2018, p. 1720.

[40] The *Data Trustee model* created by Microsoft for the German market is an example of these kind of solutions. See https://docs.microsoft.com/en-us/azure/germany/germany-overview-data-trustee; similarly, see H.H. ABRAHA, *How compatible is the US "Cloud Act" with cloud computing? A brief analysis*, in *International Data Privacy Law*, 2019, Vol. 9 no. 3, p. 208: "*This arrangement [the Data trustee model, N.d.A.] could create a situation where personal data concerning a US person and required for US domestic crime investigation purpose is neither located in the USA nor effectively controlled by a US company*". The Data trustee model developed by Microsoft allows the company to maintain responsibility for the service from a technical point of

ta centres directly within the territory of the People's Republic of China to adhere to the Cybersecurity law, while also developing technical and juridical solutions that allow their customers to avoid possible unwanted access to their data by the US government under the Cloud Act.

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The European strategy regarding access to data and data governance is fairly different from the Chinese and US approaches. In fact, the document "*A European Strategy for Data*"[41] published on 19 February 2020, outlines a clear identity for the European Union that is based on an analysis of the data economy. Although recognising the roles of the US and China in the global scenario, it aims to propose / impose a distinctly European way: the unique balance between maximum use of data for the economic development of the European Single Market on the one hand, and very high ethical standards, privacy, safety and security on the other.[42]

Very pragmatically, in outlining the main features of the European data strategy, the European Commission opened up to initiatives proposed by Member States for the gradual construction of common infrastructure. Furthermore, it announced its willingness to draw up several memoranda of understanding to facilitate the integration of those initiatives into the European project. Given the "high level" content of the communication, it is worth noting that it contains an explicit reference to the (then) Franco-German GAIA-X[43] project of a European cloud federation.[44] Currently, the GAIA-X project is now open to adhesion by other Member States, and the promoters are "striving for synchronisation with the European data strategy".[45] It aims to combine

view, while at the same time respecting the need for data to be located on German territory, so that they are exclusively subject to German legislation. The German trustee and the data subject will be able to access the data, while Microsoft will be able to do so only in limited cases provided for in the contract.

[41] The European Commission, *Communication from the Commission to the European Parliament, The Council, The European economic and social Committee and the Committee of the Regions "A European strategy for data"*, COM (2020) 66 final, 19 February 2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:66:FIN.

[42] *Ibidem*, p. 3.

[43] The common position of 18 February 2020 is available at this link https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-position-on-gaia-x.pdf?__blob=publicationFile&v=10.

[44] *Ibidem*, p. 18.

[45] *GAIA-X: The European project kicks off the next phase*, available at https://www.bmwi.de/Redaktion/EN/Publikationen/gaia-x-the-european-project-kicks-of-the-next-phase.pdf?__blob=publicationFile&v=13, p. 2.

"*the technological and industrial strengths of EU industry, academia and the public sector to develop an ecosystem of data and infrastructure providers and a regulatory framework based on fundamental European values and standards. The initiative supports the target of the EU to become a global leader in innovation in the data economy and its data-driven applications as set out in the European data strategy*".[46] We shall see if this ambitious project will allow the European Union to truly compete with the other global players.

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The situation outlined above is complex, with effects that go far beyond compliance with the rules set out by the GDPR for the protection of personal data. Moreover, States and private actors act at the same level, given that Google negotiates with national governments.[47] Hence, a new constitutional competition has begun:[48] in the digital environment, public authorities and private powers compete on an equal footing and, at least apparently, with the same rules. As mentioned in the introduction, "territory" is no longer a reference to the borders of a State, and "jurisdiction" and "sovereignty" are even more immaterial. Creative legal and regulatory action is now not only needed, but it is urgent to govern the digital world with modern legal tools.

An appropriate conclusion of this reflection can be found in the words of the former President of the Italian Data Protection Authority from the interview on digital sovereignty of 16 April 2020: "*In uno spazio 'defisicizzato' come la rete, la sovranità va declinata in forme nuove, meno legate al tradizionale criterio di territorialità e più attente, invece, alla capacità degli Stati di rendere effettiva la tutela dei diritti e la stessa forma democratica* […]".[49]

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[46] *GAIA-X: Driver of digital innovation in Europe*, available at the link https://www.bmwi.de/Redaktion/EN/Publikationen/gaia-x-driver-of-digital-innovation-in-europe.pdf?__blob=publicationFile&v=8, p. 25.

[47] S. RODOTÀ, *Il concetto di democrazia nel mondo globalizzato: i governi del mercato globale, mondializzazione e territorio, i diritti*, in *Bianco e nero*, III, settembre-dicembre 2009, p. 10: "*[...] un soggetto privato, Google, negozia con gli Stati nazionali, e dunque quella di internet è una dimensione all'interno della quale non giocano i meccanismi democratici tradizionali ma c'è un testa a testa tra un grande soggetto privato – che può essere Google, ma può essere Yahoo! o può essere Microsoft – che è il protagonista, l'antagonista degli Stati nazionali*".

[48] F. AMORETTI, E. GARGIULO, *Dall'appartenenza materiale all'appartenenza virtuale? La cittadinanza elettronica fra processi di costituzionalizzazione della rete e dinamiche di esclusione*, in *Politica del diritto*, III, settembre 2010, p. 372.

[49] The full text of the interview is available at the link https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9317569.

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A NON-EUROCENTRIC VIEW ON COVID-19 AND THE RULE OF LAW

THE IMPACT OF COVID-19 ON THE LATIN-AMERICAN ECONOMY AND SOCIAL LIFE: A BRIEF INTRODUCTION

by *Alessandro Cocchi*

At the time of writing this article (late August 2020), the SARS Covid-2 pandemic is still devastating Latina America and the Caribbean with a death toll of more than 266,000 people and almost seven million cases recorded, according to data compiled by the European Centre for Disease Control and Prevention, but both cases and deaths may be under-reported. For example, a study carried out by the University of São Paulo Medical School estimates that the number of infections in Brazil could be up to five times higher than the official figure due to the low levels of testing.[1] Isolated signs of a slowdown or stabilisation of the death toll and the rate of contagion (e.g. Chile, Ecuador)[2] are not yet sufficient to open the way to any sustained economic recovery at the regional level.

The majority of the Latin-American countries were slow in reacting to and unprepared to face the emergency, and contradictory in their decision-making process. Pressure from important economic sectors determined insufficient measures for controlling the spread of the infection and untimely reopening caused new outbreaks and a general worsening in pandemic numbers, control and management.

Different institutions are monitoring the evolution and the socio-economic

[1] https://ciis.fmrp.usp.br/covid19-subnotificacao/.

[2] The two most populous nations, Brazil and Mexico, have seen the highest number of deaths – more than 117,000 and 62,000 respectively. Peru has had more than 28,000 confirmed deaths. Chile has had more than 10,000 deaths, although the number of daily cases has been coming down. Colombia continues to see cases and deaths rise, with more than 18,000 confirmed deaths. Argentina has seen further rises in cases after seemingly managing to control the disease: on 26 August, it recorded more than 10,000 new cases in a single day – for the first time since the pandemic began. Ecuador recorded one of the earliest and worst outbreaks in the region, although daily deaths here have now dropped (BBC news, data source: European Centre for Disease Control and Prevention, 27 August 2020).

impacts of the pandemic.[3] Projections and impact assessments are still tentative and constantly being updated. Due to the unprecedented extent of the pandemic and the poor availability of epidemiological and socio-economic data, which are often unreliable, uneven or biased by strict political control (e.g. Nicaragua), the analysis and modelling capacity of institutional observers is limited. Nevertheless, a recent study carried out by the UN-Economic Commission for Latin America and the Caribbean (ECLAC) and the Pan-American Health Organisation (PAHO/WHO) projects a 9.1% drop in gross domestic product (GDP) in the region due to the effects of the pandemic.[4] ECLAC also projects greater inequality in income distribution in all the countries of the region, forecasting an increase of the Gini index between 1% and 8% in seventeen countries analysed.[5]

With rare exceptions (e.g.: Costa Rica, Uruguay, Cuba), a number of structural problems and common difficulties in enforcing timely and large-scale prevention measures have characterised the response of all the Latin American and Caribbean countries to the pandemic, in particular:

– **Insufficient financing of the public health system**. In the majority of the Latin American and Caribbean countries, the annual current expenditure for public health is below the benchmark of 6% of national GDP indicated by the WHO/PAHO, with only Costa Rica and Uruguay meeting and slightly exceeding that benchmark. The average fiscal gap between public spending on health (as % of GDP) and the benchmark stands at 1.9% GDP (ranging from 1.1 to 2.9% of GDP).[6] Also, private insurance-based

[3] For examples, see: Johns Hopkins University, World Health Organisation (WHO), European Centre for Disease Control and Prevention, Economic Commission for Latin America and the Caribbean (ECLAC).

[4] "*Unemployment in Latin America will increase from 8.1% in 2019 to 13.5% in 2020. This will raise the number of unemployed in the region to more than 44 million people, which means an increase of more than 18 million people compared to 2019. In this context, the poverty rate is expected to increase 7.0 percentage points in 2020 to 37.3%, an increase of 45 million people (231 million people in total), and extreme poverty increased 4.5 percentage points to 15.5%, which represents an increase of 28 million people (96 million people in total)*", Informe Covid-19: *Salud y economía: una convergencia necesaria para enfrentar el COVID-19 y retomar la senda hacia el desarrollo sostenible en América Latina y el Caribe*, CEPAL-OPS (ECLAC-PAHO), 30 de julio de 2020.

[5] Covid-19 Informe Especial, *Enfrentar los efectos cada vez mayores del COVID-19 para una reactivación con igualdad: nuevas proyecciones*, ECLAC, 15 de julio de 2020.

[6] "*While all healthcare systems in Latin America subscribe to the principle of universal health coverage, in practice, only partial coverage is offered, with a significant proportion of the demand for healthcare services being met through out-of-pocket spending*", from *Latin-America-healthcare-system-overview-report 2019*, London School of Economics, 2020.

health systems turned out to be unprepared to face the consequences of a pandemic, not being oriented to satisfy emergency health care demand nor intensive care on a large scale.

– **Low capacity in epidemiological data collection and treatment** (including limited testing capacity). The effectiveness in responding to epidemic outbreaks largely depends on the institutional capacity of gathering information, data processing and supporting digital transformation in the health system. The majority of Latin American countries, mainly in Central America (apart from Costa Rica), need to strengthen their capacity to produce high-quality and accessible epidemiologic data and statistics on public health.[7]
– **Incidence of the informal economy**.[8] Around 130 million workers in Latin America and the Caribbean are engaged in informal employment, of whom at least 27 million are young people, representing nearly half of non-agricultural employment. The share of informal employment in non-agricultural activities varies from country to country, ranging from 30.7% in Costa Rica to 73.6% in Guatemala (2013).[9] People depending on the informal economy generally receive their income on a daily basis, do not have savings to count on, and cannot adjust to lockdown measures or the prohibition on public gatherings (like in market places). Therefore, violating lockdown measures can become a matter of survival and at the same time a major cause of virus spread. The high incidence of the informal economy in urban areas has possibly determined the ineffectiveness of the pandemic prevention measures set out in many Latin American countries (e.g.: Argentina).
– **Lockdown measures undermine the efficiency of the informal social safety nets (SSNs)**.[10] The informal SSNs play a crucial role in rural and urban areas in alleviating extreme poverty and reinforce the capacity of poor communities – generally not assisted by formal social services – to react to adverse circumstances. Lockdown measures inhibit social mobility and there-

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[7] Informe Covid-19: *Salud y economía: una convergencia necesaria para enfrentar el Covid-19 y retomar la senda hacia el desarrollo sostenible en América Latina y el Caribe*, cit.

[8] The "informal economy" (or informal sector or grey economy) includes all those economic activities that escape taxation and monitoring of any state or local authority. It includes black market, informal street vending, occasional hired labour, child labour, domestic work, etc.

[9] E. GOMEZ RAMIREZ, *Latin America's informal economy*, brief to the European Parliament, EP-Think Tank, 2016.

[10] Informal social safety nets (SSNs) provide support to families and individuals to assure they remain above a minimum standard of living even though with no legal guarantee. Examples of informal SSNs include transfers (in both cash and kind) from family members, friends, neighbours, community members and institutions, including NGOs and Churches.

> fore the capacity of the informal SSNs to mobilise the necessary human and financial resources to reach the most vulnerable members of the community and support them. In many cases, noncompliance with infection prevention measures (like social distancing) becomes a matter of survival and an extreme attempt to preserve the social integrity of the community.

The pandemic is being managed in different ways in Latina America and the Caribbean, depending on the constitutional instruments available and the political orientation of each government. The region is offering such a wide array of regulatory measures and political stances that only attempting to summarising them would be beyond the scope of these pages. Nevertheless, a correlation between the governments' political orientations and their effectiveness in pandemic control is clearly emerging. One of the most noteworthy examples of ideological approach to the pandemic and seriousness of the expected socio-economic impacts is represented by Nicaragua: "*The Government has been doing the complete opposite of global practice, leaving the borders open, refusing to track cases through generalized sampling and stating – as if it were a declaration of principles – that 'Nicaragua has not established and will not establish quarantine'. (...) Given this situation and considering the weak health system, scientists and national experts have expressed their fear that the government's tactic of ignoring or minimizing the pandemic could lead the country to a total ruin*".[11] Other countries in Central American and the Caribbean (i.e. Costa Rica, Cuba) or in South America (i.e. Uruguay) have been adopting opposite political approach in the pandemic management and are presently regarded as an example of good practice.

It is undeniable that populist and authoritarian governments are actually achieving the worst outcomes in controlling the pandemic. The example of Brazil is the most evident and well-known. At least five complaints against Jair Bolsonaro were presented to the International Criminal Court in The Hague. Three of these relate to his role and controversial stance taken during the health crisis caused by the Covid-19 pandemic. One of the complaints, filed by a consortium of organisations representing more than a million healthcare professionals, claims that Bolsonaro puts healthcare workers and the entire population at risk "*by taking negligent and irresponsible actions*". In the 64-page document sent to The Hague, the professionals also highlighted the president's position of "*contempt, abandonment and denial*", which has had "*disastrous consequences*" on the spread of the virus and the "*total strangulation of*

[11] ACADEMIA DE CIENCIAS DE NICARAGUA SEDE UNIVERSIDAD CENTROAMERICANA, *COVID-19 El caso de Nicaragua, Aporte para enfrentar la Pandemia*, Segunda Edición, UCA, 23 de junio de 2020.

health services". To date, the death toll in Brazil exceeds the terrible number of 120,000 people.

Governments' transparency in communicating statistics about the infection (e.g.: number of daily tests) and progress in the fight against the pandemic also varies across the continent. According to a study carried out in May 2020 by the Chilean Foundation "Ciudadanía Inteligente",[12] Colombia and México, Chile and Peru have been the most transparent countries in Latin America, while El Salvador, Uruguay, Bolivia and Nicaragua are the ones that release the least information.[13] The case of Nicaragua is noted as particularly alarming.

The initial uncertain response to the pandemic in many countries around the world[14] was based on the false assumption of a possible trade-off between public health and economy, involving the setting out of a "socially acceptable" threshold of health risk in return for greater economic stability. This false myth has been clearly contested by many economists, including the Nobel laureate Paul Krugman from the columns of the New York Times.[15] The UN Economic Commission for Latin America and the Caribbean (ECLAC) also felt the need to emphasise a direct correlation between health protection and economic recovery: "*protecting life strengthens the productive capacity of societies. (…) It is necessary that the control and mitigation policies in the field of health are aligned with the economic policy, so that they pursue the same objectives of preserving the life and well-being of the population. (…) Giving priority to health and strengthening the health systems with a primary care approach must be considered the essential basis of the response phase, recovery and reconstruction*".[16]

Against this backdrop, it is worth considering here three issues concerning the future of the region and the role that international cooperation for development can play in the post-Covid recovery process: (i) the role of civil society, (ii) the potential relevance of the sub-regional economic communities and (iii) the need for a reinforced *south-south* and *triangular* cooperation model.

In the majority of Latin American countries, civil society[17] has been grow-

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[12] https://ciudadaniai.org/index.

[13] https://ciudadaniai.org/campaigns/covid19#informe.

[14] For example in many states of the USA (e.g.: Texas and Florida), in Sweden, in UK but not in China, in New Zealand and South Korea.

[15] https://www.nytimes.com/2020/07/27/opinion/us-republicans-coronavirus.html.

[16] Informe Covid-19: *Salud y economía: una convergencia necesaria para enfrentar el COVID-19 y retomar la senda hacia el desarrollo sostenible en América Latina y el Caribe*, cit.

[17] The term includes charities, development NGOs, community groups, women's organisa-

ing over the last few decades, gaining a leading role in orienting public opinion, promoting social projects and organising the response (at least at a local level) to emergency situations like extreme poverty and food insecurity. A short-term effect of the measures adopted by the governments to control the pandemic has been that of reducing or inhibiting the action of civil society organisations, even where these measures were not necessarily planned for this purpose. Nevertheless, social networks offered new room for public debate (e.g.: Peru) and sometimes new battlefronts for counter-information campaigns (e.g.: Nicaragua, Brazil). It seems that in many Latin American countries the pandemic contributed to making the existing gap between the high level of consciousness of large sectors of the civil society and the inadequacy of the political class more apparent than ever. New movements have been created via social media during the pandemic to denounce the corruption and the mismanagement of the pandemic perpetrated by the politicians in power and their affiliated businessmen (e.g.: Honduras, Nicaragua). To what extent will civil society be able to take advantage of the distress of the traditional political elite and promote a radical renewal of the ruling class? Will civil society organisations be able to manage the potential social instability brought about by the economic impacts of the pandemic? The answers to these questions cannot be merely left to future developments, but a plan of action should rather be outlined for the international community, in particular the international development agencies which will be asked to support the recovery process. In a post-Covid World, the identification of the right partners at both political and social level will play crucial importance. The acknowledgement of the organisations of the civil society as main players in the reconstruction process will be the precondition for any structural change at the decision-making level.

A second consideration is related to the role of the regional economic communities (REC) like the Central American Integration System, the Andean Community and the MERCOSUR. In the last few decades, all these institutions have experienced a long process of weakening and their actual capacity to assume a pivotal role in a post-Covid economic recovery level is very limited. Nevertheless, the drastic reduction in trade[18] and travel imposed in the region by the pandemic prevention measures highlighted the interdependency

tions, faith-based organisations, professional associations, trade unions, social movements, coalitions and advocacy groups (https://www.who.int/social_determinants/themes/civilsociety/en/).

[18] The region's trade in goods fell 17% between January and May of 2020 (Informe Especial N. 6, *Los efectos del COVID-19 en el comercio internacional y la logística*, CEPAL, 6 de agosto de 2020.

of all Latin American economies. The role of the REC should be therefore politically strengthened. The potential support to the post-pandemic economic recovery offered by all the underutilised international trade agreements and regulatory frameworks developed by the REC over more than fifty years of activity should be fully utilised. It is therefore essential that the post-Covid recovery policies be based on a renewed effort of political and economic integration at sub-regional level in the productive, commercial, technological[19] and social sectors. It is worth mentioning that in May 2020, high-ranking representatives of the Andean Community's (AC) members states declared the need for a reinforced role of the AC in the sub-region.[20]

The third point is a consequence of the previous ones. The *south-south* and triangular cooperation model[21] has been advocated for many years by the most relevant international cooperation agencies – mainly the United Nations – but it has never been implemented on a large scale. This model is potentially conducive to the strongest leadership of the partner countries in orienting their development and responding to the double need of establishing direct political and economic relationships with potential partner countries and acquiring specific expertise in the promotion of economic development. National Cooperation Agencies already exist in the most advanced Latin American countries (e.g.: Colombia, Mexico, Brazil, Peru etc.) but they are still oriented to monitoring the incoming actions of the international cooperation agencies for development and very little to use national or international resources for promoting external actions in neighbouring countries. The *south-south* and triangular cooperation model can contribute to changing the present geopolitical scenario by facilitating the development of direct partnerships between countries whose political and economic relations have traditionally been intermedi-

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[19] See, Informe Especial N. 7, *Universalizar el acceso a las tecnologías digitales para enfrentar los efectos del COVID-19*, CEPAL, 26 de agosto de 2020.

[20] https://www.datasur.com/destacan-rol-de-la-comunidad-andina-en-la-reactivacion-posco vid-19/.

[21] The Framework of operational guidelines on United Nations support to South-South and triangular cooperation defines South-South cooperation (SSC) to be "*a process whereby two or more developing countries pursue their individual and/or shared national capacity development objectives through exchanges of knowledge, skills, resources and technical know-how, and through regional and interregional collective actions, including partnerships involving Governments, regional organizations, civil society, academia and the private sector, for their individual and/or mutual benefit within and across regions. South-South cooperation is not a substitute for, but rather a complement to, North-South cooperation*". The definitions for South-South and triangular cooperation are based on the Nairobi Outcome Document ii, negotiated in the UN High-Level Conference on South-South Cooperation and adopted by the UN General Assembly in December 2009.

ated by the most important political World players (e.g.: USA, EU, China). In a post-Covid scenario, the development of common solutions for similar problems can offer the Latin American countries an opportunity to harmonise their policies (mainly in the health sector) and prepare common ground for facing future challenges.

THE CHALLENGES OF BRAZILIAN FEDERALISM AND THE DEFENCE OF FREEDOMS DURING THE COVID-19 PANDEMIC

by *Luciene Dal Ri* and *Jeison Giovanni Heiler*

Introduction

The federalist ideology had a great impact on the world, mainly in Latin American countries, during the 19th Century due to the influence of the United States of America. Despite the decrease in the number of federations during the 20th Century, its importance can be observed by the fact that about 40% of the world population is governed by some form of Federalism.

Countries adopting the federalist structure generally have large territories or a population composed of several ethnic and idiomatic groups, allowing the national government to adapt to the specific demands of each population. In this sense, it is observed that there is no single model of federation, and each State builds its own federative system.

The liberal spirit that permeates the historical dynamics of the federalist ideology aims to avoid a concentration of powers, proposing a decentralised organisation and favouring democracy.

The challenges that democracies and federations face, due to the political, economic and social transformations that have generated the worldwide wave of "autocratisation", have been amplified by the health emergency situation, caused by the novel coronavirus pandemic. In Brazil, the government's work to contain the outbreak of Covid-19 has put individual liberties, social rights and the structure of federalism back to the test.

Facing the health emergency in Brazil and in other countries around the world, as evidenced in the webinar «Freedom v. Risk: social control and the idea of law in the Covid-19 emergency», organised by the Dipartimento di Scienze giuridiche della Università degli Studi di Firenze, has encouraged the rethinking of some debates, from a pandemic perspective, such as the restriction of fundamental rights, the resurgence of executive power, the possibility of introducing modalities of the State of Exception, and a new Constituent Assembly.

1. *The Brazilian federate State*

Although there is no single model of federation, as there are no parameters and each State builds its own federative system, some elements can be defined as characteristic of the federal state.[1] The normative architecture of the federal state presupposes a constitution that reflects the creative decision of the federation and its inseparable parts, and the adoption of mechanisms that allow for the plurality of the legal system, presenting typical rules of each sphere of the federation and of general or specific impact, denoting autonomy and decentralisation among federated entities.

