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The law passed in Italy to manage the Covid-19 pandemic: implications for the division of competences between the State and the Regions**

ABSTRACT (EN): The Italian Constitution does not provide for extraordinary rules for the management of emergencies. In the case of the COVID 19 pandemic, a new organizational model was designed to enable rapid interventions in an ever-changing scenario envisaged to remain in force only until the end of the health emergency.

The conclusion of the “state of emergency” (ended March 31, 2022) allows for a reflection on the compatibility of state and regional measures for managing the containment of the pandemic with the rules of the Constitution on the division of powers between the State and the Regions, and on the possible effects that this may have on the future of regionalism in Italy.

ABSTRACT (IT): La Costituzione italiana non prevede regole straordinarie per la gestione delle emergenze.

Per la gestione della pandemia da COVID 19 si è fatto ricorso a un modello organizzativo nuovo, valido sino alla persistenza delle esigenze collegate all'emergenza sanitaria, orientato a consentire interventi rapidi in uno scenario mutevole.

La conclusione dello “stato di emergenza” (finito il 31 marzo 2022) consente una riflessione sulla compatibilità delle misure per il contenimento della pandemia con le regole della Costituzione in materia di riparto delle competenze tra lo Stato e le Regioni, e sui possibili effetti per il futuro del regionalismo in Italia.

SUMMARY: 1. Introduction: brief remarks on the organizational model adopted to manage the COVID-19 emergency. – 2. Rules for managing the emergency. – 3. Division of competences between the State and the Regions for emergency management. – 4. Consistency of the transient model with the principles of the Constitution. – 5. Concluding remarks.

1. Introduction: brief remarks on the organizational model adopted to manage the COVID-19 emergency

In the Italian case, a new organizational model was adopted to manage the COVID 19 pandemic, different from the ordinary one that was to remain in force for as long as required by the health emergency.¹

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** Peer-reviewed article.

¹ State and regional measures for emergency management can be found in the database *Osservatorio Covid-19*, available on the website www.issirfa.cnr.it.

In short, with the aim of enabling rapid interventions in a changing scenario, decision-making powers were centralized at State level also for those matters over which legislative competence lies with the Regions.

The action model outlined by the legislation for the management of the emergency envisages on the one hand legislative acts for defining the principles of the measures to contain the pandemic, and on the other, executive acts for modulating their intensity and territorial distribution.

Legislative competence of a general nature was entrusted exclusively to the State; the Regions were only allowed interventions to implement the temporary State provisions through administrative acts of a general nature.

The laws passed to manage the emergency raised several problems of constitutional standing among which the constitutional legitimacy of administrative acts with a substantially regulatory content, the compression of constitutionally guaranteed rights and the restriction of regional autonomy.

It is not possible here to address all the issues related to the consistency of the rules to contain the spread of the virus with the system of the sources of law,² nor the issues related to the curtailment of a series of constitutionally protected rights.³

It is not even possible to analyse all the issues that have arisen regarding the restrictions on regional autonomy, and the consistency of the rules for managing the emergency with the principle of loyal collaboration.⁴

The conclusion of the “state of emergency”⁵ (ended March 31, 2022) allows for a reflection on the compatibility of state and regional measures for managing the containment of the pandemic with the rules of the Constitution on the division of powers between the State and the Regions, and on the possible effects that this may have on the future of regionalism in Italy.

2. Rules for managing the emergency

The Italian Constitution does not envisage special laws for the management of emergencies. However, it does provide dynamic tools that enable the legal system to urgently react to extraordinary cases of necessity (in particular, the decree law, which allows for extraordinary regulatory interventions by the Government).

In the case of the emergency following the COVID 19 pandemic, the Government used the instrument of the decree law in an unprecedented way to set up an extraordinary

² On the impact of emergency legislation on the system of sources of law, see M. LUCIANI, *Il sistema delle fonti del diritto dell'emergenza*, in *Rivista AIC*, 2/2020, and A. CARDONE, *Modello costituzionale e trasformazione del sistema delle fonti nelle crisi economica e pandemica. Emergenza e persistenza*, on *Osservatorio sulle fonti*, 2/2022.

