

THE ITALIAN RESPONSE TO COVID-19: BETWEEN THE CIVIL PROTECTION CODE AND PRIME MINISTERIAL DECREES

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Summary

Almost three years after the outbreak of the pandemic, it seems to be possible to identify some trends and draw some concluding remarks concerning the legal response to the pandemic crisis in Italy. While the constitutional system was probably successful in safeguarding the core content of the rule of law, the question to be asked might well be another one. Namely, did the legal framework, based on the combination of the use of decree-laws and prime ministerial decrees, and greatly diverged from the Civil Protection Code, really prove to be the most suitable response, or, on deeper analysis, did it end up generating more problems than it solved?

Keywords: COVID-19; Italy; regulatory policy; governance capacity.

1 FOREWORD

Constitutionalist doctrine has amply demonstrated that in Italy, despite some undeniable twists and turns, “the response of our institutions has not been that typical of an authoritarian democracy” and “the Constitution, once again, has demonstrated that it is able to offer a solid and effective regulatory framework, disproving all those who complain about the absence of an explicit rule on states of emergency”.¹ There

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1 An earlier version of the article was presented at the international scientific conference on “Life in the Time of COVID-19 - Social Implications on the Security and Well-being of Vulnerable Groups in the European Context”, held in at the Faculty of Law in Rijeka on July 7 and 8, 2022. I would like to thank the conveners for giving me the opportunity to discuss my draft paper with an extremely qualified and inspiring group of scholars and for their insightful comments. I would further like to thank the conference’s participants for the fruitful debate that contributed greatly to improving my article. In particular, I am profoundly grateful to Sanja Barić who provided valuable comments on the present article. Here as everywhere, the usual disclaimer applies: nobody but the author can be taken to account for the many omissions and

is no need to recall the ancient theoretical explanations of “*necessity*” as a source of law² or to listen to the appeals, *de iure condendo*, of those who would like to constitutionalise the emergency through the introduction of a so-called *emergency clause*,³ arguments which periodically re-emerge at times when exceptional situations become more pressing. It is thus true to say that, without changes, the Italian Constitution still proved itself to be resilient.⁴

imperfections that remain, in spite of all the support received.

Massimo Luciani, “Il sistema delle fonti del diritto alla prova dell’emergenza,” *Rivista AIC*, no. 2 (2020): 140.

- 2 Santi Romano, “Sui decreti-legge e lo stato di assedio in occasione del terremoto di Messina e di Reggio Calabria,” *Rivista di diritto pubblico e della pubblica amministrazione in Italia*, no. 1 (1909): 251-272.
- 3 In fact, the Italian Constitution does not provide for any specific constitutional basis for emergency legislation and does not have any “emergency clause”, such as that present in the Constitutions of other legal systems (e.g. the United States, Germany, France, Spain). This is historically explained by the fear of the framers of the Constitution - stemming from the inauspicious episode that the rules on the state of exception had in the Weimar Republic - namely, that such a constitutionalisation of power would end up legitimising its liberticidal abuses. The constitutional text contains only two references to emergency. On the one hand, Article 78 of the Constitution states that “The Houses deliberate the state of war and confer the necessary powers on the Government”. On the other hand, Article 77 (2) of the Constitution states that “When in extraordinary cases of necessity and urgency the Government adopts provisional measures having the force of law, it must on the same day present said measures for confirmation to the Houses which, even if dissolved, shall be summoned especially for this purpose and shall convene within five days”. As far as Article 78 of the Constitution is concerned, although a misplaced parallelism with wartime has often been part of the public debate, the use of this provision as a constitutional basis for issuing emergency measures to deal with the health crisis has never been seriously considered. Precisely for this reason, the response of the Italian constitutional system can in no way be compared to the theory - mentioned by some scholars during the pandemic - on the “state of emergency” put forward by Rossiter, since the author identifies precisely in war, as well as internal rebellion and economic depression, the threats legitimising the proclamation of “Constitutional dictatorship”. See, Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948). As for the use of decree-laws governed by Article 77 of the Constitution (i.e. decrees adopted by the Government in extraordinary cases of necessity and urgency, which must be ratified by Parliament within the peremptory term of 60 days), the practical use of these acts has been anything but extraordinary in the Italian constitutional experience. In fact, a massive use of decree-laws as an instrument of ordinary legislation has traditionally been justified by reasons of political discretion. Since it is up to Parliament to decide on the ratification of decree-laws through their legislative ratification within a set deadline, Parliament’s decision to adopt an extensive interpretation of the constitutional requirements of extraordinary necessity and urgency has long been considered a matter of political discretion beyond judicial control. Only since 1996 has the Constitutional Court increasingly marginalised the abuse of decree-laws. However, “this act is far from an ‘extraordinary’ act, at least if we understand something extraordinary as the pandemic has been”. For such a reconstruction, see Pietro Faraguna, “Covid-19 and the Constitution in Italy”, accessed May 15, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338535. On the “emergency clause”, see Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006), 116.
- 4 For some comparative evaluations of the regulatory response to the Covid 19 pandemic in the

Therefore, if the Italian constitutional order, despite some *stress tests* to which it has been subjected, can be said to be, at least formally, safe, one cannot on the other hand be exempt from formulating some reservations regarding the appropriateness of the choices made to fight the pandemic in Italy. In other words, the true center of gravity of the reflection must be found not in an alleged breach of the constitutional order, in an alleged violation of the hierarchy of sources or in an alleged excessive compression of fundamental freedoms, all approaches repeatedly excluded by the most attentive scholars, but rather in a careful evaluation of the degree of efficiency demonstrated by the *ad hoc* emergency scheme that was put into practice.⁵

From this point of view, a brief reconstruction of the “regulatory chain” of the epidemic will highlight how the Government’s practice has departed significantly from the general discipline of emergency situations contained in the recent Civil Protection Code.⁶ In fact, in the face of a consolidated national civil protection system, which is also the result of the incessant work of jurisprudence, both constitutional and administrative, the flood of acts that have marked the evolution of the pandemic, relying as much on the power to issue ordinances of the Minister for Healthcare as on the unusual combination of decree-law and decree of the President of the Council of Ministers, has led to a considerable deviation from the provisions of the aforementioned Civil Protection Code.