The federation also requires that other structural elements be established, such as clear hypotheses of federal intervention, in order to guarantee the physical unity and legal identity of the federation; the means by which the subnational bodies are part of the federal legislative authority, allowing the participation of the local member in the formation of federal legislation; and the existence of a Supreme Court, with national jurisdiction, to interpret and protect the Federal Constitution, and settle disputes or conflicts between the federal government, the state governments, other legal entities under domestic law, and issues related to the application or federal law.[2]

The different ways of shaping the characteristics listed above give rise to the various models of federalism. In this context of plurality, Brazilian federalism, since its establishment in 1889, has had different features, being reaffirmed, with more or less centralisation, in all national constitutions since then.

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[1] For Federated States, see the Forum of Federations website: www.forumfed.org.

[2] H. KELSEN, *Teoria Geral do Estado* (1945), 5.ed. São Paulo, 1990, p. 451 ss. R.M. HORTA. *Organização constitucional do federalismo*, in *Revista da Faculdade de Direito da Universidade de Minas Gerais,* n. 28-29, 1986, p. 10 ss. Available at: https://www.direito.ufmg.br/revista/index.php/revista/article/view/980 (April 2020). G.A. TARR, *Introduction*, in J. KINCAID, G.A. TARR (ed.), *Constitutional origins, structure, and change in federal democracies*, London, Ithaca, 2005, p. 8 ff.

The current Constitution of the Federative Republic of Brazil, of 1988, was the result of the search for decentralisation by a Constituent Assembly that reflected the national political context of transition, after more than 20 years of military dictatorship, and which aimed to give credibility to and legitimise the new democratic regime.[3] In this context, the Constituent Assembly established the country's political and administrative organisation comprising the Union, the states, the federal district and the municipalities, and recognising the autonomy of those entities.[4]

The structure of Brazilian federalism is also based on the recognition to the Union of many listed reserved powers and to the States of concurrent powers. In this way, Member States legislate on the few matters that are not implicitly or explicitly prohibited by the Constitution. Such an understanding also applies to the provision of State Constitutions and the laws which govern the legal political organisation of municipalities.[5]

When disciplining decentralization, the legislator carried out the division of powers in the legislative and administrative spheres, and opted for the principle of predominance of interest, establishing matters of general interest to the Union, and matters of regional and local interest to states and municipalities respectively.[6]

The Constituent Assembly established the interrelationship and collaboration between the levels of power as a notable feature, establishing vertical distribution of constitutional powers and prioritizing «the development of mechanisms for approximation, cooperation, assistance between central and local governments».[7] This institutional design, despite having been called autarchic

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[3] C. SOUZA, *The political engineering of federalism in Brazil*, in C.C. MENDES, D. CHEBENOVA, A.C. LORENA (ed.), *30 Years of the Brazilian Federal Constitution: perspectives for Brazilian federalism*, Brasília, 2019, v. 1, p. 17.

[4] The insertion of the municipality as a federative entity was an innovation of the current Constitution in Brazilian federalism, and although there is a certain doctrinal divergence regarding its nature as a federative entity, the federal constitution endowed them with political and administrative autonomy. G. ANDERSON, *Fiscal federalism: a comparative introduction*, Oxford, 2009, p. 1: «In a few federations (Brazil, India, Nigeria, South Africa), the municipal or local order of government is also established within the constitution».

[5] See recent decisions of the Brazilian Federal Supreme Court, in judicial constitutionality control: ADI 3110, ADI 6195, ADI 6193.

[6] The division of powers between the Federation and the Member States is regulated in Brazilian Constitution in Articles 20 to 24 (Union), 25 to 28 (Federated States), Articles 25 to 28 (Municipalities) and Articles 29 to 31 (Federal District), excluding the municipalities from competing legislative competence and cases of private competence with possible delegation of competence (art. 22, sole paragraph).

[7] R.S. RAMMÊ, *O federalismo em perspectiva comparada: contribuições para uma adequada*

federalism, «sought to stimulate cooperation and coordination between federated entities, which in this way do not always perform exclusive functions, as is the case with health».[8]

In addition to the power distribution in the federal system, federalism has proven to be «an important variable to explain the difference between bicameral and unicameral countries, but not to explain the political strength of the chambers».[9] In this sense, Brazilian federalism features certain peculiarities, as within the legislative Brazilian bicameral system, the House of Representatives holds proportional representation according to the population of each state of the federation, while the Senate is equally divided for each unit of the federations.[10] The functions of the Brazilian Senate are focused on subnational representation in politics and in the federal legislative process, with strong economic implications, having the role of imposing veto power, according to state interests against an eventual majority dictatorship.[11]

The theoretical conception is, however, distorted in practice with the loss of subnational representativeness and the migration to the representation of the will of the national political parties, becoming just another space in which the parties are emphasized, by means of their leadership.[12]

The political representation of minority states, through the Federal Senate,

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compreensão do federalismo brasileiro, in *Revista Eletrônica Direito e Política,* v. 10, n. 4, 2015, p. 2309. Available at: https://siaiap32.univali.br/seer/index.php/rdp/article/view/8374 (August 2020).

[8] In criticism of the Brazilian constitutional conception as a cooperative, see C. SOUZA, *The political engineering of federalism in Brazil*, in C.C. MENDES, D. CHEBENOVA, A.C. LORENA (ed.), *30 Years of the Brazilian Federal Constitution: perspectives for Brazilian federalism*, Brasília, 2019, v. 1, p. 22. On the barriers of Brazilian cooperative federalism in the face of the new coronavirus pandemic, see D.A. AZEVEDO, J.N. RODRIGUES, *Pandemia do Coronavírus e (des) coordenação federativa: evidências de um conflito político-territorial*, in *Espaço e Economia*, 18, 2020, p. 05. Available at: https://journals.openedition.org/espacoeconomia/12282 (April 2020).

[9] P.R. NEIVA, *Os determinantes dos poderes das câmaras altas: federalismo ou presidencialismo?*, in *Dados – Revista Brasileira de Ciências Sociais*, v. 4, n. 1, 2006, p. 271 s.

[10] G.A.D. SOARES, *A democracia interrompida*, Rio de Janeiro, 2001, p. 293.

[11] P.R.P. NEIVA, *Os poderes dos senados de países presidencialistas e o caso do Brasil*, in L.B. LEMOS (ed.), *O Senado Federal brasileiro no pós-constituinte*, Brasília, 2008, p. 46 s.

[12] R.M. HORTA, *Organização constitucional do federalismo*, in *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais*, n. 28-29, 1986, p. 17. Available at: https://www.direito.ufmg.br/revista/index.php/revista/article/view/980 (April 2020). M.R. LOUREIRO, *O Senado e o controle do endividamento público no Brasil*, in L.B. LEMOS (ed.), *O Senado Federal brasileiro no pós-constituinte*, Brasília, 2008, pp. 393-414. J.E.D.C. MARQUES, *Bicameralismo de fato? Representação regional e produção legislativa no Senado Federal brasileiro*, in *36 Encontro anual da ANPOCS,* 2012, p. 14. Available at: http://anpocs.org/index.php/papers-36-encontro/gt-2/gt10-2/7951-bicameralismo-de-fato-representacao-regional-e-producao-legislativa-no-senado-federal-brasileiro/file (August 2020).

denotes the fact that decision-making power is fluid in different centres of power and allows framing of Brazil as a consensual democracy, as proposed by Lijphart.[13]

In this consensual model, «once the power is widespread among many agents, they need to enter into a convergence so that governments may work properly».[14] Failure to reach cooperation between agents would then trigger political crises, such as the one started in 2013 and which would end the presidential term of former Brazilian President Dilma Rousseff. The crises unfortunately do not end in the past, but with the pandemic and the centralising tendency of the current federal government, the ability to build cooperation between political agents from different spheres of the federation is impaired, worsening the conditions for the full functionality of the Brazilian democratic model.

With the loss of the capacity for cooperation, the judicialization of politics, defined by Tate and Vallinder as «displacement of the decision pole of certain issues that traditionally fell to the Legislative and Executive powers to the scope of the judiciary», occurs more frequently.[15] It is then possible to observe the action of the Brazilian Supreme Federal Court to settle disputes or conflicts between the Union and subnational entities, including the respective indirect administration entities.[16]

The expansion of the institutional space of the judicial branch, in response to political demands, has caused aggressions against the entities and members of the branch, particularly by some members of the executive branch.

2. *The challenges in coping with Covid-19*

A few days after the declaration of a public health emergency of international concern by the World Health Organization, the Brazilian federal gov-

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[13] A. LIJPHART, *Modelos de Democracia: desempenho e padrões de governo em 36 países*, Rio de Janeiro, 2003, p. 53. O. AMORIM NETO, *O Brasil, Lijphart e o Modelo Consensual de Democracia*, in M. INACIO-RENNÓ (ed.), *Legislativo Brasileiro em Perspectiva Comparada*, Belo Horizonte, 2009, p. 113.

[14] J.P.S.L. VIANA, M.C. CARLOMAGNO, V.R. CARVALHO, *Impasses da democracia brasileira: Presidencialismo de coalizão, impeachment e crise institucional*, in L.M. MONTEIRO, L. SANTANA (ed.), *Temerosas transações: ensaios sobre o golpe recente no Brasil*, Santa Cruz do Sul, 2017, v. 1, p. 53.

[15] C.N. TATE, T. VALLINDER, *The Global Expansion of Judicial Power: The Judicialization of Politics*, New York, 1995, p. 13.

[16] The powers of the Supreme Federal Court are provided for in the Constitution of the Federative Republic of Brazil, 1988, article 102, I.

ernment declared a public health emergency of national importance[17] and the Brazilian National Congress approved the law to "fight" the novel coronavirus. Gradually, states and municipalities declared an Emergency Situation and started to take measures, not always in accordance with federal rules and interests, to protect public health. Due to the subsequent worsening of the epidemiological context, on March 20th, the National Congress approved the recognition of a "State of Public Calamity", for tax purposes, in force until December 31st. 2020.[18] In the same way, states and municipalities have also declared a state of public calamity, due to the inability to guarantee access to the public health system, to all those who need it and have expanded their measures to combat the pandemic.

2.1. *From the Emergency Situation to the State of Public Calamity*

In the constitutional framework, we find a whole context for State action, through the Emergency Situation and the State of Public Calamity, in defence of public health and in confronting the novel coronavirus pandemic.

The current Brazilian Constitution originally does not directly provide for a declaration of an Emergency Situation and says little about the State of Public Calamity, only defining the Union's legislative competence over Civil Defence, which implies planning and promoting permanent defences against public calamities and emergency situations and sharing the powers of the federal government with subnational health protection entities.[19]

The Emergency Situation is characterized in the infra-constitutional legislation as an abnormal situation, caused by disasters, causing damage and losses that can be overcome by the affected community and that imply a partial compromise of the response capacity of public bodies. It is below the State of Public Calamity in terms of severity, established in a Federal Constitution as

[17] Ministry of Health, Legal Act n. 188/2020.

[18] It is the first time that the Union has declared a State of Public Calamity since the tax liability law has been in force. Legislative Decree n. 6/2020, which received a request from the President of the Republic through Message 93/2020, acknowledged the serious situation of public calamity for tax purposes, due to the Covid-19 emergency.

[19] With the objective of universalising access to the public health system, the constituent promoted the coordination and division of responsibilities and resources between the different entities of the Federation, in a coordinated manner, providing services and equipment for primary care, media care and highly complex care. Brazilian Constitution of 1988, articles 6, 22, 23 and 196.

of the administrative power of the Union and characterised infra-constitutionally as a situation of abnormality, also caused by disasters, causing damage and losses that imply the substantial compromise of the power response capacity and public health system, putting people's safety or life at risk.[20]

The recognition of Emergency Situations and Public Calamities significantly strengthens the performance of different governmental spheres. As a result of the aforementioned institutes, the federative entity has access to extraordinary resources, such as the contingency reserve and state and federal aid, the waiver of bidding for contracting services and purchases, intended exclusively to solve the problems caused by the emergency or calamitous situation.[21] In a specific case of Public Calamity, the Federal Constitution allows the Union to establish compulsory loans and open extraordinary lines of credit to meet unpredictable and urgent expenses,[22] within the limits of the edition of provisional measures, and complementary law authorises the suspension of counting of terms for the reduction of debts and expenses, and for the achievement of fiscal results.[23]

Only with Constitutional Amendment 106, of May 2020, which has a more detailed constitutional provision on the delimitations of the State of Public Calamity, for the specific case of confrontation with the new coronavirus. Through the aforementioned amendment, specific rules were instituted, in urgent cases, for the extraordinary fiscal, financial and contracting regime, legal limitations normally applied to the federal executive branch, regarding personnel hiring processes, and works, services and purchases, as well as creating expenses or waiving tax revenues, buying and selling securities issued by the national treasury, micro, small and medium-sized companies, in the event of a pandemic.

Despite the strengthening of government agencies, through the Emergency Situation, or the State of Public Calamity, it is observed that the legal rules limit state action strictly to those required to cope with the abnormal situation and guarantee the inspection and the performance of control bodies, as well

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[20] Federal Law n. 12.608/2012 and Federal Decree n. 7.257/2010.

[21] The situation also allows temporary staffing, as long as there is a specific law authorising it. The Union's assistance to entities occurs through the advancement of social benefits, insurance release and the extension of federal loan payments, among other methods. In addition, small-scale entrepreneurs, cooperatives and informal states can access the Constitutional Funds emergency line – valid for the Midwest, Northeast and North regions.

[22] See Brazilian Constitution of 1988, articles 148 and 167.

[23] See Federal Law n. 13.979/2020 and Legislative Decree n. 06/2020 that foresees a mixed commission composed of Deputies and Senators to monitor the expenditures and the measures taken by the federal government to face the problem.

as affirming the restrictive interpretation of the legal institutes.[24] It should also be noted that in the specific case of leading with the pandemic, Constitutional Amendment no. 106 states that "the National Congress may suspend, by legislative decree, any decision by an executive branch or entity", that implies irregularity or non-compliance with the limits of the aforementioned rule.

2.2. *Brazilian federalism in the face of the public health emergency*

The Brazilian federal system was put to the test by the novel coronavirus epidemic. The tension between government spheres developed through the application of the legislative and administrative competence regime, which was often amplified by the political difficulties of the Senate, in the representation of subnational interests.

The debate was focused on the powers of the Union, the states, the federal district and the municipalities in the protection and defence of health. In this context, the Union is limited to establishing general rules, to be supplemented by the states and the federal district. The Federal Constitution also establishes common administrative competences for all federated entities with regard to health care.

Following the legislative concurrent powers, the federal government enacted Law n. 13.979/2020, which is specific to dealing with the public health emergency caused by the novel coronavirus. The aforementioned rule provides for the possibility of local health managers, as long as they are authorised by the Ministry of Health, to impose restrictive measures on the population's rights, such as isolation of the infected, quarantine of suspected infection, determination of mandatory medical examinations, laboratory tests, collection of clinical samples, vaccination and other prophylactic measures, specific medical treatments, epidemiological study or investigation, exhumation, necropsy, cremation and handling of cadavers, exceptional and temporary restriction of entry and exit from the country by highways, ports or airports, as well as the restriction of interstate and intermunicipal mobility.

The law aims at adapting domestic legislation and coordinating actions and services to deal with health emergencies in all federal spheres, aiming to pro-

[24] The Fiscal Responsibility Law (Complementary Law n. 101/2000) defines limits of action in the event of an emergency situation and a state of public calamity, and Law n. 8.666/1993 regulates public tenders and contracts. For the specific case of the State of Public Disaster caused by facing the public health emergency resulting from the new coronavirus, see Legislative Decree n. 6/2020.

tect the community and provide greater legal security. The aforementioned emergency rule consists of mechanisms to ensure its effectiveness, such as inspection by public agents, compulsory communication of information on suspected infections, as well as the accountability of violators.[25]

In this sense, Administrative Act n. 5, of March 17th, 2020, deals with the compulsory nature of measures to deal with the outbreak of the new coronavirus, according to the ordinary federal law on the subject, explaining that respective disobedience may imply a crime against public health and disobedience to a legal order of a public official, punishable with imprisonment and a fine.[26] The same ordinance allows assistance from the police in cases of refusal or disobedience by a person subjected to compulsory isolation, quarantine, medical examinations, laboratory tests and specific medical treatments.[27]

In parallel to federal regulations in different times, all government spheres recommended isolation or social distancing, hand hygiene with specific products, and the use of masks, in situations that involve movement or stays in areas where there is movement and concentration of people. Some states and municipalities have made these recommendations mandatory, often usurping the Union's legislative reserved powers.

Even despite the existence of a specific federal law, it was observed that due to the delay of the central government, in order to exercise the coordination of public policies necessary to deal with the novel coronavirus, states and municipalities triggered normative acts that, in an uncoordinated manner and often without constitutional observance, they invaded the powers of other federal entities. Many of these acts violate fundamental rights (such as travel and assembly) and promote the interruption of public services, with losses for the populations directly affected.[28] Faced with this scenario, the federal government made an appeal to governors and mayors to review their decisions and drafted Provisional Measure n. 926/20, changing the face of the law, to centralise the definition of what essential activities are at the federal level.

The tension in the uncoordinated performance between the different governmental spheres reached the Supreme Federal Court, by questioning of the constitutionality of Provisional Measure n. 926/2020. The Supreme Court affirmed that the Union's power in legislating on the area must always be interpreted in a way that safeguards the autonomy of the other federated entities in

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[25] Law n. 13.979/20, article 3, § 4.

[26] Decree Law n. 2.848/1940 (Penal Code), articles 267, 268 and 330.

[27] Interministry Legal Act n. 5/2020, article 6th.

[28] See Attorney General's Office, Opinion SFCONST/PGR 100129/2020, on the ADIN 6.341/DF, in Brazilian Federal Supreme Court.

fighting the coronavirus, thus guaranteeing the performance of the subnational entities.[29]

This interpretation drew the attention of the legal community, because it is contrary to the dynamic that had previously prevailed in the Supreme Federal Court, that of "centripetal federalism", with the consequent centralization of powers around the Union.[30]

Shortly after the aforementioned decision of the Supreme Federal Court, on April 20th, a request was made by state deputies from the state of Amazonas for the Union to promote federal intervention in the public health system of that federative entity. The request alleges the collapse of the healthcare area, as well as human rights violations and the compromise of public order, sensitive principles for the maintenance of the Federative State.[31]

This request draws attention, as it affects state autonomy, reaffirmed by other member states and municipalities, in the midst of the political crisis generated by the pandemic. Even though the federal government did not carry out the intervention in the state of Amazonas, the possibility of a worsening health crisis in the country led the President of the Republic to consult Ministers of State regarding the possibility of establishing a State of Defence or a State of Siege. The possibility generated controversy and political clashes, with clear opposition from the National Congress, deflating presidential political pretensions.

2.3. *Protection of privacy* versus *protection of public health*

The protection of public health, especially in the context of a pandemic,

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[29] In ADI 6.341/DF the Supreme Federal Court through an injunction approved in (04/15/2020), stated that alongside the actions taken by the federal government «The measures do not rule out acts to be practiced by the state, the federal district and municipality considered competing competence in the form of article 23, item II, of the Major Law».

[30] M.C. CONTINENTINO, E.V.M. PINTO, *Estamos diante de um novo federalismo brasileiro?*, in *Revista Consultor Jurídico*. Available at: https://www.conjur.com.br/2020-abr-18/observatorio-constitucional-estamos-diante-federalismo-brasileiro (August 2020). See about this subject C. SOUZA. *Federal Republic of Brazil*, in J. KINCAID, G.A. TARR (ed.), *Constitutional origins, structure, and change in federal democracies*, cit., p. 84.

[31] In this case, according to Article 34 of the Brazilian Federal Constitution, federal intervention is allowed. In Brazil, the establishment of federal intervention in accordance with the current Constitution occurred only in 2018, in two Brazilian states (Rio de Janeiro and Roraima), based on the commitment of public order. The previously parsimonious use of this legal institute is due to the concept of being an extreme measure, contrary to state autonomy, as well as due to the history linked to Brazilian dictatorships, generating widespread controversy and political controversy.

highlights the collective aspect of the law, resizing individual rights such as privacy. In Brazil, the protection of data privacy, related to the fight against the new coronavirus, is managed based on the Brazilian Federal Constitution, Law n. 13.979/2020 and Federal Executive Decree n. 10.212/2020, which adopts the International Health Regulations, by the World Health Organization. The aforementioned standards safeguard personal data and information, based on confidentiality and anonymity, even though they allow their exposure when essential for the purposes of risk assessment and management for public health.[32]

In this sense, Law n. 13.979/2020 requires that everyone immediately inform the health authorities of possible contacts with infected people in areas considered to be regions of contamination by the coronavirus. The law also establishes that the sharing of essential data for the identification of people infected or suspected of having a coronavirus infection is mandatory between entities of the public and private administration, with the sole purpose of preventing the spread of the virus.[33] The Ministry of Health will maintain public and updated data on confirmed, suspected and investigating cases related to the public health emergency situation for the time necessary to combat the pandemic, safeguarding the right to confidentiality of personal information.

The emergency regulation aims to treat privacy not as an obstacle to the use of personal data to deal with the pandemic, but as a reference that allows fundamental rights and freedoms to be guaranteed while protecting public health.[34]

Basing his reasons on the pandemic and the need for social isolation, the President of the Brazilian Republic issued provisional measure no. 954/2020 determining that telephone companies share their customers data with the Brazilian Institute of Geography and Statistics, for «official statistical production, with the objective of conducting interviews in person in the context of household surveys».[35] The constitutionality of the rule was questioned in the Brazilian Supreme Court, alleging the absence of urgency and relevance assumptions, as well as due to the non-guarantee of confidentiality mechanisms

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[32] Executive Federal Decree n. 10.212/2020, article 45.

[33] B. BIONI, R. ZANATTA, R. MONTEIRO, M. RIELLI, *Privacidade e pandemia: recomendações para o uso legítimo de dados no combate à COVID-19. Conciliando o combate à COVID-19 com o uso legítimo de dados pessoais e o respeito aos direitos fundamentais*, São Paulo, 2020.

[34] Provisional Measure n. 928/20 is questioned through ADI 6347 and ADI 635 in Brazilian Supreme Court, where it is stated that the aforementioned measure limits the right to information and prevents the inspection of public acts related to the pandemic, as it allows the suspension of an application period that depends on a public agent or sector primarily involved in tackling the pandemic, allowing the State to exercise discretion and offending the principle of due process.

[35] Provisional Measure n. 954/2020, article 2, paragraph 1. Available at: http://www.planalto.gov.br/CCIVIL_03/_Ato2019-2022/2020/Mpv/mpv954.htm(August 2020).

for personal data and the lack of a normative act that allows companies of telecommunications to transfer of personal data from their users to the public authorities. The Brazilian Supreme Court granted the request for an injunction with the suspension of the rule's effectiveness.[36]

The use of a provisional measure in order to regulate the mitigation of the right to privacy and allow official statistical production, without the necessary respect for the constitutional assumptions of relevance and urgency, highlights the distorted use of the measure.