³ On the impact of emergency legislation on several constitutionally protected rights, see A. LAMBERTI, *Emergenza sanitaria, Costituzione, soggetti deboli: vecchi e nuovi diritti alla prova della pandemia*, on *federalismi.it*, 6/2022.

⁴ On the impact of emergency legislation on the system of the division of competences between the State and the Regions, see A. D'ATENA, *L'impatto dell'emergenza sanitaria sul riparto delle competenze di Stato e Regioni*, on *Italian Papers on Federalism*, 1/2021.

⁵ The “state of emergency” was issued on 31 January 2020 by Council of Ministers.

organizational system alternative to the traditional system: in a nutshell, considering the impact of the interventions on constitutionally guaranteed rights and the need to ensure the interventions would be as homogeneous as possible across the national territory, it was decided to centralize power at State level.⁶

The decree law was therefore the instrument used to temporarily modify the division of legislative and administrative competences, and to introduce public prevention policies that have had a significant impact on constitutionally guaranteed rights.

The action model outlined by the Italian Government provides for a legal basis of reference consisting of legislative acts and administrative measures.⁷

The acts of a legislative nature are the decree laws which are envisaged by the Italian constitutional system precisely to react to extraordinary cases of necessity and urgency. The decree laws are then converted into law, as laid down in Article 77 of the Constitution; the acts of an executive nature are two: first of all the Decrees of the President of the Council of Ministers (known by the abbreviation "DPCM"), to which the decree laws issued over time specifically refer, and Regional Ordinances.

The decree laws were entrusted with the task of defining the general principles while the administrative measures had the task of modulating the intensity and territorial distribution of the measures to contain the pandemic.

The first act adopted by the Government, which provided the groundwork for the season of legislation designed to curtail the pandemic and support the economic and productive system, was the declaration of the state of emergency issued on 31 January 2020, subsequently extended several times, until 31 March 2022.⁸

This first act was followed by two Orders of the Minister of Health, adopted in pursuance of Article 32 of Law no. 833/1978, which governs the division of responsibilities between the State and the Regions in health matters,⁹ which introduced the first extraordinary measures.¹⁰

⁶ In many cases, the Government's interventions also concerned matters that were at least partially of regional legislative competence (in particular health protection and civil protection). The "ordinary" tools and procedures, whereby decision-making powers are attributed to the level of government most appropriate to reach a given objective, were not used (such as the substitute powers provided for by Article 120 of the Constitution, the principle of subsidiarity, the so-called "transversal" matters or the "*call to intervene in subsidiarity*"). The solution that was adopted was that of a transitional organization system that would be in place for the entire duration of the emergency; this solution involved a compression of regional autonomy and changes in the links between the different levels of government.

⁷ The time horizon of the extraordinary measures is linked to the state of emergency.

⁸ The state of emergency was first declared by the Council of Ministers' Resolution of 31 January 2020 until 31 July 2020; it was subsequently extended several times by the following measures: Council of Ministers' Resolution of 29 July 2020 (until 15 October 2020); Council of Ministers' Resolution of 7 October 2020 (until 31 January 2021); Decree-Law of 14 January 2021 n. 2 (until 30 April 2021); Decree-Law of 22 April 2021 n. 52 (until 31 July 2021); Decree-Law of 23 July 2021 n. 105 (until 31 January 2022); Decree-Law of 24 December 2021 n. 221 (until 31 March 2022). The "state of emergency" ended on 31 March 2022; with Decree-Law of 24 March 2022, n. 24, was established for a gradual restart of all activities in the ordinary way.

⁹ The national authorities competent to deal with health emergencies are the Mayor, the President of the Region and the Minister of Health (art. 32, l. 833/1978). The criteria for the allocation of competence are unclear; in the literature it has been observed that a criterion can be identified in Article 117 of Legislative Decree 112/1998,

Subsequently, was adopted Decree Law no. 6 of 23 February 2020 which introduced a new action model structured on a legislative basis for identifying the measures to curtail the contagion and on a series of Decrees of the President of the Council of Ministers (DPCM) for the application of the measures across the national territory.