Starting from these premises, an attempt will be made to examine, through the argumentative scheme of the comparative evaluation, the use of this regulatory channel which was chosen concretely, whilst abandoning the typical paradigm of civil protection, which would have been usable in the abstract but which the Executive preferred to leave dormant in its toolbox.

Perhaps, almost three years after the beginning of the health crisis and the consequent declaration of a national emergency, having passed the most acute phase of the fight against this “invisible enemy”, it is possible to attempt to draw a balance of the way in which the Italian constitutional system has responded to this clearly sudden and unpredictable upheaval. In other words, we believe that the time is ripe to

Croatian context, see Đorđe Gardašević, “Business as Unusual: Pandemic Concentration of Executive Powers in Croatia,” *Pravni zapisi* 12, no. 1 (2021): 91-122. For further comparative considerations, see Joelle Grogan, “States of Emergency,” *Verfassungsblog*, accessed May 26, 2020., <https://verfassungsblog.de/states-of-emergency/>; Joelle Grogan, “Power, Law and the COVID-19 Pandemic - Part I: The Year of Pandemic,” *Verfassungsblog*, accessed May 15, 2021., <https://verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-i-the-year-of-pandemic/>. For a more general overview of emergency situations, see Oren Gross, and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).

5 Antonio Ruggeri, “Il coronavirus, la sofferta tenuta dell’assetto istituzionale e la crisi palese, ormai endemica, del sistema delle fonti,” *Consulta Online*, no. 1 (2020): 214; Enrico Grosso, “Legalità ed effettività negli spazi e nei tempi del diritto costituzionale dell’emergenza. È proprio vero che ‘nulla potrà più essere come prima?’”, *Federalismi.it*, no. 16 (2020), iv-xvi.

6 Legislative decree no. 1, Official Gazette, no. 17/18. (hereinafter: Civil Protection Code): a legislative and, therefore, subconstitutional framework designed to tackle issues of civil protection in cases of emergency. The Civil Protection Code replaced the previous Law no. 225/1992, which established the National Civil Protection Service.

try to test, *de iure condito*, whether the strategies put in place during this exceptional period of time have been the most appropriate, that is to say, whether the alternative management of the emergency, which has imposed itself overwhelmingly in practice and was marked by a rather nonchalant way of using sources, was the preferable solution, or whether, on closer inspection, it did not end up generating more problems than it actually solved.

2 THE LEGAL REACTION TO THE VIRUS IN ITALY

In order to reconstruct the practice followed in the attempt to combat the COVID-19 pandemic, and in the parallel impossibility of taking a census of the entire sequence of individual measures adopted, it can be noted from the outset that the Government's approach to containing the spread of the virus was rooted in three main pieces of regulation:

- 1) Article 32 of Law no. 833/1978;
- 2) the Civil Protection Code;
- 3) an unusual combination of decree-laws and prime ministerial decrees.

The very first Government interventions started when the epidemic was only affecting faraway countries and thus still appearing as a distant problem. In fact, on January 25, 2020, a first ordinance was issued by the Minister for Healthcare - followed only five days later by a second one - under Article 32 of the National Healthcare Service Act,⁷ which provided for surveillance measures with respect to passengers coming from the areas affected by the first outbreaks of the virus, on the one hand, and the strengthening of the recruitment of healthcare personnel, on the other.⁸

Subsequently, on the day immediately following the declaration by which, on January 30, 2020, the World Health Organisation defined the Coronavirus epidemic as a public health emergency of international proportions, the Government, for its part, declared a state of national emergency, pursuant to Article 24 of the Civil Protection Code, initially for a period of six months.⁹ On the basis of this declaration, a whole series of ordinances of the Head of the Civil Protection Department were then adopted, starting on February 3, 2020. The recourse to this measure was accompanied

7 Article 32 of National Healthcare Service Act, Law no. 833/1978, Official Gazette, no. 360/78, last amended with Legislative decree no. 66/10, Official Gazette, no. 106/10. Under this provision, the Minister for Healthcare is enabled to issue exceptional ordinances for public hygiene and health purposes. Such instruments are traditionally deemed exceptional in that they can temporarily derogate from ordinary legislation provided that they do not infringe the core content of fundamental rights.

8 Ordinance of the Ministry for Healthcare, Official Gazette, no. 21/20; Ordinance of the Ministry for Healthcare, Official Gazette, no. 26/20.

9 Deliberation of the Council of Ministers, Official Gazette, no. 26/20. The declaration, which did not involve Parliament, empowered the Head of the Civil Protection Department to adopt, under Article 25 of the Civil Protection Code, exceptional civil protection ordinances aimed at preventing the spread of the virus, even derogating from the provisions of the law - which must be expressly indicated - as long as the general principles of public law and the norms of the European Union were respected.

by the indication of the main derogations to the regulatory provisions - for the most part covered by the Procurement Code - necessary to coordinate the various relief and assistance interventions to the population, as well as to guarantee the functioning of the public services and to establish a special *Scientific Technical Committee* to assist the Head of the Civil Protection Department.¹⁰

In the meantime, despite the commendable activation of the civil protection system, the use of ordinances on health matters continued in parallel. This is so true that, between the declaration of the state of national emergency and February 22, 2020, three more ordinances were issued by the Minister for Healthcare, pursuant to the aforementioned Article 32 of Law no. 833/1978. In particular, these ordinances provided a whole series of operational instructions as well as precautionary measures - such as the suspension of work and school activities and the closure of non-essential commercial establishments - aimed at enabling the containment of the pandemic in the municipalities that were the first to be hit hard by COVID-19.

As the spread of the virus suddenly worsened, in the space of a few weeks, namely on February 23, 2020, a day that marked a real change of pace on the part of the Government in its response to the pandemic, the Council of Ministers adopted the first in a long series of decree-laws.¹¹ This decree-law, no. 6/2020, provided, in Article 1 (1), for the competent authorities to adopt, in areas where there were positive cases of COVID-19, “any containment and management measure that is appropriate and proportionate to the evolution of the epidemiological situation”. The subsequent, and hotly debated, Article 2 then authorised the same competent authorities to adopt “further emergency containment and management measures [...] also beyond the cases of Article 1 (1)”.

