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THE SEPARATION OF POWERS IN THE GLOBAL ARENA: PROMISES AND BETRAYALS

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Following in the footsteps of Ginsburg & Versteeg. The bound executive during the pandemic: Italy as a case study.

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An Introduction

These working papers were borne from the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (Istituto di ricerche sulla pubblica amministrazione - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration.

This paper serves as Introduction to the seminar on *The Separation of Powers in the Global Arena: Promises and Betrayals* that was held on December 16th, 2022 at the LUISS Guido Carli University in Rome.

The seminar's purpose has been to collect the contributions by international legal scholars to the study of the principle of the separation of powers and its transformations in a global context, and namely when adopted international and supranational institutions and challenged by global crises.

The seminar has gathered scholars with different legal backgrounds -history of institutions, international law, administrative law, environmental law- and with expertise at various levels, i.e. international, supranational and domestic.

The presentations discussed during seminar have resulted in seven papers, in addition to the present Introduction.

The principle of separation of powers, as theorized by Montesquieu, has been at the basis of modern democracies. With the evolution of democratic governance, however, it seems to have gained more a formal and normative value than a heuristic capacity as a principle capable of providing an interpretative key of the existing reality. Gradually that model, explicitly or implicitly adopted by democratic Constitutions, has suffered exceptions and deviations which the Covid-19 pandemic has even worsened.

In Western democracies the executive branch has often vested itself with legislating powers through decree-laws or equivalent. Parliaments have allowed this invasion, at the same time adding subsequent lengthy changes to these laws to meet local, sectorial, or corporate needs. In other instances, Parliaments have aimed at making the rules and applying them, through "self-executive" laws which are so detailed that they leave no room for any exercise of discretion by the administrations. The judicial branch has exercised regulatory powers in many sectors, expanding or shrinking principles or creating new rights and duties.

Exceptions and deviations are such as to make some scholars observe that the separation of powers no longer exists and has been replaced by different balances. Already in 1984 Lijphart argued, for example, that majoritarian democracies have been characterized by the concentration of powers on the executive, by the fusion of legislative and executive powers, and by the cabinet dominance over the legislative branch[1].

Although the literature on the separation of powers and on its crisis is very rich, the perspective from which this symposium intends to delve into the phenomenon is relatively novel as it aims to combine four elements.

First, the objective of the symposium is to analyse the phenomenon mainly through the lens of administrative law and from the point of view of public administrations. The articles deal with the principle of separation of powers and include the analysis of all the three branches and investigate the relationships among them. However, the focus of the symposium is mainly on exploring the *transformations in the exercise of administrative power* as a result of the intrusion by

[1] A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven / London: Yale University Press, 1984, *passim*.

the other branches into the administrative arena or, on the contrary, as a result of the appropriation by the executive branch of functions that are typically attributed to the other branches.

Second, the chosen perspective combines *different time planes*. The symposium looks, on one hand, at the origins of the principle of separation of powers, by identifying the "good promises" that through the principle were intended to be fulfilled. On the other hand, it should try to grasp the current trends, long-term o short-term, which militate in the direction of "betraying" the principle of separation of powers in its original meaning.

Third, in the analysis of "betrayals", the perspective will focus on the interaction between the principle of separation of powers and the direct and indirect *impact of globalization on this principle*. This interaction is examined under two respects: the first is that of the application of the principle by international and supranational organizations, established and operating to deal with global problems; the second is that of the impact that international and supranational bodies (and the regulation dictated by these bodies to address global problems) have had on the interpretation of the principle of separation of powers by the States. In this regard, without claiming to be exhaustive, three sectors have been chosen in which globalization, and the crises connected to it, have induced an alteration of the principle of separation of powers, determining a concentration of powers in the executive branch to the detriment of the legislative and the judiciary branch or, vice-versa, a subtraction of these powers from the executive branch by the judiciary. These sectors are democracy (and the democratic crisis, taking as case studies Poland and Hungary), health (and the consequences of the health crisis), and environment (and the consequences of the environmental crisis).

Finally, the perspective is mainly focused on the experience of American and European democracies.

More in detail, the first part on the promises and, thus, on the history of the principle of separation of powers includes two articles. *La constitution de l'Angleterre": Montesquieu and the reasons for separating the powers* by Pasquale Pasquino explores the historical evolution and interpretations of the separation of powers, from Montesquieu's influential work to contemporary political-constitutional systems. It examines Montesquieu's trinity of powers—legislative, executive, and judicial —and its role in shaping modern constitutionalism. The American

Constitution's system of checks and balances is analysed as a refinement of Montesquieu's doctrine. Challenges to this system, such as political party control and the growing power of executives, are discussed, along with the evolving role of constitutional courts. The article concludes by highlighting the need for a re-evaluation of the separation of powers in the 21st century, considering the dispersal of power among elected and non-elected entities in modern political systems.

Along these lines, the following article entitled *Montesquieu's legacy in the construction of American democracy* by Noah A. Rosenblum stems from the observation the most recent evolution of American constitutional law. While Montesquieu's ideas on separating government powers were central to late 18th-century American constitutional debates, the current Supreme Court majority, despite claiming fidelity to the Founders, largely overlooks his influence, opting instead for a selective and formalist interpretation of history.

This absence of Montesquieu prompts inquiries into the original meaning of separation of powers and its alignment with the Court's recent rulings. Thus, the article reconstructs the Supreme Court's evolving formalism on the separation of powers, tracing its roots back to opposition to the New Deal in the 1930s. It explores how this doctrine has reshaped American administrative law, particularly in recent years.

It, then, examines the Court's reliance on historical practices in recent cases but points out its selective disregard for historical evidence contradicting its formalistic interpretation of the separation of powers.

Finally, it delves into the pragmatic approach of the Founding Fathers towards separation of powers, suggesting they prioritized governance outcomes over rigid doctrinal adherence. It argues that Montesquieu's influence on American democracy lies in his understanding of how institutions shape political practices, a concept embraced by the Framers but overlooked by the modern Supreme Court.

The second part of the symposium, then, moves to analyse the role that the principle of separation of powers has in international and supranational organizations. The article entitled *Of Cheques and Balances: Separation of Powers in International Organizations Law* by Jan Klabbers explores the application of separation of powers principles within international organizations, a topic notably absent in current literature, especially if one excludes the European Union.

While international organizations are traditionally viewed as entities delegated tasks by member states, the paradigm of separation of powers, common in domestic governance, does not easily align with their collaborative nature. Unlike states, international organizations pursue specific goals outlined in their constitutive instruments, fostering cooperation among organs rather than checks and balances. Despite this, examining international organizations through the prism of separation of powers may offer insights into their evolving governance structures. The paper argues that while the autonomy of international organizations from member states is increasing, the development of a separation of powers doctrine remains limited, with recent funding practices further complicating the prospect. By exploring the impact of market-based funding on separation of powers, the paper underscores the challenges in controlling international organizations' activities, ultimately questioning the feasibility of implementing separation of powers within their governance frameworks. The analysis intentionally excludes the European Union and financial institutions due to their unique funding mechanisms and evolving roles beyond traditional international organization frameworks.

Indeed, a specific article of the symposium deals with the European Union. *The separation of powers and the administrative branch in the European Union* by Marta Simoncini explores the application of the principle of separation of powers to EU institutions. It examines how the EU's interpretation of this principle by the Court of Justice of the EU shapes the functioning of its administrative arm and argues that the principle has not contributed to framing the accountability of the EU administrative branch.

The analysis focuses on the limitations of the current framework in ensuring accountability within the administrative sphere, with specific attention to the non-delegation doctrine as interpreted by the Court of Justice. Despite efforts to uphold the principle of separation of powers, challenges remain in framing administrative accountability effectively within the EU context.

The third part of the symposium aims to provide a selective overview of the areas -democracy, environment, health- in which the principle of separation of powers has been especially challenged by global crises and it does so by focusing on some case studies.

With reference to democracy, the proliferation of democratic backsliding in many countries has been characterised *inter alia* precisely by the torsion of the principle of separation of powers. The decline of democracy globally has reverberated within the traditional structures of separation of powers, with authoritarian transitions notably emerging within the European Union, particularly in Hungary and Poland. The article entitled *The Dismantling of Power Sharing in Hungary and Poland. Two Roads to the Same Destination?* by Zoltán Szente and Wojciech Brzozowski shows that, despite their constitutional systems being labeled as "abusive constitutionalism", "illiberal democracy", or "populist constitutionalism", these countries share characteristics of anti-democratic transformations that undermine the system of checks and balances. This article delves into the nuanced constitutional changes in Hungary and Poland, examining how these regimes, while maintaining the facade of constitutional democracy, have weakened the division of power. It explores the methods employed by these governments to consolidate power while ostensibly adhering to democratic norms. Furthermore, the study investigates how contemporary challenges to separation of powers, such as the expansion of judicial power and multi-level constitutionalism, are addressed in these contexts. Through a comparative analysis, it seeks to discern whether the paths taken by Hungary and Poland represent distinct trajectories or share fundamental similarities. Ultimately, the paper aims to draw lessons from these experiences and their implications for the future of democratic governance.

Alongside with the democratic crisis, the climate change crisis has impacted the principle of separation of powers. *Climate Change, Narrative, and Public Law Imagination* by Liz Fisher argues that the interaction between climate change and public law presents a complex narrative landscape, shaping the imagination of legal frameworks and responses. Current narratives predominantly emphasize strategic litigation as a means to achieve low carbon futures, yet these narratives oversimplify the role of public law and often lead to narratives of promises and betrayals. By taking the separation of powers as an example of narrative in action, the article explores alternative narratives that present law as offering institutional and reasoning capacities necessary for the large-scale transformations demanded by climate change. It argues for a broader engagement with the substance of public law in addressing climate change and highlights the importance of understanding narrative dynamics in shaping public law imagination. It examines the prevailing narrative surrounding

public law and climate change, and proposes an alternative narrative. It concludes by considering the implications of these narratives for administrative law imagination. While primarily focusing on examples from administrative law in the US, UK, and Commonwealth, the insights presented resonate across legal cultures and public law contexts.

The impact that the global health crisis, following the Covid pandemic, has had on the principle of separation of powers is analysed in the last article of the symposium. *Following in the footsteps of Ginsburg &Versteeg. The bound executive during the pandemic: Italy as a case study* by Elisabetta Lamarque examines the impact of the COVID-19 pandemic on constitutional guarantees by comparing the findings of a recent comparative law study with developments in the Italian legal system. The study largely confirms the hypothesis that despite the pandemic's centrality to policymaking, the Italian Executive faced democratic constraints from an independent judiciary and efficient parliamentary oversight. However, contrary to expectations, regional and local authorities did not significantly constrain the national Executive due to Italy's small size and the global nature of the health threat. The article argues that Italy lacked democratic safeguards against technical-scientific power, emphasizing the need to integrate such powers into checks and balances for safeguarding individual rights.

Sabino Cassese

Elisabetta Morlino

Following in the footsteps of Ginsburg & Versteeg. The bound executive during the pandemic: Italy as a case study.