2.4. *The expansion of the activities of the Federal Executive Branch during the pandemic*

Since the promulgation of the 1988 Brazilian Federal Constitution, there has been an excessive frequency of provisional measures, representing an average of 25 per semester under the different Presidents, from 1988 to 2019. Due to the health emergency, an even greater increase was observed in the activities of the Federal Executive Power, through the exercise of an atypical legislative function, forcing institutional reservations.[37] In the first six months of 2020, 71 provisional measures were issued, 56 of which dealing with matters related to the Covid-19 outbreak.[38]

The situation is aggravated when we observe the content of the provisional measures. Even though they are related to the pandemic, they are not relevant and urgent, such as Provisional Measure n. 927 and 936/2020 which limited labour rights, 928/2020 which limited access to information provided by public entities, 954/20 which dealt with the sharing of personal data of customers of telecoms companies with entities linked to the Federal Executive Branch, and 966/2020, which deals with the accountability of public agents.

In this context, the judiciary has been widely called to act in the defence of fundamental rights, and consequently it has suffered frequent attacks, particularly from members of the federal executive power.[39] The situation reached the

[36] Five lawsuits questioning the constitutionality of Provisional Measure n. 954/20 have been filed with the Federal Supreme Court (ADI 6387, 6388, 6389, 6390 and 6393).

[37] On the necessary connection between the Constitution, mutual tolerance and institutional reserve, see S. LEVITSKY, D. ZIBLATT, *Como as democracias morrem*, Rio de Janeiro, 2018, pp. 99-116.

[38] Information available on the websites: https://www2.camara.leg.br/atividade-legislativa/legislacao/mpemdia (July 2020).

[39] As an example, the role of the Supreme Federal Court is cited, which on its institutional website states that between March 13th and July 30th, 2020, it received 4,074 pandemic-related

point where the Justices ("Ministers") of the Supreme Federal Court and institutions linked to the Judiciary Branch strongly rejected such aggressions, reaffirming their constitutional functions, the opposition to authoritarian minds and their commitment to democracy.[40]

The unnecessary use of provisional measures is also evident, since the legislative process in the case of bills submitted by the Executive Branch can be significantly faster than for those coming from the parliament.[41] A good example is the brevity of the legislative process of Law n. 13.979/2020 that provides for measures to deal with the public health emergency resulting from the new coronavirus. The law was proposed by the Federal Executive Branch on February 4th, 2020, and needed only two days in Congress to be approved, sanctioned and receiving presidential promulgation on February 6th. The brevity of the process highlights the lack of political and public debate and the violation of the principle of publicity in the legislative process.[42]

Because of the political crisis aggravated by the pandemic, Bruce Ackerman proposed the idea of a new Brazilian constituent assembly, and consequently a new constitution, in an article in the newspaper Correio Braziliense. The author states that «The political corruption revealed by the Lava-Jato operation, culminating in Bolsonaro's irresponsible response to the coronavirus

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cases, and issued 3,997 decisions on the subject. The Supreme Federal Court made important decisions related to the pandemic, such as the suspension of the payment of debts of 21 units of the federation with the Union and the allocation of the amount to face the Covid-19 outbreak, the destination of part of the resources recovered in Operation Lava-Jato (car wash) to combat the pandemic, the possibility to apply the emergency regime in cases of public calamity, maintenance of the common administrative competence of the federated entities, suspension of the restriction of access and transparency of public data, determination for the Ministry of Health to release the numbers again of the pandemic, as well as relativisation of labour relations during the fight against the Covid-19 outbreak. Available at: http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=448556&ori=1 (August 2020).

[40] See the News from the Supreme Federal Court. Available at: http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=444140 (August 2020). About the erosion of democracies in the world, see A. LÜHRMANN, S.F. MAERZ, S. GRAHN, N. ALIZADA, L. GASTALDI, S. HELLMEIER, G. HINDLE, S.I. LINDBERG, *Autocratization Surges – Resistance Grows. Democracy Report 2020*. Varieties of Democracy Institute (V-Dem), Gothenburg, 2020, p. 09 ss. According to the aforementioned report, from March 2020, autocracies are in the majority in the world today, with 92 countries, in contrast to the 87 countries considered democratic. The wave of "autocratisation" is affecting G20 countries, including some federations such as Brazil, India and the United States. In the geo-political context closest to Brazil, we have seen Latin America return to the democratic level last registered in the early 1990s, while Eastern Europe and Central Asia are at post-Soviet levels.

[41] G. AGAMBEN, *Stato di eccezione*, Torino, 2003, p. 17.

[42] Still in the legislative sphere, in 2020 two constitutional amendments were enacted (106 and 107), which specifically deal with developments in the new coronavirus pandemic.

crisis, led ordinary citizens to fear that democracy has no future». In his vision «the best way to respond to the growing political alienation is to call a new Constituent Assembly in 2023», reconsidering «the key decisions of the 1988 Assembly as they, over the decades, have generated the current crisis of public confidence». «If the 2023 Constituent Assembly adopts parliamentarism, the new Constitution will greatly reduce the risk of extremist takeovers».[43]

In response and in opposition to Ackerman's proposal, Brazilian professors published an article stating that «the Brazilian situation, although extremely problematic, is not likely to be changed for the better with a new constitution».[44] The authors show, with a wealth of examples, that parliamentarism does not rule out political polarisations, and remind us that the choice of presidentialism in Brazil is the result of a democratic request. They also conclude that the current need in Brazilian is to reconstruct the *ethos* of legality presupposed by constitutionalism, reinforcing its commitment and the conception of the constitution, as a foundation that has an autonomous value in transcending circumstances.

Although the frequent amendment of the Brazilian constitutional text in order to adapt it to government plans[45] and moments of political crisis are starting points for thinking about a new constitution; and studies of comparative constitutional law indicate the average life span of a constitution as being 19 years,[46] it should be noted that the proposal for a new Constituent Assembly, or even a new constitution without a constituent, was also previously defended by former Presidents, Dilma Roussef and Luiz Inácio Lula da Silva, and by the current Vice-President, Hamilton Mourão, without finding fruitful debate in Brazilian society.[47]

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[43] B. ACKERMAN, *O Brasil precisa de nova Constituição*, in *Jornal Correio Braziliense*, 13 Jul. 2020. Available at: https://www.correiobraziliense.com.br/app/noticia/opiniao/2020/07/13/internas_opiniao,871622/o-brasil-precisa-de-nova-constituicao.shtml (August 2020).

[44] T.R. BUSTAMANTE, E.P.N. MEYER, M.A.C. OLIVEIRA, J.R.G. PEREIRA, J.Z. BENVINDO, C. PAIXÃO, *Why Replacing the Brazilian Constitution Is Not a Good Idea: A Response to Professor Bruce Ackerman*, in *Int'l J. Const. L. Blog*, 28 Jul., 2020. Available at: http://www.iconnectblog.com/2020/07/why-replacing-the-brazilian-constitution-is-not-a-good-idea-a-response-to-professor-bruce-ackerman/ (August 2020).

[45] M. NEVES, *Constituição e direito na modernidade periférica uma abordagem teórica e uma interpretação do caso brasileiro*, São Paulo, 2018, p. 417.

[46] Z. ELKINS, T. GINSBURG, J. MELTON, *The Endurance of National Constitutions*, New York, 2009, p. 129.

[47] About the former Presidente Dilma Roussef statement, in 2013, about a new constituent, see: https://www12.senado.leg.br/noticias/materias/2013/06/24/dilma-propoe-constituinte-para-reforma-policy. (August 2020). About the former Presidente Lula's affirmation, in 2018, about a new

The democratic triumph represented by the Brazilian Constitution of 1988 and the political erosion of the proponents of such measures, reinforce the preservation of our constitutional text, despite its frequent modification over time.

3. *Final considerations*

In Brazil, the changes that have occurred after the promulgation of the current constitution strengthened the centralisation of the federal legislative competences, while at the same time expanding the subnational percentage of public revenue. The excessive and distorted promulgation of provisional measures by the Federal Executive Branch was also observed, in addition to federal interventions. The political crisis that took place, added to the frequent corruption scandals, fostered social polarisation, hate speech, attacks on members of the Judicial Branch, and demonstrations favourable to dictatorship, strengthening aspects of "autocratisation".

The context of political crisis was accentuated with the pandemic, with the recrudescence of the Federal Executive Power being observed mainly through the expansion of excessive and distorted promulgation of provisional measures. Even though it is an important tool to respond to the demands caused by the pandemic, it has been observed that the increase of the number of provisional measures implies the progressive expansion of the Executive Power within legislative activity, making it difficult for the Federal Legislative Branch to participate in the development of relevant public policies for the country and hampering the legislative agenda. Such a practice becomes dangerous when it turns into a permanent government practice, forcing reservations about institutions and the rules of the democratic system.

The situation becomes even more alarming when it appears that, through provisional measures, attempts have been made to mitigate the right to privacy and labour rights, the non-accountability of public agents, the restriction of access to public information, and the greater centralisation of administrative powers, to the detriment of subnational governments.

Uncoordinated action between different spheres of government and the collision between administrative decisions have allowed the restriction of fun-

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constituent, see: https://www1.folha.uol.com.br/fsp/brasil/fc29089906.htm (August 2020). About the Brazilian Vice President Hamilton Mourão's statement: https://www1.folha.uol.com.br/poder/2018/09/vice-de-bolsonaro-defende-nova-constituicao-sem-constituinte.shtml (August 2020).

damental rights such as freedoms of speech, freedom of expression, freedom of assembly and freedom of movement, as well as putting access to the public health system at risk.

It has been observed then that a series of variables can make the federal model provided in the Brazilian constitution more flexible, such as the sharing of public revenues, the recentralisation of the role of the Union, constitutional amendments, the judicial interpretation of the Brazilian Federal Constitution and the real representation of the interests of all states of the federation in the legislative activity. The protection of the federative form of the State, by means of a Constitutional clause, does not prevent practices that imply aggression towards the rules of the dream of Brazilian cooperative federalism.

The expansion of political deterioration on different fronts did not make the proposal for a new Constituent Assembly and the change of government system a successful idea. The creation of a new constituent without the understanding of and commitment to constitutionalism and the constitution would possibly end up maintaining the Brazilian practice of frequent constitutional amendments, which goes back to the dictatorship of Getúlio Vargas (1937-45), in order to adapt it to government plans.

The preservation of the current Constitution is due to the awareness of Brazilian historical demands, which do not exclude the necessary social and political rethinking, reviewing commitments, preserving mutual tolerance and the institutional reserve in the separation of powers and in the defence of democracy.

THE CORONAVIRUS PANDEMIC AND INEQUALITY UNVEILED: THE BRAZILIAN CASE

by *Rafael Köche* and *Luíza Richter*

1. *Introduction* [*]

In a significant part of the world, the pandemic shed light on a series of latent phenomena, to a greater or lesser extent. It highlighted human finitude (Heidegger) and our need to live with each other, being together (Maffesoli). It challenged healthcare systems and how much people are willing to sacrifice for the benefit of the community. It impacted the foundations of a globalized society and regional and global integration processes, bringing into question which resources and services are considered essential and the limits of technology and social control. Respected authors argued that the coronavirus crisis is the picture of the State of Exception (Agamben), demonstrating how easily we are willing to renounce our freedom in exchange for the expectation of living longer (Calligaris). Some predicted a crisis in the capitalist system and the eruption of a new social movement. Others went for different sorts of global conspiracies.[1]

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[*] For scientific journal evaluation standards, it is specified that Richter collaborated in the writing of sub-chapter 3 (*Inequality in Brazil and Covid-19*).

[1] M. HEIDEGGER, *Being and time*. Translated by Joan Stambaugh. New York: State University of New York Press, 1996; M. MAFFESOLI, *Crise sanitaire, crise civilisationnelle*. http://www.ceaq-sorbonne.org/node.php?id=92&elementid=2232; M. MAFFESOLI, *La nostalgie du sacré*. Paris: Éditions du Cerf, 2020; G. AGAMBEN, *Riflessioni sulla peste*. 2020. https://www.quodlibet.it/giorgio-agamben-riflessioni-sulla-peste; C. CALLIGARIS, *Para Agamben, pandemia funciona como pretexto para o poder satisfazer sua sede de mais domínio*, in *Folha de São Paulo*, São Paulo, 26 mar. 2020. https://www1.folha.uol.com.br/colunas/contardocalligaris/2020/03/para-

Despite our philosophical impressions about the phenomenon, we intend to focus on another aspect. We will analyze how the pandemic intensifies existing problems and the inability of specific political programs to promote the basic needs for the most vulnerable population members, a thesis endorsed to some extent by Butler and Mascaro.[2] Brazil will be our field of study for this.

According to the World Bank, Brazil will be the ninth-largest economy in the world by the end of this decade:[3]

Top Ten Countries by Nominal GDP at Current U.S. Dollar Exchange Rates

Country	*Nominal GDP (in trillions)*	*PPP Adjusted GDP (in trillions)*	*Annual Growth (%)*	*GDP Per Capita*
United States	$21.43	$21.43	2.2%	$65,298
China	$14.34	$23.52	6.1%	$10,262
Japan	$5.08	$5.46	0.7%	$40,247
Germany	$3.86	$4.68	0.6%	$46,445

agamben-pandemia-funciona-como-pretexto-para-o-poder-satisfazer-sua-sede-de-mais-dominio.shtml; S. ŽIŽEK, *Pandemia: covid-19 e a reinvenção do comunismo*. São Paulo: Boitempo, 2020; B. DE SOUSA SANTOS, *A cruel pedagogia do vírus*. São Paulo: Boitempo, 2020; A. DAVIS, N. KLEIN, *Construindo movimentos: uma conversa em tempos de pandemia*. São Paulo: Boitempo, 2020; G. LIPOVETSKY, *O coronavírus è um sintoma da hipermodernidade*. Interview by Pablo Bujalance published by Málaga Hoy, 9 mar. 2020, traslated by Cepat, 12 mar. 2020. http://www.ihu.unisinos.br/78-noticias/597016-o-coronavirus-e-um-sintoma-da-hipermodernidade-entrevista-com-gilles-lipovetsky; Unione Europea, Comunitario di Informazione in materia di Ricerca e Sviluppo (CORDIS), Tendenze Scientifiche, *Perché le teorie del complotto sul COVID-19 si diffondono più velocemente della pandemia*, 22 aprile 2020. https://cordis.europa.eu/article/id/415930-trending-science-why-covid-19-conspiracy-theories-spread-faster-than-the-pandemic/it. See also the debate in Brazil based on the text by Y. FRATESCHI, *Agamben sendo Agamben: o filósofo e a invenção da pandemia*, 12 may 2020. https://blogdaboitempo.com.br/2020/05/12/agamben-sendo-agamben-o-filosofo-e-a-invencao-da-pandemia/.

[2] J. BUTLER, *Capitalism Has its Limits*, 20 march 2020. https://www.versobooks.com/blogs/4603-capitalism-has-its-limits; A.L. MASCARO, *Crise e pandemia*. São Paulo: Boitempo, 2020.

[3] International Monetary Fund, *World Economic Outlook 2019*, Washington, IMF, 2019. See also: International Monetary Fund, *World Economic Outlook, April 2020: The Great Lockdown*, April 6, 2020, Washington, IMF, 2020. https://www.imf.org/en/publications/weo. World Bank, *World Development Indicators*. https://databank.worldbank.org/reports.aspx?source=2&series=NY.GDP.MKTP.CD&country=#. Accessed Dec. 23, 2020.

India	$2.87	$9.56	4.2%	$2,100
United Kingdom	$2.83	$3.25	1.5%	$42,330
France	$2.72	$3.32	1.5%	$40,493.9
Italy	$2.00	$2.67	0.3%	$33,228.2
Brazil	$1.84	$3.23	1.1%	$8,717
Canada	$1.74	$1.93	1.7%	$46,195

Source: World Bank. *World Development Indicators*. Accessed Dec. 23, 2020

Even though the Brazilian economy is among the largest in the world, wealth concentration is still a problem. Based on the Gini coefficient, Brazil is the eighth most unequal country in the world.[4] By analyzing the distribution of income in different social strata of the population, the situation is even worse: the *World Inequality Report 2018* shows that Brazil is the country where the wealthiest 1% of the population holds the most significant concentration of income in the world:[5]

The distribution of national income in Brazil, 2015

Income group	*Number of adults*	*Income threshold* (€)	*Average income* (€)	*Income share*
Full Population	142 521 000	–	13 900	100%
Bottom 50%	71 260 000	–	3 400	12.3%
Middle 40%	57 008 000	6 600	11 300	32.4%

[4] United Nations Development Programme, *Human Development Report 2020*. New York: UNDP, 2020. http://hdr.undp.org/sites/default/files/hdr2020.pdf. See also: B. MILANOVIC, *Global Inequality: a new approach for the age of globalization*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2016.

[5] World Inequality Lab, *World Inequality Report 2018*. Paris: World Inequality Lab, 2017. The Human Development Report 2020 confirms this conclusion. (United Nations Development Programme, *Human Development Report 2020*. New York: UNDP, 2020. http://hdr.undp.org/sites/default/files/hdr2020.pdf).

Top 10%	14 252 000	22 500	76 900	55.3%
Top 1%	1 425 000	111 400	387 000	27.8%
Top 0.1%	142 500	572 500	2 003 500	14.4%
Top 0.01%	14 300	2 970 000	10 397 600	7.5%
Top 0.001%	1 430	15 400 000	53 986 200	3.9%

Source: World Inequality Lab. *World Inequality Report 2018*, Table 2.11.1

Considering that Brazil is a continental country, with the fifth largest population and the eighth-most unequal economy in the world, the impact of the pandemic could only be huge: Brazil is today (January 18, 2021), according to official data, the runner-up in the world in the number of confirmed cases and deaths by Covid-19. Brazil represents 2.7% of the world's population but accounts for 10% of world deaths from the novel coronavirus.[6]

Even though inequality is not new in Brazil, the challenge of dealing with a pandemic has unveiled inequality on many different levels. Due to the pandemic itself, the situation is becoming even worse. For many years, Köche has sustained that inequality produces a democratic deficit and an active movement to build an *Imaginarium* that keeps people in a symbolic oblivion.[7] We attempt to give visibility to this phenomenon by unveiling that inequality.

The Brazilian Unified Health care System (SUS) is one of the world's largest and most complex public health care systems. According to the Brazilian Express Constitutional Provision (art. 196), the state must ensure complete, universal, and accessible health care for the country's entire population, including foreigners. The Brazilian Constitution also allows private health insurance companies to participate in the health care system to complement the public health system that covers the entire country (art. 199).

Since the beginning of the pandemic, Brazil has had to deal with the fol-

[6] Johns Hopkins University. *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE)*. https://coronavirus.jhu.edu/map.html. Access at January 18, 2020.

[7] «A desigualdade produz severas consequências políticas. Na medida em que a assimetria entre pessoas è tão radicalizada, o poder de influência e decisão é, na mesma medida, radicalmente assimétrico. Isso produz um evidente *déficit democrático*: há vozes que dominam; há vozes que resistem; mas, acima de tudo, há pessoas que têm suas vozes silenciadas. E, aparentemente, há um movimento ativo para construir um *imaginário* que as mantenha no *esquecimento simbólico*». (R. KÖCHE, *Direito da Alteridade: democracia e desigualdade nos rastros da (in)diferença*. São Paulo: LiberArs, 2017, p. 113).

lowing scenario: over half of the ICU beds were in the hands of the supplementary health care system, to which only 25% of the population has accessed it.[8] According to the WHO and the Ministry of Health recommendations, the ideal ICU bed ratio was 1 to 3 beds for every 10,000 inhabitants. Brazil had a figure of 2.2 beds, therefore satisfactory. However, disaggregating public and private data show that SUS had an average of 1.4 beds for every 10,000 inhabitants, against 4.9 in the private health care system.[9] In 2019, the difference between ICU beds available for people using public and private healthcare was already huge. Covid-19 only exacerbated the situation.[10]

Covid-19 has impacted Brazilians differently due to differences in their living conditions, particularly those who can afford private healthcare. Almost half of Brazil's population lives without basic sanitary facilities, 35 million people live without access to treated water, and 5.1 million live in "subnormal agglomerations" (slums). Therefore, it is not surprising that by the end of May 2020, there were more victims of Covid-19 among the residents of favelas (slums) in the city of Rio de Janeiro than there were in 15 Brazilian states combined.[11]

The pandemic has also increased inequality in education. Although the Brazilian Constitution states education to be a «right of all and duty of the State» (art. 205), it only guarantees free access to primary education, from four to seventeen years of age (art. 208, item I and §1). In the same way, as in the health care system, the Brazilian Constitution allows the private sector to provide education (art. 209). Therefore, Brazil has two very distinct situations: the public school system and the private school system.

During the pandemic, most schools stayed closed and online classes were encouraged to reduce the impacts of Covid-19. However, 4.8 million children

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[8] *Mais procurado, SUS só tem 44% dos leitos de UTI*, in *Correio Brasiliense*, Brasília, 13 march 2020. https://www.correiobraziliense.com.br/app/noticia/brasil/2020/03/13/interna-brasil,834066/mais-procurado-sus-so-tem-44-dos-leitos-de-uti.shtml.

[9] Associação de Medicina Intensiva Brasileira. *AMIB apresenta dados atualizados sobre leitos de UTI no Brasil*, 28 apr. 2020. https://www.amib.org.br/fileadmin/user_upload/amib/2020/abril/28/dados_uti_amib.pdf.

[10] *Ibid*.

[11] *Brasil tem 48% da população sem coleta de esgoto, diz instituto trata Brasil*, in *Agência Senado*, Brasília, 25 September 2019. https://www12.senado.leg.br/noticias/materias/2019/09/25/brasil-tem-48-da-populacao-sem-coleta-de-esgoto-diz-instituto-trata-brasil; *Quase 35 milhões de brasileiros não têm acesso a água tratada*, in *Portal R7*, 24 September 2019. https://noticias.r7.com/brasil/quase-35-milhoes-de-brasileiros-nao-tem-acesso-a-agua-tratada-24092019; *Favelas do Rio somam mais mortes por Covid-19 do que 15 estados do Brasil*, in *Portal G1*, 21 May 2020. https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/05/21/favelas-do-rio-somam-mais-mortes-por-covid-19-do-que-15-estados-do-brasil.ghtml.

and adolescents aged nine to seventeen do not have access to the internet at home, which corresponds to 17% of all Brazilians in this age group. It is not by chance that this year's National High School Examination (ENEM in Portuguese), an instrument used to define admission to higher education institutions and the granting of scholarships, was called "the most unequal ENEM in history".[12]

Finally, we will unveil Brazil's inequality by analyzing how we perceive inequality and how the country treats inequality and the pandemic in different scenarios.

2. *Inequality: methodological premises*[13]

The growing inequality and its social, political, and economic consequences have become one of the main themes on the world agenda. According to Piketty, the issue of inequality and redistribution is at the heart of the political conflict. Sen states that the need for a critical examination of traditional political and economic has never been greater. Zarka maintains that we can no longer accept the increasingly glaring inequalities. Finally, Stiglitz claims that our political and economic system is inefficient, unstable, and fundamentally unjust. This is a small illustration of a new perception that is being forged worldwide.[14]

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[12] P.S. COELHO, *O Enem mais desigual da história*, in *Estadão*, 17 de maio de 2020. https://politica.estadao.com.br/blogs/fausto-macedo/o-enem-mais-desigual-da-historia/. "Aqueles que não acessam a internet de nenhuma forma, no entanto, chegam a 11% da população nessa faixa etária. A exclusão è maior entre crianças e adolescentes que vivem em áreas rurais, onde a porcentagem daqueles que não acessam a rede chega a 25%. Nas regiões Norte e Nordeste, o percentual è 21% e, entre os domicílios das classes D e E, 20%". (M. TOKARNIA, *Brasil tem 4,8 milhões de crianças e adolescentes sem internet em casa*, in *Agência Brasil*, Rio de Janeiro, 17 May 2020. https://agenciabrasil.ebc.com.br/educacao/noticia/2020-05/brasil-tem-48-milhoes-de-criancas-e-adolescentes-sem-internet-em-casa). Ver também: Todos pela Educação, *Ensino a distância na educação básica frente à pandemia da covid-19*, Nota técnica, abril 2020. https://www.todospelaeducacao.org.br/_uploads/_posts/425.pdf.