But what attracted the critical attention of the constitutionalist doctrine, especially from the point of view of the sources, was in particular Article 3 (1) which provided that the aforesaid measures were to be adopted “by one or more decrees of the President of the Council of Ministers, at the proposal of the Minister for Healthcare, having consulted the Minister of the Interior, the Minister of Defence, the Minister for Economy and Finance and the other Ministers with jurisdiction in this field, as well as the Presidents of the competent Regions, in the event that they concern only a single Region or certain specific Regions, or the President of the Conference of Presidents of the Regions, in the event that they concern the national territory”.¹²

10 See Ordinance of the Head of the Civil Protection Department no. 630/2020, Official Gazette, no. 32/20.

11 Based on Article 77 (2) of the Constitution of the Republic of Italy, Official Gazette, no. 298/47, last amended with Constitutional Law no. 2/2022, Official Gazette, no. 267/22.

12 Decrees adopted by the President of the Council of Ministers are administrative acts, possibly bearing normative content, however they are certainly and entirely subject to law. See Ludovico A. Mazarolli, “‘Riserva di legge’ e ‘principio di legalità’ in tempo di emergenza nazionale. Di un parlamentarismo che non regge e cede il passo a una sorta di presidenzialismo extra ordinem, con ovvio, conseguente strapotere delle pp.aa. La reiterata e prolungata violazione degli artt. 16, 70 ss., 77 Cost., per tacer d’altri,” *Federalismi.it*, no. 1 (2020): 13-15, who criticised the use of decrees of the President of the Council of Ministers instead of decree-

Thus, relying on the formal coverage provided, upstream, by the decree-law, specific restrictive measures were, downstream, adopted through a flood of decrees from the President of the Council of Ministers: namely, those of February 23, February 25, March 1, March 4, March 8, March 9, March 11 and March 22, 2020.¹³ *Medio tempore*, however, pursuant to Article 122 of decree-law no. 18/2020, a decree of the President of the Council of Ministers of March 18, 2020¹⁴ appointed the Commissioner for the Enactment and Coordination of the Measures to Tackle and Contain COVID-19.

Furthermore, the path laid out by decree-law no. 6/2020, and based on the decrees of the President of the Council of Ministers and authorised by previous decree-laws, once started, continued to be followed throughout the fight against the pandemic. So much so that, as the health crisis evolved, when the first decree-law (with the exception of some specific provisions) was abrogated, the subsequent decree-law no. 19/2020, following this peculiar regulatory scheme for the management of the epidemic, authorised the adoption of different and more stringent measures to respond to the emergency, yet again by means of special Prime Ministerial Decrees. Therefore, in implementation of this second decree-law, which expressly referred, unlike the previous one, to the resolution of the state of national emergency of January 31, the Prime Ministerial Decrees of April 1, April 10 and April 26,¹⁵ among others, were adopted.

Moreover, even when, from April 2020, the spread of the virus came to a gradual halt, *the modus operandi* remained exactly the same.¹⁶ That is to say, the Government continued, always within the framework of primary sources, i.e. decree-laws, to issue, in rapid succession, a flurry of decrees of the President of the Council of Ministers, some of rather short duration, also reflecting a certain pressure, in truth already evident in the first phase of managing the emergency. From this angle, it

laws, since the use of the former, by not providing for any formal intervention and control by Parliament, ended up undermining the separation between legislative and executive power on which the Italian form of government is based.

- 13 Decree of the President of the Council of Ministers of February 23, 2020, Official Gazette, no. 45/20; Decree of the President of the Council of Ministers of February 25, 2020, Official Gazette, no. 47/20; Decree of the President of the Council of Ministers of March 1, 2020, Official Gazette, no. 52/20; Decree of the President of the Council of Ministers of March 4, 2020, Official Gazette, no. 55/20; Decree of the President of the Council of Ministers of March 8, 2020, Official Gazette, no. 59/20; Decree of the President of the Council of Ministers of March 9, 2020, Official Gazette, no. 62/20; Decree of the President of the Council of Ministers of March 11, 2020, Official Gazette, no. 64/20; Decree of the President of the Council of Ministers of March 22, 2020, Official Gazette, no. 76/20.
- 14 Decree of the President of the Council of Ministers of March 18, 2020, Official Gazette, no. 188/20.
- 15 Decree of the President of the Council of Ministers of April 1, 2020, Official Gazette, no. 88/20; Decree of the President of the Council of Ministers of April 10, 2020, Official Gazette, no. 97/20; Decree of the President of the Council of Ministers of April 26, 2020, Official Gazette, no. 108/20.
- 16 Gian Paolo Dolso, *Circolare liberamente. Principi, interpretazioni e disciplina emergenziale* (Napoli: Editoriale Scientifica, 2021), 102.

seemed emblematic that even the new Government,¹⁷ which took over the leadership of the country, had, at least initially, perpetuated the same regulatory structure that had previously been used in the emergency practice, as demonstrated by the issuance by the then newly elected President of the Council of Ministers, Mario Draghi, of the prime ministerial decree of March 2, 2021.¹⁸

In this unprecedented and chaotic background, in parallel with the rapid and incessant acceleration of the disease, it is still worth noting that the aforementioned state of national emergency, with a special resolution of the Council of Ministers, was extended on several occasions, until March 31, 2022.

Having thus briefly reconstructed the practice developed by the Government since the end of January 2020, and beyond the individual measures adopted, one can attempt to highlight a regulatory trend that has characterised the regulatory management of the epidemic in Italy. In particular, what we wish to adequately highlight is that, as the pandemic worsened, the strategy of containment and management of the spread of the virus shifted from initial interventions centred on the civil protection system to a new path of emergency governance, in truth, completely different with respect to the system outlined by the Civil Protection Code. Indeed, the Civil Protection Code, although never entirely - at least formally - abandoned, was initially affected by a functional hybridisation at the hands of the concurring power of necessity and urgency embodied in the head of the Minister for Healthcare. This overlapping reached its climax with decree no. 414/2020 of the Head of the Civil Protection Department by which the Secretary General of the Ministry for Healthcare was identified as the implementing party “for the management of activities connected to the management of the emergency relating to the health risk”.