Elisabetta Lamarque*

But then, to the Royal Chemist e and his assistant's dismay, the Governor said what every mayor and provincial governor the world over always said when faced with an outbreak of contagious disease.

Orhan Pamuk
Nights of Plague. A Novel
Translated by Ekin Oklap
Faber 2022

Abstract

The paper compares the findings of a recent comparative law study (Tom Ginsburg and Mila Versteeg, The bound executive: Emergency powers during the pandemic, in I•CON 19, no. 5 (2021), 1498–1535) about the impact of the pandemic on the guarantees available under constitutional law with the most recent developments in relation to a specific national legal system, that of Italy, which for various reasons appears to be particularly significant. Experiences in Italy largely confirm the hypothesis advanced by Ginsburg&Versteeg. Despite being centrally involved in the policy choices to combat the pandemic, the Italian Executive was not entirely unbound in terms of its action, but on the contrary came up against solid democratic constraints not only in the form of the reaction by an independent and non-deferential judiciary, but also through largely efficient parliamentary oversight procedures. However, in contrast to the argument proposed by Ginsburg&Versteeg, Italian regional and local authorities did not operate as

* University of Milano-Bicocca School of Law Milano Italy. Email elisabetta.lamarque@unimib.it. An earlier version of this article was presented at a seminar on *The Separation of Powers in the Global Arena: Promises and Betrayals* organized by Sabino Cassese and Elisabetta Morlino in Rome (Italy), Luiss Guido Carli University. I am very grateful to Sabino Cassese, Elisabetta Morlino, Pasquale Pasquino, Noah Rosenblum, Jan Klabbers, Marta Simoncini, Elisabeth Fisher and Zoltan Szente for their contributions to the debate and I especially thank Pasquale Pasquino for his helpful comments on the second draft of the article. I am also grateful to Alessia Conti, Giacomo Mingardo and Elena Sammaciccio, Phd students at the University of Milano-Bicocca, for their research assistance.

a real constraint on the national Executive, as Italy's small geographical size and the global scale of the threat to health made it reasonably advisable to centralise decision making to combat the virus. In conclusion, the paper argue that Italy proved to lack almost entirely the necessary democratic antibodies only *vis-a-vis* the technical-scientific power, which should also have been contained and controlled into the system of checks and balances aimed at guaranteeing individual rights.

1. Introduction

To attempt to write today a study examining the tangible impact of the pandemic on the guarantees available under constitutional law, and in particular the principle of the separation of powers, is by any measure a titanic endeavour. This is due both to the copious body of legislation and case law that has been adopted over the last three years to deal with the global health emergency, as well as the extremely large number of papers written by legal scholars, which would need to be considered before formulating any new hypothesis.

In particular, legal publications that have considered any of the numerous ways in which Covid-19 has affected the previously existing arrangements under national, supranational and international legal systems are so replete with novelties – consider for example the staggering increase in the number of open-access and pre-print articles[1] – as to merit consideration themselves as an object of study.

The advent of Covid-19 in effect appears to have remoulded and changed, perhaps definitively, the way in which legal literature is produced. On the one hand, during the darkest initial months after the arrival of the virus, the role of legal scholars proved to be indispensable – or at the very least much more important than it had been in the past – in systematising and interpreting the myriad of measures adopted by public authorities at an incessant rate[2]. On the other hand, however, legal writings soon raised the same

[1] See Anna Krisztián and Olga Ceran, "The "new normal" in academia: What CoVid-19 reveals about (legal) publishing and online scholarly communication," *European Journal of Legal Studies* 1 (2020): 3-4 and, in relation to Italy, Ginevra Peruginelli, Sara Conti, Chiara Fioravanti, and Lorenzo Bacci, "Legal Scholarship Production on CoVid-19: An Analysis on Italian Law Journals' Articles," *The International Information & Library Review* 53 (2021): 3.

[2] Ginevra Peruginelli, "COVID-19 and digital library services: an overview on legal information," *Digital Library Perspectives* 37, no. 1 (2021): 71 believes that legal doctrine during the emergency has played "an

problems as the measures that they were dealing with in that, having been produced and disseminated according to a scatter gun approach, including through blogs and even podcasts, they soon accumulated, reaching 'devilishly' high numbers[3]. It is no coincidence that a new label – Comparative Covid Law – was coined to denote a self-standing field of comparative legal studies on the legal repercussions of the pandemic[4].

As a result, I take the view that the legal literature on the pandemic has now become unmanageable, and that its vastness contributes to increasing, rather than reducing, the difficulty in knowing and assessing the essential characteristics of the phenomenon, which is already so broad and polyhedric in its own right.

1.1. Selecting. In the wake of Borges and Eco.

How then should be proceed? One suggestion is provided in one of the last public interventions made by Umberto Eco – leaving a kind of academic and moral testament – concerning the tasks and responsibilities incumbent upon university professors within a complex and globalised world that is submerged by information readily accessible to all[5]. In his brief and tightly-worded speech, significantly entitled "*Perché le Università*" ["Why Universities"], the renowned semiotician and writer argued, amongst other things, that "the inability to filter entails the incapacity to discern. Only universities (and more generally educational institutions) can teach us how to select". In this regard Eco recalled Borges' story *Funes el memorioso*, in which Ireneo Funes was "a character who remembered everything: every leaf he saw in his childhood, every word he heard in the course of his life, every murmur of wind he felt on his skin, every sentence he read". He noted that "just because of such total memory, Funes was an idiot, paralysed by his inability to filter and to throw away the results of his experiences". Funes – and here it is

essential function in presenting and understanding the legislative products of the regulatory state and in interpreting case law".

[3] I am referring here to the episode recounted in the Gospels in which Jesus asked the possessed Gerasene "What is your name?", to which the devil replies "My name is Legion, because we are many" (Mark, 5: 9, but see also Luke 8, 30). It is notable that there are sites dedicated to legal studies on the pandemic that simply refer scholars on to other sites (see, for example, https://libraryguides.mcgill.ca/COVID19-Legal).

[4] Angelo Jr Golia, Laura Hering, Carolyn Moser and Tom Sparks, "Constitutions and Contagion. European Constitutional Systems and the COVID-19 Pandemic," *Heidelberg Journal of International Law (ZaöRV / HJIL)* 81, no 1 (2021): 149-150.

[5] Umberto Eco, *Why Universities?*, 20 September 2013, at https://www.youtube.com/watch?v=YWUf30GE4pU and (in Italian) at http://www.magna-charta.org/resources/files/20130920_Relazione_di_Umberto_Eco.pdf

Borges writing – "had effortlessly learned English, French, Portuguese, Latin. I suspect, nevertheless, that he was not very good at thinking. To think is to ignore (or forget) differences, to generalize, to abstract. In the teeming world of Ireneo Funes there was nothing but particulars, and they were virtually *immediate* particulars"[6].

I firmly believe that to select is always the best way of dealing with any issue, and this is especially the case in relation to the issue we are considering in this paper.

A study of the role played by executives during the health emergency has already been published which, following this method, has made a tangible contribution to raising awareness of this aspect. This is the paper written by Tom Ginsburg and Mila Versteeg entitled *The bound executive: Emergency powers during the pandemic*, which is based precisely on a nuanced selection and systematisation of empirical findings relating to more than one hundred national legal systems between the start of the global emergency and mid-July 2020[7].

The data collected by Ginsburg&Versteeg, with the support of a sizeable team of research assistants, refutes conventional accounts of emergency governance in general, which many scholars still today reiterate when discussing the health crisis. Ginsburg&Versteeg argue that it is not true to assert that crisis governance is characterised by an unbound executive that faces few, if any, legal constraints, demonstrating that, during the pandemic, "in many countries, checks and balances have remained robustly in place"[8].

That global survey highlights, in particular, that in democratic countries courts especially, but also legislatures, have played a role in monitoring and constraining executive action to combat the virus. Moreover, many legal systems have also activated "subnational constraints" on national executive, which are imposed by local authorities[9].

According to Ginsburg&Versteeg, it is a good thing that it is ongoing interaction among branches that collectively determines the response to the pandemic[10]. They believe that, when confronted with the pandemic, "a particular society is likelier to come closer to its

[6] Jorge Luis Borges, *Funes, His Memory*, in *Jorge Luis Borges. Collected Fictions*, trans. Andrew Hurley (London: Penguin Books, 1998), 137 (Jorge Luis Borges, *Funes el memorioso*, in *Ficciones*, 1944).

[7] Tom Ginsburg and Mila Versteeg, "The bound executive: Emergency powers during the pandemic," *I•CON* 19, no 5 (2021): 1498–1535.

[8] Consequently, Ginsburg&Versteeg challenge la teoria "neo-Schmittian" of the "unbound executive" during times of crisis elaborated by Posner&Vermeule, and conclude that the governance in times of pandemic "has been decidedly Madisonian" (ivi, 1499-1500).

[9] Ivi, 1500, 1518-1533.

[10] Ivi, 1533.

optimal response through the involvement of multiple branches of government, with an executive that is bound to interact with other branches of government"[11].

This assessment appears convincing to me also for another reason. Indeed, as has been noted by Scheppele&Pozen, action taken by the executive during an emergency must be a source of concern for constitutional scholars not only in terms of the democratic risk resulting from the (much studied) phenomenon of "executive overreach", but also the risk of the opposite (less studied) phenomenon of "executive underreach", which occurs when leaders fail to protect their populations, despite having "the legal and practical capacity to act in face of a threat"[12]. Scheppele&Pozen refer in this regard to Hannah Arendt, who argues that, in order to be effective and durable, constitutions must perform two principal functions[13]: on the one hand they must limit power, whilst on the other hand they must also constitute effective power. It is in this second sense that, when confronted with a major threat for the general public, executive underreach can have heavy "moral, practical and democratic costs". Scheppele&Pozen take this reasoning to its extreme consequences in going so far as to conclude that, "while overreach remains a serious constitutional problem in emergencies, the underreach of national executives [during the first months of the pandemic] has had the worst public health effects"[14].

Therefore, the involvement of all branches of government in the response to the health crisis called for by Ginsburg&Versteeg can help to avoid or reduce democratic risks not only of the overreach but also of the underreach of national executives, as the other branches can offset any shortcomings of the executive and make up for its inactivity.

Making a further selection after Ginsburg&Versteeg's selection, this paper compares their findings with the most recent developments in relation to a specific national legal system, that of Italy, which for various reasons appears to be particularly significant (para. 1.2).

1.2. Why Italy

[11] Ivi, 1534.

[12] Kim Lane Scheppele and David Pozen, "Executive Overreach and Underreach in the Pandemic", in *Democracy in times of pandemic. Different Futures Imagine*, eds. Miguel Poiares Maduro and Paul W. Kahn (Cambridge: Cambridge University Press, 2020), 38 et seq.

[13] Ivi, 47.

[14] Ivi, 52.

Italy provides an excellent case study in assessing the role of the executive in the management of the pandemic due to both factual and legal-institutional reasons.

First and foremost Italy – it is important to recall – was one of the first western democracies to be reached by the virus, and was perhaps the first to react.