With this provision, a new organizational model was added to the ordinary legislation on "health protection" and "civil protection" which centralized decision-making powers in the hands of the Government, thus setting aside the ordinary criteria for the division of competences between the State and the Regions and the containing role of Parliament whose oversight and control action was deferred to the time when the emergency decrees would be converted into laws.

The measures outlined by Decree Law no. 6/2020 have been amended several times, in particular by Decree Law No. 19/2020, which approved changes to the organisational system for emergency management.

Overall, taking into account also the measures to support the economy, in the year 2020 27 decree-laws were passed, 14 of which were later expressly repealed, 18 in the year 2021, 6 of which were expressly repealed, and 5 in the year 2022, 1 of which was repealed.¹¹

In a nutshell, the decree laws have been entrusted with three tasks:

- determine the content, limits and procedures for adopting restrictive measures on individual and collective activities, and centralizing such powers in the hands of the national authorities;
- define the methods, forms and contents of the protection and "relief" measures drawn up to address the economic and social consequences of the health epidemic;
- set a date declaring the end of the emergency, and therefore the end of the restrictive measures connected to it.

The implementation of the measures provided for in the decree-laws was mostly entrusted to numerous decrees of the President of the Council of Ministers (DPCM);¹² moreover were

according to which emergencies of local importance must be managed by orders of the Mayor, those of regional importance by orders of the President of the Region, those of interregional or state importance by orders of the Minister of Health. In this sense see V. NERI, *Diritto amministrativo dell'emergenza: tra unità e indivisibilità della Repubblica e autonomia regionale e locale. Le ordinanze contingibili e urgenti*, in *Urbanistica e appalti*, 2020, n. 3, 346-352 (the reference is taken from I. RAIOLA, *Il regionalismo cooperativo alla prova dell'emergenza sanitaria*, Council of State, Study Office, 2020, p. 9, footnote 20).

¹⁰ The first measure of the Minister of Health of 21 February 2020, entitled « Additional prophylactic measures against the spread of the infectious disease COVID-19», published in Official Journal of the Italian Republic n. 44 of 22 February 2020, ordered national authorities to apply the quarantine measure with active surveillance for fourteen days to individuals who had had close contact with confirmed cases of infectious disease by COVID-19, and the measure of fiduciary home stay for all those who had entered Italy after staying in the areas of China affected by the epidemic. The second measure of the Minister of Health of 21 February 2020, published in the same number of Official Journal of the Italian Republic, adopted in agreement with the President of the Lombardy Region, established the "red zone" in some municipalities in the region where clusters of COVID-19 infection had been recorded. For further information on the contents of the first measures to contain the contagion, see M. CAVINO, *Covid-19. Una prima lettura dei provvedimenti adottati dal Governo*, on *federalismi.it*, 1/2020.

¹¹ The data are extracted from the website of the Presidency of the Council of Ministers, Section "Coronavirus, la normativa vigente".

adopted ordinances by the Minister of Health, and numerous ordinances by regional and local government.¹³

The emergency management measures resulted in frequent overlaps between state and regional measures, a high degree of complexity of the regulatory framework and, at least in the first phase, application uncertainties that made it necessary to provide support, including institutional support, for widespread knowledge of the rules in force at the various critical moments of the pandemic.¹⁴

3. Division of competences between the State and the Regions for emergency management

The rules for the division of competences outlined by the emergency legislation have gradually settled down.

Decree Law no. 6/2020 enabled the Presidents of the Regions to adopt restrictive measures to contain the infection in the presence of certain conditions.¹⁵

In this first phase, some Regions adopted ordinances that overlapped the State measures, thus creating the first uncertainties.¹⁶

The ensuing Decree Law no. 19/2020, which defined clearer boundaries between State and Regional competences, rectified the situation.

The Regions, within the areas of their competence, were allowed to introduce provisional measures, where such measures are more restrictive than those envisaged at State level, only in the presence of particular contingent circumstances exacerbating the health risk, and in any case measures that would not affect the manufacturing activities and the activities of strategic importance for the national economy.

