

## COVID-19 Response in Italy

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**Abstract.** The article describes the response of Italy during the first year and half of the COVID-19 pandemic, from its outbreak until Autumn 2021, focusing on the public health measures response. The scope of the article is to describe the public health measures adopted as well as their legal basis and the main legal problems that such measures raised, to identify the mistakes, the administrative problems and the inefficiencies that affected the Italian response. Section I provides a chronicle of the main events, from a legal and administrative perspective, that characterized the Italian response to COVID-19. Section II offers a synthetic picture of the regulatory context in which the measures were adopted, of the new legal environment set up to deal with the pandemic and discusses the main legal problems and issues that characterized the management of the pandemic. The Final Section briefly describes the main legal problems and lessons for the future that the COVID-19 pandemic may provide.

**Keywords:** COVID-19, Pandemic, Government Response in Italy

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### 1. Foreword

Italy was the first Western country hit by the COVID-19 pandemic: Italy and the Italians were not ready, from the healthcare and the psychological and economic perspectives, for the COVID-19 pandemic. Italy was unprepared to respond promptly, efficiently and firmly to the outbreak of the pandemic.

At the end of August 2021, after three waves of the COVID-19 pandemic hit Italy, more than 4.5 million people have been infected by COVID-19 and more than 129,000 persons have died due to COVID-19 or to the complications connected to it.

The containment measures that should have kept the virus outside Italian borders or limited its spread in the Italian territory failed. Mitigation measures, established to keep the spread of the virus under control, finally resulted in a strong lockdown (from March to May 2020), which strongly limited the rights of citizens and the possibility to carry out economic activities. Rights, including fundamental rights of citizens (and foreigners), have been strongly limited, although not completely suspended.

However, taking account of the unprecedented situation and of the many problems (and casualties) that even other European and American countries suffered, the Italian response has been pointed to as a good example for other countries in the world.<sup>1</sup> It has been underlined that Italy has been able to recover and to set up a sophisticated system of monitoring the spread of the virus and to adopt flexible containment and mitigation measures.<sup>2</sup>

Mistakes and delays have occurred. A number of deaths might have been avoided if such mistakes have not occurred. Criminal investigations are being carried out to check if such mistakes occurred because of fault or fraud.

The aim of this research is to provide a chronicle of the main events, from a legal and administrative perspective, that characterized the Italian response to COVID-19 (Section I) and to offer a synthetic picture of the regulatory context in which the measures were adopted, of the new legal environment set up to deal with the pandemic, and to discuss the main problems and issues (only under the legal perspective) that characterized the management of the pandemic (Section II). Identifying mistakes, administrative problems and inefficiencies may help in improving the response

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<sup>1</sup> Cf. Jason Horowitz and Elisabetta Povoledo, 'Italy, Pandemic's New Epicenter, Has Lessons for the World' (2020) The New York Times of 21 March 2020 <<https://www.nytimes.com/2020/03/21/world/europe/italy-coronavirus-center-lessons.html>> accessed 1 November 2021 (as all other links indicated in this article); and Gary P. Pisano, Raffaella Sadun and Michele Zanini, 'Lessons from Italy's Response to Coronavirus',

(2020) Harvard Business Review (27 March 2020) <<https://hbr.org/2020/03/lessons-from-italys-response-to-coronavirus>>.

<sup>2</sup> Cf. Jason Horowitz, 'How Italy Turned Around Its Coronavirus Calamity' (2020) The New York Times of 31 July 2020 <<https://www.nytimes.com/2020/07/31/world/europe/italy-coronavirus-reopening.html>>.

and procedures to be adopted in case of future catastrophic events as the COVID-19 pandemic has been, and unfortunately still is at the moment this article has been written. The COVID-19 pandemic may provide us lessons for the future (Conclusions).

## Section I: Chronicle of the Italian Government Response to COVID-19

### 2. The Outbreak of the COVID-19 Epidemic in Italy

At the beginning of 2020, in Italy the “Chinese epidemic” (as it was called at that time) was considered something far away, concerning a limited part of China, with a very low possibility of spreading in Europe and in other areas of the world.