This is clear from the dates. The first cases of Covid-19 in Italy – two tourists travelling from China – were detected in Rome on 30 January 2020. However, even before this early stage the Minister of Health had reported to Parliament (at a hearing held on 22 January) and had also adopted measures requiring the monitoring of flights incoming from China (on 24 January; flights were then blocked on 27 January)[15]. On the following day, 31 January, the Italian Executive declared a "national state of emergency"[16].

On 21 February 2020 Italy had its "patient zero" in the north, the most industrialised and most densely populated part of the country (Codogno, a small town 60 km south-east of Milan). From that time onwards, infection numbers started to rise exponentially, in parallel with a proliferation in the type and number of the public measures adopted to combat the virus[17]. Within a short period of time, despite having one of the most advanced health systems in the country in terms of quality of care, hospitals and intensive care units in that area of the country started to come under major strain. A particularly poignant video, which became famous around the world, was shot during the night of 18 March 2020 in Bergamo (a city with 120,000 inhabitants around 50 km north-east of Milan), showing a long line of army trucks leaving the hospital filled with coffins. This was because the city mortuaries were already full and the bodies of the dead needed to be taken elsewhere for cremation[18].

[15] The complete list of actions taken at central level to combat the health emergency, starting with the parliamentary hearing of Minister of Health on 22 January 2020 until today (12 January 2023), can be found at https://www.openpolis.it/coronavirus-lelenco-completo-degli-atti/. To date, the acts listed, which do not include the measures taken by the regional and local authorities, are 1.022.

[16] On the basis of the pre-existing Civil Protection Code (see *infra* section 2.1., letter *b*).

[17] A careful overview of the legal instruments put in place by the Italian legal system in the fight against the virus is offered by Michele Massa, "A General and Constitutional Outline of Italy's Efforts against COVID-19", in *Coronavirus and the Law in Europe*, ed. Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst and Fryderyk Zoll (Cambridge: Intersentia, 2021), 25 et seq.

[18] See, for instance, https://www.youtube.com/watch?v=Os1TJHJ_ijc, https://www.bbc.co.uk/programmes/p0872zh9 and https://www.france24.com/en/20200319-coronavirus-death-toll-in-italy-overtakes-china-s-after-rising-to-3-405.

Italy thus turned into a kind of 'legal laboratory', having been forced by circumstances beyond its control to identify legal arrangements capable of containing the health emergency that were at the same time compatible with constitutional democracy.

Secondly, the Italian legal system features all of the characteristics that Ginsburg&Versteeg regard as providing suitable checks and balances *vis-a-vis* executive action taken to manage the health crisis.

Italy is a country with a long-standing and solid tradition of local self-government, which can be traced back to the mediaeval communes in a continuous line interrupted only briefly by the fascist totalitarian State[19].

It is also a State organised on a regional basis comprised of twenty regions. Each region has the power to enact regional laws – with the same status as laws adopted by the national Parliament – in any area except those reserved by the Constitution, either entirely or in part, to the central State legislature[20]. In addition, the Constitution also grants the regions the power to adopt regulations to implement laws in those same matters[21].

Above all, it must be noted, insofar as relevant for our present purposes, that the list of matters over which competence is shared between the regions and the State, and in which national legislation has the power only to dictate the fundamental principles applicable to the respective matter, includes specifically "health protection"[22].

Finally, there is no doubt that Italy has an independent judiciary. The judiciary in Italy is organised on a "dual" basis [23] in that, alongside ordinary jurisdiction (civil and criminal) there is also a system of administrative courts (the regional administrative courts, the "tribunali amministrativi regionali" known as "TAR" at first instance, and the Council of State at second instance), which are charged with protecting individuals against the public

[19] The Italian Constitution, in its Fundamental principles (Articles 1-12), states that: "The Republic [...] recognises and promotes local autonomies, and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation" (Article 5).

[20] Article 117, para. 1-4, It. Const.

[21] Article 117, para 6, It. Const.

[22] Article 117, para 3, It. Const.: "Concurring legislation applies to the following subject matters: [...] health protection [...]. In the subject matters covered by concurring legislation legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation".

[23] About the Italian "dual system of jurisdiction" see Elisabetta Silvestri, "Administrative Justice in Italy," *BRICS Law Journal*, 3 no. 2 (2016): 67 et seq.

administration. In contrast to the ordinary courts, the administrative courts have the major power of being able to invalidate not only administrative acts but also regulations that are unlawful.

It must be pointed out, however, that the Constitution provides for a specific guarantee of independence only in relation to the ordinary courts, whilst establishing that guarantees concerning the independence of the administrative courts be provided for by statute law. Nonetheless, it is possible to assert that, by the time the pandemic started, the source of criticism (which in a distant past had been more than justified) concerning the "contiguity" of administrative jurisdiction with the Executive had long since been resolved[24]. Accordingly, today the Italian administrative courts can be regarded in every respect as representing an independent and impartial judge of public power[25]. Indeed, as will be discussed below (in section 3), precisely when they found themselves in the front line during the pandemic and were called upon to grant judicial relief, they played a crucial role[26], showing that they were able to promptly exercise[27] effective powers to review the actions of national and regional governments. In doing so they struck a delicate balance between the requirements of security and safeguarding health on the one hand and the guarantees of other fundamental freedoms on the other hand[28].

To complete the framework, I must finally recall that Italy has a strong Constitutional Court (hereafter: ItCC) with well-established independence. Indeed, thanks to the method used for the appointment and election of its members, according to which the governing majority does not play any role whatsoever in the selection of constitutional justices, from a comparative law perspective the ItCC appears to enjoy greater independence from political authorities than almost all other judicial bodies vested with powers of constitutional review[29].

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[24] Aristide Police, "Administrative Justice in Italy: Myths and Reality," *Italian Journal of Public Law* 7, no. 1 (2015): 41 et seq.

[25] Aristide Police, "Administrative Justice", 56.

[26] Giuseppe Tropea, "Potere di ordinanza, normalizzazione dell'emergenza e trasformazioni dell'ordinamento," *Diritto Amministrativo*, no. 4 (2021): 885 et seq., in particular para 6.

[27] Giulio Napolitano, "Giustizia amministrativa e logica del diritto amministrativo (anche alla luce della pandemia)," *Questione giustizia*, no. 1 (2021).

[28] Francesco Goisis, "La giustizia amministrativa nell'emergenza pandemica, tra incisività dei poteri e self-restraint," *Diritto processuale amministrativo*, no. 4 (2021): 853 et seq.

[29] Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford: Oxford University Press, 2016), 43; Nadia Fiorino, Fabio Padovano and Grazia Sgarra, "The Determinants of Judiciary Independence: Evidence from the Italian Constitutional Court

It must also be added that, formally speaking, the ItCC is situated outside the judiciary *stricto sensu*. However, from a functional perspective it is inextricably, and in some sense intimately, linked to it due to the system of incidental referral as well as the absence of any form of individual direct constitutional complaint. The system of incidental review implies genuine interdependence between the ItCC and the judiciary, as the ItCC would be unable to perform its task were the courts not to refer questions; conversely, courts would be unable to continue proceedings, where they doubted the constitutionality of a given law, if the ItCC were not to resolve their doubts. Considered from a historical perspective, this interdependence has prevented the emergence of a rivalry between the two bodies in Italy. It has also favoured to the utmost the creation initially of a relationship of loyal collaboration, and later a kind of fraternal sharing in the performance of the common task of protecting individual rights, albeit according to different mechanisms and procedures. It can therefore be asserted that, over the years, the relationship between the ItCC and the 'other' courts has become so close, both prior to constitutional review and during implementation of the judgments of the ItCC, as to give rise to a kind of 'wider judiciary' comprising both[30].

Finally, Italy is particularly significant as a case study because it has a parliamentary system[31], which is the most common system of government around the world.

Parliamentary government, as is known, involves the executive branch acting as a permanent emanation of the legislative branch[32] on the basis of a confidence relationship that lessens the separation between them, which instead is rigorously respected and even highlighted in the presidential form of government"[33]. Consequently, it is precisely with

(1956-2002)," *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft*, 163, no. 4 (December 2007): 686 and 691.

[30] Elisabetta Lamarque, "Direct Constitutional Complaint and Italian Style do not Match. Why Is That?", in *Dialogues on Italian Constitutional Justice. A Comparative Perspective*, eds. Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia and Andrea Simoncini (London-New York-Torino: Routledge-Giappichelli, 2021), 149; Ead., *Corte costituzionale e giudici nell'Italia repubblicana. Nuova stagione, altri episodi* (Napoli: Editoriale Scientifica, 2021), 43 and *passim*. The residual distinction between their functions is extremely clear: the function of ruling legislation unconstitutional with effects erga omnes is vested exclusively in the ItCC, while such a power is denied to the ordinary courts; on the other hand, the function of the definitive resolution of concrete disputes is by contrast vested in the latter and denied to the former.

[31] Article 94 It. Const.

[32] Leopoldo Elia, "Governo (forme di)", in *Enciclopedia del diritto*, XIX (Milano: Giuffrè, 1970), 642.

[33] Marta Cartabia and Nicola Lupo, *The Constitution of Italy. A Contextual Analysis* (Oxford: Hart Publishing, 2022), 66. In that sense, the Authors refer to parliamentary systems as monistic, or "fusion of powers" systems.

reference to parliamentary democracies that it is interesting to establish during normal times – and all the more so during emergencies, where action is taken largely by executives – what type of oversight could possibly be exercised by the Parliament in regard to a body that is by definition an expression of its own majority[34].

In addition, considered specifically from the perspective of the separation of powers between the Legislature and the Executive, the Italian legal system features an extraordinary peculiarity within the parliamentary democracies themselves. In fact, in Italy the dividing line between the functions of the Parliament and of the Executive is even thinner than it is elsewhere, given the power of the Executive to adopt primary legislation, which in other countries is normally the exclusive prerogative of parliaments[35].

The system adopted at the outset by the Italian Constitution already provides that the Executive may adopt not only regulations (as is typical of executive branches) but also provisions with legislative status: these are specifically legislative decrees (*decreti legislativi*, Article 76 of the Constitution) and decree-laws (*decreti-legge*, sometimes also translated as law decrees, Article 77 of the Constitution). Of course, in both cases the Constitution subjects the exercise of legislative powers by the Executive to a requirement of approval by Parliament, and applies limits to them which it falls to Parliament to oversee, as both categories of legislative acts "have to be accompanied by a proper, parliamentary law to permanently enter the legal order: either before, as the delegation law for legislative decrees, or after, as the conversion law for decree-laws" [36].

However, it is already apparent from the wording of the Constitution that the image – presented within classical studies of the sources of law – of the executive branch as the body charged with implementing the law, and not (also) as a lawmaker itself, is a deceptive one[37].