Later on, the Civil Protection Code was substantially replaced by a new parallel channel which hinged on decree-laws instituting a decree-making power of the President of the Council of Ministers. Thus, a new system for implementing emergency measures was introduced, represented by the decrees of the President of the Council of Ministers, something which seems to be totally outside of the national civil protection system.

Ultimately, what is evident is how the *trend* followed by the Government in the management of the pandemic has resulted, from the point of view of the use of sources, in a strong deviation from the traditional paradigm of regulating emergency situations.

17 In fact, on January 26, 2021, due to internal disagreements within the Government, the second Government to have been headed by Giuseppe Conte resigned; on February 2, 2021, the President of the Republic, Sergio Mattarella, intervened publicly, giving the task of forming a new Government to Mario Draghi: former Governor of the Bank of Italy as well as President of the European Central Bank.

18 On closer inspection, there was a change of course from the previous emergency governance, only following the adoption of decree-law no. 44/2021, Official Gazette, no. 79/21, instead of a special decree of the President of the Council of Ministers. In this way, the measures to combat the health emergency were dictated directly by a primary source, which provided an express legal basis for them. However, while this certainly appeared to be a good choice, what continued to be lacking was an effective realignment of the Government’s response to the firm provisions of the Civil Protection Code.

3 LAW DECREE / PRIME MINISTERIAL DECREE V. CIVIL PROTECTION CODE

Having described the practice followed in Italy in the regulatory management of the pandemic, it is now necessary to ask whether the decision to derogate from the system of civil protection sources, although undoubtedly left up to the free assessment of the decision maker, proved to be the most appropriate, at least in terms of systematicity and coordination of the various interventions, among those that, theoretically, could have been taken.¹⁹

Starting from the principle, i.e. the declaration of a state of national emergency, which constitutes the substantial prerequisite for the activation of the Government's *extra ordinem* power, it is important to point out that this, if it was preceded by a number of ordinances of necessity and urgency issued by the Minister for Healthcare, lacked a prior declaration of the *state of mobilisation* of the National Civil Protection Service, even though it is foreseen as a preliminary measure by the Civil Protection Code.²⁰ The decision to reach, *omisso medio*, the declaration of a state of national emergency, however, is not at all persuasive. In fact, at a very early stage, prior to the discovery of the first viral outbreaks, and even before witnessing a deepening nationwide health emergency, it would have been possible to proceed with a declaration of a state of mobilisation that would have guaranteed some initial support to the territorial bodies originally involved, in line with the requirements of adequacy and subsidiarity.²¹

The formal declaration of the state of national emergency, moreover, in addition to having been preceded by the aforementioned ordinances of the Minister for Healthcare, was also anticipated by a note from him declaring “the need to proceed with the declaration of the state of national emergency referred to in Article 24 of legislative decree no. 1/2018”.²² The discrepancy with respect to the provisions of the Code appears, also here, evident insofar as, according to the aforementioned Article 24, the deliberation of the Council of Ministers should, at least theoretically, have been based on an “expeditious assessment carried out by the Civil Protection Department”, at the proposal of the President of the Council of Ministers, at the possible request of the President of the Region involved and in any case once having

19 For further details on these developments, see Stefano Civitarese Matteucci et al., “Italy: Legal Response to Covid-19,” in *The Oxford Compendium of National Legal Responses to Covid-19*, eds. Jeff King, and Octávio Luiz Motta Ferraz (Oxford: Oxford University Press, 2021), 1-29; Michele Massa, “A General and Constitutional Outline of Italy’s Efforts Against COVID-19 - With the Best Face On,” in *Coronavirus and the Law in Europe*, eds. Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst, and Fryderyk Zoll (Cambridge: Intersentia Ltd, 2021), 25-54.

20 In particular, under Article 23 of the Civil Protection Code, a state of “mobilisation” can be ordered by decree of the President of the Council of Ministers alone - instead of the entire Government - in order to allow an initial, albeit more limited, support to any affected regional systems.

21 Article 23 of the Civil Protection Code.

22 The quotation refers to the premises of the Deliberation of the Council of Ministers (January 31, 2020).

acquired his agreement. In the preamble of the resolution of the Council of Ministers, however, there is no trace of any preliminary assessment by the aforementioned Department.

And yet, the setting in motion of the structures of the National Civil Protection Service implies the involvement of a very heterogeneous apparatus, characterised by a breadth of vision undoubtedly greater than that of the Minister for Healthcare alone. Therefore, it would perhaps have been preferable to combine the assessment of the Minister for Healthcare with a diagnostic analysis of the calamitous impact carried out by a specialist body such as the Civil Protection Department, so as to provide an operational framework and a technical basis, as complete as possible, on which to base the declaration of the state of national emergency.

Moreover, the civil protection ordinance no. 630/2020, as mentioned above, provided for the appointment, under Article 2 (1), of the *Scientific Technical Committee* to be used by the Head of the Civil Protection Department to overcome the health emergency. However, the unusual decision to include such a provision in an ordinance is particularly perplexing, not only because the reason for using a provision of necessity and urgency to prepare a merely organisational act cannot be discerned, but also because, since it is a secondary source, the principle of legality could not be said to be fully respected. This is all the more true if one bears in mind that, as things stand, a suitable and sufficient legal basis for the formation of the aforementioned Committee could well have been found in the Civil Protection Code. In fact, the Code, with regard to emergencies of national importance, provides for the convening of the *National Civil Protection Operational Committee*.²³

That is to say, a body which, according to the combined provisions of Articles 13 and 14 of the Civil Protection Code, is made up of, among others, the operational structures of the National Civil Protection Service, i.e.: “the professional orders and colleges and their respective National Councils [...] and the national bodies, institutes and agencies carrying out functions in the field of civil protection and companies, societies and other public or private organisations carrying out functions useful for civil protection purposes”. In the case in question, if one looks at the above-mentioned operational structures of the National Civil Protection Service, one can clearly see that the National Civil Protection Operational Committee referred to in Article 14 could certainly have been structured in a way that would have tended to be analogous, if not entirely superimposable, to the Scientific Technical Committee, thus avoiding the institution of a pleonastic *ad hoc* body.