The first cases of people affected by the new virus in China were reported to the World Health Organization (WHO) by the national authorities on 31 December 2019 and on 22 January 2020 the government ordered the quarantine of the city of Wuhan and, a few days later, in other towns of the Huabei region.<sup>3</sup> On 17 January 2020, the relevant EU agency, the European Centre for Disease Prevention and Control (ECDC), issued an alert, stating that the likelihood of importation of cases of the “novel coronavirus” (as it was provisionally defined) to the EU had to be considered low, but could not be excluded.<sup>4</sup> On 30 January 2020, the Director-General of WHO declared the novel coronavirus outbreak a public health emergency of international concern (PHEIC), the WHO’s highest level of alarm.<sup>5</sup>

During this period, that can be seen as a “quiet period before a storm”, the Italian health authorities set up some preliminary measures to take care of the epidemic that was still considered a local and localized health issue. The Minister of

Health of Italy set up a “task force” on 22 January 2020, with the aim to carefully observe the evolution of the epidemic in China, to suggest to the Minister of Health guidelines for people, workers and students moving back and forth to the Huabei region, among other measures.<sup>6</sup>

So, at that time, the idea, not only of the Italian and European health authorities, but even of doctors and scientists all over the world, was that the “novel Coronavirus” could hardly circulate and hit other parts of the world, and not absolutely Europe or US.

The idea was that the “novel Coronavirus” was a virus belonging to the family of respiratory viruses, that could be kept under control with checks and restrictions at the borders, such as checking symptoms as fever with thermoscanners, or by imposing quarantine to all the persons coming from affected areas. The previous experiences of the Middle East Respiratory Virus (MERS, first identified in 2012) and SARS (2002-2004) which caused a great concern worldwide, but a very limited spread,<sup>7</sup> and the initial idea that the spread of the “novel Coronavirus” would be possible only through persons with symptoms, likely caused a general underestimate of the risk of a worldwide spread.<sup>8</sup>

### 3. The Monitoring of the Spread of the “Novel Coronavirus”

After the institution of the “task force” on 22 January 2020, the Minister of Health issued specific orders (using the power conferred to him by the Italian health legislation), providing for the first prophylaxis activities, indicating a number of hygiene measures for those needing to travel to the affected areas (including vaccination against influenza and hand and respiratory hygiene),

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<sup>3</sup> See World Health Organization, ‘Novel Coronavirus (2019-nCoV) Situation report - 1 21 January 2020’ and subsequent reports <<https://www.who.int/emergencies/diseases/novelcoronavirus2019/situation-reports>>.

<sup>4</sup> European Centre for Disease Prevention and Control, *Rapid Risk Assessment: Cluster of pneumonia cases caused by a novel coronavirus, Wuhan, China, 2020*, 17 January 2020 <<https://www.ecdc.europa.eu/en/publications-data/rapid-risk-assessment-cluster-pneumonia-cases-caused-novel-coronavirus-wuhan>>.

<sup>5</sup> World Health organization, *WHO Director-General’s statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)*, 31 January 2020, <[https://www.who.int/dg/speeches/detail/who-director-general-statement-on-ih-er-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-statement-on-ih-er-emergency-committee-on-novel-coronavirus-(2019-ncov))>.

<sup>6</sup> On the institution of the task force, see the press release of the Minister of Health (22 January 2020), available on the website of the Ministry of Health, <<https://www.salute.gov.it/portale/nuovocoronavirus/>

detttaglioComunicatiNuovoCoronavirus.jsp?lingua=italiano&menu=salastampa&p=comunicatistampa&id=5373>. The minutes of the task force are available on the website of the Ministry of Health, at <<https://www.salute.gov.it/portale/nuovocoronavirus/detttaglioPubblicazioniNuovoCoronavirus.jsp?lingua=italiano&id=3070>>.

<sup>7</sup> For a comparison of the different Coronaviruses, see Eskild Petersen, Marion Koopmans, Unyeong Go, Davidson H Hamer, Nicola Petrosillo, et al., ‘Comparing SARS-CoV-2 with SARS-CoV and influenza pandemics’, (2020) *The Lancet* 20, 1 Sept. 2020.

<sup>8</sup> As concerns the very low risk perception at the eve of the pandemic in Italy amongst healthcare workers, see Matteo Riccò, Luigi Vezzosi, Federica Balzarini, Nicola Luigi Bragazzi, ‘Inappropriate risk perception for SARS-CoV-2 infection among Italian HCWs in the eve of COVID-19 pandemic’ (2020) 91, 3 *Acta Biomed*.

establishing biosecurity measures for any healthcare personnel involved with possibly affected persons (i.e. use of facial mask, waterproof gown, gloves), providing separate airport routes for passengers coming from Wuhan and establishing the activation of the surveillance system for suspected cases of infection, as well as the isolation and carrying out of tests (through nasopharyngeal and oropharyngeal swab) for "suspected cases of COVID-19", and providing for measures for the prophylaxis of students returning from China<sup>9</sup>. When the situation in China worsened, special flights were organised by the Italian authorities to bring back Italians from China and providing for a quarantine period upon their arrival in the Italian territory<sup>10</sup>.