[13] Based on: R. KÖCHE, *Direito da Alteridade: democracia e desigualdade nos rastros da (in)diferença*. São Paulo: LiberArs, 2017, pp. 71-111.

[14] T. PIKETTY, *L'économie des inégalités*, 6. ed., Paris: La Découverte, 2008, p. 3; T. PIKETTY, *Le Capital au XXI^e siècle*, Paris: Seuil, 2013, p. 18 and 38; A. SEN, *Desenvolvimento como Liberdade*. Transl. Laura Teixeira Motta. São Paulo: Companhia das Letras, 2010, p. 150; Y.C. ZARKA, *L'inappropriabilité de la Terre: principe d'une refondation philosophique*. Paris: Armand Colin, 2013, p. 5; J. STIGLITZ, *O preço da desigualdade*. Lisboa: Bertrand, 2014, p. 43; P. KRUGMAN, *We Are the 99.9%*, in *The New York Times*, The Opinion Pages, 24 Nov. 2011.

For outraged young people and protesters worldwide, capitalism fails to keep its promises, even generating what it has not promised, like inequality, pollution, unemployment, and the degradation of values to the point that everything is acceptable and no one is responsible.[15] More importantly, we have ended up realizing that there are political and socioeconomic mechanisms that produce inequality[16] and that, in a sense, would be a consequence of capitalism's logic.[17]

When analyzing the phenomenon of inequality, it is practically impossible to highlight how much responsibility each element has for the problem. This happens because of the high degree of interconnection between the various forces that shape inequality. The evaluation of the disparity of inequality will pass through the inevitable questioning of mutual recognition, which is why we chose to focus our efforts on assessing its tracks, the most evident marks left by inequality.

In this sense, the analysis of inequality must face two aspects: the fundamental heterogeneity of human beings and the diversity of variables that can measure the phenomenon. Therefore, measuring inequality depends on the choice of variables on which the analysis will focus (focal variables) when comparing different people. The different faces of the same variable (internal plurality) must also be considered. Even though they are deemed elementary or uniform, certain variables have a vast internal plurality (criteria of real income, or happiness, for example).[18]

From a methodological perspective, such comparisons will always be limited since the chosen variable will be limited. There will always be a static comparison of a dynamic phenomenon, like analyzing a photo, which may very well portray a certain fixed point, from a given point of view, but which,

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http://www.nytimes.com/2011/11/25/opinion/we-are-the-99-9.html, access at: 21 Nov. 2014; D. COHEN, *Richesse du monde, pauvretés des nations*, 2 ed. Paris: Flammarion, 1998; C. DOUZINAS, *Greek protests show democracy in action*, in *The Guardian*, 7 February 2011. http://www.theguardian.com/commentisfree/2011/feb/07/greece-protest-democracy-government, accessed on: 21 Nov. 2014; *Spanish youth rally in Madrid echoes Egypt protests*, in *BBC News*, 18 May 2011. http://www.bbc.co.uk/news/world-europe-13437819, access at: 21 Nov. 2014; *Movimiento 15-M: los ciudadanos exigen reconstruir la política*, in *El País*, 17 mai. 2011. http://politica. elpais.com/politica/2011/05/16/actualidad/1305578500_751064. html, accessed on: 21 Nov. 2014; *Occupy protests around the world: full list visualized*, in *The Guardian*, 14 Nov. 2011. http://www.theguardian.com/news/datablog/2011/oct/17/occupy-protests-world-list-map, accessed on: 21 Nov. 2014.

[15] J. STIGLITZ, *O preço da desigualdade*. Lisboa: Bertrand, 2014, p. 43.

[16] T. PIKETTY, *L'économie des inégalités*. 6 ed. Paris: La Découverte, 2008, p. 4.

[17] Y.C. ZARKA, *L'inappropriabilité de la Terre: principe d'une refondation philosophique.* Paris: Armand Colin, 2013, p. 72.

[18] A. SEN, *Repenser l'inégalité*. Paris: Seuil, 2000, p. 19.

of course, will ignore all the infinity and movement of variables that are not being (and can never be simultaneous) taken into account when assessing inequality. In other words, inequality from one variable can create a situation entirely different from inequality from another variable. To summarise: equality concerning one variable does not necessarily coincide with inequality in another. Therefore, the ubiquitous human diversity must be faced as much as the variety of focal variables involved.[19]

Why, then, problematize equality? Precisely because equality is a measure of justice, the law cannot be sustained without that measure. Each theory of law and each theory of democracy will always be linked to an idea of equality (no matter what). The notion of equality is closely related to the contemporary concept of legitimacy. Therefore, discussing inequality is fundamental for political, legal, economic, and epistemological purposes.

After these preliminary considerations that inequality is a broad and partly opaque concept, it is possible to say that inequality is always expressed in relation to something. It presupposes a comparison between agents, showing a particular deprivation reduction in the «capabilities». A theory of inequality assessment will be intrinsically linked to a poverty estimation theory, as they are related concepts. In this context, it is essential to emphasize that we understand poverty not merely as a low income but as a deprivation of essential services and resources.[20]

Although it is important to conceptually distinguish poverty from the concept of a low level of income, these two perspectives cannot fail to be linked. Income is an essential means of obtaining opportunities, and the most important one is that it is essential to decide about what we can or cannot do in our daily lives. In other words: an inadequate income is, in effect, a robust predisposing condition for a poor life.[21] Thus, when we say that poverty corresponds to the deprivation of elementary needs for minimum conditions, we do not ignore that insufficient income is the main factor linked to this problem and can never be overlooked.

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[19] «L'éthique de l'égalité doit prendre en compte comme il convient l'omniprésence de nos diversités, qui affectent les relations entre les espaces. C'est précisément en raison de la *diversité* des êtres humains que la *pluralité* des variables focales peut faire un telle différence». (A. SEN, *Repenser l'inégalité*. Paris: Seuil, 2000, p. 58).

[20] A. SEN, *Repenser l'inégalité*. Paris: Seuil, 2000, p. 31. The *capabilities* represent: «diverses combinaisons de fonctionnements (états et action) que la personne peut accomplir. La capabilité est par conséquent, un ensemble de vecteurs de fonctionnements, qui indique qu'un individu est libre de mener tel ou tel type de vie» (*Ibid.*, p. 76).

[21] A. SEN, *Desenvolvimento como Liberdade*. Trans. Laura Teixeira Motta. São Paulo: Companhia das Letras, 2010, p. 120.

As a disadvantage criterion, the deprivation of capacities is more important than a low-income level since income is only instrumentally important. Its derived value depends exclusively on many social and economic circumstances.[22] The analysis that will be made later seeks to highlight this type of deprivation.

Besides, the problem of world poverty does not appear to be simply a straightforward historical consequence of ancient explorers. Inequality is rooted in the division of land and the exploitation of slave labor; in the alliance between the elites; in the poorer part of the population's unequal access to education and the labor market; in the lower effectiveness of public spending in the social area; and in the low representation of the poor in Government. There seems to be a strong political motivation and philosophical foundation for the (radical) inequality to remain at the current level in this context.

This scenario has made it accessible for theories that defend individualism to flourish, a historically limited form of self-interpretation that became predominant in the West. The tradition of inwardness, which internalized the moral sources, produced a disengaged reason, a subject without form, a punctual self.[23] This generates the image of the subject as ideally disengaged, that is: «as free and rational to the extent that he has fully distinguished himself from the natural and social worlds, so that his identity is no longer to be defined in terms of what lies outside him in these worlds». Consequently, it generates a punctual vision of the self, ideally read as: «free and rational to treat these worlds – and even some of the features of his own character – instrumentally, as subject to change and reorganizing in order to secure the welfare of himself and others». Resulting in «an atomistic construal of society as constituted by, or ultimately to be explained in terms of, individual purposes».[24]

World poverty is not expressed by the simple lack of goods and resources, as if it were a mere logistics or distribution problem. Nor does it seem to be due to the lack of legal instruments, since nationally, internationally, and

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[22] «Le manque fondamental qu'implique la pauvreté, c'est celui des capabilités minimales adéquates, même si elle est aussi, entre autres, une affaire d'inadéquation des moyens économiques de l'individu (les moyens de prévenir le manque de capabilité)». A. SEN, *Repenser l'inégalité*. Paris: Seuil, 2000, p. 160.

[23] P. RICOEUR, *Percurso do reconhecimento*. Trans. Nicolás Nyimi Campanário. São Paulo: Edições Loyola, 2006, p. 168; C. TAYLOR, *Sources of Self: The Making of the Modern Identity*. Cambridge: Harvard University Press, 1989, pp. 149-272.

[24] C. TAYLOR, *Argumentos Filosóficos*. Trad. Adail Ubirajara Sobral. São Paulo: Loyola, 2000, p. 19.

transnationally, there are regulatory frameworks for protecting human rights. Radical inequality is closely related to politics and philosophy since political power and economic power have come together in the same hands: «the history of the distribution of wealth has always been deeply political; it cannot be reduced to purely economic mechanisms».[25]

According to data systematized by the International Program of Comparative Studies on Poverty (CROP), from the University of Bergen, Norway, between 1988 and 2002, the poorest 25% of the world's population reduced their participation in global wealth from 1.16 to 0.92%, while the wealthiest 10% accumulated more wealth, going from 64.7 to 71.1% of the wealth produced worldwide. In the last few years, this proportion has increased further. To reiterate: poverty is not something new. However, at this point, what is surprising is that severe poverty is considered almost entirely preventable. Just this 6.4% increase in wealth for the richest would be enough to double the income of 70% of the Earth's population, if only the additional enrichment of the wealthiest 10% of the planet between 1988 and 2002 was redistributed, leaving their fortunes practically intact.[26]

Human rights continue to be violated massively. Pogge asserts that noncompliance with human rights is more or less directly linked to poverty: the connection is more direct in the case of fundamental social and economic human rights, such as the right to a standard of living capable of ensuring the health and well-being of oneself and one's family, including food, clothing, housing, and medical care. The link is more indirect in civil and political human rights associated with a democratic government and the rule of law. Impoverished people, often malnourished, illiterate, and concerned with the struggle for survival, often lack sufficient means to resist or reward their rulers, who are usually oppressive governments. These governments serve others' interests, often foreign agents (governments and corporations, for example), capable of reciprocity, perpetuating radical inequality.[27]

We can take the 1948 Universal Declaration of Human Rights[28] as a reference. Notably, more than half of humanity cannot exercise their rights inher-

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[25] T. PIKETTY, *Le Capital au XXI^e siècle*. Paris: Seuil, p. 47.

[26] Comparative Research Programme on Poverty. Scientific Portfolio. CROP Vision. Bergen, 2010. http://www.crop.org/storypg.aspx?id=92&MenuNode=&zone=0. Acesso em: 21 out. 2011.

[27] T. POGGE, *World Poverty and Human Rights*. http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf.

[28] When referring to the 1948 Universal Declaration of Human Rights, I do not ignore the *global fragments* that make up the world built under the hegemony of Eurocentric rational thought (E. MENDIETA, *Global Fragments: Globalizations, Latin Americanisms, and Critical Theo-*

ent to the human condition itself – the effect of radical inequality between subjects who would share some identity (being together). Identity presents itself as a condition of possibility for us to talk about dissymmetry[29] and, therefore, asymmetry and inequality. This happens because inequality passes through the question of "who am I?" together with "who are you?".

Inequality is always expressed as a relationship. Thus, it is only possible to speak of dignity through a process of constitution of identity. This kind of anticipation of meaning demonstrates, in the difference, the ethics of the language involved and the political theory that supports the notion of equality of a given historically located community.

In a world where over 34 people per minute die due to causes linked to poverty, how can we believe that these people's silent demands can be heard? In a world where millions of children are exploited in illegal forms of work, where millions of adults are illiterate, where millions live in countries with education considered highly deficient, with teachers who do not even have a book to guide classes, how can we believe that these people do not have their ability to act politically stifled?

The questions raised above should not be seen as meaning to demonstrate people who are deprived of their capabilities – a possible understanding and which would imply a significant advance, it must be said. We intend to demonstrate further that, in addition to those who do not have their importance recognized (non-recognition), some are simply forgotten in political deliberations (mis-cognition). This reveals something beyond these people's existence; it reveals a precarious production of political and philosophical knowledge. Such methodological premises are necessary for an adequate legal epistemology, especially in the time of Covid-19.

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ry. Albany: Suny, 2007). I only take as a basis, among many possible others, a formal normative reference that expresses, although minimally, what can be considered legally existential for the human condition. Evidently, this requires a more in-depth analysis and dialogue with, among others, new decolonial or post-colonial studies. In this sense: F.F. BRAGATO, *Para além do discurso eurocêntrico dos direitos humanos: contribuições da descolonialidade*, in *Novos Estudos Jurídicos*. Vol. 19, Itajaí, 2014, pp. 201-230. http://dx.doi.org/10.14210/nej.v19n1, p201-230. Acesso 22 set. 2014; and Instituto Humanitas Unisinos. *Revista do Instituto Humanitas Unisinos*, nº 431, *Pós-colonialismo e pensamento descolonial. A construção de um mundo plural*, São Leopoldo, Ano XIII Unisinos, nov. 2013. http://www.ihuonline.unisinos.br/media/pdf/IHUOnline Edicao431.pdf. Acesso em: 10.04.2014.

[29] P. RICOEUR, *Percurso do reconhecimento*. Trans. Nicolás Nyimi Campanário. São Paulo: Edições Loyola, 2006, p. 168.

3. *Inequality in Brazil and Covid-19*

According to the United Nations, Covid-19 is a test for societies, communities, governments, and individuals on how they can utilize solidarity and cooperation to overcome the virus and mitigate its effects.[30] However, this unprecedented situation is only revealing the precarious conditions of inequality worldwide. Noticing the worldwide abuses, the United Nations has made some efforts to address most of them in an attempt to prevent Human Rights abuses from occurring.[31] In April 2020, the UN released a report on Human Rights protection during Covid-19 called «We are in this together». The aim was to demonstrate how better outcomes could be produced by preserving human rights while responding to the pandemic altogether.[32]

The coronavirus pandemic has highlighted a forgotten part of the world's population, bringing to light, profound social problems. This part of the text will analyze Brazil's response to the pandemic, a country experiencing an economic and political crisis since 2014. Before the coronavirus arrived, Brazil had 6.5% of its population living on less than $1.90 per day.[33]

Researchers concluded that 54.8% of Covid-19 cases in Brazil in March were imported from other countries, especially Italy, where 5% of those infected arrived from China, with 9.3%, and France, with 8.3%.[34] Even though

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[30] United Nations. Human Rights. Office of the High Commissioner, *Covid-19 and its human rights dimensions*. Accessed on: August 13, 2020. https://www.ohchr.org/EN/NewsEvents/Pages/COVID-19.aspx.

[31] «Today, the U.N. Security Council is mulling over some draft resolutions in response to Coronavirus, but without U.N. guidance countries have imposed quarantine and social distancing measures on their own. It is the enforcement of such quarantine measures that has concerning human rights implications». (K.S. DELVAC, *Human Rights Abuses on Enforcing Corona Virus Security Measures*, in *National Law Review*, Vol. X, no. 146, Pepperdine University 2020. https://www.natlawreview.com/article/human-rights-abuses-enforcement-coronavirus-security-measures).

[32] United Nations, *Policy Brief on Human Rights and Covid-19*. Access August 14, 2020. https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf.

[33] IBGE. *Síntese de Indicadores Sociais: em 2019, proporção de pobres cai para 24,7% e extrema pobreza se mantém em 6,5% da população*. Brasília: Editoria Estatisticas Sociais. November 12, 2020. https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013-agencia-de-noticias/releases/29431-sintese-de-indicadores-sociais-em-2019-proporcao-de-pobres-cai-para-24-7-e-extrema-pobreza-se-mantem-em-6-5-da-populacao.

[34] E. ALISSON, *54% of covid cases imported to Brazil by March 5 came from Italy*. São Paulo Research Foundation (FAPESP). *Agencia FAPESP*. Access on January 21, 2021. https://agencia.

the first cases of Covid-19 arrived in Brazil through the socioeconomically advantaged part of the population, poor people had a greater chance of dying from Covid-19 than rich people. The population's most impoverished 20%, had twice as much chance of contracting Covid-19 than the wealthiest 20% of the population.[35] Proportionately, black and brown people with no education were four times more likely to die from Covid-19 than white, college-educated adults (80.35% compared to 19.65%).[36]

Research conducted using data from SIVEP-Gripe found that Covid-19 mortality increased in northern regions compared with central and southern areas. The rates indicate that less socioeconomically developed regions in the country have higher death rates.[37] The North region of Brazil, one of the most affected by the virus, has the highest Covid-19 mortality rate. Before Covid-19, half of the impoverished population belong to this region.[38]

Additionally, data collected through May 2020 showed that people were more than three times more likely to die from coronavirus if they did not have a college degree in Brazil (71.3% of people with no education died from the virus, while 22.5% of people with a college degree died from it). Data scientists show a direct correlation between no college education and the threat from Covid-19 due to poverty, access to health care, and basic sanitation needs.[39]

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fapesp.br/548-dos-casos-importados-de-covid-19-para-o-brasil-ate-5-de-marco-vieram-da-italia/32826/.

[35] L. PINHEIRO, *Mais Pobres têm duas vezes mais chances de ter covid do que mais ricos, aponta pesquisa da UFPEL*, in *G1*, 23 set. 2020. https://g1.globo.com/bemestar/coronavirus/noticia/2020/09/23/mais-pobres-tem-duas-vezes-mais-chance-de-ter-covid-do-que-os-mais-ricos-aponta-pesquisa-da-ufpel.ghtml.

[36] A. MARAFIGO, M.C. MAZIVIEIRO, *Como a morte do mais pobres afeta populações de forma desigual e perversa*, in *Carta Capital*, Sao Paulo, 8 set. 2020. https://www.cartacapital.com.br/blogs/br-cidades/como-morrem-os-pobres-coronavirus-afeta-populacoes-de-forma-desigual-e-perversa/.

[37] P. BAQUI, I. BICA, V. MARRA, A. ERCOLE, M. VAN DER SCHAAR, *Ethnic and regional variations in hospital mortality from COVID-19 in Brazil: a cross-sectional observational study. The Lancet Global Health*, Vol. 8, pp. E1018-26, July 02, 2020. https://doi.org/10.1016/S2214-109X(20)30285-0.

[38] IBGE. *Síntese de Indicadores Sociais: em 2019, proporção de pobres cai para 24,7% e extrema pobreza se mantém em 6,5% da população*. Brasília: Editoria Estatisticas Sociais. November 12, 2020. https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013-agencia-de-noticias/releases/29431-sintese-de-indicadores-sociais-em-2019-proporcao-de-pobres-cai-para-24-7-e-extrema-pobreza-se-mantem-em-6-5-da-populacao. In 2019, data show that a quarter of young adults between 15 and 29 were unemployed. Correspondingly, the North region of the country has an informal employment rate of 61.6%, the highest in the country. (*Ibid.*).

[39] A. MARAFIGO, M.C. MAZIVIEIRO, *Como a morte do mais pobres afeta populações de forma*

The dire hygiene conditions of part of the population could be one of the main factors for the spread of Covid-19. Around 48% of Brazilian people do not have access to sewerage systems. Thirty-five million Brazilians have no access to potable water. In a pandemic where washing hands is not only crucial to prevent the spread but also the easiest prevention method to follow, some people cannot even carry out this task. As an example, the north region of Brazil has only 10.24% of its waste collected.[40]

Even though Brazil has a public health system that provides robust healthcare around the country, research produced by the University of São Paulo found that states considered epicenters of the pandemic in Brazil did not provide precise data about how many intensive care beds were being used for Covid-19. According to the study, this lack of information could prevent states from saving lives since there is no monitoring of what needs to be done and what measures need to be taken.[41]

In this context, disinformation is a hazardous health issue. As Tedros Adhanom Ghebreyesus, Director-General of the World Health Organization stated at the Munich Security Conference in February 2020: «We are not just fighting an epidemic; we are fighting an *infodemic*». Since the outbreak of Covid-19, disinformation and misinformation have spread worldwide, just like the virus itself. UNICAMP researchers, experts in disinformation, created a Reporting Channel, which, in October 2020, already counted more than 60 thousand messages in Brazil. In the beginning, the contents compared Covid-19 to less lethal diseases and even denied it. Then, the focus shifted to unproven treatments and attacks on preventive measures, such as face masks.[42]

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desigual e perversa, in *Carta Capital*, Sao Paulo, September 8, 2020. https://www.cartacapital.com.br/blogs/br-cidades/como-morrem-os-pobres-coronavirus-afeta-populacoes-de-forma-desigual-e-perversa/.

[40] Senado Federal. Brasil tem 48% da população sem coleta de esgoto, diz instituto trata Brasil. Access September 22, 2020. https://www12.senado.leg.br/noticias/materias/2019/09/25/brasil-tem-48-da-populacao-sem-coleta-de-esgoto-diz-instituto-trata-brasil.

[41] Universidade de São Paulo. *Lacunas e inconsistências marcam dados sobre leitos de UTI para Covid-19*, in *Jornal da USP*, June 6, 2020. Access August 12, 2020. https://jornal.usp.br/ciencias/lacunas-e-inconsistencia-marcam-os-dados-sobre-leitos-de-uti-para-covid-19/. See also: M. ANDREONI, *Corona Virus in Brazil: What you need to know*, in *The New York Times*, January 10, 2021. Accessed on: August 13, 2020. https://www.nytimes.com/article/brazil-coronavirus-cases.html.

[42] *Cientistas da Unicamp mapeiam desinformação sobre Covid-19 e afirmam que pseudociência se propaga como epidemia*, in *Portal G1*, 05/10/2020. https://g1.globo.com/sp/campinas-regiao/eleicoes/2020/noticia/2020/10/05/cientistas-da-unicamp-mapeiam-desinformacao-sobre-covid-19-e-afirmam-que-pseudociencia-se-propaga-como-epidemia.ghtml.

It happens that, unlike the rest of the world, where government agencies had to combat disinformation circulating particularly on social networks, in Brazil, disinformation has been produced several times by government agencies, particularly on declarations made by President Jair Bolsonaro. In 2020, two Health Ministers left their posts, refusing to follow the demands made by the Presidency of the Republic to defend the use of hydroxychloroquine as a preventive treatment against the coronavirus. President Bolsonaro made more than two hundred public statements downplaying the effects of the pandemic and the disease («only mild flu»).[43] Now, as the world strives to approve and distribute vaccines, Bolsonaro is carrying out a campaign to discourage vaccination, putting in doubt its effectiveness, warning that the «virus vaccine could turn people into "crocodiles"».[44] Not surprisingly, the French historian Laurent-Henri Vignaud, author of the book *Antivax – Resistance to vaccines from the 18th century to the present day* and professor at the University of Borgogne, states: President Bolsonaro is the only political leader in history to discourage vaccination.[45]

As the coronavirus pandemic unfolded, Brazil had to deal with the following scenario: over half of the country's ICU beds were controlled by private insurance companies, not by the Government's public health care system. However, only 25% of the population has access to the private health care system, mainly composed of white people. Data show that white people are more likely to be admitted to the ICU and survive after hospitalization.[46]

The chart below shows a considerable discrepancy between the beds avail-

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[43] *Our Biggest Problem is Fake News*, in *BBC Brazil*. Accessed on: August 14, 2020. https://www.bbc.com/news/world-latin-america-52739734.