Decree-laws, in particular, are legislative acts which the Constitution allows the Executive to adopt specifically in order to deal with "extraordinary cases of necessity and urgency". In view of the purpose for which they may be adopted, they enter into force immediately,

[34] The beautiful monograph by Elena Griglio, *Parliamentary Oversight of the Executives. Tools and Procedures in Europe* (Oxford-New York: Hart Publishing, 2020), 7 and *passim*, published before the advent of the pandemic, is dedicated to the answer to this question.
[35] Andrea Morrone, *Fonti normative. Concetti generali, problemi, casi* (Bologna: il Mulino, 2022), 167.
[36] Cartabia and Lupo, *Constitution of Italy*, 105.
[37] Marta Cartabia, "Legislazione e funzione di governo," *Rivista di Diritto Costituzionale* (2006): 63-64.

usually on the day on which they are published in the Official Journal, after being approved by the Council of Ministers and reviewed, and then formally issued, by the President of the Republic. However, they are provisional acts: if Parliament fails to convert a decree-law into law within sixty days of publication in the Official Journal, either as originally issued or with amendments, it will cease to have effect retroactively as if it had never been issued.

And yet despite the constitutional limits imposed on the Executive's rule-making powers, it can nonetheless be asserted that, in Italy, legislative power at the central level is exercised both by Parliament and by the Executive[38]. Moreover, the Italian Constitution even appears to suggest that the Executive implements its programme, on the basis of which it has obtained the confidence of the Houses of Parliament, mainly through legislative activity[39], as this gives the Executive not only the opportunity to adopt legislative acts of its own, but also the power to launch the procedure that will ultimately result in the approval of parliamentary legislation (Article 71 of the Constitution).

However, the picture would not be complete if, alongside the original constitutional design, we were not to consider also the practice followed over the last fifty years, especially from the 1990s onwards[40]. Over the course of this extremely long period, in *de facto* terms parliamentary law progressively lost its original predominance within the system of the sources of law. Specifically, the initially bipolar relationship between Parliament and Executive as regards the production of legislation became blurred, and the system shifted from a form of co-legislation towards an outright imbalance in favour of the Executive in terms of legislative activity[41]. The ItCC itself now seems to regard Parliament's and Executive's legislation as being interchangeable for all possible purposes. For example, it takes the view that both comply with the absolute reservations of competence to primary legislation [*riserve di legge*] put in place by the Constitution in order to protect fundamental rights. In the same way, when it issues an urgent invitation

[38] VV.AA., *Constitutional Law in Italy* (The Netherlands: Wolters Kluwer International, 2021, 89). Per tutti see Morrone, *Fonti normative*, 167.
[39] Cartabia and Lupo, *Constitution of Italy*, 104.
[40] Livio Paladin, *Le fonti del diritto italiano* (Bologna: il Mulino, 1996), 245-246.
[41] Marta Cartabia, "Il Governo "signore delle fonti"," in *Gli atti normativi del Governo tra Corte costituzionale e giudici*, eds. Marta Cartabia, Elisabetta Lamarque and Palmina Tanzarella (Torino, Giappichelli, 2011), XII. For a more recent analysis among the many see Andrea Cardone, "Modello costituzionale e trasformazione del sistema delle fonti nelle crisi economica a pandemica. Emergenza e persistenza," *Osservatorio sulle fonti* no. 2 (2022): 509 et seq.

to Parliament to bring certain legislation into line with the Constitution, the ItCC will consider its request for intervention by the legislator to have been acted upon even if only a decree-law is adopted by the Executive[42].

Countless studies have examined all of the innumerable manifestations and facets of the complex phenomenon of the 'marginalisation of Parliament', a dynamic which reached its apex well before and certainly irrespective of the pandemic.

For a number of years, the most striking and most controversial instance of this phenomenon, which the ItCC has only been able to stem to some extent, has been the 'abuse' of decree-laws. Executives have often made inappropriate usage of the power to issue decree-laws, treating the decree-law as a kind of reinforced legislative proposal, which by the time it reaches Parliament has already come into force. In most cases in which this occurs, the prerequisites of extraordinary necessity and urgency required under Article 77 of the Constitution have not been met, as is apparent from the considerable number of decree-laws that have been adopted by Executives of all colours[43]. It is not infrequent for one individual decree-law to incorporate extremely disparate measures, many of which are not urgent. Often, the text of a decree-law is 'armour-plated' by associating the resolution concerning its approval with a confidence vote before either or both Houses of Parliament. The effect of this is to prevent Parliament from making changes to the text of the decree-law, calling its bluff with the threat of resignation in the event that the conversion law is not approved. The list goes on, and the literature has identified innumerable practices, which need not be listed here, that distort the intent of this instrument[44].

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[42] I am referring to the case of life imprisonment, i.e. to the doubt of constitutionality, raised by the Court of Cassation, on the provisions that do not allow the person sentenced to life imprisonment for crimes of the mafia, who has not collaborated usefully with justice, to be admitted to the benefit of conditional release, even after having served the prescribed portion of the sentence and even if there are symptomatic elements of his repentance (ItCC, Orders nos. 97/2921, 122/2022 and, after the Decree-Law no. 162/2022, ItCC, Order no. 227/2022).

[43] In 2008, for instance, there were 38 decree-laws, 41 legislative decrees and 71 laws, 27 of which converted decree-laws. The numbers for the most recent years are as follows: in 2019 there were 24 decree-laws, 24 legislative decrees and 78 laws, 19 of which converted decree-laws; in 2020, 38 decree-laws, 36 legislative decrees and 66 laws, 25 of which converted decree-laws of which converted decree-laws; in 2021, 47 decree-laws, 55 legislative decrees and 83 laws, 32 of which converted decree-laws; in 2022, 32 decree-laws, 32 legislative decrees and 69 laws, 21 of which converted decree-laws.

[44] For an overview of these distortions, see the effective synthesis by Sabino Cassese, "Il governo legislatore," *Giornale di diritto amministrativo*, no 5 (2021): 557-558.

However, the process of hollowing out the legislative function of Parliament reached its apex not with the abuse of the instrument of the decree-law, which has now become endemic, but rather in relation to another very specific process: the approval of the budget [45].

The approval of the budget is a fundamental democratic process within which, according to the original idea of constitutionalism, the representative body should exercise its control over the majority in the most exacting way. Moreover, it is also the most difficult decision for Parliament, because the stability of its relationship with the executive is measured with reference to it, and indeed the life of the whole State for the following year depends on it[46]. In fact, for reasons which it is not possible to explain in greater detail here, no member of Parliament was able to read the text tabled by the Executive, on which they were voting, during the legislative procedure that resulted in the adoption of the budgetary law for 2019 (December 2018) as well as the following year's budget (December 2019)[47]. However, somewhat paradoxically, Parliament appeared to recover its democratic control function as least in part during the midst of the second wave of coronavirus pandemic (December 2020) when approving the text of the budgetary law for 2021[48].

All of this makes it even more interesting to study the way in which the Italian legal system operated during the pandemic.

The starting point was in fact a system in which the Executive already had, within its everyday toolbox, a suitable normative instrument for dealing with extraordinary events such as the pandemic. As has been summarised, "a natural calamity such as a pandemic is precisely the kind of contingency which warrants the application" of decree-laws[49].

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[45] Luciano Violante, "Dal Parlamento delle leggi al Parlamento dei controlli," *federalismi.it*, no. 3 (2019): 244 conclusively suggests that, given the now occurred emptying of its legislative function, the only way to safeguard the principle of representation of the Parliament should be to strengthen and to reinvigorate its activity of control over the Executive.

[46] Sabino Cassese, "Così si è logorato il rapporto tra Governo e Parlamento,", *Corriere della sera*, 29 December 2022, who refers to the approval of the budgetary law for 2023.

[47] To such an extent that some parliamentarians have denounced the emptying of their function with some conflicts of attribution of powers before the ItCC (conflicts that the ItCC has considered for the first time in its history abstractly admissible by individual parliamentarians, even if in the specific cases declared inadmissible).

[48] But only in the discussions in the Chamber of Deputies within Commission V (Budget) in their referring activity (Chiara Bergonzini, "La sessione di bilancio 2020, tra pandemia e conferma delle peggiori prassi," *Osservatorio costituzionale*, no. 1 (2021): 219 et seq.).

[49] Massa, "General and Constitutional Outline", 29.

However, it is also a legal order in which, even before the pandemic, Parliament played a marginal role in the dialectical relationship with the Executive as regards the adoption of legislation by the latter, and struggled – as is also the case for many other parliaments around the world – to identify effective instruments for exercising oversight over the Executive.

The following sections will attempt to demonstrate that the health crisis did not by any means reverse the process of parliamentary marginalisation in Italy, but at the same time did not also heighten it.

Indeed, it is possible to identify various attempts by Parliament – some of which were unexpectedly successful – to make its voice heard as regards the Executive's choices to deal with the emergency (section 2). Moreover, and above all, judicial review has worked well in Italy as it has provided independent and timely responses to calls for protection emanating from society (section 3). Thus, as regards the two aspects recalled above, Italy fully confirms the position taken by Ginsburg&Versteeg.

On the contrary, the arguments presented by the two authors concerning the subnational constraints on the national Executive appear to hold good, as far as the Italian legal system is concerned, only at the start of the health emergency. In fact, once the initial period of helplessness and confusion had passed, both the national legislator and the judiciary were resolute in pushing for the centralisation of policies to combat the pandemic and to support individuals and businesses, so much so as to relegate the contributions made by the regions and municipalities to residual status (section 4).

2. Parliamentary involvement

2.1. A legislative model of crisis governance

The Italian legal system can undoubtedly be said to endorse the "legislative model" of emergency power, which handles emergencies according to the ordinary system of checks and balances and by enacting, if necessary, ordinary statutes that delegate special and temporary powers to the Executive[50]. In fact, the Constitution does not contain any

[50] John Ferejohn and Pasquale Pasquino, "The law of the exception: A typology of emergency powers," *Int J Constitutional Law* 2, no 2 (2004): 216-217.

specific clause concerning the state of emergency[51], other than the provisions on the exercise of emergency powers during wartime (Article 78 of the Constitution).

In particular, when the pandemic broke out, Italy already had a number of strings to its bow, which were ready to be unleashed:

a) the Executive enjoyed legislative powers which were practically unlimited in substantive terms, even though provisional and subject to parliamentary review (through the adoption of decree-laws which, as discussed above, the Constitution provides for in extraordinary cases of necessity and urgency); and *b)* a number of tried-and-tested and fully functioning legislative models were available in order to deal with certain types of emergency, which assigned the power to adopt "unforeseen and urgent orders", by way of exception to primary legislation, to officials from both the national Executive and local authorities[52]. One such mechanism was provided by the legislation on civil protection, which had historically been enacted in order to remedy the consequences of various catastrophic earthquakes and was applicable to "calamitous events of natural origin or resulting from human activity" [53]. In addition, the law establishing the national health service, and also subsequent legislation, granted powers to issue ordinances, again by way of exception to primary legislation, in the area of public health both to the Ministry of Health, as well as to regional presidents and mayors for more localised health emergencies[54].