On 31 January 2020, the day following the WHO declaration of the public health emergency of international concern, the Italian Government declared the state of emergency according to the civil protection legislation<sup>11</sup>. As will be explained later, such an emergency declaration, which is frequently adopted by the Government to counteract situations that are outside of the ordinary (like earthquakes or floods, but also disruption of the local service of waste collection), allows the specially appointed commissioner (which, in the case of large emergencies, like in the case of COVID-19, is usually the Head of the Civil protection department) to adopt acts which may derogate to a number of laws, especially in the field of public contracts<sup>12</sup>.

Thus, at the beginning of February 2020, the Head of the Civil protection department adopted ordinances aimed at coordinating interventions, also through implementing bodies, aimed at

<sup>9</sup> Ministry of Health, circulars 1997 (22 January 2020 and 1 February 2020).

<sup>10</sup> It was a complex operation coordinated by the head of the Civil protection department (as provided by its order, 3 February 2020, 630), which required the intervention of many public bodies, such as the Ministries of Foreign affairs, of Defence, of Health, of Infrastructures and the National Civil Aviation Authority.

<sup>11</sup> Decision of the Council of Ministers (31 January 2020) on *the declaration of the state of emergency as a result of the health risk associated with the onset of diseases resulting from transmissible viral agents*, published on the Italian Official Journal (G.U., 1 February 2020, 26).

<sup>12</sup> The Italian Civil protection code is established by the legislative decree (2 January 2018), 1. The Council of Ministers, upon the occurrence of events which, following a prompt assessment carried out by the Civil protection department and in conjunction with the regions and autonomous provinces concerned, upon the proposal of the President of the Council of Ministers, declares the state of emergency of national importance, setting its duration and determining the territorial extent with

prohibiting air, land and sea traffic on the national territory; providing for the coming back of Italians from affected places; sending specialized personnel abroad; providing for the acquisition of drugs, medical devices, personal protection devices, and biocides; providing the requisition of certain goods; establishing an advisory technical-scientific committee (*Comitato tecnico scientifico* - CTS); and establishing measures to safeguard the validity of the school year of students engaged in international mobility programs in areas at risk of contagion or returned from such areas and therefore subjected to quarantine<sup>13</sup>.

#### **4. The Outbreak of COVID-19 in Italy: The First Public Health Measures Adopted (the First Wave)**

Even before the WHO declaration of the public health emergency of international concern, Italy had very close contacts with the COVID-19 outbreak on 29 January 2020, two Chinese tourists were found positive for COVID-19 and cured in a specialized hospital in Rome. However, all their contacts were immediately traced, and the situation was immediately put under control.

The nightmare became true on 21 February 2020: at 1 o'clock in the night the welfare assessor of the region of Lombardia declared that an Italian man, with no links with China, had been found positive to the new Coronavirus.<sup>14</sup> Although later on it would be found out that the Coronavirus had been already circulating in the North of Italy for several months (December or even November 2019), this man was defined as "patient one", i.e. the first person infected locally<sup>15</sup> and that day is considered the formal beginning of the pandemic in Italy.

reference to the nature and quality of the events (art. 24, par. 1). The duration of the state of emergency of national importance cannot exceed 12 months and can be extended for no more than a further 12 months period (art. 24, par. 3). A further extension of the state of emergency is thus possible only by passing a specific law.

<sup>13</sup> See Civil protection orders (3 February 2020) 630; (6 February 2020) 631; (12 February 2020), 633; (13 February 2020), 635; (21 February 2020), 637; (22 February 2020) 638; (25 February 2020), 639.

<sup>14</sup> Press release of the Regione Lombardia (21 February 2020) <[www.lombardianotizie.online](http://www.lombardianotizie.online)> accessed 1 November 2021.