Similar considerations can also be made with respect to the appointment, by decree of the President of the Council of Ministers of March 18, 2020, on the basis of the provisions of Article 122 of decree-law no. 18/2020, of the *Extraordinary Commissioner* for the implementation and coordination of the measures necessary to contain and combat the epidemiological emergency. In this regard, it is by now well established that in Italy administrative law increasingly encounters exceptions due to the constant recourse to the phenomenon of the commissioners, which, inevitably, contributes to the expansion of an emergency governance derogatory to ordinary

23 Article 14 of the Civil Protection Code.

law. In fact, the establishment of extraordinary administrative bodies to deal with situations of objective difficulty in providing for ordinary administration or the need to achieve priority and specific results is becoming increasingly frequent in practice.

It is necessary, however, to remember that the civil protection system already contemplated the possibility for the Head of the Civil Protection Department to appoint, by means of his own ordinances, special *Delegated Commissioners* in order to better coordinate the implementation of the ordinances themselves.²⁴ In the light of these regulations, therefore, it is difficult to understand the need nor, even less, the point of appointing, by prime ministerial decree authorised by a prior decree-law, a third and totally separate figure with respect to the provisions of the Civil Protection Code, which indeed appears to be that of the aforementioned Extraordinary Commissioner.

More generally speaking, both the institution of the Scientific Technical Committee, on the one hand, and the appointment of the Extraordinary Commissioner, on the other, certainly show the gap that exists between the legislative paradigm and the real situation.²⁵ In other words, they both represent the figure of a more general and peculiar *modus operandi* that, forgetting the consolidated forecasts foreseen by the Civil Protection Code, inevitably ended up creating a gap with the national civil protection structure, intrinsically organic and self-sufficient, whose heterointegration, with the consequent overlapping of additional and different figures, has done nothing but generate issues regarding the coherence of the system.

In an attempt to close the circle opened with these initial considerations, one can now ask oneself whether the *sui generis* regulatory procedure followed by the convulsive governmental practice, precisely because it resulted in a macroscopic departure from the firm framework of the National Civil Protection Service, was not itself the reason why the acts adopted turned out to be so problematic from the point of view of the sources involved, leading to considerable difficulties of interpretation.

On the level of the formal relations between the sources of law, the emergency management scheme, rooted in the sequence decree-law / decree of the President of the Council of Ministers, raised some eyebrows. First of all, the *carte blanche* delegation contemplated by Articles 1 and 2 of decree-law no. 6/2020 seemed to provide only formal coverage regarding the legality of the administrative measures concretely adopted to respond to the emergency.

In truth, this was a mechanism that did not meet the criteria established by the Italian Constitutional Court with regard to the sufficiently detailed content of the legislative provision attributing powers to the administration, in compliance with the principle of legality. If, on the other hand, the regime outlined by the Civil Protection Code had been followed, the President of the Council of Ministers could have issued civil protection ordinances that, finding their legal basis in the Code itself, would

24 Article 25 of the Civil Protection Code.

25 Paolo Giangaspero, "La normativa 'speciale' sulla gestione della pandemia da covid-19 sotto il profilo dei rapporti tra competenze statali e regionali," in *Virus in fabula. Diritti e Istituzioni ai tempi del covid-19*, eds. Gian Paolo Dolso, Maria Dolores Ferrara, and Davide Rossi (Trieste: Eut, 2020), 113.

undoubtedly have escaped the same doubts of legality advanced by many against prime ministerial decrees.

Moreover, the decrees of the President of the Council of Ministers, having to be subject to the principle of typicality, show a certain structural inadequacy in dealing with contingent situations because of the difficulty they have in attempting to maintain the exercise of power within the framework of decree-laws.²⁶ If the decree-law / decree of the President of the Council of Ministers represents, in effect, a framework whose functionality is dependent on the capacity of the decree-laws to typify the measures that can be adopted with prime ministerial decrees, on the other hand it is undeniable that the discretionary characteristic of every emergency situation is, precisely, the impossibility of predetermining *ex ante* the interventions necessary to overcome it. And it was, therefore, the extraordinary nature of the pandemic, such as to require measures that were barely susceptible to being defined *a priori*, that was yet another of the many reasons why the use of *extra ordinem* ordinances would have proved more suited to a flexible and effective Government response.²⁷

But, on closer inspection, there is perhaps more. The model based on decree-laws as the institutive sources of the power to adopt subsequent decrees of the President of the Council of Ministers, embodying the choice of *ad hoc* management of each emergency and, at the same time, abandoning the idea of following the previous legal framework dedicated to the generality of calamitous events, has ended up putting the very regulatory nature of the decree-law institution under great stress. In fact, it has been argued²⁸ that decree-laws, and in particular those that have provided for measures to contain and manage the epidemic, have improperly operated as a sort of “*rule of recognition*”²⁹ with respect to a whole series of regulatory typologies already existing in the legal system.

The impression is, therefore, that the emergency decree-laws, in initiating an unprecedented emergency microsystem, have lost their nature as a source directly containing measures to deal with the emergency, in order to become rather strangely a rule of recognition of other legal acts - decrees of the President of the Council of Ministers - by which to deal with the emergency. This has allowed the tendency to dilute the regulatory function of the decree-law that has led it to move away from its

26 In fact, although in the first decree-law no. 6/2020, Official Gazette, no. 45/20 the list of measures that could be adopted by decree of the President of the Council of Ministers was merely illustrative, as early as the subsequent decree-law no. 19/2020, Official Gazette, no. 79/20, on the other hand, a list was provided that was not only exhaustive but also rather detailed of measures that could be concretely adopted by decree of the President of the Council of Ministers.

27 See Diletta Tega, and Michele Massa, “Fighting COVID 19 - Legal Powers and Risks: Italy,” *Verfassungsblog*, accessed March 23, 2020, <https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-italy/>.