[44] *Brazil's Bolsonaro warns virus vaccine can turn people into 'crocodiles'*, in *France 24*, Brasília (AFP), 18/12/2020. https://www.france24.com/en/live-news/20201218-brazil-s-bolsonaro-warns-virus-vaccine-can-turn-people-into-crocodiles.

[45] *Bolsonaro è provavelmente o primeiro líder político da história a desencorajar vacinação, diz especialista francês*, in *BBC News*, 05/02/2021. https://www.bbc.com/portuguese/brasil-55939354.

[46] P. BAQUI, I. BICA, V. MARRA, A. ERCOLE, M. VAN DER SCHAAR, *Ethnic and regional variations in hospital mortality from COVID-19 in Brazil: a cross-sectional observational study. The Lancet Global Health*, Vol. 8, pp. E1018-26, July 02, 2020. https://doi.org/10.1016/S2214-109X(20)30285-0. N.R. COSTA, *A Disponibilidade de Leitos em Unidade de Tratamento Intensivo no SUS e nos Planos de Saúde Diante da Epidemia da COVID-19 no Brasil*. Escola Nacional de Saúde Pública Sergio Arouca. Rio de Janeiro, 27 Mar. 2020. http://www.ensp.fiocruz.br/portal-ensp/informe/site/arquivos/ckeditor/files/DISPONIBILIDADE%20DE%20UTI%20NO%20BRASIL_27_03_2020(1).pdf.

able in ICUs for private health insurance companies and the public health system. For example, in the Northern region, private health insurance companies have seven times more ICU beds per 100,000 inhabitants than the public health system:

The average density of ICU beds in the Brazilian National Healthcare Program (SUS) and in the private health care sector per 100,000 inhabitants

Region/whole of Brazil	*Total ICU beds available per 100,000 inhabitants*	*Total ICU beds available per 100,000 inhabitants – Government's single-payer health care system*	*Total ICU beds available per 100,000 inhabitants – private health insurance companies*
North	15.4	10.6	74.0
Northeast	15.3	11.3	57.7
Central-west	28.7	14.2	82.0
Southeast	29.5	18.5	55.0
South	23.0	20.0	35
Brazil	**21.0**	**13.6**	**62.6**

Source: N.R. COSTA. *A Disponibilidade de Leitos em Unidade de Tratamento Intensivo no SUS e nos Planos de Saúde Diante da Epidemia da COVID-19 no Brasil.*

As regards education, the impacts are astronomical. Due to Covid-19, classes are being held online. However, almost 40% of public-school students do not have computers or tablets at home. In this scenario, having the right to education fulfilled seems practically impossible.[47] The public education system is accustomed to dealing with a lack of material, money, and support. During Covid-19, the situation is not different. High School students are organizing themselves to repeat the year because, according to them, they did not learn anything from the online classes. Students pointed out two significant causes: most of their classmates do not have access to the internet or computers/tablets, and

[47] E. OLIVEIRA, *Quase 40% dos alunos de escolas públicas não tem computador ou tablet em casa*, in *G1*, Jun. 9, 2020. Access Aug. 12, 2020. https://g1.globo.com/educacao/noticia/2020/06/09/quase-40percent-dos-alunos-de-escolas-publicas-nao-tem-computador-ou-tablet-em-casa-aponta-estudo.ghtml.

they have only 20 minutes of class a day, instead of 5-6 hours per day.[48]

Consequently, students do not feel prepared to graduate and face the High School National Exam (ENEM) for university entry. State school students will compete with private school students. Studies show that only 9% of private school students do not have access to computers or tablets (against 40% of state-school students).[49]

The unequal situation between students attending state and private schools is unmeasurable and worsens when these pupils are not given the opportunity to graduate. A study made by IBGE (Brazilian Institute of Geography and Statistics) in 2019 demonstrated that people with High School or Middle School education have higher unemployment rates. The rates are higher for black and brown communities, as can be seen below:[50]

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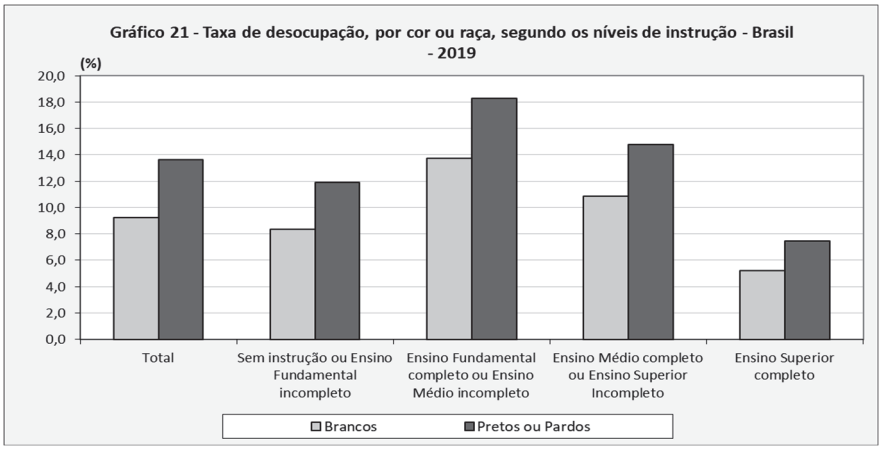
[48] J. GRAGNANI, *Coronavirus: alunos da rede publica planejam reprovar de proposito para aprender de verdade em 2021*, in *BBC Brazil*, Sao Paulo, Aug. 10, 2020. Access Aug. 14, 2020. https://www.bbc.com/portuguese/brasil-53655833. Hence, there is a lack of public policies to resolve the matter since there are no laws or measures regarding providing computers/tablets to students or making access to the internet easier (Brasil. Ministério da Educação. *Saiba quais ações o MEC está realizando para enfrentar o Corona Virús*. Brasília, Apr. 8, 2020. Accessed on: Aug. 12, 2020. https://www.gov.br/pt-br/noticias/educacao-e-pesquisa/2020/04/saiba-quais-acoes-o-mec-esta-realizando-para-enfrentamento-ao-coronavirus). The State of Minas Gerais tried to solve this problem by offering students printed materials. However, students are arguing that this is not enough since they have to learn everything by themselves. J. GRAGNANI, *Coronavirus: alunos da rede publica planejam reprovar de proposito para aprender de verdade em 2021*, in *BBC Brazil*, Sao Paulo, Aug. 10, 2020. Accessed on: Aug. 14, 2020. https://www.bbc.com/portuguese/brasil-53655833.

[49] *Quase 40% dos alunos de escolas públicas não tem computador ou tablet em casa, aponta estudo*, in *G1*, Ju. 09, 2020. Access Aug. 12, 2020. https://g1.globo.com/educacao/noticia/2020/06/09/quase-40percent-dos-alunos-de-escolas-publicas-nao-tem-computador-ou-tablet-em-casa-aponta-estudo.ghtml.

[50] IBGE. *Síntese de Indicadores Sociais: em 2019, proporção de pobres cai para 24,7% e extrema pobreza se mantém em 6,5% da população*. Brasília: Editoria Estatisticas Sociais. November 12, 2020. https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013-agencia-de-noticias/releases/29431-sintese-de-indicadores-sociais-em-2019-proporcao-de-pobres-cai-para-24-7-e-extrema-pobreza-se-mantem-em-6-5-da-populacao.

The unemployment rate, by color or race, by education level – Brazil 2019



Source: IBGE. Brazilian Institute of Geography and Statistics

In the graph above, light grey represents white people, while dark grey represents black and brown people. From left to right: total; No education or incomplete elementary school; Complete elementary school or incomplete high school education; Complete high school education or incomplete college education; Higher education completed.

The differences can be seen when comparing access to basic needs, such as food, for example. In Brazil, public schools are not only a place where students can learn but a place where they can eat. Around 41 million students in Brazil depend on state provision of free meals at schools. For most of these students, school meals are their main meal of the day. In the State of São Paulo, 15% of state school students have their only meal of the day at school.[51] In April, a law was passed to keep providing meals to families attending the state school system, even though classes were being held online.[52]

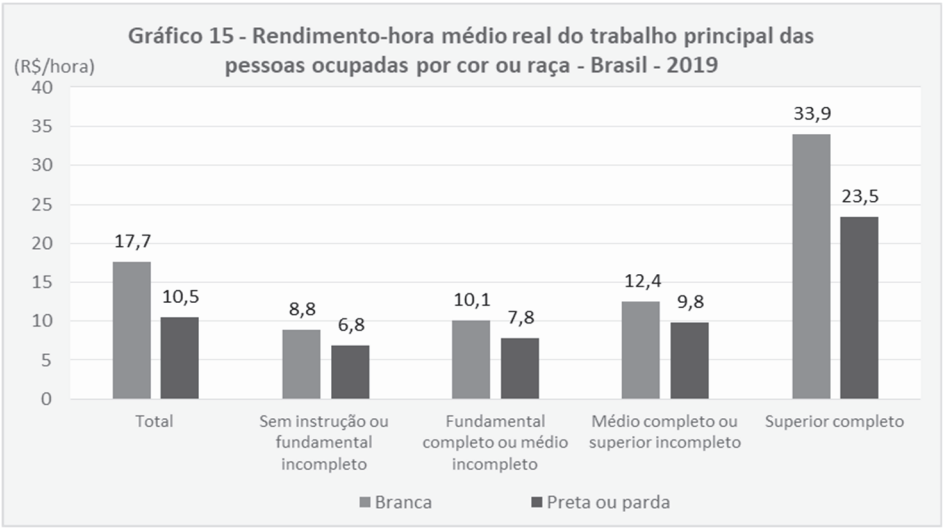
Being forced to give up one's studies abruptly is something quite typical in Brazil. According to IBGE data, students are frequently forced to abandon their studies due to poverty since their families need help to keep the household. Due to this lack of education, these families end up with low salaries,

[51] E. VEIGA, *Pandemia do coronavirus pode levar a fome quem depende de merenda escolhar*, in *DW*, March 24, 2020. https://p.dw.com/p/3Zxrq.

[52] BRASIL. *Lei nº 13.987, de 7 de abril de 2020.* Altera a Lei nº 11.947, de 16 de junho de 2009, para autorizar, em caráter excepcional, durante o período de suspensão das aulas em razão de situação de emergência ou calamidade pública, a distribuição de gêneros alimentícios adquiridos com recursos do Programa Nacional de Alimentação Escolar (PNAE) aos pais ou responsáveis dos estudantes das escolas públicas de educação básica. Brasília, D.O.U 07/04/2020, edição extra, p. 9.

not having a chance to move up through the social classes. On the other hand, people with higher levels of education are better paid. Brazilian research institutions indicate that this discrepancy also concerns racial issues. In the graph below, IBGE presents the average income of employed persons, by color or race and by the level of education:[53]

The average income of employed persons, by color or race and by the level of education



Source: IBGE. *Síntese de Indicadores Sociais*. Brasília, 12/11/2020

The graph shows hourly earnings by level of education. Light grey represents white people; dark grey represents black and brown people.

In terms of employment, 2019 saw Brazil's highest unemployment rate since 2012. In March and April 2020, the first two months of Covid-19 in the country, Brazil lost almost 1 million jobs. By June 2020, the number had increased to 7.8 million:[54]

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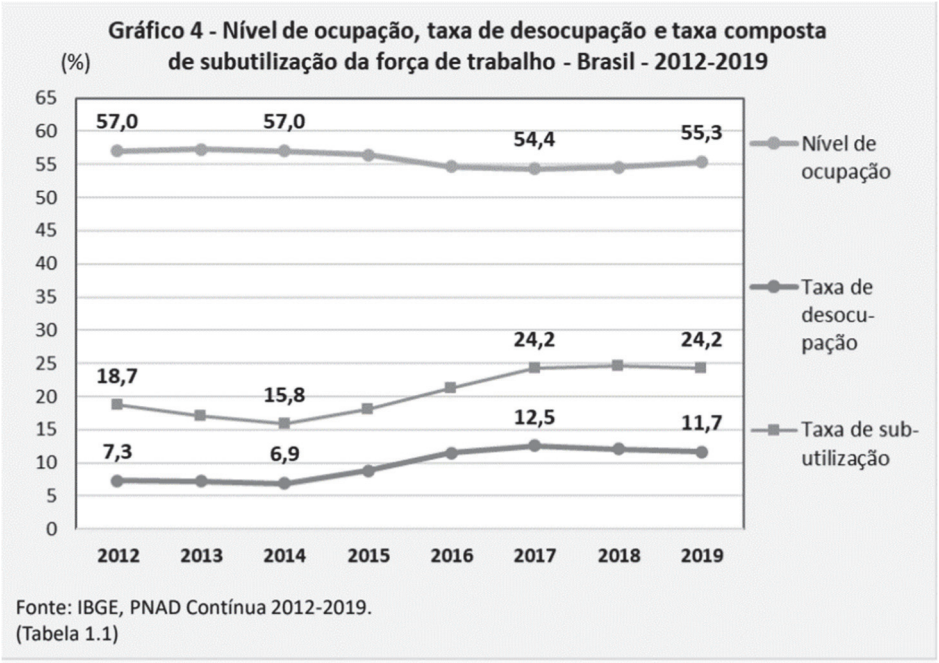
[53] IBGE. *Síntese de Indicadores Sociais: em 2019, proporção de pobres cai para 24,7% e extrema pobreza se mantém em 6,5% da população*, in *Agência IBGE Notícias*, Estatísticas Sociais, Brasília, 12/11/2020. https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013-agencia-de-noticias/releases/29431-sintese-de-indicadores-sociais-em-2019-proporcao-de-pobres-cai-para-24-7-e-extrema-pobreza-se-mantem-em-6-5-da-populacao.

[54] R. PEDROSO, *Nearly eight million Brazilians out of work due to Covid-19 pandemic*, in *CNN*, December 5, 2020. https://www.cnn.com/2020/06/30/americas/brazil-coronavirus-unemployed-intl/index.html; J. MCGEEVER, *Brazil loses over 1 million jobs in two months as corona-*

Employment rate, unemployment rate, and compound rate of underutilization of the workforce. Brazil, 2012-2019



Source: IBGE. *Social Indicators synthesized*, November 10, 2020

Top line, employment rate; central line, unemployment rate; lower line, underutilization of the workforce rate.

In low- and middle-income countries like Brazil, the informal economy plays a significant role, contributing to jobs, incomes, and livelihoods. However, this class of workers generally lacks necessary protections, including social protection coverage. In this context, Covid-19 mainly affects informal workers due to restrictive and containment measures.[55] The chart below shows the relationship between the number of informal workers vs. total employees vs. Covid-19 Government Response Stringency Index:

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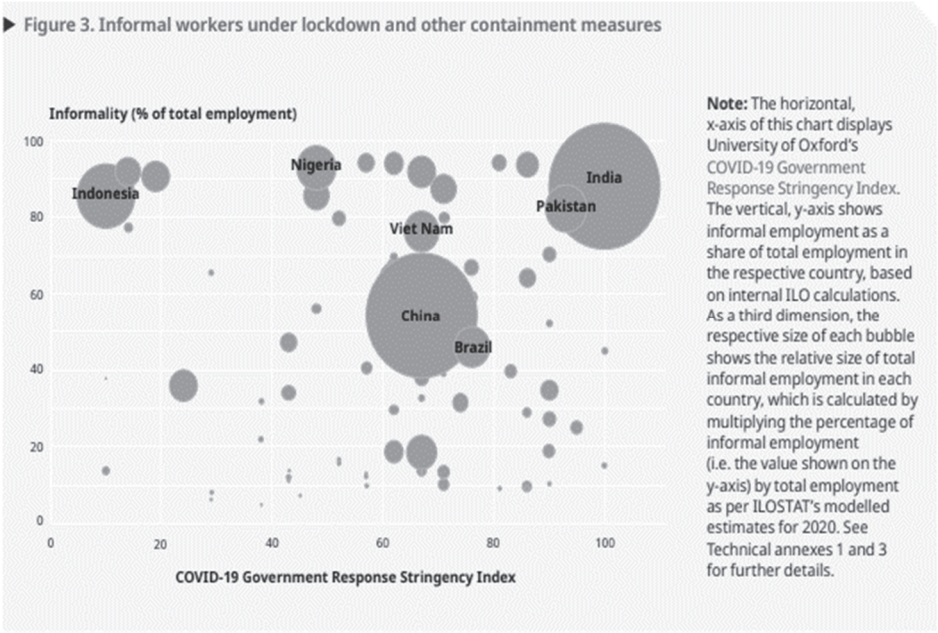
virus sweeps country, in *Reuters*, December 5, 2020. https://reut.rs/3qdd5qR; Brazilian Institute of Geography and Statistics (IBGE). *Social Indicators synthesized. An analysis of the living conditions of the Brazilian population*. Rio de Janeiro, IBGE, Nov. 10, 2020. https://agenciadenoticias.ibge.gov.br/media/com_mediaibge/arquivos/6178888f440cadb3ff272b61aef88c2c.pdf.

[55] ILO. *ILO Monitor: Covid-19 and the world of work*. 2 ed. Updated estimates analysis. April, 7, 2020. https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/briefingnote/wcms_740877.pdf.



Source: ILO. *ILO Monitor: Covid-19 and the world of work*. April 7, 2020

As a measure to confront the effects of the pandemic, the Federal Government drafted dozens of legislative acts related to Covid-19 (74 provisional measures; 52 laws; 53 decrees), exempting taxes on products to fight Covid-19, simplifying the importation of these products, and authorizing the hiring of 5,000 temporary professionals as reinforcements in the healthcare area.[56] The Government has expanded companies' access to credit: the program has already approved R$ 10.9 billion in credits, benefiting 12,629 companies.[57]

In this context, the Emergency Program for the Maintenance of Employment and Income was instituted, allowing for a proportional reduction of the working day and salary or the temporary suspension of employment contracts.

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[56] BRASIL. Ministério da Economia/Ministério da Saúde. *Portaria Interministerial nº 12.683, de 25 de maio de 2020*. Brasília, D.O.U de 26/05/2020, Edição 99, Seção 1, p. 14.

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The Federal Government compensated the reduction in salaries with the payment of an assistance benefit directly to workers in this situation. The Government secured R$ 200 billion to guarantee the maintenance of jobs during the new coronavirus crisis. More than 20 million signed agreements, benefiting more than 9 million workers and about 1.4 million companies.[58]

With the payment of welfare benefits, including self-employed or informal workers, the Government implemented the most prominent social protection network in history. With 68.2 million beneficiaries and more than R$229.71 billion invested, the «Emergency Aid» was a benefit created to guarantee a minimum income to Brazilians in a more vulnerable situation during the Covid-19 crisis. Due to its size, it is already considered «the largest cash transfer program in the world».[59]

The economic measures implemented in response to the pandemic have increased Brazil's public deficit., which should develop fiscal policies to counterbalance public spending on the one hand and collection on the other. The country, which has one of the most complex and regressive tax systems globally, has the opportunity to reform its system to reduce the concentration of income and wealth, reducing the effects of the pandemic and the differences between rich and poor.[60]

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4. *Conclusion*

«The virus does not discriminate», said Butler, «it treats us equally, puts us equally at risk of falling ill, losing someone close, living in a world of imminent threat. […] By the way it moves and strikes, the virus demonstrates that the global human community is equally precarious».[61] However, from the picture laid out above, we cannot help but conclude that social and economic inequality will ensure that the virus discriminates.

With 10% of the world's coronavirus deaths, Brazil has seen very different scenarios with its unequal social classes. Private healthcare, available to only 25% of the population, has four times more ICU beds than the National Brazilian Health System. With schools closed, many low-income students lost their main meal of the day. With remote learning, the population without access to the internet or with no access to a computer at home is particularly impaired, and the number of young people without a computer at home is four times higher in state schools than in private schools.

The coronavirus pandemic has the potential to produce another form of social distancing: widening the gap between rich and poor. Smith and Tocqueville, the coryphaeus of liberalism, foresaw that relying on the market to solve the problem of poverty means producing a society radically divided into two parts, which, in the long run, would become anthropologically different: «the society of the rich and the society of those whom they are forced to annihilate themselves to avoid being poor».[62] Since we already faced divided humanity[63] long before the pandemic, the current situation requires public in-

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[61] «The virus alone does not discriminate, but we humans surely do, formed and animated as we are by the interlocking powers of nationalism, racism, xenophobia, and capitalism». J. BUTLER, *Capitalism Has its Limits*, 20/03/2020. https://www.versobooks.com/blogs/4603-capitalism-has-its-limits.

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terventions to reduce pre-existing inequalities and those produced by the pandemic and by the stringent measures of governments.

In the OECD's latest *Economic Surveys* about Brazil, specialists stated that it needs a solid and inclusive recovery that will require long-lasting economic policy improvements. They point out that Brazil will have to focus primarily on fighting inequality: «Social protection can be strengthened through a better focus on the most effective policies and benefits, which could allow significant reductions in inequality and poverty. […] Raising productivity implies reallocations and structural changes in the economy, which should be accompanied by well-designed professional training and education policies. Professional training with a strong focus on jobs with local demand can help workers transit from the pandemic and seize new opportunities to move into better jobs».[64]

Given this situation, Brazil must reassess its policies, structuring programs to reduce economic and social inequalities and increasing people's access to water, sanitation, medicine, education, and public health. The country's economic development will go through challenges such as the social protection of informal workers and the reduction of income concentration. The improvement of political institutions should tackle the problem of the concentration of the media instruments in few players and, at the same time, must deal with challenges created by disinformation and misinformation. Finally, considering the Brazilian fiscal scenario, the most important structural change needed to face the problems presented in this brief essay will be pushing through tax reform capable of reducing the inequality problems of the current system.

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LEGAL ISSUES RAISED BY THE ADOPTION OF MEASURES TO CONTROL THE COVID-19 PANDEMIC: THE CASE OF GUATEMALA

by *Irma Yolanda Borrayo*

1. *The structure and organisation of Guatemala*

In Guatemala, the governance of the state is divided between three bodies, executive, legislative, and the judiciary. There is only one legislative chamber. It is structured and organised in an administrative system, a political electoral system, a municipal system, a financial system, and a control and taxation system, as well as the Army and a criminal law system.

Constitutional control is exercised by the Constitutional Court responsible for ensuring the constitutionality of laws and acts of public power that may affect the fundamental rights and liberties of citizens. Issues rise in those cases in which the Court is called to interpret the meaning of the rules and their conformity with the Constitution on two different levels: ensuring the constitutionality of the laws and protecting fundamental rights, the latter being particularly controversial. The Supreme Court and the Constitutional Court clash regarding the possible competence of both courts in certain areas.

Guatemala has a population of 16 million people, according to the 2018

census, 44% are indigenous, 60% of which live in poverty, and 70% of the workforce is in the informal economy.