<sup>15</sup> The patient "zero", i.e. the person who brought the SARS-CoV-2 virus in Italy has never been identified (and it will never be). In epidemiology, there is a distinction between the "primary case" and "secondary case" (where the primary case is the individual who brings the disease into a population, i.e. any defined group of people; and the people infected by him are called secondary cases, and those infected by them are the tertiary cases). Another definition is that of "index case", i.e. the first case discovered by the health care system in an outbreak, that

Immediately afterwards, new cases were found in other towns of the Lombardia region and in other regions of the North of Italy.<sup>16</sup> Emergency restrictive measures (i.e., quarantine) were immediately adopted by the Minister of Health together with the presidents of the impacted regions: a red area with about 50,000 residents was created and other red areas had been created in the following days.<sup>17</sup>

The Government response to the first wave of the pandemic in Italy (February-May 2020) may be divided in 4 phases: “Phase 0” relates to the measures taken before the pandemic spread in Italy (22 January – 21 February 2020); “Phase 1” refers to the restrictive measures taken to contain the spread of the virus, ending up with a national “lockdown” (21 February-3 May 2020); “Phase 2” relates to the step by step reopening and relaxing of containment measures after the lockdown (4 May-14 June 2020); and “Phase 3” relates to the response based of measures taken to keep under control the pandemic during its very low spreading (15 June-7 October 2020). At the end of the third phase, a new wave of pandemic spread in Italy, which resulted in a different approach (from October 2020).

In order to contain the spread of COVID-19 (during the so-called “Phase 1” of COVID-19 response, from 21 February to 3 May 2020) a new special legislation was enacted (decree-law, 6, 23 February 2020), providing special powers to the President of the Council of Ministers (in short, also defined as the Prime Minister), acting upon the proposal of the Minister of Health. Such powers, to be exercised through a decree of the President of the Council of Ministers (DPCM) included the possibility to establish the prohibition of departure from the affected area by all individuals; the prohibition of access to the area concerned; the suspension of events, initiatives, meetings of any kind, in public or private places; the suspension of educational services for children and schools of all levels, including universities, except for distance learning activities; the closure of museums and other cultural institutes and places; the suspension of competition for access to public employment; the application of the quarantine measure to

individuals who have had close contact with confirmed cases of COVID-19; the obligation of people entering in Italy from areas at epidemiological risk (as identified by the WHO) to inform the Italian health authorities; the closure of all commercial activities (except those for the sale of basic items, such as food and medicines); the closure or limitation of the activity of public offices; the use of personal protective equipment or the adoption of particular precautionary measures to enter essential public services and shops; the limitation of land, air, rail, sea transportation; and the suspension of work activities for companies, except those providing essential and public utility services (or for activities carried out at home).<sup>18</sup>

The first DPCM was issued on 23 February 2020 and established (for 14 days) red areas (with closure of schools, shops and sport activities, among others) in certain areas of the regions Lombardia and Veneto.

In the following days (and months) an increasing number of DPCM would enact progressively restrictive measures.

The DPCM of 25 February 2020 established the suspension of the activities of schools and universities through 1 March 2020, as well as the suspension of judicial proceedings for the whole territory of the regions Emilia Romagna, Friuli Venezia Giulia, Lombardia, Veneto, Liguria and Piemonte (i.e., most areas of the North of Italy).<sup>19</sup>

The DPCM of 1 March established differentiated measures for the period from 2 to 8 March, notably the obligation to use face masks by suspected cases and, in the red areas, also when accessing public services or shops; moreover, it established containment measures (i.e., prohibition of parties and sport events, closure of schools and museums, special care for restaurants, smart working, surveillance of cases) in the “orange areas”.<sup>20</sup>

The DPCM of 4 March provided for certain measures to be applied in the whole territory of Italy until 3 April 2020: prohibition of sport competitions, obligation to follow special prudential rules for sport activities in gyms, limited access to emergency departments for accompanying persons, information and hygienic measures and closure of schools till 15 March.<sup>21</sup>

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leads to an investigation and possibly to find that there were cases who had fallen ill before the index case was diagnosed: see Johan Giesecke, ‘Modern infectious disease epidemiology’ (Boca Raton, CRC Press, 2017) 11.

<sup>16</sup> The data on the trend of the COVID-19 epidemic are available on the website of epidemic department of the Italian higher health institute (Epicentro of the Istituto superiore di sanità – ISS) <<https://www.epicentro.iss.it/coronavirus/sars-cov-2-sorveglianza-dati>>.

<sup>17</sup> Orders of the Ministry of Health in agreement with the President of the Lombardy Region (21 February 2020), providing for urgent measures regarding the

containment and management of the epidemiological emergency from COVID-19 (G.U., 25 February 2020, 47).