¹² In the year 2020 were issued 22 DPCM, 4 DPCM in the year 2021 and 2 DPCM in the year 2022; also in this case, the data are extracted from the website of the Presidency of the Council of Ministers, Section “Coronavirus, la normativa vigente”. It is important to emphasize that the Draghi government did not resort to the instrument of the DPCM for the application of measures to contain contagion and aid the economy, but to decree-laws.

¹³ Emergency management measures can be found on the database on-line *Osservatorio Covid-19*, on website www.issirfa.cnr.it.

¹⁴ The extraordinary measures have been collected in databases published on institutional websites, together with F.A.Q. to allow for correct interpretation; the complexity of the regulatory framework has prompted several attempts to reconcile measures and simplify information. For example, see database on-line *Osservatorio Covid-19*, on website www.issirfa.cnr.it, in which some reading notes of the emergency management measures were published, with the aim of helping to identify the rules in force. These notes were then taken up and also published on the CNR's institutional portal and on other websites.

¹⁵ On closer examination, it even allowed for an expansion of the regional sphere of action: under certain conditions, regions were also allowed to adopt restrictive measures to contain contagion that affected constitutionally guaranteed rights and freedom. On the prerequisites set out in the article 3 of d.l. 6/2020 for the issuing of ordinances by the Presidents of the Regions, see S. STAIANO, *Né modello, né sistema. La produzione del diritto al cospetto della pandemia*, on *Rivista AIC*, 2, 2020, p.359.

¹⁶ For an overview of the first cases of overlap between State and regional measures, see E. LONGO, *Episodi e momenti del conflitto Stato-Regioni nella gestione dell'epidemia da Covid-19*, on *Osservatorio sulle fonti*, 2/2020, 388-389, and G. BOGGERO, *Le “more” dell'adozione dei DPCM sono “ghiotte” per le Regioni. Prime osservazioni sull'intreccio di poteri normativi tra Stato e Regioni in tema di Covid-19*, on *dirittiregionali.it*, 1/2020.

This scheme opened up a second phase in which the Regions were allowed to issue only more restrictive measures, which had to be communicated to the central body in order to allow for the territorial coordination of the policies for the containment of the contagion.

Following the evolution of events, the system of division of competences outlined by the emergency legislation has been further modified with the addition of two new elements: the possibility for the Regions to also adopt expansive measures with respect to those provided for by state measures, and the system of regional colours reflecting the severity of the epidemiological situation in the Regions matched with the different degrees of restrictive measures to contain the contagion.¹⁷

A third phase then began valid until the end of “state of emergency” - in which the Regions were allowed to adopt restrictive or expansionary measures with respect to those indicated at central level (in the cases, and following the criteria, set forth by the State measures), with the important corrective condition requiring agreement with the Minister of Health who ensures the coordination that is necessary to harmonize the actions of the various levels of government.¹⁸

Parliament approved the model delineated by the Government by converting into law the decrees adopted during the emergency.

Thus, gradually, the legislation for the management of the emergency made its way into the system of sources, outlining a transitional organizational and procedural model that is characterized – as a matter of fact - by a compression of regional autonomy.

In practice, indeed, decision-making power was entrusted to the State, leaving the Regions with only the role of implementing state measures with differentiated margins of autonomy in the different phases of pandemic management.

The State has exercised legislative powers in an exclusive manner in various matters normally entrusted to concurrent competence (for instance “health protection”, “civil protection” and “coordination of public finance”, all included in the list referred to in paragraph 3 of Article 117 of the Constitution).

While, on the one hand, the laws issued to manage the emergency enabled the Government to promptly adapt the measures to contain the pandemic to the rapidly evolving

¹⁷ On the spaces of autonomy allowed to the regions to seek a change in the colour assigned according to the criteria laid down in Article 1, par. septies, of d.l. 33/2020, after its amendment, see T. FROSINI, *Le Regioni colorate e differenziate: come combattere la pandemia nei territori?*, on *Diritti regionali*, 2/2021, 281 ss., and P. COLASANTE, *La zonizzazione “cromatica” delle Regioni italiane a seconda del livello di rischio di contagio da COVID-19: quale ruolo per i Presidenti di Regione nella “anticipazione” dei provvedimenti di competenza del Ministro della Salute?*, on *Diritto e salute*, 3/2020.