2. *An analysis of the measures adopted to contain the Covid-19 pandemic*

2.1. *Constitutional references that allow to declare the State of Emergency*

After the World Health Organisation declared the Covid-19 pandemic a Public Health Emergency of International Concern and Guatemala Ministry of Public Health and Social Assistance issued the Plan for the Prevention, Containment, and Response to the Covid-19 Coronavirus, during the Council of Ministers the President of the Republic declared the STATE OF PUBLIC CALAMITY with Government Decree No. 5-2020 and its amendment in Government Decree No. 6-2020, ratified by Congress with Decree No. 8-2020.

In Guatemala, the above-mentioned dispositions have their constitutional basis in articles 1. (Protecting the Person); 2. (Duties of the State); 3. (Right to Life). Specifically, article 138 of the Constitution, with regard to limiting constitutional rights, which includes among the duties of the State and its authorities ensuring the Nation's population maintains full possession of the rights guaranteed by the Constitution. However, in the event of a public calamity, the rights guaranteed by the following articles may be restricted: 5. Freedom of action; 6. Unlawful detention; 9. Questioning detainees or prisoners; 26. Freedom of movement; 33. Freedom of association and demonstration; the first paragraph of article 35. Freedom of speech; the second paragraph of article 38. Holding and carrying arms; and the second paragraph of article 116. Strike regulations for civil servants.

In the event of any of the cases mentioned in the previous paragraph, the President of the Republic will make the relevant declaration through a decree issued by the Council of Ministers and the Public Order Act dispositions will apply.

Article 139 of the Constitution refers to the dispositions in the Public Order Act establishing the measures and rights applicable to the situation, such as: a) State of Prevention; b) State of Alarm; c) State of Public Calamity; d) State of Siege; and e) State of War.

The Public Order Act, which has constitutional value, included in Decree No. 7 of the National Constituent Assembly, lists all the measures relevant to the declaration of the State of Public Calamity in articles 1, 2, 14, and 15.

The first presidential dispositions expanding on Decree No. 5-2020 and its amendments in Decree No. 6-2020, were published on 16 and 21 March 2020. The previous dispositions were replaced by those introduced on 29 March 2020 as part of the State of Calamity framework valid from 30 March to 12 April 2020.

The State of Calamity is regulated by articles 14 and 15 of the Public Order Act that authorises the Government to take the measures it deems necessary to avoid as much as possible the damage caused by any calamity that may hit the country or any of its regions, as well as to avoid or reduce its effects.

2.2. *Special powers granted as a consequence of the State of Emergency declaration consist of and relevant limitations*

Article 15 of the Public Order Act sets the measures that the President of the Republic may take in cases of calamity, such as the following:

1) Centralizing, in the measure and circumstances outlined by the decree, all the public and private services with the methods and in the situations required by the State of Calamity.

In this case, the control, monitoring, testing and caring for patients with Coronavirus symptoms was centralised in the hands of the Health Department of the Government, under the control of the Ministry of Health, preventing other entities from carrying out testing and caring for patients. However, it may be possible to extending this control.

Emergency hospitals were built to attend Coronavirus patients, or potentially infected patients, in the Industrial Park, in the capital's zone 9; in the Municipality of Villanueva, south of the capital; in the departmental capital of Quetzaltenango, and one was announced in the departmental capital of Petén, in the north of Guatemala.

2) The immediate effect of the declaration is to limit the freedom of movement, association, and demonstration, increasingly restricting people's rights to circulate; in the last announcement made during a broadcast to the nation, on Saturday 3 April 2020, travel was further restricted to people's departmental area.

3) The Government further restricted the freedom of movement by setting the hours in which circulation in the street is permitted, effectively imposing a curfew between the hours of 16:00 and 4:00 the following day. The National Police (PNC) and the National Army of Guatemala were among the institutions put in charge of ensuring compliance with the measures.

4) Suspending works and activities in the public and private sector until 12

April 2020, with the exception of the Presidential Office and the Government Cabinet Office, the highest administrative authorities of each public institution, the staff dealing with the State of Calamity, medical staff, tax enforcement personnel, the staff of the Department of Assistance to the Consumer, and any other essential service. The exception applies also to other Public organs, such as the Judicial and Legislative authorities.

The public and private sectors, as well as decentralised entities, are asked to allow or facilitate the conditions for employees to work remotely and provide them with the necessary tools to work from home.

5) Disposing the mandatory continuity of essential public and private services in the following industries: health, fresh water supply, waste collection, public safety, private safety and transportation of valuables, air travel, telecommunications, national port system, heavy cargo transportation, food, pharmaceutical, personal health and hygiene products, energy.

6) Disposing mandatory changes to working hours in order to comply with the curfew restrictions and where this is not implemented, requiring employers to provide employees with means of transportation, which must be authorised by the Ministry for the Economy (MINECO, Guatemalan abbreviation).

7) With regard to the power to set minimum and maximum prices for essential goods and avoid price surges, detailed regulations were not issued on the subject. Initially, prices increased, but as oil and petrol prices dropped, the price of essential goods stabilized. Luckily no shortages were reported.

8) There is no record of communities in the affected areas being ordered to evacuate or at risk due to the nature of the epidemic. The most effective measure is the "Stay at home" initiative to reduce the spread of the infection and avoid the collapse of the healthcare system. The Guatemalan Institute for Social Security (IGSS) as well as other hospitals suspended external consultations for cases involving non-chronic illnesses.

Due to the increase in the number of cases, the two hospitals initially involved were joined by more and the government is now using a number of hotels to quarantine people suspected of having contracted the virus.

9) As for international border control, measures have been taken to protect the country's borders, including customs and the airport. The latter being the point of entry with the highest number of people with Coronavirus symptoms taken to the hospitals created to manage the emergency and spend the quarantine period. A situation made worse by the arrival of deportees on planes from the United States of America, who normally test positive to the virus.

10) Religious and leisure activities, face-to-face teaching – remote teaching is allowed – multi-passenger public transport, visiting prisons and care homes, are all prohibited, shopping centres are closed, except for those that provide

essential public services, such as supermarkets, local shops and groceries, restaurants offering take-away service, hotels and B&Bs, banks, activities involving agriculture, farming, phytozoosanitary and hydrobiological resources, livestock, and transportation of humanitarian aid during curfew hours, which may result in the violation of human rights.

11) Ordering advertising bodies and the media to diffuse messages to the public; as well as prohibiting the publication of messages that may cause confusion, panic, or worsen the situation, taking responsibility for any consequences. This includes national information channels, any omissions and failures must be reported to the competent authorities to establish legal responsibilities. It also includes the Academy of Mayan Languages, which must divulge information in the Mayan language of each community. The problem is that the media cannot ask questions during the President's press conferences, and if they do, they are not broadcasted, limiting the information available to the public.

12) With the aim of preventing the pandemic from extending to other areas, the Government further restricted the freedom of movement by setting the hours in which people can circulate in the streets, effectively imposing a curfew between the hours of 16:00 and 4:00 the following day. Police and other control bodies patrolled the streets and arrested more than 100 people, who were fined or sentenced to jail terms, for violating the curfew. From 14 May, circulation is further restricted for three consecutive days, until 18 May 2020, and again in the following weeks.

Citizens protest because this caused chaos and prevented many workers from receiving their two-week salary and not enough notice was given for people to be able to shop for food. As reported on social media.

This caused a lot of conflict, for example, in farmer communities in the west and many complained on social media that the President did not notify the population in advance of the lockdown across the country; the announcement was made on the national channel at 19:00 on 14 May, with effect from 15 May 2020 at 05:00, allowing people to leave their homes for just 6 hours, from 05:00 to 11:00. Which prevented farmers from being able to transport and sell their produce.

2.3. *Competence issues between the Central Government and local governments in the implementation of the recent legislation to control the Coronavirus epidemic*

Potentially the competences of local governments and municipalities may overlap; however, until now there have been no conflicts of jurisdiction or competence.

Departmental governments representing the Central Government have taken the lead in applying the measures to control the population, backed by mayors and citizens, who with the autonomy granted to municipalities have joined in to support the Government.

As the first measures were put in place, some mayors and their collaborators carried out a number of searches in condominiums on the Pacific coast, ultimately violating the constitutional rights and freedoms of the residents, considering that circulation in the streets was prohibited, staying at home was not.

2.4. *Actual or potential issues in terms of individual rights caused by the Government's stricter control over travel and communication of citizens*

a) By further restricting transportation of humanitarian aid to curfew hours could create a problem in the event of emergencies outside those hours when access to hospitals is prohibited, effectively violating the right to health and ultimately the right to life. Emergencies can occur at any time of the day or night. A situation that was later regulated.

b) Travel restrictions disposing that anyone with Covid-19 must isolate and anyone close to them quarantine in hospitals, other establishments determined by the Government, or in their own homes, remain applicable. Anyone in breach of quarantine rules may be liable to administrative, civil, or criminal sanctions for infecting third parties. This is a delicate issue and may violate human rights because it is difficult to establish the conditions and type of responsibility.

c) The writ of amparo granted by the Constitutional Court allowed solicitors to travel during curfew hours to defend their clients; it also allowed freedom of movement to medical staff providing services in the Health sector, which had not been included among the exceptions.

d) As for relations between employers, trade unions, and workers, the parties involved are urged to agree on how to suspend certain work contracts within the terms prescribed by the law; however, employers ultimately decide how to suspend their employees, which may include termination without benefits, affecting their constitutional guarantees and acquired rights.

e) It is worth mentioning that, according to the Constitution, once the reasons for issuing the decree based on its article 138 (in this case, Declaration of the State of Public Calamity), everyone has the right to demand accountability for unnecessary acts and measures not authorised by the Public Order Act.

f) The dynamics of Presidential dispositions change rapidly as statistics show numbers growing across the world and new issues arise. Control and re-

striction measures multiply and become difficult to keep up with. What one rule permitted or did not regulate, is not permitted by the next. Tension rises among doctors, nurses, and health operators working in hospitals with Covid-19 patients, as they complain about having insufficient staff, supplies, and personal protection equipment, the low quality of the food they receive, and unpaid, delayed, or reduced salaries. More than 50 doctors died working in hospitals with Covid-19 patients: they are unsung heroes. Social media has been inundated with criticism and indignation about these issues.

g) One of the sectors of the population particularly affected by the restrictions are rural farmers who took their produce to the capital and protested blocking the Pan-American Highway in a place called *Los Encuentros*, in the western part of the country, where the roads of four regions intersect, as well as in other regions, having lost their precious fruit and vegetables required to feed people in the city. To prevent produce from going completely wasted, they donated it to the surrounding communities, but made no profits from these products that cost them hard work in the fields. However, trucks transporting products such as cement, beer, soft drinks, snacks, fast food, etc. were allowed to circulate. It was horrendous to watch videos and look at the photos posted on social media showing menacing tanks circulate in the city streets.

The Government privileges the interests of large monopolies and large companies selling fast food, beer, soft drinks, and blocks the trucks from rural communities transporting fruit and vegetables and food needed to ensure a healthy diet. This approach affects producers and consumers.

On Friday 15 May, a market day in almost all Guatemalan communities, tensions arose in many areas and communities across the country, such as in Los Encuentros, San Francisco El Alto, and the following day in Totonicapán, and farmers blocked access to trucks owned by large companies.

The Government decided to test everyone working in local shops and groceries for Coronavirus, hopefully for their own good and not as an excuse to close them down.

h) With Decree No. 15-2020, despite presidential resistance, Parliament approved the mandatory continuity of health, fresh water supply, waste collection, telephone, Internet, and electricity services and services whose payments can be deferred. An initiative that helps the population, especially the unemployed. However, the legislative decree was blocked by the Government who presented another initiative deeming it had a better wording. Despite this, after much debate (and disagreement), Parliament disregarded the veto and continued the approval process, however, the resistance from the Government remains as it has not published it yet; a situation that has caused conflicts among some members of parliament and the president.

The law is required urgently to allow to solve all these issues, because the situation with workers made redundant and businesses closing started in March and in May a solution much anticipated by the population still had not been found. It is a contradictory behaviour that exposes the president on national communication channels.

i) In consideration of the situation created by the pandemic, it was argued that the Government's priority is to have access to the funds of the Guatemalan Institute for Social Security (IGSS) that provides health care, medicines, old-age, widowhood, and basic pensions to thousands of people who rely on it. The eagerness to obtain the funds of the IGSS is a problem faced by every Government, an ambition of the private sector.

There is an urgency to supply hospitals and put into fruition the millions of quetzals from the loans they made during the first three months this government was in power.

2.5. Other issues involving individual rights

There is no doubt that restrictions are needed to prevent the pandemic from spreading; however, the methods used are not conductive to the well-being of the population; the aim of imposing restrictions preventing farmers from transporting fruit and vegetables, closing local stores and groceries, seems to be that of destroying small trading. In fact, the transport of beer, soft drinks, and cement is not subject to time restrictions.

Stopping healthy fruit and vegetables from reaching local markets is a violation of the equality rights of farming communities as well as the rights of consumers, as not everyone can buy from supermarkets.

The president does not explain how the destitute will be fed. For example, people who live hand to mouth, those who live in one room and pay the rent daily or monthly and if they miss a payment get kicked out in the street.

The extension of curfew hours also means that anyone assisting people in need with free meals will not be able to help as many people. How will these people eat? There are people who need to sell their products daily to be able to feed their families.

The curfew reduces the food deliveries and parcels that can be handed out.

It limits the rights of those who do not have sufficient money to order home deliveries, leaving them without food.

Without food there is no health and no life. This is a violation of people's fundamental rights.

Prolonging these restrictions leaves defenceless the majority of people who

have no daily income to buy food, milk for children, and many other essentials.

To date, according to social media, at least 30,000 jobs have been lost due to businesses closing down.

The help promised by the Government, in the form of 1,000 quetzals a month for 3 months to those who have lost their jobs and small traders left with no income, has yet to arrive. This is despite the fact that from the first month of the pandemic the Government submerged us in thousands of millions of quetzals of loans authorised by the Congress of the Republic.

From 15 May, the Government started providing help for those who consume 200 kW or less of electricity, a criterion used by the Government to assign 1000 quetzals a month per family. This, however, led to acts of vandalism and corruption: deceased receiving subsidies, electricity bills and codes required to obtain subsidies being stolen, etc.

On 15 May 2020, with reference to the latest restrictions, the spokesperson for Presidential Office announced:

– The circulation of four- and two-wheel vehicles remains prohibited. The restriction applies also to bicycles and scooters. Except for food deliveries. Not everyone can walk, if the services are far from their homes. Some have health issues.
– Anyone who has a medical emergency can circulate without restriction. As well as anyone who works in authorised establishments. Including medical sales representatives, but all must have documents from the National Police certifying the authorisation.
– Cash machines can be accessed from 8am to 11am, as long as reached on foot. This may expose users to attacks from robbers, who are always on the lookout. Not everyone has easy access to a cash machine which in some cases can be kilometres away.
– Butches, bakers, and tortilla shops must be closed, except for those that are within stores or groceries. This, the spokesperson says, is to reduce the number of establishments open. As small shops are closed, owners are left with no income and not everyone can shop in supermarkets or have food delivered at home.
– According to the President of the Republic, there is the risk that the country may have to close down completely for 15 days if the number of Coronavirus infections grows. Luckily, this did not cause large-scale protests.

All these rules sparked public anger on social media, and many sectors and the general public threatened to protest in vehicles, because nobody agrees with the measures to close down the country for 15 days. Later the President

dismissed the total lockdown and the 17:00 to 05:00, Monday to Friday, curfew remained in place. However, public transport was not authorised to resume. Saturdays and Sundays at home. Except for meal deliveries.

Government Decree No. 9-2020 24/05/2020 in the Council of Ministers. Extends the State of Calamity, declared with Government Decree No. 5-2020, of 5 March 2020, approved by Decree No. 8-2020 in the Congress of the Republic, and its amendments, for an extra 30 days. Published in the Official Journal on 25 May 2020. It also extends the Presidential Dispositions of 14 May 2020 and Reforms of 17 May 2020, applicable from MONDAY 25 MAY 2020 at 05:00.

Government Agreement 65-2020, of 24/05/2020, establishes the temporary *Covid-19 Emergency Presidential Commission*, which can be referred to as «COPRECOVID», or «The Commission», reporting to the President of the Republic. The objective is reorganising the public and private hospital system to treat Covid-19 patients. The purchasing system is extremely complicated and encumbered by bureaucracy, however, high corruption levels make strict controls necessary.

The population does not comply with the measures, when we had the pandemic under control, risk was still high, but the Government's provisions became more flexible and the number of cases rose due to people's behaviour, especially those living in high density areas, which caused an unexpected acceleration in the spread of the virus. However, keeping the restrictions in place for too long is not an option as this would create other issues, such as domestic violence, which has increased frightfully – since the travel restriction were put in place, more than a thousand cases were reported to the authorities.

Data show a lot of discrepancies, but one thing is for sure: between 300 and 400 new case are reported every day, because a large part of the country is malnourished and lives in poverty.

According to the newspaper *Prensa Libre*, on 11 May 2020, «...the Coronavirus pandemic situation in Guatemala for the next weeks and months is not encouraging based on data from the Massachusetts Institute of Technology (MIT) and Our World in Data. There could be 18,858 new cases in the next 30 days, with an average of 628 patients testing positive every day. By 15 July, Guatemala would register 29,600 cases and by this date there would be 871 Covid-19 deaths». Coronavirus cases are concentrated in the centre of the country in the departments of Guatemala, Chimaltenango and Sacatepéquez. *Prensa Libre* reports «MIT» and «Our World in Data» projections, which both agree there could be 19,298 cases by August. On 16 June 2020, there were more than 10,000 Coronavirus cases.

One of the greatest problems is that the Government is unable to run effi-

ciently the Health system, which has always been precarious in Guatemala, no government has given it enough attention, and corruption runs high; on the other hand, the millions approved by the Congress have not been put into use: medical staff, doctors and nurses complain they have not been paid for three months, hospitals have not been supplied and the additional hospitals created for the pandemic have no longer capacity and now all hospitals are used for Coronavirus patients, including the Guatemalan Institute for Social Security and hotels it contracted to help manage the emergency.

On 11 July, the resignation of the doctors who accepted to assist the president of the Covid-19 Emergency Presidential Commission, known as COPRECOVID, presided by Dr Edwin Asturias, renowned epidemiologist, was announced. The reason for the resignation was the great disorganization at the Ministry of Public Health and Social Assistance, which is nothing new in Guatemala. They know the country and accepted the position, I think it was a waste of time for them to accept the job and then resign. Despite this, the Commission announced that it hopes to soon open churches and public transport, which could once again lead to an increase in Coronavirus cases.

Public hospitals already care for Coronavirus patients because those created especially for the pandemic are already full, the complaints of doctors and medical staff in hospitals about the lack of personal protection equipment, supplies, and medicines is reiterated by the resignation of an epidemiologist complaining that the minister does not regularly report the real data. They complain that the purchasing system is extremely complicated and encumbered with bureaucracy, however, high corruption levels make strict controls necessary.

Different sectors, as well as members of parliament asked for the Ministry of Health to be removed for lack of initiative, however, the President has not acknowledged these requests.

New poverty-stricken areas add to those already existing in the streets of the capital and across the country where improvised white flags are the symbol of the hunger afflicting the poorest families.

In Guatemala 70% of the working population operates within the informal economy and with the pandemic it has lost its daily income and help does not reach everyone.

Also businesses such as restaurants, coffee shops, the entertainment sector, etc., have been affected as they had to temporarily or permanently close their activities, leaving 30,000 people without a job.

Noticeably, the pandemic has also caused an increase in the number of crimes such as child pornography and human trafficking, because with schools closed and children spending more time at home, in their neighbourhoods, or at their parents' workplaces, they become easy targets for delinquents.

Cases of violence against women and domestic violence, kidnappings, murders, assassinations, extortions, increase every day.

Breaches of restriction measures and curfew rules lead to arrests, court cases and ultimately to prison sentences, as people are unable to pay the fines.

As a consequence, overcrowding in prisons increases due to the increase of detainees sentenced for breaching restriction measures and curfew rules. This situation caused the virus to spread in prisons and juvenile detention centres and other places. On 15 June 2020, according to the media, there were more than 200,000 detainees, a situation that further penalises the population living in poverty. Meanwhile, the Government has permitted meetings and parties among the elite, without making a single arrest. On the other hand, among market traders' violations have been sanctioned particularly harshly, violating the principle of equality before the law.

From a social point of view, it must be said that the majority of the population does not have access to education or healthcare, sectors that have been greatly overlooked by all governments in Guatemala; women and children malnourished for generations because ignored by corrupt governments and, therefore, as a lesser evil, reopening the country's economy is a necessity. Foreign debt grows quickly with every government while corruption does not show signs of slowing down.

The International Commission against Impunity in Guatemala (CICIG), which investigated cases of governmental corruption, highlighted the existence of corruption networks among Guatemala's Government authorities and that they all form a united front, but this is another matter. What is worth mentioning is that said Commission obtained great results that led to the sentencing of corrupt officials; however, it was attacked by government officials, members of the military, and lawyers who managed to get the Commissioner and his collaborators expelled, leaving citizens exposed to corruption and this is why the pandemic spreads and there are no adequate health services to address the situation. Not for the lack of resources, but because corruption is our worst enemy.

Ignorance and poverty partly contribute to the fact that the restriction measures are not followed, face masks are not used properly, social distancing is not always respected, hands are not washed in numerous occasions. Ignorance is our worst enemy and it is endemic. But the hunger suffered by the great majority is even worst.

During a week in June, on Monday 8, there were 447 new cases; Tuesday 364, but Saturday 13 June the new cases reached a peak of 509, which dropped to 354 on Sunday 14. Despite travel restrictions, new cases keep rising; in June 2020 Guatemala has a total of 9,845 cases, of which 7,573 active,

384 deceased, and just 1804 recovered (data subject to official revision and update by the Ministry of Health 15/6/2020). Despite the travel restrictions, why is the number of recovered patients so low? Are the Health System and hospitals to blame?

Improvisation, corruption, and cronyism lead to the increase of cases, many people stay at home not to get infected, convinced that staying home stops the situation in hospitals from getting worst; however, the President should focus on reorganising the health system to make sure it works efficiently, because the restrictions on travel are seriously damaging the economy. The minister must be removed immediately. Travel restrictions alone are not sufficient. This is "every man for himself"!

If the government continues like this, in Guatemala we will struggle to even stabilise the pandemic, it will take a long time if the data provided by the government are reliable.

On Monday 15 June, in an interview, epidemiologist Dr Manuel Sagastume from the Ministry of Public Health said that his resignation was due to the fact that the minister was not reporting the correct number of deaths caused by Corona virus in Guatemala. The department of Epidemiology demands data transparency from Minister Hugo Monroy. As a matter of fact, on 17 June the media suddenly reported an alarming change: 19 deaths had been reported on Tuesday but the next day, following these allegations, the deaths caused by Coronavirus rose to 416.

In his weekly message, the President simply imposed further travel restrictions for the following 15 days in June, based on vehicle odd and even registration plates applicable to the population in the central region, which includes the departments of Guatemala, El Progreso, Sacatepéquez, and San Marcos in the western region of the country; closing down regions with the highest number of Coronavirus cases on Sunday 21 and Sunday 28 of June 2020.

We thought we had seen the worst, but no, on 18 June the number of new cases rose to over 600. With 13 new deaths, the total number of deceased reaches 2290.

Tuesday 16 June the numbers showed:

– 10,706 total cases,
– 2090 recovered,
– 8190 active cases presented,
– 434 new cases,
– 19 deceased.