The action taken was initially based on mechanism *b)*. In particular, the Executive invoked the Civil Protection Code precisely when declaring a national state of emergency on 31 January 2020[55]. In addition, numerous acts taken by the Head of the Civil Protection Department – a department which operates within the Office of the President of the Council of Ministers – and by other authorities within the Executive were premised on the civil protection model throughout the entire duration of the emergency, i.e. until 31 March 2022[56].

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[51] Ida Nicotra, *Pandemia costituzionale* (Napoli: Editoriale Scientifica, 2021), 49 et seq.
[52] Morrone, *Fonti normative*, 293 et seq.
[53] Legislative Decree no. 1/2018 (Codice della protezione civile).
[54] Article 32 Law no. 833/1978; Article 117 Legislative Decree no. 112/1998; Article 50 Legislative Decree no. 267/2000.
[55] See *supra* section 1.2.
[56] The last extension of the state of emergency took place with Decree-Law no. 221/2021 (see also, for further measures, Decree-Law no. 24/2022).

After less than one month, following a deterioration in the situation, the Executive started to avail itself also of mechanism *a)*, and with the now famous Decree-Law no. 6 of 23 February 2020 launched a whole series of decree-laws, which were designed to address any new problems that would emerge over time.

For our present purposes, it is interesting to note that, in adopting that first decree-law, the Executive not only made substantive provision but also, relying on mechanism *a)*, also established a mechanism *c)*, namely "a special legislative model" specifically created to combat the coronavirus, which was based on an instrument usually referred to under its acronym DPCM: decree of the President of the Council of Ministers.

This is an act that is formally adopted by the Prime Minister on a proposal by the Minister of Health and after consulting both the competent ministers as well as the presidents of the individual regions affected (or, for measures affecting the entire country, the President of the Conference of the Regions). In actual fact however – according to reports from insiders – in practice measures were invariably discussed and adopted in substantive terms within the Council of Ministers as a whole.

Decree-Law no. 6 thus created a parallel model for the management of the emergency, which supplemented (although did not replace) the emergency legislation already on the books. Accordingly, from that point onwards, Italian law dealt with the pandemic according to a twin-track approach: mechanism *b*) on the one hand and mechanisms *a)+c)* on the other hand.

This involved the parallel operation of two distinct models, aimed at satisfying different goals, even though both were ultimately under control of the Executive: under mechanism *b)*, and in particular the Civil Protection Code, the Executive performed the role of coordinator and technical auxiliary, whilst under mechanism *a)+c)* it implemented political choices in relation to the management of the emergency[57].

As regards specifically mechanism *a)+c)*, it could be argued that it was the Executive that created for itself a new and unprecedented power of intervention. This fact could be invoked as proof of executive overreach and of the inertia on the part of the representative

[57] Corrado Caruso, "Cooperare per unire. I raccordi tra Stato e regioni come metafora del regionalismo incompiuto," *La Rivista "Gruppo di Pisa"* (2021): 300.

body precisely at a time when the most important choice was being made, namely the choice of the instrument to be used in order to deal with the pandemic.

However, I do not agree with this opinion.

Parliament in fact reviewed and subsequently confirmed the choice of mechanism *c)* made by the Executive within a timescale and in a manner that, as far as I can remember, was absolutely unprecedented, and which I do not believe will be repeated in future. Specifically, Decree-Law no. 6 was converted into law by the Parliament within only 12 days without any substantive amendment and practically unanimously, with only 2 votes against in the 630-member Chamber of Deputies and only 5 abstentions in the Senate, which at the time was comprised of 320 senators[58].

Thus, following the conversion into law of Decree-Law no. 6, the DPCM established itself as the key instrument for implementing political choices in relation to the management of the pandemic at national level, as a flexible and swiftly deployable instrument, which was thus well-suited to timely intervention in response to a rapidly changing situation.

As a result, throughout the entire duration of the health emergency in Italy the most far-reaching public interventions, in both negative as well as positive terms on the lives of people – consider the arrangements for distributing support for businesses and the limits on the exercise of fundamental rights – were established or shaped by DPCM.

Throughout all of those terrible months, all of us, children included, became used to quoting that acronym, which had previously been known only to a select group of legal specialists, asking one another how exactly the recently approved DPCM would change our everyday habits, as well as the potential developments that the next DPCM was set to bring.

2.2. Two phases and two different roles for Parliament

To date in Italy, more than a thousand national "Covid acts" – varying in terms of their nature and origin – have been adopted by the central public authorities[59], whilst it is

[58] Edoardo Raffiotta, "I poteri emergenziali del governo nella pandemia: tra fatto e diritto un moto perpetuo nel sistema delle fonti", in *Emergenza, costituzionalismo e diritti fondamentali*, eds. AIC Associazione Italiana dei Costituzionalisti (Napoli: Editoriale Scientifica, 2021), 211.

[59] https://www.openpolis.it/coronavirus-lelenco-completo-degli-atti/

simply impossible to count the "Covid acts" adopted by the various local authorities[60]. The national "Covid acts", which can be attributed to the two parallel tracks mentioned above, include a large number of decree-laws and parliamentary conversion laws, numerous DPCM and measures issued by various ministers (starting naturally with the Ministry of Health) and various of other public authorities. These include several independent administrations or technical bodies, although above all authorities under the control of the Office of the President of the Council of Ministers itself, such as the Head of the Civil Protection Service and the Extraordinary Commissioner charged, amongst other things, with implementing the national vaccination campaign (a position created by one of the first decree-laws of 2020, which continued to operate throughout the entire duration of the state of emergency[61]).

However, as our aim is to ascertain whether and how the bounds on the political choices made by the Italian Executive worked during the pandemic, it is particularly interesting for us to see how the special legislative mechanism of *a)+c)* operated.

Simplifying as far as possible, I am particularly convinced by the diachronic two-stage interpretation suggested by some scholars[62].

There was a first, extremely short phase during which parliamentary and democratic participation or supervision of the Executive's policy was not sufficient. This was then followed by a second, extremely long phase covering the entire remaining duration of the pandemic, during which the special legislative model was corrected and improved with the imposition of both procedural and substantive bounds on the Executive.

Phase one started with the adoption of Decree-Law no. 6 (on 23 February 2020), whilst phase two was launched by Decree-Law no. 19 (of 25 March 2020), followed by its conversion law (on 22 May) [63], and continued substantially unchanged until the end of the state of emergency (on 31 March 2022).

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[60] Morrone, *Fonti normative*, 297, counts two thousand regional and local ordinances, but it is not known which database he relied on for the count.

[61] Pursuant to art. 122 of the Decree-Law 17 March 2020, no. 18, with DPCM 1 March 2021 the General of the Army Corps Francesco Paolo Figliuolo was appointed "Extraordinary Commissioner for the implementation and coordination of the measures to contain and contrast the COVID-19 epidemiological emergency and for the execution of the campaign national vaccine".

[62] Vincenzo Lippolis, "Il rapporto Parlamento-Governo nel tempo della pandemia," *Rivista Aic*, no. 1 (2021): 268 et seq.; Raffiotta, "I poteri", 214.

[63] Law 22 May 2020, no. 35.

As far as substantive bounds are concerned, Decree-Law no. 6 referred very generically to the human behaviour that the DPCMs would be empowered to restrict. This meant that the administrative discretion available to the Prime Minister to adopt acts that could potentially encroach upon fundamental rights such as freedom of assembly and freedom of movement was almost unlimited, as this power could cover practically any measure adopted to deal with the emergency.

This problem, which was widely raised within the literature, almost disappeared during phase two[64], as Decree-Law no. 19 listed more precisely the actions which DPCMs could limit and the measures that they could adopt. As such, it provided a more solid legislative basis for the Executive's administrative powers, which were thus restricted by a source of law with superior status.

Moreover, during phase one Decree-Law no. 6 did not impose any temporal limits on the applicability of the emergency rules adopted by each DPCM. By contrast, during phase two the legislation stipulated a maximum time limit for the effect of emergency rules[65], thereby ensuring compliance with the requirement that any emergency measures must be temporary in nature, which is one of the fundamental features that a democratic legal order cannot disregard when responding to emergency situations[66].

As far as procedural constraints are concerned, during phase two a general requirement was introduced for the Executive to consult with the Technical-Scientific Committee (hereafter: CTS).

This body was specifically established in order to provide scientific advice to the Executive on the fight against the coronavirus, and for this reason was dependent on the Civil Protection Department within the Office of the President of the Council of Ministers[67]. In fact, the Decree-law no. 19 provides that "with regard to technical and scientific aspects as well as assessments of adequacy and proportionality", DPCMs "shall as a general rule be adopted after consulting with the Technical-Scientific Committee"[68]. This accordingly

[64] *Contra*, however, see the interesting comments of Marcello Cecchetti, "Le limitazioni alla libertà di iniziativa economica privata durante l'emergenza," *Rivista Aic*, no. 4 (2020): 73-74.

[65] The maximum term was initially thirty days (with Decree-Law no. 19), then increased to fifty days (Decree-Law 2 dicembre 2020, no. 158).

[66] Tania Groppi, "Le sfide del coronavirus alla democrazia costituzionale," *Consulta on line* (2020): 193.

[67] The CTS was established with a decree of the Head of Civil Protection dated 5 February 2020, was subsequently changed in its composition and finally dissolved following the cessation of the state of emergency on 31 March 2022.

[68] Article 2 Decree-Law no. 19/2020 converted by Law no. 35/2020.

introduced a significant constraint on the administrative discretion available to political decision makers, which moreover also the courts would attempt to enforce in several cases (section 3).

The characteristics of the model adopted during phase two were addressed in an important judgment of the ItCC, which decisively approved them on the basis of in-depth reasoning. According to the ItCC, under this model the law sufficiently detailed the classes of containment measures eligible for adoption by a DPCM and provided that emergency measures could only apply on a temporary basis. Moreover, again according to the ItCC, further guarantees for the rights of individuals could be inferred from the fact that the law subjected the acts of the Prime Minister to "a requirement that typically applies to the exercise of administrative discretion", because it provided that the DPCMs must comply with the principles of "adequacy and proportionality with the risk effectively present" throughout the entire country or any part of it, thanks to the requirement to obtain advice from to the CTS.

However, for our present purposes, the radical change of fundamental importance that marked the shift from phase one to phase two was another one. In fact, during phase two a specific procedure for ensuring parliamentary oversight over the Executive was put in place and regularly applied.

Initially, Decree-Law no. 6 did not even provide for any requirement for the Executive to report to Parliament concerning the contents of DPCMs. By contrast, Decree-Law no. 19, as amended following its conversion into law, not only required the Executive to report to Parliament every fifteen days concerning all of the measures introduced by it but, thanks to an amendment tabled by a member of Parliament, also introduced the following requirement, which the literature considers to be "genuinely unprecedented within the tradition of emergency legislation" [69]: "the President of the Council of Ministers or a minister designated by him shall illustrate to the Houses of Parliament the content of the measures to be adopted *in advance of their adoption* [...] *with a view to taking account of any indications formulated by Parliament*", unless "this is not possible due to reasons of urgency related to the nature of the measures to be adopted" [70] (italics added).

[69] Raffiotta, "I poteri", 207 et seq.
[70] Article 2 Decree-Law no 19/2020 converted by Law no. 35/2020.