28 Giuseppe Mobilio, “La decretazione d’urgenza alla prova delle vere emergenze. L’epidemia da Covid-19 e i rapporti tra decreto-legge e altre fonti,” *Osservatorio sulle fonti*, Special issue (2020): 370.

29 In the sense indicated by Hart of a rule defining criteria for the identification of valid legal sources in a given legal system: Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

nature outlined in Article 77 of the Constitution.³⁰

The dubious appropriateness of the use of decree-laws typifying subsequent decrees adopted by the President of the Council of Ministers cannot be overcome even by accepting the thesis, supported, among others, by the former President of the Council of Ministers, Giuseppe Conte, in expounding the choices of method that have inspired the regulatory strategy of his Government, according to which the recourse to that alternative governance was linked to the particular urgency due to the pandemic.³¹ The *former* President, in fact, after stating that “it would not have been possible to entrust the entire regulation to decree-laws alone, since the unpredictability of the pandemic evolution [...] has forced us to intervene several times, even a few days apart and [...] the conversion of decree-laws into laws must be carried out by Parliament within 60 days, with the consequence that this conversion would take place, more often than not, when the effects had passed or in any case superseded by the subsequent decree”, revealed how recourse to prime ministerial decrees was inspired precisely by the “need to equip oneself with a particularly agile tool, so as to intervene promptly according to the evolution of the disease”.

In fact, the purported justification that prime ministerial decrees were indispensable for the reasons of speed is not at all persuasive and does not seem to be decisive for preferring these acts to the ordinances of necessity and urgency provided for by the Civil Protection Code. The characteristics proper to decrees adopted by the President of the Council of Ministers, which contribute to making them rather agile instruments, are also predictable with respect to the *extra ordinem* measures of the Civil Protection Code.³²

Both the adoption by a monocratic body, without the need to pass the scrutiny of a *plenum* in which different political sides are expressed, and the absence of intervention and formal controls by the President of the Republic, who does not issue these acts, and by the Parliament, which does not have to convert them, accompany the procedure for the formation of both types of regulation in question. Indeed, to put it bluntly, the civil protection ordinances, unlike the decrees of the President of the Council of Ministers, are also exempt from the preventive control of the Court of Auditors and do not require a proposal from the Minister for Healthcare or to hear the competent Ministers, as well as the Scientific Technical Committee for the aspects which are more closely related to the assessments of adequacy and proportionality.

We must therefore accept that not even the alleged greater speed of the prime ministerial decrees could have justified all the twists and turns that the system of sources has undergone, which in the face of the resources that the system already knew of for responding to emergencies, could not and should not appear necessary.

30 Rather than conferring on other authorities the power to adopt further acts, decree-laws should rather contain “measures of immediate application”, as provided for in Article 15 (3) of Law no. 400/1988, Official Gazette, no. 214/88 (hereinafter: Government Discipline Act).

31 Consider, in this regard, the full transcript of the *lectio magistralis* delivered at the University of Florence on February 26, 2021 by former President of the Council of Ministers Giuseppe Conte, available at www.firenze.repubblica.it.

32 Compare Article 25 of the Civil Protection Code, which refers to civil protection ordinances, and Article 17 of Law no. 400/1988, which refers to ministerial decrees, including decrees adopted by the President of the Council of Ministers.

4 CONCLUDING REMARKS

Drawing inspiration from the deviation of Government practice from the Civil Protection Code, we can sketch some conclusive reflections on the governance of the pandemic phenomenon in Italy.

If the formal legitimacy of the free choice to resort to decree-laws typifying subsequent decrees adopted by the President of the Council of Ministers can hardly be doubted, except to then verify, from time to time, the merits of the individual measures adopted, it is undeniable that the greatest perplexities connected to this unusual regulatory strategy have, rather, developed around the low degree of systematicity and, therefore, efficiency of the response that the Government, in a very difficult context, was forced to provide.³³ With this, however, we do not intend to go so far as to believe that any perplexity that might have arisen regarding the regulatory sequence, decree-law and prime ministerial decree, could have been avoided by the mere fact of resorting to the Civil Protection Code and, consequently, to the instrument of civil protection ordinances. And this for the pre-eminent reason that not even such ordinances could be completely exempt from criticism.

In this regard, one could, first of all, raise some reservations as to the actual preordination of the codified system to govern a peculiar emergency such as a pandemic. In fact, the Code, for the very fact that it is configured as a civil protection discipline, has an intrinsic limitation: that is, it offers as its main scope, natural disasters, such as seismic, volcanic, hydrological and adverse meteorological events, which are rather different from the pandemic emergency. So, although within the Code public health risks are covered by the National Civil Protection Service and therefore no doubts could be raised as to the formal legitimacy of its use in the management of the pandemic, strictly speaking, among the various disasters that the 2018 legislator had in mind when regulating the possible content of the orders under Article 25 of the Civil Protection Code, a pandemic was not envisaged.

33 The pandemic did not, therefore, lead to the “state of exception” theorized by Carl Schmitt: see Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2006). In fact, assuming that this is a legal and not a merely political category, it presupposes that a single political or institutional subject takes charge of it and manages it, whereas during the pandemic in Italy, on the one hand, the chain of sources adopted corresponded to a chain of multiple competent institutions - Parliament, Government, President of the Council of Ministers, Minister for Healthcare, Head of the Civil Protection Department etc. - and, on the other hand, none of the acts adopted could escape judicial review. In particular, the Italian Constitutional Court already had occasion to express its view. In fact, in a decision issued in October 2021, the Constitutional Court upheld the legal framework illustrated above, providing for a combination of a decree-law with a list of possible restrictive measures, and administrative acts implementing the specific measures according to the current state of affairs (decision in a case no. 198/2021 of October 22, 2021). In short, the Court held that the contested legislative framework vested the President of the Council of Ministers with the task to execute, with general administrative acts, sufficiently detailed measures. For an analysis of this judgment, see Pietro Faraguna, “Covid-19 and the Constitution in Italy.” See also Italian Constitutional Court, decision in a case no. 278/2020 of December 23, 2020; Italian Constitutional Court, decision in a case no. 4/2021 of January 14, 2021; Italian Constitutional Court, decision in a case no. 37/2021.