<sup>18</sup> Art. 1, par. 2 of the decree-law 23 February 2020, 6, G.U., 23 February 2020, 45), providing urgent measures regarding the containment and management of the epidemiological emergency from COVID-19.

<sup>19</sup> DPCM 25 February 2020, G.U. (25 February 2020) 47.

<sup>20</sup> DPCM 1 March 2020, G.U. (1 March 2020), 52.

<sup>21</sup> DPCM 4 March 2020, published in G.U. of 4 March 2020, n. 55.

The closure of schools for all the Italian territory was a really extraordinary event.

### 5. The Italian National Lockdown (March-May 2020)

The epidemic situation was quickly worsening: in many regions in the North of Italy the intensive care departments of the hospitals had already reached their maximum capacity and patients had to be moved to hospitals in other areas; the number of deaths was quickly increasing (reaching its maximum level of around one thousand deaths per day at the beginning of April 2020), protective tools (and especially face masks) were not available for all of the population (and actually available in a very limited amount even for hospital doctors and paramedics).

As it was not clear, at that time, how exactly the SARS-CoV-2 virus (as it was later definitively named)<sup>22</sup> could infect people<sup>23</sup> and vaccines and medical care for the novel Coronavirus had still to be found, the only tool to limit the diffusion of the pandemic was to establish a large regional lockdown, so to limit personal relationships and contacts between people. On 8 March 2020 a very large red zone, extending to almost all the North of Italy, was established, with strong restriction on the movement of people, who had to stay at home except for reasons of work, necessity, or health.<sup>24</sup>

Unfortunately, the news that a very restrictive DPCM was going to be issued circulated hours before it was published in the Official Journal, so thousands of Italians found the way to move to central and southern regions of Italy.

After this event, in order to prevent an uncontrolled diffusion of COVID-19 in the whole territory of Italy, it was felt necessary to extend the restrictive measures provided for the North of Italy to the whole Italian territory: in a dramatic press conference in the evening of 9 March 2020 the Prime Minister declared he had just signed a DPCM whose content would be summarised as follows: “I

stay at home” (#iorestoacasa). The DPCM of 9 March extended to the whole Italian territory the measures established with the DPCM of 8 March: the most important measure was the obligation for any “natural person” to avoid any movement in entry and exit from the territories, “as well as within the same territories”, except for some specific reasons: proven work needs, situations of necessity and reasons of health. Other measures were the suspension of public and private events; the closure of ski resorts, museums, schools and universities, swimming pools, gyms and sports centres (except for the training of professional or high-level athletes); the limitation for commercial activities (that could operate only under certain conditions); the absolute prohibition of exiting from their place for affected or quarantined persons; and the preference for the use of “agile working” (i.e., from home).<sup>25</sup>

Other measures were enacted in the following days: the DPCM of 11 March 2020 ordered the closure of all shops and retail business activities (except food shops and pharmacies);<sup>26</sup> the Minister of Transportation issued decrees on 17, 18, 28 March to limit access to Italy from abroad; on 20 March 2020 the Minister of Health issued an order to close parks, public gardens etc. and clarifying the activities which could be carried out, such as jogging, although only around home; the DPCM of 22 March 2020 ordered the closure of trade and industrial activities (with some exceptions).<sup>27</sup>

### 6. The Reopening After the First Wave (Phase 2: 4 May-14 June 2020)

As a consequence of the hard lockdown measures adopted by the Italian Government, the epidemic situation began to improve at the end of April 2020.<sup>28</sup> The slope of the epidemic curve was heading down, and thus the DPCM of 26 April 2020, on the one hand established new safety measures, such as the obligation to use face masks (even if self-produced) in all indoor public places;<sup>29</sup> on the

<sup>22</sup> The International Committee on Taxonomy of Viruses (ICTV) on 11 February 2020 named the virus as “severe acute respiratory syndrome coronavirus 2”, in short “SARS-CoV-2”.

<sup>23</sup> At that time, it was not clear if the virus would be transmissible only through direct breathing contacts (by inhaling droplets containing the virus coming out from the mouth or nose of close people while breathing or talking), at what distance (1 or 2 meters) or even through contacts with objects that have been touched by infected people.

<sup>24</sup> DPCM 8 March 2020, G.U. (8 March 2020) 59.

<sup>25</sup> DPCM 9 March 2020, G.U. (9 March 2020) 62.