We can say, in the end, that the Italian Parliament was able to incorporate itself into the decision-making circuit on its own initiative[71].

The literature thus refers to phase two as the phase of the "parliamentarisation of the emergency" [72]. Considering subsequent practice, it has been noted how the "parliamentarisation" of the most important policies of the Executive was real and not merely formal, although at no point went as far as to result in genuine co-participation by Parliament in the decisions made by the Executive.

In fact, an analysis carried out within the literature covering the period until the initial months of 2021 established that, for the first ten DPCMs adopted during phase two, on seven occasions the Executive (on six occasions via the Minister of Health and on one occasion via the Prime Minister) sent advance "communications" to Parliament, to which the Houses of Parliament responded by adopting "resolutions". The aim of these resolutions was to direct the actions of the Executive either through specific policy guidelines or general medium to long-term objectives. On the other hand, on one occasion, the Minister of Health provided a "advance notice", which did not elicit any response from Parliament, and on two occasions the Executive, acting through the Prime Minister, availed itself of the right to inform Parliament only *ex post*, due to "considerations of urgency related to the measures to be adopted" [73]. Whenever either House of Parliament voted on a resolution, the Executive usually complied with it, amending the provisions of the DPCM as illustrated to Parliament in the advance communication[74].

Thus, the need for increasingly greater involvement by the representative body resulted in tangible solutions as early as the spring of 2020.

It should also be pointed out that, after the initial months had passed, an ongoing dialogue was established between Parliament and Executive, based on all instruments provided for under parliamentary law for controlling Executive's action[75].

[71] Lippolis, "Il rapporto", 278.
[72] See notes 67 and 69.
[73] Riccardo Mazza, "La 'parlamentarizzazione' dell'emergenza Covid-19 tra norme e prassi," *federalismi.it*, no. 12 (2021): 157 et seq.
[74] Mazza, "La 'parlamentarizzazione'", 161.
[75] Lippolis, "Il rapporto", 274.

Above all, Parliament also became substantially involved in the decision – a fundamental decision from a political perspective – to extend the state of emergency, whereas at the outset the Executive had proclaimed a state of emergency entirely on its own. In fact, at the beginning of the pandemic not only did the cabinet resolution not enjoy parliamentary support, but also the Executive's intention to adopt it had not even been communicated in advance to Parliament[76]. On the contrary, on the day before the Executive's resolution was adopted, on 30 January 2020, the Minister of Health had spoken before both Houses of Parliament according to an "urgent notification procedure" in order to report on potential initiatives to combat the virus, but he had not made any reference to the possibility of a state of emergency being declared[77].

Indeed, as far as the need to involve the representative body was concerned, one could not have expected any more from a legal system such as Italian one, which for a number of years had been suffering from a progressive marginalisation of Parliament (section 1). This conclusion is even more compelling if it is considered that, at the height of the lockdown, in contrast to the Executive, Parliament encountered considerable difficulty in performing all of its functions due to the problems associated with meeting in person, having (reasonably in my view) declined to sit remotely[78].

2.3. One single serious gap

Italian law was seriously lacking in one respect: it failed to provide timely and full access to the discussions among the experts comprising the CTS, the body established on an ad

[76] A state of emergency on the national territory relating to health risk, as mentioned, was approved by the Council of Ministers on the basis of the Civil Protection Code on 31 January 2020, while the extensions took place first with the resolutions of the Council of ministers of 29 July 2020, 7 October 2020, 13 January 2021 and 21 April 2021, and then with Decree-Laws (first with Decree-Law no. 105/2021 and then, as mentioned in the note 55, with the Decree Law no. 221/2021). While the Civil Protection Code does not require the Executive to bring its decisions on the extension to Parliament, the Executive has freely chosen to involve the two Chambers, and the Chambers have expressed themselves by voting on a resolution (which in one case asked the Executive to deliberate an extension for fewer months than initially wanted by the Executive itself: in that case, as noted by Mazza, "La 'parlamentarizzazione'", 165-166, the Executive complied with the parliamentary resolution).

[77] Lippolis, "Il rapporto", 269.

[78] Among the many Authors on that point, with reference to the initial stages of the pandemic, see Nicola Lupo, "Il Parlamento nell'emergenza pandemica, tra rischio di auto-emarginazione e 'finestra di opportunità'," *Il Parlamento nell'emergenza pandemica, Il Filangieri. Quaderno* (2020):145 et seq.; Maria Cristina Grisolia, "Il rapporto governo-parlamento nell'esercizio della funzione normativa durante l'emergenza Covid-19," *Osservatorio sulle fonti, fasc. speciale* (2020): 597 et seq; Salvatore Curreri, "Il Parlamento nell'emergenza: resiliente o latitante?," *Quaderni costituzionali*, no. 4 (2020): 710-713.

hoc basis in order to provide the Executive with the interpretation and critical reading required by the raw medical and epidemiological data, as well as with the range of possible instruments offered by science in order to combat the spread of the virus.

There was an extraordinary public interest in gaining access to these discussions, above all if it is considered that, throughout the entire state of emergency, the Italian Executive did not have any other official interlocutors[79] within the scientific community. As such, it relied on the information provided by the CTS not only in relation to the adoption of each new DPCM (for which the law itself obliged the Executive to consult the CTS) but also, most likely, through informal discussions[80], before adopting any measure, including those very same decree-laws. This certainly occurred, for instance, in relation to the Decree-law that introduced the vaccine mandate[81], the Decree-law on the "reopening"[82] and also the Decree-law reducing the duration of the validity of vaccine passes (known as "green passes") for the fully vaccinated[83].

Despite the fact that the discussions held within the CTS were of great interest for the community, when the CTS was initially set up the Executive stipulated that the minutes of its meetings would not be made public. On 14 April 2020, a number of citizens then submitted a general freedom of information request in relation to those documents. Following the denial of that request, the applicants brought an action before the administrative court, which accepted their arguments in their entirety, issuing an urgent order to publish all minutes. The reason given by the administrative court in its ruling was clear: if the legal system already recognises a requirement for full transparency and

[79] Several Italian scientific societies have adopted recommendations, opinions and guidelines on many aspects of pandemic management, but none has done so as an Executive's consultant (Giada Ragone, "Imparare dalla pandemia: saperi scientifici e processi di decisione politica," *Quaderni costituzionali*, no. 1 (2022): 96).

[80] Antonio Iannuzzi, "Il comitato tecnico-scientifico nella gestione dell'emergenza sanitaria: il bilancio dell'esperienza utile per far emergere prospettive di riforma", in *La gestione dell'emergenza sanitaria tra diritto e tecnica*, eds. Antonio Iannuzzi e Giovanna Pistorio (Napoli: Editoriale Scientifica, 2022), 15 notes that the Executive's methods of interlocution with the CTS are not known, because it has never been disclosed whether the relationship was continuous and informal, as is more likely, or if the CTS only worked on specific questions.

[81] Decree-Law no. 44/2021, which recalls, in the preamble, the "notice" expressed by the CTS in two of its meetings.

[82] Decree-Law no. 52/2021, which also recalls, in the preamble, the "notice" expressed by the CTS in two of its meetings.

[83] Decree-Law no. 172/2021, which implements the opinion in this sense made by the CTS (Cosimo Lotta, "La legislazione emergenziale per contrastare la pandemia da Covid-19 tra scienza e diritto: il ruolo del Comitato tecnico-scientifico," *Consulta online*, no. 1/2022, 344), without however mentioning it in the preamble.

information for acts on the basis of which individual measures are adopted as well as acts with a much more limited impact on society, then "it is all the more necessary that access must be granted to the minutes of the CTS which, in setting out the factual premises for the adoption of DPCMs, have a special social impact on the local communities and on society as a whole"[84].

Following the interim ruling issued by the administrative court, the Executive did not even wait to receive the decision on the merits and decided to publish all of the minutes on the Civil Protection Service website forty five days after the respective meeting[85]. The Council of State went on to hold that "the public interest in obtaining full transparency in relation to the acts by which the Executive and the health authorities have taken since the outset to combat the spread of the pandemic and in casting light – according to the '*glasshouse*' principle, which must apply to the transparency of administrative action – on the albeit complex and articulated decision making processes that, also during an investigative or merely preparatory stage of the procedure, led to the adoption of emergency measures that had a major impact on the exercise of fundamental rights" had been satisfied[86].

The Council of State was right: at this stage public opinion could be said to have been largely satisfied, aside from some residual technical difficulties in consulting the text of the minutes[87].

However, almost nobody noticed that this solution also prevented members of the Chamber of Deputies and senators from gaining access to the matters discussed by the CTS, despite it being absolutely essential for them to scrutinise the minutes, specifically at the time when they received the advance communication concerning the DPCM due to be adopted shortly, or when requesting the Executive to provide information concerning its actions.

It is also important to consider that, throughout the pandemic, the Italian Parliament did not enhance the instruments available to it for accessing information, even though these

[84] Tribunale Amministrativo Regionale per il Lazio, section I quater, Judgment 22 luglio 2020, no. 8615.
[85] At https://emergenze.protezionecivile.gov.it/it/sanitarie/coronavirus/verbali-comitato-tecnico-scientifico
[86] Consiglio di Stato, section III, 9 July 2021, no. 5213.
[87] Francesco Laviola, "La decisione politica science-based e il ruolo del Comitato tecnico-scientifico nella gestione dell'emergenza Covid-19 tra arbitrarie pretese di segretezza e riaffermazione del diritto alla trasparenza," *federalismi.it*, no. 20 (2021): 158.

were already very weak and did not offer adequate fora and procedures for the specific purpose of questioning technical experts[88]. As such, the Parliament did not cultivate any direct relations with the scientific community, and in this respect relied exclusively on the Executive's channel, which was in turn limited to consultation with the CTS[89].

As a result, the forty-five day delay in publishing the reports of the CTS gave rise to the secondary effect of rendering parliamentary oversight over the Executive's actions during the pandemic 'a facade' or in any case superficial oversight[90].

If Parliament did not have access to the very same scientific yardstick by which the Executive measured its own actions, how could it exercise control over the Executive's political choices, which were assumed to be based on that yardstick?

3. Courts

As far as judicial review during the Covid-19 pandemic and the bounds on executive action resulting from judicial review are concerned, the conclusions reached by Abiri&Guidi in relation to the USA and other countries certainly do not apply in Italy[91].

In fact, the Italian courts did *not* prove to be unprepared to meet the challenge of the pandemic as they were accustomed – above all within the administrative courts – to reviewing highly discretionary acts carried out by public authorities, and to doing so on the basis of interim actions. During the health crisis, they have *never* adopted a stance of deference to the Executive's choices as a general rule, and have *never* even chosen to apply a looser standard of review to its measures.

On the contrary, the Italian courts have always struck the usual balance between rights and interests of constitutional standing with reference to the principle of reasonableness. Moreover, whilst they have often endorsed choices made by the Executive that interfere with individual freedoms, they have by no means – in my view – done so out of deference

[88] Simone Penasa, "La consulenza scientifica parlamentare; analisi comparata di uno strumento costituzionalmente necessario," *Rivista di diritti comparati*, no. 3 (2021): 13 et seq.; Cecilia Siccardi, "Organi tecnici e produzione normativa," *Osservatorio sulle fonti* (2022): 812.