¹⁸ The modifications to the system of distribution of competences between the State and the Regions were introduced by law decree 125/2020. Despite corrections to the rules for the application of extraordinary measures to contain the contagion, there were still cases of conflict and overlapping between state and regional measures; see the cases reported by G. LAVAGNA, *Il Covid e le Regioni. Uso e “abuso” delle ordinanze extra ordinem dei Presidenti regionali*, on *federalismi.it*, n. 17/2021, *passim*. However, it must be emphasized that there has been also virtuous episodes, as in the case of the ordinances issued by the Friuli Venezia Giulia, Veneto and Emilia-Romagna regions to deal with the second wave of contagion taking coordinated and uniform measures in a restrictive sense with respect to what was envisaged at state level; see, again, G. LAVAGNA, *ivi*, pagg. 114-115.

events, on the other hand, it entailed the suspension of and derogation from many constitutional principles, rights and guarantees.¹⁹

Furthermore, as a matter of fact, it introduced a regulatory chain that does not perfectly comply with the general rules of the sources of law (consider, in particular, the content of the Decrees of the President of the Council of Ministers – DPCM).²⁰

4. Consistency of the transient model with the principles of the Constitution

However, despite several doubts raised by the scientific community and by the political forces of the opposition, the emergency legislation passed the constitutionality test.

With reference to the more general profiles, the Constitutional Court rejected various complaints claiming unconstitutionality, some of which concerned the alleged downsizing of the role of Parliament²¹ and restriction of personal freedom.²²

Also the measures about the system of the division of competences between the State and the Regions which, for the reasons mentioned above, determined a compression of regional autonomy not balanced by adequate forms of coordination, were considered to be compatible with the rules of the Constitution.

The issue was addressed in Ruling no. 37/2021 which traced the boundaries of the areas of competence of the State and the Regions in the model that constituted, so to speak, a derogation from the "ordinary" model.²³

According to the Court, in a nutshell, the state of emergency resulting from the Covid 19 pandemic objectively justifies the temporary exercise of regional functions by the State.

To reach this conclusion, which appears consistent with the context in which the measures to react to the pandemic were decided, the Court did not refer to the constitutional instruments that allow to depart from the division of competences ("substitute" power of the State, subsidiarity, call to intervene in subsidiarity, subjects that cut across various fields).

It unexpectedly solved the problem by identifying "international prophylaxis" as an autonomous subject area to which it attributed the title of 'autonomous competence' thus providing the legal basis for attributing legislative competence to the State legislator.

¹⁹ For a detailed reconstruction of the impact of emergency legislation on the constitutional order, see a A. LAMBERTI, *Emergenza sanitaria, Costituzione, soggetti deboli: vecchi e nuovi diritti alla prova della pandemia*, on *federalismi.it*, 6/2022.

²⁰ For a more detailed analysis of the impact of emergency legislation on the system of sources of law, see at least, M. LUCIANI, *Il sistema delle fonti del diritto dell'emergenza*, on *Rivista AIC*, 2/2020, and A. CARDONE, *Modello costituzionale e trasformazione del sistema delle fonti nelle crisi economica e pandemica. Emergenza e persistenza*, on *Osservatorio sulle fonti*, 2/2022.

²¹ For example, see Constitutional Court Orders nn. 66 e 67 of 2021, and the Judgment no. 198 of 2021.

²² See Constitutional Court Judgment no. 127 of 2022.

²³ For an analysis of the Constitutional Court judgment no. 37/2021 see A D'ATENA, cit., D. MORANA, *Ma è davvero tutta profilassi internazionale? Brevi note sul contrasto all'emergenza pandemica tra Stato e Regioni, a margine della sent. n. 37/2021*, on *Forum di Quaderni costituzionali*, 2, 2021, and S. MANGIAMELI, *L'emergenza non è una materia di legislazione*, on *Giurisprudenza costituzionale*, 2/2021.