It has been argued, secondly, that the Code, in drawing the limit of the *extra ordinem* power of civil protection attempts to respect not only of the general principles of the legal system, but also of the norms of the European Union, and would obstruct the proper management of the pandemic. Indeed, the belief that *all* European Union norms impose a rigid limitation on civil protection ordinances, they would not seem at all to be in tune with the needs they aim to fulfil. Actually, the provisions subject to the most frequent derogations during the pandemic were precisely those strictly derived from the European Union on which the Italian Procurement Code is based.³⁴

Once more, a certain astonishment is aroused by the second part of Article 25 (1) of the Civil Protection Code where it specifies that civil protection ordinances must “contain an indication of the main rules from which they intend to derogate”. To tell the truth, this is a provision that may appear of doubtful usefulness, as well as applicability. In fact, the listing of the main provisions susceptible to derogation could prove difficult to implement in practice, considering that, due to the very unpredictable nature of the emergency, the rules to which it would be necessary to derogate would not *a priori* be easy to identify.

But the perplexities do not end there. One could, therefore, continue to scrutinise the architecture of the Code in an attempt to track down further structural aporias, but it would not be worth it since such a search would represent a mere stylistic exercise. It seems, in fact, all too evident that the Code is not without its limitations and flaws. And although, in this regard, one might wonder what discipline of an entire sector, even if consolidated in a single unitary *corpus*, can really be said to be free of inconsistencies, what, however, is important to highlight are two distinctive features of the Civil Protection Code that contribute to making it undoubtedly appreciable: its aspiration to be systematic, combined with its attention to internal coherence, characteristics that could have led to its being preferred as an instrument for governing emergencies.

It may well have been more appropriate, therefore, to try to widen the meshes of the civil protection discipline, even - admittedly - with some forcing of the text, rather than creating *ex novo* a parallel model of emergency management, decidedly less rigorous and lacking the same internal coherence. In fact, it is certainly no mystery that, in the Italian experience, the strings of the civil protection legislation have been stretched so tightly as to include the most disparate and, perhaps, most distant objects from the Code’s guiding rationale.³⁵

Over the years we have witnessed the use of civil protection legislation for the most diverse reasons: from the election of the Pope to the organisation of the G8 *summit*, including even the management of the Olympics.³⁶ If, therefore, the

34 See ordinance of the Head of the Civil Protection Department, no. 655/2020, Official Gazette, no. 82/20.

35 Roberto Zaccaria, and Enrico Albanesi, “Le ordinanze di protezione civile ‘per l’attuazione’ di decreti-legge (ed altri scostamenti dalla l. n. 225 del 1992),” *Giurisprudenza costituzionale* 54, no. 3 (2009): 2231-2248.

36 See decree of the President of the Council of Ministers of April 5, 2005, Official Gazette, no. 78/05, concerning the funeral of the Holy Father John Paul II and the election of the new Pope; decree of the President of the Council of Ministers of September 21, 2007, Official Gazette,

legislation in question was repeatedly bent, in total disregard of the most elementary requirements of necessity and urgency, as well as the temporary nature of calamitous situations, for the main purpose of derogating from the rules in force on public contracts, for the management of events that went far beyond the catastrophes referred to in the Code, it is hard to understand why the same thing could not have been done to deal with a contingency, this time truly urgent, such as the pandemic.³⁷ In other words, one cannot help wondering whether one would not have remained more within the constitutional perimeter by resorting to a systematic application of the civil protection regulatory framework as a whole, which already offered fertile ground on which to graft a prompt emergency reaction, rather than deciding to derogate from it by abandoning it in practice.

In fact, the emergency would certainly have lent itself, especially at times of acute spread of the epidemic over the entire national territory, to a quick, specific and consolidated legal regulation, which the Code, even with all its shortcomings and imperfections, would have been able to offer. Any urgent intervention could thus have been carried out through the use of civil protection ordinances, the initial declaration of a state of national emergency which would have determined the course of action, already imposing an initial discipline, while any further operation, albeit still relevant but less pressing, could have been entrusted to ordinary laws or, at most, to decree-laws, thus allowing Parliament to regain possession of its lost legislative function.³⁸

Faced with a national emergency, following the Civil Protection Code, the measures to deal with it would also have been characterised by a marked coherence, something which in its absence was often lamented. Using a tried and tested system, rather than experimenting with an *ad hoc* one, would also have avoided all those significant distortions of the framework of sources produced by the use of prime ministerial decrees.

But this was not done and the micro-system of sources started by decree-law no. 6/2020 continued to be procrastinated throughout the emergency period. This led to considerable hermeneutical uncertainties that ended up generating inevitable bewilderment even among the citizens.³⁹

A further question arises, therefore, spontaneously: why was the structure envisaged by the Civil Protection Code, although not without its flaws and limitations, not allowed to deploy all its unifying force in the face of the pressures of the pandemic? The prevailing answer to this question, in justifying the setting aside

no. 222/07, concerning the Italian G8 Presidency in the year 2009; decree of the President of the Council of Ministers of June 10, 2005, Official Gazette, no. 139/05, concerning the Winter Olympic Games held in Turin in 2006.

37 See Zaccaria and Albanesi, “Le ordinanze di protezione civile ‘per l’attuazione’ di decreti-legge (ed altri scostamenti dalla l. n. 225 del 1992).”

38 This would also have helped to limit the concentration of powers in the hands of the executive branch, at the expense of the legislative branch. See Elena Griglio, “Parliamentary Oversight under the Covid-19 Emergency: Striving Against Executive Dominance,” *The Theory and Practice of Legislation* 8, no. 1-2 (2020): 49-70.