[89] Lavinia Del Corona, "La fiducia nella scienza alla prova dell'emergenza sanitaria da Covid-19", in *La gestione*, 25.

[90] Antonello Lo Calzo, "Le prassi parlamentari sul sindacato ispettivo nel contesto dell'emergenza sanitaria", in *Le prassi delle istituzioni in pandemia*, eds. Luca Bartolucci and Luca Di Majo (Napoli: Editoriale Scientifica, 2022), 152 and 167-168.

[91] Gilad Abiri and Sebastián Guidi, "The Pandemic Constitution," *Colum. J. Transnat'l L.*, 60, no. 1 (2021): 68 et seq.

or adulation, but rather by correctly considering the constitutional framework, which is fully centred on the principle of solidarity (starting with Article 2 of the Constitution: "The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled") and which defines health "as a fundamental right of the individual and as a collective interest" (Article 32 of the Constitution)[92].

Under Italian law, judicial review over action taken in order to manage the health emergency was conducted mainly by the administrative courts, which found themselves in the front line in dealing with requests brought by citizens due to their status of "directly accessible" courts[93]. They were called upon to issue rulings in real time, very often on an interim basis, concerning requests seeking the cancellation of various "Covid acts", including DPCMs, which were challenged before the courts both on the grounds that they failed to respect the proper distribution of powers among different levels of government and also on the grounds that they did not constitute reasonable restrictions on the rights of citizens. Jurisdiction over some cases lay with the ordinary courts, such as those on employment relations or involving challenges to sanctions imposed on people who had failed to comply with restrictions imposed by public authorities.

In any case, a vast body of administrative litigation accumulated in relation to all types of measures, with the exception of mask mandates, which were evidently perceived by all citizens as minimum indispensable measures, even though some rulings were issued concerning mask wearing by children within schools. For example, the administrative courts were required to rule not only on access to minutes of the CTS, as mentioned above, but also on school attendance, the assessment of school grades, the restrictions imposed on business activity, vaccine mandates, the procedure for granting marketing authorisation for vaccines, liability for any harm caused by vaccination, the specific position of healthcare professionals, claims to priority eligibility for vaccination, the regulations applicable to vaccine passes ("green passes"), the amendments to the rules

[92] It is certainly the case, for example, of the Judgment of the Italian Council of State, section III, 30 March 2020, no. 1553, quoted by Gilad Abiri and Sebastián Guidi, "The Pandemic Constitution," 97, that validated an Executive-mandate quarantine with the aim to guarantee "the still more primary and general constitutional value" of "public health, that is the health of the generality of citizens". Above, all, it is the case also of the Judgment of the same supreme administrative court, 20 October 2021, no. 7045, on the compulsory vaccination of health professionals (especially paragraphs nos. 42.7. et seq.)

[93] Antonella Minzione, "I giudici e la pandemia," *federalismi.it – paper* (12 January 2022): 3

applicable to proceedings before the administrative courts adopted by the legislator during the pandemic, and so on[94]

Overall, the administrative courts made independent and in some cases extremely brave choices, inspired by the requirement to safeguard the foundations of Italian democracy even during the darkest moments of the health emergency.

The judgment ordering the CTS to publish its minutes, as discussed above (section 2.3.), is symbolic of this approach. However, we can also highlight other major rulings, such as the interim order issued by the Council of State upholding an action brought by general practitioners who had challenged a measure issued by the Italian Pharmaceutical Agency (AIFA) suspending authorisation to use hydroxychloroquine to treat Covid[95]. The Council of State stated that, "according to the current state of scientific knowledge" and "without prejudice to any further detailed investigation" by the administrative courts and the AIFA, "the risk-benefit ratio" "is not reasonably such as to preclude the off-label usage of hydroxychloroquine and its prescription by the attending physician, under his or her specific responsibility", for the purpose of taking care at home of a patient infected with Covid.

However, as was the case for parliamentary oversight, this area too was affected by the same information gap *vis-a-vis* scientific power which, by its nature, are ill-suited to being controlled. I'm referring to the difficulties in conducting judicial review of the "technical and scientific discretion" (*discrezionalità tecnica-scientifica*) of the administrative authorities.

Even before the pandemic, there was already much discussion within the literature regarding the depth to which judicial review by the administrative courts could reach in relation to administrative assessments of a technical nature. Moreover, case law was already extremely variegated and a wide range of approaches had been adopted. In addition, there was also a mismatch between the theoretical standard of review and the actual standard of review applied within individual rulings[96].

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[94] A review of the administrative case law divided into these themes can be read in Antonella Minzione, "I giudici," 14 et seq.

[95] Council of State, section III, Order 11 December 2020, no. 7097.

[96] Alfredo Moliterni, "Il sindacato giurisdizionale sulle valutazioni tecnico-scientifiche e l'instabile confine tra amministrare e giudicare," *Diritto Processuale Amministrativo* (2021): 399 et seq.; Margherita Ramajoli, "Valutazioni tecniche, pubblica amministrazione e diritti fondamentali", in *Diritto e valutazioni* scientifiche, eds. Benedetta Liberali and Lavinia Del Corona (Torino, Giappichelli, 2022), 157 et seq.

Administrative case law fluctuated in the same manner also in relation to "Covid acts", alternating between rulings such as the one on hydroxychloroquine (in which the review by the courts reached into the dynamics of scientific debate in order to assess the reasonableness of the resulting administrative measure[97]); and rulings such as the ones holding that the Executive enjoyed "extremely broad discretion" in pursuing pre-determined health policy objectives[98], and that its actions were open to review "solely on the grounds of serious and manifest shortcomings and/or mistakes or evident lack of logic, irrationality, disproportionateness or unreasonableness, there being no possibility to review the merits and acceptability of the decisions adopted, nor whether they are appropriate or convenient"[99]. In these latter cases accordingly, the administrative courts limited themselves to conducting an external review, examining – in cases involving DPCMs – whether the measures adopted were consistent with the indications contained in the corresponding CTS minutes.

The difficulty appears to have been avoided to a lesser extent by the ordinary courts in relation to the matters falling under their jurisdiction. Notable rulings include for instance a judgment cancelling an order that directed a restaurant operator to close the premises and to pay a fine for having kept the restaurant open after the curfew imposed by a DPCM. The court held that neither the premise for the DPCM not the CTS minutes themselves on which the DPCM was based contained any "specific indications concerning the seriousness of the rate of spread of the virus that were such as to render the measures [contained in the DPCM limiting the rights of individuals] appropriate and proportionally adequate". For this reason, the court held that the DPCM was unlawful, set it aside and accepted the restaurant operator's arguments[100].

As regards the judicial review of "Covid acts" with legislative status, this fell to the ItCC, which could only intervene in a second stage, after having been apprised of the matter at hand on an incidental basis by the ordinary or administrative courts, or more rarely following a direct application by the State or by a region.

[97] Among the others see, for example, also Council of State, section III, Judgments 18 February 2002, no. 1376 and 28 February 2022, no. 1381.
[98] Among the many in this sense see Tar Lazio, section I-Roma, Judgments 2 May 2022, no. 5411 and 30 May 2022, no. 6956 and Council of State, section III, Judgment 30 August 2022, no. 7547.
[99] Council of State, section I, Opinion 15 May 2021, no. 850.
[100] Tribunale di Pesaro, Judgment 17 febbraio 2022, *Diritto&Giustizia* 99 (2022).

Although it became involved at a later stage than the other courts, due to the failure by Italian law to provide for any form of direct constitutional complaint by individuals[101], the ItCC did not by any means keep its head down.

On the contrary, the ItCC was asked to rule precisely the most controversial aspects of the emergency legislation that the referring courts had been unable to resolve on their own, and thus had the opportunity to have the last say on all of the most delicate balancing operations between constitutional interests that were carried out initially by the Executive in decree-laws, and later by Parliament in conversion laws[102].

The ItCC's most significant rulings considered legislative decisions. The judgment that upheld the special legislative model based on decree-laws and DPCMs has already been discussed above (section 2.2.), whereas the judgment approving the centralisation on the national legislator of powers to manage the emergency will be considered below (section 4).

However, other important decisions are above all three recent ruling, adopted on 1 December 2022 in relation to eleven referral orders, which symbolically brought the Covid era to the end, upholding the Executive's most contested measures. The press release states as follows: "The ItCC has ruled inadmissible on procedural grounds the question concerning the inability of healthcare professionals who have not complied with the requirement of vaccination to perform their duties, where these do not involve contact with other persons. The choices made by the legislator during the pandemic concerning the requirement of vaccination for healthcare personnel have been found to be neither unreasonable nor disproportionate. Finally, the questions raised with reference to the provision preventing employers from paying any allowance to employees who have been suspended in the event of the failure to comply with the requirement of vaccination have also been ruled unfounded; the ItCC has held that this is the case both for healthcare personnel as well as for persons working in schools"[103].

[101] Elisabetta Lamarque, "Direct Constitutional", 143 et seq.

[102] ItCC, Judgments Nos. 174/2020; 175/2020; 185/2020; 195/2020; 196/2020; 245/2020; 269/2020; 278/2020; 4/2021; 19/2021; 37/2021; 57/2021; 66/2021; 67/2021; 96/2021; 108/2021; 128/2021; 140/2021; 167/2021; 198/2021; 199/2021; 213/2021; 236/2021; 245/2021; 254/2021; 256/2022; 262/2021; 21/2022; 4/2022; 5/2022, 8/2022; 15/2022; 23/2022; 31/2022; 32/2022; 40/2022; 84/2022; 96/2022; 112/2022; 127/2022; 132/2022 and 171/2022.

[103] Now see ItCC, Judgements Nos. 14/2023, 15/2023 and 16/2023.

The reasons given in its initial judgments do not leave scope for suspicions concerning any *a priori* deference by the ItCC to the Executive, but on the contrary stress its convinced adherence to the balance of constitutional interests struck by the Executive and Parliament together. Moreover, in its last ruling on the consequences for unvaccinated workers, a stance of extreme deference to choices made by the Executive would not have made sense, given that the ItCC was now intervening after the end of the health emergency.

4. Local authorities

During the frantic episodes that characterised the first phase, in Italy all levels of government took action at the same time, often in a confused and uncoordinated manner. This was because, as mentioned above, the legislation in force at the time on civil protection and healthcare provided for powers to issue ordinances not only at national level but also at local and regional level, and also given that Decree-Law no. 6 did not clearly allocate tasks among the different levels of government.