However, the following day, after the comments made by the epidemiologist of the Guatemalan Ministry of Health, in an interview with journalists

from the CNN, and the allegations about not disclosing the real data of the pandemic, the figures show:

– 11,251 new infections,
– 246 new cases, down,
– 2,200 recovered,
– 427 deceased.

The increase in the number of deaths, from 19 to 427 the next day, really stands out.

On Friday 19 June, the media announced the dismissal at the highest roles within the Ministry of Health. On Saturday 20 June, the data showed a total of 12,755 cases, the highest figure in the 99 days since the first case was identified; 31 deceased and 139 recovered.

MIT's projections for Guatemala show that on 15 August we will reach 261,146 cases; another projection predicts 49,785 cases, and a third 30,700 confirmed patients, on the same date.

Sunday 21 June (Summer Solstice), with the curfew in place all day, 390 new cases, 34 deaths, and 153 recovered are announced, after 1195 tests were made. The number of patients recovering is not increasing. On Monday 22 June data show a very high increase in new cases: 649. The new authorities say that they are preliminary figures that the new minister is processing. Numbers continue to rise and with as few as 1090 tests, 771 new cases are detected, the highest number to date; 35 deceased; 79 recovered. Wednesday 24 June, data show 14,819 confirmed cases, 601 deaths; 2,930 recovered and 11,286 active cases.

Today, 25 June, is the day in which Guatemala celebrates Teachers. Data showed new cases rising sharply with 800 new cases after 1628 tests; 22 deceased; 19 recovered. Covid-19 case summary.

3. *Covid-19 case summary*

Total figures, 15,619 cases; 12,045 active; 623 deceased; 2,949 recovered. (Source: Mspas.gob.gt.). The Minister of Health says they are preliminary data because she ordered an audit due to the fact that some hospitals and laboratories have not updated their records.

We have reached 5 July 2020. Data show 12,509 confirmed cases. According to epidemiologists it is still possible to avoid losing control of the number of infections. Tests dropped from an average of 1000 to 749.

The MIT forecast is 49,785 cases and the most conservative projection is of 30,700 confirmed patients by 15 August.

Today, Saturday 18 July 2020, *Prensa Libre* published a drastic change in the data: from 33,809 active cases, this Saturday the real figures raised 38,042; but the most surprising thing was that also the number of patients who recovered grew exponentially and the latest data that had been processed over the last two months went from 4,989 to 23,365. There had never been such a high number of recoveries and the data and changes cannot be trusted, meaning that the data provided by the Ministry of Health are not reliable. Some say that the discrepancy in the data is due to the fact that the database used as a main source had two fields and that this caused digitalization errors when cases were counted.

According to the Ministry of Health, analysis also included data pertaining to deceased patients showing that 90% died maximum after 21 days.

They consider the possibility or reporting all cases of patients who have had symptoms for more than 21 days as having recovered, said Lorena Gobern, National Coordinator for Epidemiology Control.

Health authorities reiterated that the alert level table (which will be implemented in the next days to indicate the restrictions applicable in each municipality) will be valid for two weeks and is independent of the epidemiology analysis table presented today (18 July 2020) by the Ministry of Health. In future, the alert level system and the table of cases will be available on the same website.[1]

Yesterday, 26 July, a partial reopening of Guatemala's economy was announced. The partial operation of the capital city's public transport system, *Transmetro*, was authorised. Curfew hours remain in place between 21:00 and 4:00 the next morning, no curfew during weekends. Travel restrictions based on vehicle odd and even number plates were cancelled.

On 23 August 2020 and based on the data form *Table* implemented by the Ministry of Health and Social Assistance of Guatemala, the reopening looks like this:

– 68,533 total cases,
– 57,735 recovered,
– 2,611 deceased.

The data obtained from the Table showing the daily Covid-19 figures are subject to verification.

Without downplaying the effects of the Covid-19 Pandemic in Guatemala,

[1] *Prensa Libre* web page *https://www.prensalibre.com/*, 18 July 2020.

it is worth mentioning that at the moment the greatest difficulty in the country is that governability has reached rock bottom. The Supreme Court of Justice does not recognise the authority of the Constitutional Court with some members of parliament wanting to elect their own appeal and Supreme Court of Justice judges who guarantee them immunity.

The Government does not provide details of all loans issued to address the Covid-19 emergency. The Parliament authorised approximately 11,000 million quetzals in loans, destined to support people affect by the interruption of commercial activities, and to restart the economy. Plus, an additional debt of 7,000 million quetzals for the economic recovery plan requested by the Government. The president of the Republic is incoherent in his statements, government initiatives are contradictory, and there is no accountability.

Problems arise that would not have arisen in normal conditions, which leads to assume that in some places the curfew is being used by government officials to commit crimes and evict citizens, like in the case of Cubulco in Huehuetenango, where people are being evicted, based on claims of ownership rights, without respecting the ancestral rights of these communities.

In these conditions and while fighting the pandemic, rural communities find themselves in situations that threaten their livelihoods, as well as their human rights.

In other even worst cases, some mayors with links to drug traffickers have sold the land owned by farmers and now are evicting them taking advantage of the fact that due to the travel and gathering restrictions those affected cannot request the assistance of the authorities and report these cases, nor protest and coordinate a response within their communities. According to social media the Government has carried out 51 evictions up to 24 August 2020, enforcing one eviction a day, which means leaving large numbers of the vulnerable people without home.

On the other hand, corrupt individuals attack officials such the Human Rights Prosecutor and the Corruption Prosecutor, as well as judges, appeal court judges, judges of the Constitutional Court, who have contributed to uphold the rule of law, with the objective of destabilise their work.

In addition to the problems described and to the pandemic, Parliament is threatening not to obey to the decisions of the Constitutional Court, which would imply a breach of the constitutional order, a coup, and loss of government control across the country, leaving the country exposed and more vulnerable to drug traffickers and other criminals.

This chaotic situation is worsened by the majority of judges of the Supreme Court of Justice who in collusion with some members of parliament, and with influential people such as retired military officials, who use law to attach legit-

imacy, largely contribute to the anarchy in the country, disobeying the resolutions of the Constitutional Court. For example, when the Supreme Court of Justice does not obey to a decision of the Constitutional Court ordering to prosecute a number of members of parliament investigated by the CICIG.

As if this was not enough, the Attorney General, requested to prosecute a number of parliament members, judiciary officials, including judges of the Constitutional Court whose independent magistrates, despite the threats, have upheld and supported with their rulings the frail state of law in Guatemala.

As a result, some groups have used social media to encourage people to protest publicly against the false accusations and attacks on the Constitutional Court, the Human Rights Prosecutor, judges and magistrates, which aim to destabilise prosecutors, causing more confusion, anarchy and institutional instability, as well as serious violations of constitutional rights and guarantees.

Finally, for the month of August, according to the official data from the Table of the Ministry of Public Health and Social Assistance, Guatemala reports the following data on 26 August 2020:

– 69,651 total cases,
– 11,760 current cases,
– 57,891 recovered,
– 2,630 deceased.

The capital city of Guatemala recorded the greatest number of cases (40,562), due to the highest number of people living in the city; followed by Quezaltenango (4,119); Sacatepéquez (3,121) and Izabal (2,380). Men appear to have been more affected than women. It is believed that data should be verified due to the fact that they are based on the number of tests carried out daily.

Any future measures adopted by the Government will be decisive in controlling the pandemic in conjunction with reopening the economy and the benefits given to the population.

THE COVID-19 SITUATION IN PERU FROM A CONSTITUTIONAL AND ENVIRONMENTAL LAW PERSPECTIVE

by *Luís Álamo*

1. *Regulation of the state of emergency in the Peruvian Constitution*

Peru has a significantly diverse population (more than 32 million people, of which 70% of families live in a situation of informal employment). Territorially, the country is divided in Coast, where the majority of the population lives, Mountains, and Rainforest. It has more than 9,000 communities, 2,703 of which are native Peruvians, and 6,682 farmers. 55 indigenous groups and 18 communities of peoples in isolation or initial contact. Since 15 March 2020, the country has registered 1,138,239 confirmed cases and 41,026 deceased. What does the Peruvian constitution say about regulating this exceptional situation that Peruvians are facing?

Article 137 of the Constitution of Peru regulates the state of emergency: State of Emergency and State of Siege. A State of Siege is declared before situations that threaten the territorial integrity of the nation in the event of an invasion, external warfare, civil war or the imminent danger thereof, with the mention of the fundamental rights that are not restricted or suspended. A State of Siege does not exceed 45 days. Any extension requires Congress approval.

On the other hand, a State of Emergency is declared «in the event of disturbance of the peace or internal order, catastrophe, or serious circumstances that effect the life of the Nation». Under no circumstances no one shall be ex-

iled. The State of Emergency cannot exceed 60 days. Its extension requires a new decree. During the State of Emergency, the Army may assume control over domestic order if the President of the Republic decides so. Now, let's see how these constitutional provisions apply to regulations issued to fight the Covid-19 pandemic.

2. *Covid-19 in Peru: constitutional basis, measures adopted and relevant legal effects*

Article 137 of the Constitution of Peru, with reference to the State of Emergency, among other justifiable reasons, refers to serious circumstances that effect the life of the Nation. This is the constitutional basis on which the government at the time based its national State of Emergency declaration in response to the Covid-19 outbreak and ordered the mandatory isolation (quarantine), by Supreme Decree No. 044-2020-PCM, published on 15 March 2020.

The measures adopted to implement the State of Emergency related to:

- Suspending the Constitutional Rights pertaining to personal freedom and safety, the inviolability of the home, freedom of assembly, and freedom of movement within the territory.
- Limiting the freedom of movement, as people were allowed to circulate in the streets only to provide or access essential goods and services.
- Putting in place measures designed to strengthen the National Health System across the nation, and all public, private, and half public-half private health structures, as well as all their civil servants and employees, were subject to the regulations issued by the Ministry of Health, for the safety and protection of people, goods, and places.
- Imposing restrictions on commercial, cultural, and leisure activities and establishments, hotels and restaurants, suspending public access to venues and stores, with the exception of stores selling food, drinks, and essential goods, pharmaceutical and medical establishments, opticians, or establishments selling orthopaedic, hygienic products, and filling stations.
- Temporary closure of national borders.

These measures aimed at reducing the number of people travelling in order to avoid the opportunities of contact, mitigate the risk of transmission, and contain the spread of the virus. Unfortunately, largely due to the population not complying with the rules, these measures did not have the effects hoped, despite the system of fees and penalties put in place to sanction any violations.

On the other hand, the political instability triggered by the declaration of permanent moral unfitness of the then President Martín Vizcarra by the Congress of the Republic, sharpened even further the crisis caused by the pandemic. The nomination of interim President Manuel Merino de Lama, who at the time was the Chairman of the Congress and whose lack of electoral legitimacy was denounced mainly by the younger generations who forced his resignations, led to the social distancing protocols introduced to avoid infections being largely ignored.

Currently, the President of the Republic is Francisco Sagasti, who will remain in office until 28 July 2021, when the presidency will pass to the new president elected in the general elections held on 11 April 2021. In the meantime, this new administration has issued Supreme Decree No. 08-2021-PCM, published in the Official Journal El Peruano, on 27 January 2021, which extends the State of Emergency for severe circumstances affecting the life of the nation due to the Covid-19 pandemic, until 28 February 2021.

Unlike the previous administration, this time the government opted for a localised quarantine, based on different levels of alert:

Moderate	*High*	*Very High*	*Extremely High*
–	Piura	Tumbes	Lima
–	Loreto	Amazonas	Constitutional province of Callao
–	Lambayeque	Cajamarca	Ancash
–	La Libertad	Ayacucho	Pasco
–	San Martín	Cusco	Huánuco
–	Ucayali	Puno	Junín
–	Madre de Dios	Arequipa	Huancavelica
–		Moquegua	Ica
–		Tacna	Apurímac

Article 7, point 7.1, of the Supreme Decree mentioned in the paragraph above, established: «The National Government, the Regional Governments, and Local Governments, each within their areas of competence and constantly liaising, will continue promoting and/or monitoring the following rules, in line with the recommendations from the National Health Service, with reference to:

– Social distancing – minimum one (1) metre.
– Frequent hand washing.
– Use of face masks.
– Use of outdoor and ventilated spaces.
– Avoiding gatherings. – Protection of the elderly and people at risk. – Promoting mental health.
– Continuous screening of the population.
– Continuous strengthening of the health services.
– Use of information technology to monitor Covid-19 patients.
– Use of open data and information databases. – Fighting disinformation and corruption.
– Adequate waste disposal.
– Responsible diffusion of information about Covid-19 and the measures adopted to fight it.
– Ensuring public road transport vehicles operate with all windows open.
– Ensuring all public and private venues are adequately ventilated, with doors and windows open whenever possible.
– Public and private business to prioritise working from home and staggered timetables at opening and closing times.

The Regional and Local Government propose to the Presidency of the Council of Ministers amendments they consider necessary with reference to the restrictions introduced due to the State of National Emergency, which will be assessed and approved if in line and compliant with the applicable regulations».

It is worth highlighting the progress in terms of collaboration between the Central Government and the Regional and Local Governments, in fact, unlike the first decision taken at the beginning of the pandemic, now these subordinate governments play a much more propositional and participative role, at least from a juridical point of view, in handling and approaching the Covid-19 pandemic.

With regard to personal travel limitations, mandatory restrictions apply from Monday to Sunday, but during different times of the day, while people living in regions in which extremely high alert measures apply are required to stay at home at all times.

In relation to business activities and access to public places, restrictions aim at reducing capacity, based on the level of alert applicable in the area in which the establishment is located.

3. *Legal issues caused by the control measures adopted by the Peruvian government in relation to the interaction with other levels of government*

Regional and local governments, sub-national or intermediate, assume an increasingly greater role in relation to the issues caused by the pandemic and how they are managed. In this respect, it is pertinent to ask: What does the autonomy given to them by the constitution consist of in terms of their actual approach and management? Is it the same as independence?

These regional and local governments, from when they were created (1979 Constitution), to when they were effectively implemented (2001), went through a bumpy process of territorial decentralization. The sharing of functional competences with the government, as well as environmental topics, have been some of most complex issues. The Conga project in Cajamarca, and delimiting the area reserved to traditional fishing in Tumbes, are clear examples of tensions created by their autonomy in relation to the powers of Central Government.

Before starting this brief analysis, it is worth specifying that the Peruvian government is unitary and decentralized. Article 191 of the constitution states that regional governments have political, economic, and administrative autonomy. However, it is important to remember that this is a case of the government conceding autonomy, not sovereignty, to local authorities. Therefore, they are not independent and do not have sovereignty, but are part of a more ample order, the government's, aimed at unity and bound by the legal system. This is confirmed by abundant jurisprudence from the Constitutional Court. Now, how is this autonomy implemented when it comes to environment protection? Let's see.

These regional governments' ability to plan and create policies, as well as approve and modify regional rules, is proof of their political autonomy. These rules issued based on the powers and competences of the regional governments are binding within their respective jurisdictions.

Regional governments also have administrative autonomy with reference to internal organisation, establishing and regulating the public services they are responsible for (promoting compliance with the rules, protecting the quality of the environment, and implementing different Regional Systems).

Additionally, regional and local governments have financial autonomy as they can create, collect, and administrate their incomes (creating funds, cashing in administrative sanctions), and approve their own institutional budgets, in which they can include strategic objectives and operational activities that promote a better management of their finances.

Therefore, the autonomy enjoyed by regional governments does not give

them sovereignty or independence from the central government. And their administrative, financial and political autonomy is exercised in compliance with the Constitution and the law. As a consequence, their decisions must be respected by the Central Government, who will not be entitled to interfere, limit, or invoke their unconstitutionality.

It is clear, that the Constitution of Peru organises the country – in a unitary manner – in three levels of government (National, Regional, and Local), all autonomous, but not independent.

In this sense, the Government in power disposed that during the State of Emergency: «The Regional and Local Governments propose to the Presidency of the Council of Ministers amendments they consider necessary with reference to the restrictions introduced due to the State of National Emergency, which will be assessed and approved if in line and compliant with the applicable regulations».[1] Shall we have a look at what happened?

The Ministry of Health is the national authority with the highest power in all matters concerning health. This Ministry established the National Operations Committee with the aim of implementing, executing, monitoring, and assessing the national response to Covid-19. Additionally, many regional governments also created their own COVID REGIONAL Operations Committees and when it came to implementing and intervening to contain and prevent the spread of Covid-19, this created a conflict of competence, with gaps and overlaps, because national and regional authorities have different perspectives and interests when it comes to addressing the same issues.

With regard to citizens, in Peru, Supreme Decree No. 68-2020-PCM established a Work Group called «Te Cuido Perú» (I take care of you, Peru), with the aim of monitoring and assisting anyone infected with the Covid-19 virus, with a digital platform for the geo-location of people and their direct contacts. The State of Emergency has the purpose of restricting mobility and geolocation allows to track this mobility and monitor citizens' movements. However, by issuing this rule, Peru also enters the realm of citizen surveillance through geo-location. In these circumstances, the Peruvian Government must respect the fundamental rights of its citizens and the applicable constitutional framework, which means strictly applying the criteria of necessity and proportionality when using these systems. Failure to do so would affect the fundamental rights recognised by the Peruvian constitution.

With regard to business activities (Mining and Environment), the government established that during the State of Emergency and the quarantine regulations, people were allowed to circulate in the streets only to provide or ac-

[1] Article 11 of the Supreme Decree No. 044-2020-PCM.

cess essential goods and service. However, it set an exception: In the case of production and industrial sectors, additional indispensable activities that do not affect the national emergency can also be included. The Ministry for Energy and Mining (MINEM), with a communication on 9 April 2020, announced that the transport of cargo and goods and operations critical to the mining sector are permitted at national level. The exception is defined as necessary to protect the environment and public safety. Failure to carry out said activities would put at risk the environment and the health of the surrounding communities.

What happened really? Since the State of Emergency was declared in Peru, on 16 March 2020, there have been 2,000 interventions against environmental violations, in the rainforest area of the country and in other territories, 60% of which involved illegal mining. The same happened with the transportation of consumables – such as cyanide and explosives – used in these activities in various regions of the country. Prosecutors specialised in Environmental matters and National Police intercepted consumables destined for areas in which illegal mining takes place. This is explained by the high value of gold these days.

From a positive point of view, as a consequence of the Covid-19 pandemic, the Government has taken the opportunity to carry out reconstruction works postponed for more than two years, improve its education and health system, and connectivity in rural areas and vulnerable communities. It appreciated the need to focus on public health and environment policies that take in consideration social, environmental, and cultural differences. In terms of air pollution, due to travel restrictions imposed as a consequence of the State of Emergency caused by Covid-19, the past 20 March in Lima (the capital of Peru), the amount of particulate matter in the air fell by 800% compared to last year, according to data from the Ministry for the Environment.

Emerging from this crisis must lead us to reformulate more effective social policies against organised crime, targeting specific territories and focussing on people, with the sustainable use of our resources in mind, but for everyone's benefit, protecting the environment, because the option of loosening environmental rules will only affect more our lives and the environment. It is an opportunity to strengthen society's commitment to building a more sustainable country and citizenships that ensure the quality of life in a balanced and healthy environment for people's development.

JAPAN AND COVID-19: REFLECTIONS ON MEASURES LIMITING PERSONAL FREEDOM AGAINST THE BACKGROUND OF A CONSTITUTIONAL DEBATE

by *Alessandro Caprotti*

SUMMARY: 1. The effect of the pandemic on the Shinzo Abe government's first difficult choices, January – May 2020. – 2. The collapse of certainty, Japan's winter health crisis, September 2020 – January 2021. – 3. Some reflections regarding the policy and legal actions taken by the Japanese government in combating Covid-19.

1. *The effect of the pandemic on the Shinzo Abe government's first difficult choices, January – May 2020*

The pandemic due to the Covid-19 coronavirus has profoundly affected global social and political life, and Japan has certainly not been exempt from the issues that have characterised the difficult passage of 2020. This year was also supposed to be Japan's year; many important events, including the Tokyo Olympic Games, were due to be celebrated during its course, but since January, the need to totally revise the planned programs became immediately evident.

On 15 January 2020, the Ministry of Health, Labour and Welfare, Japan reported the first imported case of laboratory-confirmed 2019-novel coronavirus (2019-nCoV) from Wuhan, Hubei Province, China. The case-patient was a male, between the age of 30-39 years, living in Japan who travelled to Wuhan, China in late December and developed fever on 3 January 2020 while staying in Wuhan, although he stated he had not visited the Huanan Seafood Wholesale Market or any other live animal markets in Wuhan where the spread of the disease probably started.[1]

[1] The information was immediately published by the World Health Organization (WHO)

The government, having become aware of the first certified case in the territory, reacted somewhat slowly to the events that were very quickly leading the global health situation to collapse however. Considering that the consequences of the contagion were plausibly limited, the Japanese executive began only on February 13 to take the first official countermeasures to the health problem, making public the Basic Policies for Coronavirus Disease Control on February 25, more than a month after the certification of the first case.[2]

These policies, however, rather than containing concrete measures to counteract the infection, were nothing more than simple hygiene instructions, useful to try to contain potential contagion (including the often repeated suggestions to: ensure proper hand washing and covering the mouth when coughing or sneezing).[3] No drastic provisions seemed necessary to avoid the uncontrolled expansion of the health risk. In the meantime, however, although in Japan the case numbers continued to remain fairly limited, about 93 cases as of February 21 according to the World Health Organization (WHO),[4] in Europe the epidemic began to spread, requiring a firmer reaction from the governments of the countries that, more than any other, were suffering from the exponential growth in infections. Concerned about the exponential increase of infections in Western countries, the Japanese executive decided, at that point, to intervene by proposing an amendment to one of the main regulations concerning the containment of health epidemics: the New Influenza Special Measures Act.[5] This law, enacted in 2012, together with the disciplines regulated by two other sources, the Quarantine Act and Japan's Infectious Diseases Prevention Act,[6] establishes the main countermeasures that can be adopted on Japanese territory in order to protect public health. Clearly, however, the legislation, designed to cope with seasonal flu epidemics, offered only the possibility of applying restraining measures that could not significantly affect the personal freedom of citizens, making it impossible to even think about promoting a national lockdown. In view of this, the only way forward for the government was to amend the current law in such a way as to provide the possi-

on the 17th of January looking to prepare Japanese population to firmly respond to the health crisis that could emerge see the World Health Organization report at *www.who.int*.

[2] See A. EJIMA, *Japan's Soft State of Emergency: Social Pressure Instead of Legal Penalty*, in *verfassungsblog on matter constitutional*, 2020.

[3] Art. 4 p. 1 of the Basic Policies for Coronavirus Disease Control enacted on 25th of February, 2020: "Take general infection prevention measures such as hand washing and covering the mouth when coughing".

[4] Coronavirus disease 2019 (Covid-19) Situation Report – 32.

[5] NISMA, Act No. 31 of May 2012.

[6] Act No. 201 of June 6, 1951 and Law No. 114 October 2, 1998.

bility to declare a state of emergency, in the meantime sending some directives to local governments asking them to discourage movement of people by ordering the closure of those places open to the public that could encourage the transmission of the virus, including: schools, theatres and sports facilities.

The proposal, however, was immediately opposed by the Constitutional Democratic Party of Japan, which demanded, before approving the government's amendments, the inclusion of an additional clause requiring the government to report to the Diet when it wanted to issue an emergency declaration.[7] Furthermore, some of these opposition parliamentarians declared it was impossible to vote in favour of the executive's request, considering it constitutionally more appropriate to assign the task of deciding whether or not to declare a state of emergency to the Diet.