39 Stefano Civitarese Matteucci, “Italy - The Italian Response to Coronavirus Was Constitutionally Legitimate - Was it Suitable as Well?,” *Public Law* no. 4 (2020): 796-798.

of the Civil Protection Code, has been based on the widespread idea that the civil protection system has not “stood the test of the current emergency situation”.⁴⁰

In fact, we believe that the Government’s choice of regulatory policy was dictated not by a judgement of the inadequacy of civil protection legislation to deal with an epidemic of this magnitude, but, on the contrary, precisely by a profound awareness of the state of the art - existing until the recent pandemic - of emergency governance in our legal system. The reasons for the misalignment from the legislative paradigm are, therefore, most likely to be found in the desire to depart, as far as possible, from a discipline that would have strongly tied the Government’s response as it would have been rooted in a model, not only legislative but also jurisprudential, that had long surrounded the power of ordinance with special precautions so as to harmonise it with the constitutional system.⁴¹

There is, therefore, a well-founded suspicion that governmental practice began to favour the use of the alternative model, when it perceived that the previous civil protection framework (which was initially resorted to but soon relegated to a merely marginal role) would have found itself facing the developing emergency with a series of severe limits to the civil protection ordinance power. In fact, these limits had been long since highlighted both by the Constitutional Court, which had reviewed in a general way, the legitimacy of the individual provisions attributing ordinance power, and by the administrative judges, that had scrutinised the specific derogation ordinances.

The alternative model exhibited, evidently, a greater malleability and a considerable degree of flexibility, which stemmed precisely from the absence of a clear legal regime that could somehow channel the prime ministerial normative powers into the groove of the Constitution. The agility of the decrees of the President of the Council of Ministers, testified moreover by the same divisions that have provoked a lively doctrinal debate on their uncertain and debatable nature and, therefore, on their necessary contents, has inevitably led to greater vagueness about the limits they had to encounter as well as the jurisdictional controls to which they had necessarily been subject.⁴²

40 Gian Paolo Dolso, “Coronavirus: nota sulla dichiarazione dello stato di emergenza per rischio sanitario,” *AmbienteDiritto.it*, no. 1 (2020): 17.

41 See Article 25 of the Civil Protection Code; Italian Constitutional Court, decision in a case no. 8/1956 of July 2, 1956.; Italian Constitutional Court, decision in a case no. 26/1961 of December 19, 1968; Italian Constitutional Court, decision in a case no. 4/1977 of January 5, 1977; Italian Constitutional Court, decision in a case no. 201/1987 of May 28, 1987; Italian Constitutional Court, decision in a case no. 127/1995 of April 14, 1995; Italian Constitutional Court, decision in a case no. 44/2019 of March 13, 2019, which define the legal framework, compliance with which is required for civil protection ordinances to be compatible with the Constitution.

42 The legal nature of decrees of the President of the Council of Ministers has fuelled a lively debate among scholars. See Maria Cristina Grisolia, “Brevi spunti introduttivi e qualche domanda su ‘emergenza e governo-pubblica amministrazione,’” *Rivista AIC*, no. 1 (2021): 433-442. In particular, Laura Buffoni, “L’ufficio di giurista: la forza/valore di legge e lo Stato d’eccezione,” *Osservatorio sulle fonti*, Special Issue (2020): 496, considers that they are administrative acts without normative content; according to Antonio Mitrotti, “Salus rei

This is ultimately the reason why it was decided not to take the main route, but rather to inaugurate an undoubtedly singular *modus agendi* that marked a clear departure from previous legislation. In other words, the National Civil Protection Service has been *deliberately* left “quiescent” in order to have a discipline that tends to be more agile, unencumbered by penetrating controls, as well as a clear and consolidated regulatory statute expressive of what has been called the “normalisation of the emergency”.⁴³

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publicae e legalità alla prova dell’emergenza da Covid-19. Inediti strumenti di gestione dei D.P.C.M.,” *AmbienteDiritto.it*, no. 2 (2020): 28, prime ministerial decrees are “atti di alta amministrazione”, i.e. a special category of administrative acts that act as a link between the government function and the administrative function; following Massimo Luciani, “Il sistema delle fonti del diritto alla prova dell’emergenza,” *Rivista AIC*, no. 2 (2020): 123, the decrees of the President of the Council of Ministers are substantially overlapping with the civil protection ordinances. The Italian Constitutional Court put an end to this debate, stating in judgment no. 198/2021 of October 22, 2021, that prime ministerial decrees are “atti necessitati”, i.e. administrative acts that, like *extra ordinem* ordinances are based on urgent necessity, however, unlike *extra ordinem* ordinances, they are not the expression of administrative powers that are only generically prefigured by the legal provisions attributing them and therefore susceptible to taking on various contents in order to adapt to changing situations, but are instead issued in implementation of legislative provisions - in our case, decree-laws - that already prefix their contents. It is, therefore, a reconstruction that, precisely because it is based on the legislative foundation of subsequent typified administrative acts, appears very far from Locke’s view - evoked by some scholars during the regulatory handling of the pandemic - according to which “For the Legislators not being able to foresee, and provide, by Laws, for all, that may be useful to the Community, the Executor of the Laws, having the power in his hands, has by the common Law of Nature, a right to make use of it, for the good of the Society, in many Cases, where the municipal Law has given no direction, till the Legislative can conveniently be Assembled to provide for it”. See John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven and London: Yale University Press, 2003), 171.

43 Andrea Cardone, *La “normalizzazione” dell’emergenza. Contributo allo studio del potere extra ordinem del Governo* (Torino: Giappichelli, 2011).

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Sažetak

ODGOVOR ITALIJE NA BOLEST COVID-19: IZMEĐU ZAKONA O SUSTAVU CIVILNE ZAŠTITE I UREDBI PREDSJEDNIKA VLADE

Gotovo tri godine nakon izbijanja bolesti COVID-19, moguće je identificirati neke trendove i donijeti zaključke u svezi s pravnim odgovorom na krizu prouzročenu pandemijom u Italiji. Dok je ustavni sustav vjerojatno bio uspješan u očuvanju temeljnoga sadržaja vladavine prava, ipak se postavlja jedno drugo pitanje. Naime, je li se zakonski okvir, koji se temelji na kombinaciji uporabe zakonodavnih uredbi i uredbi predsjednika Vlade, a znatno odstupa od Zakona o sustavu civilne zaštite, doista pokazao kao najprikladniji, ili je, dubljom analizom, stvorio više problema negoli donio rješenja?

Ključne riječi: COVID-19; Italija; regulatorna politika; kapacitet upravljanja.

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