After stating that the laws issued in an emergency situation come under the subject matter of "international prophylaxis", which is entrusted to the exclusive legislative competence of the State, the Court added that the matter includes all measures aimed at combating the pandemic, or at preventing it, as well as the power to allocate the related administrative function.

The reason for this broad definition of the subject matter was due to the need to ensure an all-encompassing discipline, "of national origin", suited to preserving people's equality in exercising their fundamental right to health while at the same time protecting the interest of the community.

Based on these arguments, the Court concluded that the Regions are entrusted with the task of working with the State to contain and stop the spread of the Covid 19 infection, within the limits set by the emergency legislation of the State.

More precisely, the Court specified that *"the competence of the State to regulate every measure required to contain and eradicate the infection, as well as to allocate the related administrative function, is not so vast as to interfere with the exercise of regional powers where they do not interfere with what is determined by state law and by the actions taken in pursuance of state law"*.

Therefore, the Constitutional Court held that was safeguarded the essential core of regional autonomy, which can be identified in the possibility of making differentiated choices, taking into account the specificities of the territory of reference, but within a unitary context that does not allow interference with the rules established by the state lawmaker.

5. Concluding remarks

The setting of a time limit to the legislation produced to manage the emergency excludes the possibility of there being any direct effects on the division of competencies in the future.

Instead, the possible indirect effects should be considered, also in the light of the aforementioned Ruling no. 37/2021 of the Constitutional Court.

From a first point of view, there is the problem of the compression of regional autonomy for exceptional reasons involving the entire Country, that is not expressly envisaged in the Constitution.

But then the issue has now been brought up as to whether the division of competences adopted for managing the emergency should remain, namely that "health protection" and "civil protection" should come under the exclusive competence of the State.

These are complex matters that require specific in-depth analyses.

In general, the available data show that the Regions have not represented an obstacle to the containment policies of the contagion, but rather they have been a resource.

Their actions were mainly restricted within the limits allowed by the State legislator, who provided for differentiated interventions on the basis of the specificities of the territory and the different spread of the infection.

There is no denying that there were some overlaps between State and Regional measures, which certainly did not help, nor that there were moments of institutional tension; but overall, the system seems to have held up.



On the one hand, the Government has not exercised the power of State substitution, with the exception of one case referring, however, to the provision of a Municipality.

On the other hand, there have been no cases of regional appeal against the State measures (there is only one case, which however, refers to a conflict of competences between the Region and the Municipalities).

This means that on a political level, a dialectic has been maintained that has made it possible to offset the downsizing of the autonomy of the Regions.

Once the initial moments of objective uncertainty were overcome, a dialogue was sought and new forms consistent with the extraordinary situation were worked out (in particular, informal discussions in the so-called control room that was established between the national government and the regional executive representatives, in particular, the President of the Conference of Regions).²⁴

Loyal collaboration, that was implemented through channels other than the ordinary channels, has favoured respect for regional autonomy within the unitary framework of the Republic.

This is a model that could be usefully adopted also for implementing the National Recovery and Resilience Plan (PNRR), which represents the next big challenge for the country system.

Again, a centralized chain of command was outlined; an effective coordination between the State and the Regions, also making use of the forms of dialogue that have been tried out for the pandemic response, could to be strategic for achieving the spending and reform objectives set out in the National Recovery and Resilience Plan.

²⁴ Cooperation between stataal and regional government took place through informal discussions in the so-called steering committee that was set up between the national government and the regional executives represented by the President of the Conference of Regions. For an overview of the instruments used for the coordination of State and Regions, see *Il ruolo della Conferenza delle Regioni negli anni della pandemia e l'alleanza con il Governo per superare l'emergenza*, Dossier ed. by Secretary of Conference of Regions and Autonomous Provinces, September 2022. See also BALDI-PROFETI, *Le fatiche della collaborazione. Il rapporto stato-regioni in Italia ai tempi del Covid-19*, on *Rivista italiana di Politiche pubbliche*, 3/2020, 277-306.