After being immediately called upon to resolve the inevitable jurisdictional disputes, the administrative courts provided some essential directions, which were taken into account within legislation subsequently enacted at State level[104]. In fact, during phase two, Decree-Law no. 19 drastically reduced the space initially left to the regions and local authorities, providing that the regional authorities (and to a differing extent the local authorities) could adopt interim and urgent measures "pending the updating" of the various DPCMs with reference to the changing epidemiological conditions only if these measures were more severe and more restrictive than the measures currently applicable at State level. By contrast, regional authorities were prohibited entirely from adopting measures to ease restrictions imposed at State level, except in situations provided for under State law, and in those cases had to act in accordance with procedures for loyal cooperation with the State[105]. It has been noted, however, that, at the beginning, within

[104] Gabriella Palmieri, "Tribunali amministrativi regionali: cinquanta anni di esperienza," *Diritto Processuale Amministrativo*, no. 1 (2022): 306 et seq.

[105] ItCC, Judgment no. 37/2021, para 9, describes the legislative scheme as follows: "Article 1 of Decree-Law No. 19 of 2020 contains an extensive set of precautionary and limiting measures, the application of which is entrusted to DPCMs, adopted after having taken into consideration the opinions of the Presidents of the affected Regions, or, in the cases in which they apply to the entire national territory, of the President of the Conference of Regions and Autonomous Provinces (Article 2 of Decree-Law No. 19 of 2020). While approval

the little room left by the national legislation, the "regions were very active, and a kind of informal cooperation developed, with judicial disputes between the State and the regions playing a marginal role"[106].

After this restrictive framework had been consolidated within State legislation as early as the spring of 2020, during the winter of 2020-2021 the ItCC inflicted the final blow on the residual aspirations of the Italian regions to pursue their own independent policies in containing the virus.

Events can be briefly summarised as follows. In the autumn of 2020 Valle d'Aosta, a small region in northern Italy, the territory of which includes Mont Blanc and Monte Rosa, approved a regional law that allowed the President of the Region to issue orders concerning the reopening of tourist amenities and skiing facilities, notwithstanding prohibitions imposed at State level. The national Executive challenged the regional law before the ItCC by a direct application, also asking the ItCC to issue an interim ruling preventing the regional law from applying as soon as the first snows of the winter season started to fall. It is interesting to note that our system of constitutional justice has provided for a number of years that, where the ItCC is apprised of a direct application concerning the constitutionality of legislation, it may suspend the contested law on an interim basis. However, until this case the ItCC had never considered it appropriate to accede to any such request.

The reaction by the ItCC was particularly harsh both because the region's attempt to ease the measures imposed at the level of the central State were strangled at birth by an interim order suspending the application of the regional law, and also due to the reason invoked as a basis for the ban on regions from interfering with the regulatory scheme established by the State legislator[107]. Specifically, the ItCC declined to classify the regional law under

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of these decrees is pending, the Minister of Health may intervene, to prevent the crisis from worsening, by means of the aforementioned ordinance power attributed by Article 32 of Law No. 833 of 1978. In Article 1 of Decree-Law No. 33 of 2020, then, the legislator considered it appropriate to provide also for mayors to be able to intervene on urgent basis (paragraph 9), and, above all, for Regions to be able to do so (paragraph 16). The Regions, while adoption of the DPCMs is pending, have the authority to introduce "derogative measures that are stricter than the ones provided" by the DPCM, and even "more extended" ones, although, for the latter, only in agreement with the Minister of Health, and only in the cases and forms provided for by the decrees of the President of the Council of Ministers".

[106] Giacomo Delledonne and Carlo Padula, "The Impact of the Pandemic Crisis on the Relations between the State and the Regions in Italy", in *Coronavirus and the Law*, 317-318.

[107] ItCC., Order no. 4/2021 and Judgment no. 37/2021.

the subject matter of "health protection", which appears in the list of matters over which legislation is shared between the State and the regions (Article 117(2) of the Constitution: see *supra* section 1.2.). On the contrary, pursuing a notably creative approach[108], it identified a basis for legislation that was capable of excluding outright any form of regional action with regard to measures to combat the pandemic. According to the ItCC, the subject matter of the regional legislative action in question falls within the area of exclusive competence of the State to deal with "international prophylaxis" (Article 117(3)(q) of the Constitution), "which includes the prevention or obstruction of pandemic diseases, and covers every aspect of related measures"[109]. Thus, it would appear that, during a pandemic, the field of "health protection", which falls under the competence of the regions except as regards the enunciation of fundamental principles, only continues to embrace the organisation of the regional health service. On the contrary – the ItCC clearly asserted – "independent regional policies" in relation to the pandemic are inconceivable, even if they are inspired by criteria more rigorous than those adopted by the State[110].

Moreover, according to the ItCC, the centralisation of legislative and regulatory activity on the central national authorities was entirely reasonable.

The ItCC held as follows: "when it comes to highly contagious diseases capable of spreading at a global level, logical reasons, even prior to legal ones establish, in the constitutional system, the need for a single regulatory scheme, which is national in character and appropriate for preserving people's equality in the exercise of their fundamental right to health and simultaneously protecting the interests of society as a whole. In fact, every decision made in this area, limited to the sphere of local competence, has a ripple effect, and a potentially significant one, on the international transmissibility

[108] See, willing, Elisabetta Lamarque, "Sospensione cautelare di legge regionale da parte della Corte costituzionale (Nota a Corte cost. 14 gennaio 2021 n. 4)," *Giustizia insieme* (26 January 2021).

[109] ItCC, Judgment no. 37/2021, para 7.

[110] In fact, on the basis of its exclusive competence in the field of international prophylaxis, all political decisions related to the management of the pandemic belong solely and exclusively to the State, as the ItCC itself has the opportunity to clarify, making a non-exhaustive list of its many aspects: "This conclusion, thus, applies not only to quarantine measures and the additional restrictions on daily activities, insofar as they are potential sources of the spread of contagion, but also to the therapeutic approach; the criteria and methods for calculating the levels of contagion in the population; the methods of collecting and processing data; the procurement of medicines and vaccines, as well as the plans for administering them; and so on. In particular, the vaccination plans, which may be entrusted to regional management, must be carried out according to the national criteria established by State level provisions to fight the ongoing pandemic".

of the disease, and, in any case, on the ability to contain it. In particular, failing to break the chain of contagion on a minor territorial scale, by not implementing the measures necessary to do so, is tantamount to allowing the disease to spread well beyond local and national borders". Ultimately, "the State legislator has not unreasonably concluded that dividing up responsibilities on a regional and local basis is not appropriate in such cases".

5. Concluding remarks

Experiences in Italy largely confirm the hypothesis advanced by Ginsburg&Versteeg. It has in fact been shown how, despite being centrally involved in the policy choices to combat the pandemic, the Italian Executive was not entirely unbound in terms of its action, but on the contrary came up against solid democratic constraints not only in the form of the reaction by an independent and non-deferential judiciary, but also through largely efficient parliamentary oversight procedures. However, in contrast to the argument proposed by Ginsburg&Versteeg, Italian regional and local authorities did *not* operate as a real constraint on the national Executive as Italy's small geographical size – the country is more or less the same size as Arizona – on the one hand, and the global scale of the threat to health, on the other hand, made it reasonably advisable to centralise decision making to combat the virus.

Ultimately, even in the throes of a pandemic, it can be stated that the principle of the division of powers, as reviewed and adapted in line with contemporary democratic systems and parliamentary regimes in particular, worked well in Italy. This understanding of the division of powers no longer envisages legislative and executive dominance, as was the case under the original French version, in which the judiciary was answerable to the Executive and acted as a simple mechanism for giving effect to the wishes of the legislature[111]. In fact, the fundamental dividing line currently runs between political and governmental powers vested with democratic legitimation (Parliament and Executive and, albeit in a slightly different position, President of the Republic), on the one hand, and guarantor authorities (the judiciary and the body for centralised constitutional

[111] See Pasquale Pasquino, "Nicolas Bergasse and Alexander Hamilton: The Role of the Judiciary in the Separation of Powers and Two Conceptions of Constitutional Order", in *Rethinking the Atlantic World: Europe and America in the Age of Democratic Revolutions*, eds. Manuela Albertone and Antonino De Francesco (London: Palgrave Macmillan, 2009), 82 et seq.

review), on the other hand. Today, the distinction and separation between functions with a view to the guarantee of individual rights must be drawn between these two groups of entirely homogeneous public powers[112], whereas the requirement of coordination applies within each block.

However, during the health emergency another unprecedented power made its presence felt on the scene: *technical-scientific power*, which is even more dangerous as it is backed up by economic and financial interests[113]. This power, perhaps, should also have been contained and controlled into the system of checks and balances aimed at guaranteeing individual rights.

In this respect, Italy proved to lack almost entirely the necessary democratic antibodies.

First of all, technical-scientific power did not act as a counterweight, i.e. as a further bound on the political choices made by the Executive, despite medical and scientific experts being omnipresent in the media and enjoying broad freedom of speech and expression. This was a result of the Executive's decision to rely, as regards the technical-scientific aspects to its choices, on a body – the CTS – that was lacking in independence, having been specifically established by the Executive in order to provide advice during the pandemic, operating in an entirely non-transparent manner in the corridors of the Office of the President of the Council of Ministers. In this regard, one might perhaps agree with those who, considering the various experiences under comparative law, have argued that the failure to enact legislation in advance in order to establish the technical-scientific bodies charged with providing advice to political decision makers can give rise to doubts as to their independence[114].

In addition, the revolving door between political power and technical-scientific power is in itself even more dangerous for democracy when it results in choices that affect people's bodies, as occurred during the pandemic. In fact, when "political power becomes bio-

[112] Valerio Onida, "Costituzione, garanzia dei diritti e separazione dei poteri," *Questione giustizia* (2005).
[113] Gianpaolo Fontana, "Tecno-scienza e diritto al tempo della pandemia (considerazioni critiche sulla riserva di scienza)," *Osservatorio sulle fonti*, no. 1 (2002): 804.
[114] Some legal scholars strongly criticize the fact that before the pandemic Italy, unlike many other countries, did not already have technical-scientific bodies in place to interact with politics, because the lack of pre-establishment by law of these bodies can cast doubts on their independence (Antonio Iannuzzi, "Leggi "science driven" e Covid-19. Il rapporto fra politica e scienza nello stato di emergenza sanitaria," *Biolaw Journal, Special Issue*, no. 1 (2020): 123 et seq.; Id., "Tecnica, politica e diritto al tempo della pandemia", in *Diritto e valutazioni* scientifiche, 337 et seq.).

power, the descent into authoritarianism is always possible", as bio-power reconfigures the relationship between authority and freedom[115].

Secondly, as has been noted above, the publication of the minutes of meetings of the CTS after such a long delay – a month and a half after each meeting – considered in the light of the very fast timescale for changes in the dynamics of the pandemic, prevented effective parliamentary oversight over the Executive's techno-policy.

It can therefore be stated that the only bulwark against this unprecedented power in Italy was perhaps the judiciary, which on some significant occasions attempted to expand the scope of judicial review in order to examine whether the administration had correctly assessed the scientific bases for its choices.

[115] Luciano Violante, "Introduzione", in *Bioetica, pandemia e democrazia. Rule of law nella società digitale. Vol. I. Problemi di governo*, eds. Luciano Violante and Alessandro Pajno (Bologna: il Mulino, 2021), 10 et seq.