Basically, the opposition parties did not want to leave in the hands of the executive significantly more discretionary power than that provided for by the Constitution. The health threat posed by the spreading pandemic would, in all likelihood, have required the application of measures restricting the individual rights of citizens, measures that, therefore, would have been impossible for the government to enact.

In the light of these observations, the Diet finally granted the government the right to declare a state of emergency without the possibility of enacting any measures affecting personal freedom.

The state of emergency, however, was not declared immediately because the government, for the entire month of March, decided to wait and monitor the development and expansion of what was now recognised as a pandemic with dramatic implications. The first intervention, therefore, was to postpone the Tokyo 2020 Olympic Games to the following year.[8]

In the second instance, the government left it up to the individual prefectures to adopt the countermeasures deemed appropriate to counter the spread of the virus. Some decided to follow the example of the prefecture of Hokkaido which, on February 28, had already declared a regional state of emergency, strongly advising residents to remain in their homes and to go out only for business reasons or in case of serious need.[9] Other governors, however, pressed by the practical and political dilemma of having to make decisions that could dramatically affect the personal freedom of citizens, preferred to

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[7] See E. JOHNSTON, *What will Abe's amended law for a national emergency mean in practice?*, in *The Japan Times*, March 10, 2020.

[8] See the statement made during the conference call between the organising committee, the administration of the city of Tokyo and the IOC on March 24, 2020, www.olympic.org.

[9] E. JOHNSTON, *What will Abe's amended law*, cit.

issue less stringent directives, mainly aimed at containing gatherings in places open to the public. The difficulty of intervention by local governments remained, however, evident in relation to the rapid deterioration of the health situation, which placed territorial governments in front of choices that, in any case, could have led to significant consequences. Either choosing to adopt more or less restrictive countermeasures or deciding, instead, not to issue any normative indications, leaving space to the civic sense of the citizens, were positions that, if taken, would have provoked the ignition of vibrant protests. For this reason, the voice of local officials was increasingly insistent, asking for a clear and unequivocal intervention of the government in order to adopt, and make effectively applicable, countermeasures that could be considered valid and shared throughout the Japanese territory.

The government's reaction to the requests of local authorities did not take too long to arrive and on April 16, 2020, Japanese Prime Minister Shinzo Abe proclaimed a state of emergency for seven prefectures: Tokyo, Chiba, Kanagawa, Saitama, Osaka, Hyogo and Fukuoka. In announcing this, at a government press conference held the day before the emergency was to take effect, Abe said: "We are not at a stage where rapid nationwide spread is being observed, but some areas are under pressure, so we don't have the luxury of time", justifying the issuance of the measure in order to: "preventing an explosion in cases, saving people in serious conditions and protecting you and your loved ones depends on how we change our behaviour".[10] Once again, however, the proclamation of a state of emergency was not followed at all by the intention of activating a population lockdown procedure. In fact, the executive measure simply aimed at reinforcing the countermeasures already adopted by the individual prefectures. With the exception of the decision not to reopen schools at the end of the spring holidays, the Japanese government chose only to advise its citizens of the self-protection measures necessary to contain the spread of the contagion. The administration limited itself to advising people to avoid going out of home if not for business reasons or necessity, expressing great confidence in the sense of civility and hygiene always shown by the population.[11] The measures thus adopted by the government should have remained in force in the seven prefectures mentioned for a month, but a few days after the proclamation of the "red zones" the continuous increase in

[10] See the report on the speech published *The Guardian* website *www.theguardian.com* and also the Press Conference Speech by the Prime Minister Regarding the Declaration of a State of Emergency in the archive of the Prime Minister of Japan and His Cabinet site japan.kantei.go.jp.

[11] Press Conference Speech by the Prime Minister Regarding the Declaration of a State of Emergency in the archive of the Prime Minister of Japan and His Cabinet site japan.kantei.go.jp.

infections and the fear of an uncontrolled spread of the disease caused the executive to extend the application of the measures to more territories than those previously indicated and, for this reason, in the end it was decided to proclaim a state of national emergency starting from April 17, 2020.[12]

Once again, however, government regulations did not include the imposition of rigid measures to contain and stop overall movement. The executive, as was the case with the announcement of April 7, chose to ask, rather than require, its citizens to maintain behaviour appropriate to the situation, simply inviting them not to leave except for the same reasons already recognised in the previous instructions. Only because of the pressure of the administrations of Tokyo and Osaka did the executive feel obliged to insert a clause stating that the residents of the seven prefectures identified in the provisions of April 7 were obliged not to go beyond the regional borders, except for reasons of absolute necessity, until May 6, 2020; but with the exception of this provision, the Japanese countermeasures to the pandemic only took the form of a series of warnings, admonitions and hygiene advice in order to avoid the uncontrolled expansion of the contagion.[13] The result of enacting such seemingly mild anti-infection measures was that, at the end of the national state of emergency, Japan found itself with far fewer global infections and daily infected persons than Western nations which had opted for an extended period of total lockdown. Compared to countries such as Italy, that in mid-May already counted hundreds of thousands of cases since the beginning of the health crisis, the infections in Japan stopped at 17,000 of which "only" about 850 were fatal.[14]

The question that the whole world asked itself was therefore whether all the rigid containment measures adopted by European countries were really necessary or, on the contrary, whether clear information from government bodies and correct adaptation to the suggested behaviours by the population was sufficient to reduce the risk of health and economic crisis caused by the growth of the pandemic.

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[12] The reference is to the Press Conference by the Prime Minister regarding the Novel Coronavirus held on April 17, 2020, *japan.kantei.go.jp*.

[13] See the Press Conference by the Prime Minister regarding the Novel Coronavirus, cit., *japan.kantei.go.jp*.

[14] See the article *Japan sidestepped COVID-19's worst, so what now?*, in *The Japan Times*, May 25, 2020 based on data provided by *covid19japan.com*. Really small numbers if you think of the 223,885 Italian cases, of which about 31,000 were fatal, recorded by the Ministry of Health in the daily public report on the portal www.salute.gov.it.

2. *The collapse of certainty, Japan's winter health crisis, September 2020 – January 2021*

Regardless of any favourable evaluation in reference to the measures taken by the Japanese government to cope with the epidemic curve during the spring of 2020, what remains is the fact that Japan, at the end of May, was one of the countries that had reacted best to the health crisis which had swept through many other nations. The reasons for this success are still to be ascertained: nevertheless the choice of the executive not to intervene with drastic measures of restriction of personal liberties has succeeded in avoiding the uncontrolled spread of the virus. Contrary to the health outcome, however, the economic crisis caused by the first wave of the pandemic had a clear impact on certain productive sectors, in particular services and the entertainment sector, which had been severely damaged by the limited measures taken to contain the contagion. In order to better support domestic companies and allow many activities to continue production in the safest way possible, the Japanese government adopted various measures to support remote working, while ensuring support measures for workers who, due to illness or other reasons, were unable to work.[15]

The success achieved in the battle against Covid-19, however, could neither erase nor mitigate the political crisis that, already latent in the last few years of government, had flared up again especially on the occasion of the attempt at comprehensive reform of the legislation relating to the emergency powers entrusted to the executive in March 2020. As previously explained, moreover, the Liberal administration had succeeded in only partially amending the New Influenza Law, obtaining the power to declare a state of national emergency without, however, having the possibility of issuing measures limiting the personal freedom of citizens. All this caused considerable tensions between the political parties, which had only partially subsided with the momentary victory over the virus. Nevertheless, the climate of instability on the Japanese political scene was further aggravated by the resignation of Prime Minister Shinzo Abe on August 28, 2020.

Abe's retirement from the scene, officially for reasons of treating a chronic illness that had long afflicted him, opened the door to the second leading figure in the Japanese liberal party: Yoshihide Suga. Already Cabinet secretary during the last Abe government, Suga, accepting the burden of leading Japan

[15] For an in-depth discussion of the Japanese government's labour law measures at the time of Covid, see Q. ZHONG, *COVID-19 and Labour Law: Japan*, in *Italian Labour Law e-Journal*, special issue 1, Vol. 13, 2020.

until the general elections scheduled for 2021, immediately reminded us that the top priority of the executive was to respond to the critical issues caused by the pandemic that, although apparently calmed in comparison to the frightening spring wave, could not yet be said to be completely resolved.[16]

The proactive impetus due both to the political news and, at least temporarily, to the progressive reduction of daily infection rates marked a partial economic and social recovery that manifested itself, after an evident decrease experienced during the first two quarters of the year, in a notable economic recovery testified to instead by the data relative to the third quarter of 2020.[17] In light of the flattering growth results recorded in the last quarter, at the beginning of December the Suga government decided to intervene by introducing a total of $384bn of stimulus for the Japanese economy. In the financial package approved by the executive, the majority of the funds were used to extend subsidy programs aimed at promoting domestic travel and spurring consumption in order to overcome the economic crisis that had literally sunk consumption in the first half of the year.[18] Unfortunately, the climate of positivity that had marked the beginning of autumn was soon replaced by the concern of the recurrence of the virus that, with the second wave, was already affecting Western countries. This time, however, the wait-and-see tactic that had brought luck to Japanese policy during the spring did not prove to be as effective. Infections during the course of December grew exponentially, especially in large cities, reaching 7887 new cases recorded in Japan on Thursday, January 7, 2021 alone (when the total number of cases in the months preceding the end of May 2020 was only 14,000).[19]

In consideration of the alarming indications coming, above all, from the most populous cities and areas of the territory and in agreement with the local administrations, on January 7, 2021, the Prime Minister Suga proclaimed, for the second time after the April event, a state of emergency for the four prefectures of Tokyo, Chiba, Saitama, and Kanagawa. Once again, however, the government's choice was to adopt countermeasures that relied primarily on the civic sense of the citizens, renouncing the imposition of measures particu-

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[16] See the Press Conference by Prime Minister Suga, September 16, 2020, japan.kantei.go.jp.

[17] After the dramatic spring crisis, the Japanese economy grew by around 22.9% in the third quarter of 2020, a result that the country had not achieved since the pre-crisis years of 2008. On this point, reference should be made to the data offered by K. KANEKO, *Japan's economy needs years to return to pre-pandemic levels: Poll*, December 15, 2020, www.thejakartapost.com.

[18] See K. KANEKO, *Japan's economy needs years*, cit.

[19] See the data given on the official website of the Japanese Ministry of Health updated daily: at the beginning of February 2021 the total number of recorded cases almost touched the massive figure of 400,000 infections, www.mhlw.go.jp.

larly limiting personal freedom. The January declaration, in fact, took up almost in their entirety the recommendations that Shinzo Abe's administration had forwarded to citizens during the first pandemic wave: minimal contact with strangers, attention to personal hygiene, avoiding going out after 8 p.m., except in cases of extreme necessity. In addition to these behavioural suggestions, the government reiterated, at the time of issuance of the measure, the extension of all financial aid measures already previously approved.[20] Moreover, contrary to what happened during the first spring wave, the very few infections recorded at public schools and universities nationwide convinced the government to keep schools and training institutes open, simply requiring them to enhance measures in order to foster an adequate integration between in-person teaching and remote learning.[21]

Furthermore, in order to make the measures taken to counteract the spread of the pandemic as effective as possible, the Japanese government had already decided, from December 26, 2020, until the end of January 2021, to prohibit foreigners from entering the country, especially those coming from Europe and the USA. This measure followed what had already been mentioned by the Japanese Minister of Foreign Affairs, Motegi Toshimitsu, who the previous day had already announced a ban on the entry of people from the countries currently most affected by the upsurge infections.[22]

All the measures adopted were supposed to last until the beginning of February but, in light of the continuing situation of contagiousness due to the embryonic phase of the vaccination campaign still being set up by government agencies. The Japanese government opted to extend the containment measures until March 7, 2021 in the areas most affected by the pandemic (Tokyo, Kanagawa, Chiba, Saitama, Tochigi, Aichi, Gifu, Osaka, Kyoto, Hyogo and Fukuoka). With reference to the ban on entry into the country for foreigners, however, the Ministry of Foreign Affairs, with a note published on its website on February 5, 2021, announced that it had reopened the borders to foreign travellers, while maintaining, for people coming from the 152 most affected countries, the obligation to observe a period of quarantine of 14 days as soon as they set foot on Japanese soil.[23] The number of infections, in any case, remains high, on the order of a thousand a day in the city of Tokyo alone; the

[20] See Press Conference by Prime Minister Suga, January 7, 2021, japan.kantei.go.jp.

[21] Press Conference by Prime Minister Suga, cit., japan.kantei.go.jp.

[22] See Press Conference by Foreign Minister Motegi Toshimitsu held on December 25, 2020.

[23] All references are to the Ministry of Foreign Affairs of Japan, Border enforcement measures to prevent the spread of novel coronavirus (Covid-19), enacted on February 5, 2021, www.mofa.go.jp.

measures set out by the government, unlike what happened in the first wave in April 2020, seem not to have had the same effects as previously. The Japanese model made up of few and circumscribed restrictions and reliance on civic sense seems no longer able to demonstrate the same effectiveness which it had surprisingly achieved during the spring. While we wait to see what happens next and, hopefully, to see the end of this wave of the pandemic, there remain two major questions that emerge from the Japanese government's efforts to contain infections. What determined the success of the limited measures taken in April, and what are the reasons that have convinced the Tokyo executive not to order a general lockdown as was done in Western countries?

3. *Some reflections regarding the policy and legal actions taken by the Japanese government in combating Covid-19*

The Japanese government's achievements in combating Covid-19 in the spring of 2020 were not enough to protect the country from the exponential increase in infections that occurred during the second wave. The non-restrictive measures that, at first, seemed sufficient to contain the proliferation of the virus ultimately proved inadequate to keep the number of infections below an acceptable threshold. As a consequence, criticism of the overly light nature of the countermeasures adopted, which had already arisen in April 2020 and had been quelled by the regression of the pandemic in the summer, has resurfaced in the last two months, calling for more decisive intervention by the Tokyo executive.

Delving briefly into the analysis of the Japanese constitutional tradition regarding emergency powers in the hands of the executive, the Meiji-era Constitution did foresee certain circumstances in which the emperor, or alternatively the government, was granted the power to enact emergency measures to suspend constitutional rights, in order to deal with situations of urgent necessity, mainly in the areas of martial law or financial distress (Art. 8,14 and 70 of the Meiji Constitution of 1889).[24] On the contrary, the new constitutional text, which came into force in 1947, does not contain any clause which would indicate the attribution of such power either to the government or to the parliamentary Diet. The doctrinal debate, therefore, has shifted to the possibility of interpreting some fundamental principles at the basis of the constitutional law as indirect evidence of the existence of an emergency power not written in the

[24] See, on this point, A. EJIMA, *Japan's Soft State of Emergency*, cit.

text. In light of the dictate of Article 41 of the Constitution: "The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State",[25] the identification of the Diet as the only organ of the State competent in legislative matters means, according to some, recognising the parliamentary power to enact emergency measures useful to combat situations of serious contingency, even providing for the temporary suspension of some constitutional rights.[26]

To justify this orientation, some Japanese constitutionalists, indeed, say that reading the cited Article 41 in conjunction with the discipline provided by Article 13 of the constitutional text, which identifies the "public welfare" as one of the fundamental elements that must guide the institutional action of government and legislature, leads to the attribution of a clear competence of the institutions, in the field of measures restricting personal freedom, in order to safeguard public interests considered pre-eminent over individual rights.[27] The existence of an indirect emergency power assigned to the legislator would be motivated by the will of the constituents not to include specific clauses such as those present in the text of 1889. The reasons that led to the removal of the explicit recognition of these clauses were due to the memory of authoritarian use of these clauses by the military executive during the 1930s, when emergency measures were mainly used to eliminate political dissent which had initially opposed the rise to power of the military hierarchs.

The configuration of a special power, at the head of a political institution, which derogated from the principle of inviolability of constitutional fundamental rights had remained a matter of political debate for decades; the discussion, in fact, in addition to the legitimacy of such a power, has often focused on the opportunity for reform of the constitutional text that would introduce the explicit recognition of the possibility to adopt emergency measures. According to progressive political parties, the measures issued on the occasion of the Fukushima nuclear disaster in 2011 represent a clear example of the adoption of measures limiting personal freedom that fully respect the balance between general interests and individual rights mentioned above. On that occasion, the Japanese government, in collaboration with the local authorities, following the discipline contained in the Basic Act on Disaster Management and the Act on Special Measures Concerning Nuclear Emergency

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[25] Art. 41 of the Constitution of Japan, March 3, 1947.

[26] See L. REPETA, *The coronavirus and Japan's Constitution, Article 41 provides the government with sufficient power to take aggressive action*, in *The Japan Times*, April 14, 2020.

[27] The reference is to the considerations offered by Professor Hajime Yamamoto of Keio University as reported in L. REPETA, *The coronavirus and Japan's Constitution, Article 41*, cit.

Preparedness, made it compulsory to evacuate the population living in the vicinity of the plant for fear of a dangerous explosion of the nuclear complex.[28] In the case of Covid-19, however, two notable differences emerge: firstly, it is not clear whether the provisions of the Basic Act on Disaster Management are in fact also applicable to pandemics and health crises, and secondly, the reaction following the Fukushima event was also fundamentally due to the shock of the moment that the accident had caused, something that had not happened with the slow start of the pandemic's spread.

In view of the apparent impracticability of the path followed on the occasion of the nuclear meltdown, the Abe government chose to try, as illustrated above, to reform the discipline of the New Influenza Law, adding the possibility of attributing powers to issue emergency measures in cases of a truly serious health crisis, but the opposition parties' opposition to the recognition of this competence had made these attempts futile.

For this reason, presumably, the Japanese government decided to move cautiously against any accusation of political forcing of the contingent situation. The issuing of countermeasures particularly restrictive of constitutional liberties, in fact, even if possibly justified on the basis of the same reasons used in the case of Fukushima, would certainly have raised a political fuss that could end up delegitimising, in the eyes of the population, the work of the executive in office. Perhaps, therefore, rather than a rigid formalistic interpretation of the law, the considerable Japanese reluctance to issue a total lockdown must be attributed to a decision of political opportunity. In light of these considerations, the decision to proclaim a state of emergency, first local and then national, without enacting any harsh measures to counteract the movement of people seemed to be the only viable option. It was decided, therefore, to place great trust in the civic sense of the citizenship relying on the considerable sensitivity of the Japanese people in matters of health and public and private hygiene. The same concept of self-protection, which takes the name of *Jishuku* in the local tradition, was one of the elements that ultimately proved fundamental in allowing the country to overcome the first wave with less damage than other nations.[29]

Some scholars have, however, highlighted a second element that has contributed significantly to Japan's success, at least initially, in combating Covid-19: collaboration. In contrast to other experiences, in which pandemic containment measures were expressed in the form of direct impositions on citi-

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[28] See Basic Act on Disaster Management Act No. 223 of November 15, 1961 and Act on Special Measures Concerning Nuclear Emergency Preparedness, Act No. 156 of December 17, 1999.

[29] The reference to *Jishuku* is also repeated by L. REPETA, *The coronavirus and Japan's Constitution, Article 41*, cit.

zens from above, the measures adopted by the Japanese government were characterised by the authority's request for collaboration from its citizens; Japan asked the people to help it in the fight against the virus. In this way, that kind of *power with* which, as opposed to *power over*, loosens the conception of power of domination of the authorities in order to favour the sense of cooperation that probably allows the problems that a pandemic wave presents to be faced better.[30]

The results are clear for all to see: Japan emerged from the first wave of contagion, at the end of May, in a far less dramatic condition than many Western countries. Nevertheless, the progressive and exponential increase in the number of infected people that characterised the long autumn of 2020 did not spare the imperial territory.

At the beginning of 2021, it is really complex to try to identify the causes that have brought to the poor results in terms of pandemic containment of Japanese measures during the second wave. In all likelihood, political instability and the gradual disillusionment of the population caused by not seeing any glimmer of hope of an exit from the health crisis had a role. Also the desire to restart the economy for fear of avoiding an economic recession which was inching dangerously ever closer can have contributed to the inadequacy of Japanese countermeasures in recent months. The rapid complication of the contagion situation finally forced the government to reckon with the lack of usefulness of the measures adopted up to that point. Health requirements, combined with economic difficulties, undermined the certainty of success in the fight against the virus, which until then seemed to be a foregone conclusion.

The measures of containment and the restrictions to the entry of foreigners into Japanese territory issued by the Ministry of Foreign Affairs can also be discussed. The quarantine of people coming from abroad alone did not prove indeed sufficient to stem the exponential growth of new patients who were registered every day by the administrations of major Japanese cities. As was the case in April, therefore, the executive decided to declare a state of emergency in the worst hit areas without providing for any concretely relevant sanctions for violators of the evening closing obligations provided for by the measure. For this reason, the remedies chosen by the government were inadequate from the outset: some shopkeepers continued to work after hours, thus

[30] The reference is to the contrast between the power of domination (*power over*), already identified by Max Weber, and the collaboration with the power (*power with*) which is the basis of the concept of empowerment on which movements and social sciences trends have insisted since the mid-twentieth century. See P. DI GIOVANNI, *COVID-19: vogliamo parlare del Giappone?. Risultati straordinari senza misure obbligatorie*, Really New Minds, Teramo, 2020, p. 33.

jeopardising the effectiveness of the preventive measures. Confidence in the civic sense of citizens has proved insufficient to sustain the entire operation of safeguarding national safety and, for this reason, at the beginning of February, the government reformed the Infectious Disease Law by adding the possibility of imposing fines of between 300,000 and 500,000 yen on infected persons who refuse hospitalisation or fail to notify the public authorities of their movements.[31]

There has also been renewed discussion of the advisability of providing for the application of criminal sanctions to persons who, contrary to current regulations, decide to keep their businesses open beyond the mandatory closing time. On this point, it is interesting to note that, in the general favour of the administrators of the 47 prefectures for the introduction of such measures, some associations, including, in particular, the Japan Federation of Bar Associations, intervened and contested the proposal. The motivation that led several trade associations to intervene was the protection of the fundamental rights of privacy and freedom of business activity. Once again, the battle was fought on the field of constitutional provisions because, according to these organisations, the freedoms recognised by the constitutional text as fundamental principles of the order would not allow the government to issue acts contrary to their complete free exercise, even if applied in the perspective of the protection of a higher good as provided by the dictate of Article 13.[32]

In conclusion, Japan's approach to combating Covid-19 demonstrates all the difficulties a contemporary government faces in hoping to best manage a situation that, in scope and speed of propagation, is incomparable to any health crisis that has occurred in the last fifty years. What has seemed to be a sort of "navigation by sight by the Tokyo executive", moreover, cannot be superficially dismissed as inadequate without taking into consideration the political and legal problems that have affected the government's actions; not being able, nor wanting, to assign any value judgment to the measures that have affected and involved the Japanese from month to month, therefore, it remains for us to hope that the considerable trust placed by the administration in the civic sense of the citizens will be rewarded and allow the country to emerge from the pandemic stronger and more cohesive than ever.

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[31] See E. JOHNSTON, *Japan's new virus law: Fines for noncompliance and support for hard-hit firms*, in *The Japan Times*, February 4, 2021.

[32] See E. JOHNSTON, *Japan's new virus law: Fines for noncompliance*, cit.

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