<sup>26</sup> DPCM 11 March 2020, G.U. (11 March 2020) 64.

<sup>27</sup> DPCM 22 March 2020, G.U. (22 March 2020) 76.

<sup>28</sup> See Giovanni Sebastiani, Marco Massa and Elio Riboli, ‘COVID-19 epidemic in Italy: evolution, projections and impact of government measures’ (2020) 35 *European Journal of Epidemiology* 341; cf. also Sara Tedeschi, Lorenzo Badia, Fabio Berveglieri, Rodolfo Ferrari and others ‘Effective Containment of a COVID-19 Subregional Outbreak in Italy Through Strict Quarantine and Rearrangement of Local Health Care Services’ (2021) 8 *Open Forum Infect Dis.*, 2; Silvio De Flora and Sebastiano La Maestra ‘Growth and decline of the COVID-19 epidemic wave in Italy from March to June 2020’ (2021) 93(3) *Journal of Medical Virology*, 1613 ff.

<sup>29</sup> Previously, the obligation to use face masks concerned only suspected cases (according to the idea that only persons with symptoms could spread the virus)

other hand, it established a step by step reopening as from 4 May, beginning with limited openings of essential facilities, parks, libraries and providing for a daily regional monitoring of the epidemic situation: it was the so-called “Phase 2” of the COVID-19 response, from 4 May till 14 June.<sup>30</sup>

With the decree-law of 16 May 2020, n. 33, it was established the end of the movement restriction inside the regions as from 18 May and between the different Italian regions as from 2 June 2020.<sup>31</sup>

The DPCM of 17 May 2020 permitted, as from 18 May 2020, mobility in the same region (i.e., the possibility to move between towns and places in the same region) and the reopening of churches; as from 25 May, the reopening of gyms; and as from 15 June the reopening of theatres and concert halls. All such activities had to be carried out according to safeguard measures provided by protocols attached to the DPCM.<sup>32</sup>

### 7. The Measures to Keep the Pandemic Under Control (Phase 3: 15 June – 7 October 2020)

The DPCM of 11 June 2020 marks the beginning of the “Phase 3” of the COVID-19 response (from 15 June to 7 October): it was established that as from 15 June 2020 sport competition would be allowed (although without attendance of the public) and bingo halls and similar places would be reopened. However, discos and dance clubs had to remain closed.<sup>33</sup>

As from the beginning of July, the epidemic slope was flat: there were no (or very few) new daily cases, and no COVID-19 deaths during the summer 2020. Some scientists asserted that the virus was “clinically dead”, as the hospital COVID-19 departments were emptying, and the viral load of the few infected persons was much lower as compared to what had been observed in the previous months.<sup>34</sup> Some people even thought that

there would not be a second wave of the COVID-19 epidemic.

With the DPCM of 7 August 2020 minor changes to measures and protocols were adopted, giving room for regional reopening of certain activities.<sup>35</sup>

This allowed some Presidents of regions (e.g., the President of the Sardinia Region) to issue orders to reopen dance clubs and discos.<sup>36</sup>

As later became clear, the virus had not disappeared during the summer, but it had been spreading in a concealed way; and the reopening of discotheques has been considered one of the biggest mistakes in the management of the epidemic. The discotheques are places that let people to get in touch with other people they have never met before, and thus it is also the perfect place for viruses to find “susceptible persons” (i.e. persons that are not immune to the virus)<sup>37</sup> and to increase its spread. And this is what happened: Sardinia is one of the most beautiful places where to go to sea in Italy and many tourists from every part of Italy went there to enjoy their summer holidays. When they came back home, many of them carried with themselves the virus, that so could spread in regions where its spread had been quite low during the first wave.

During the summer 2020 containment measures were arguably relaxed too much by the Government and have been applied in an even more relaxed way by Italians. The number of cases was extremely low and close to zero, it was possible but not certain that a second wave of the epidemic would raise, and not enough attention was paid to the spread of the virus in Northern countries of Europe during the summer 2020. If Italy has been the first country to be affected by COVID-19 in winter 2020, and other European countries have been hit by the pandemic with 15-30 days of delay, the strong lockdown measures adopted by Italy reversed the situation. During summer 2020 the epidemic spread in most North European countries

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and people accessing public offices and services: see art. 3, par. 5, DPCM 1 March 2020.

<sup>30</sup> DPCM 26 April 2020, G.U. (26 April 2020) 108.

<sup>31</sup> Decree-law 16 May 2020, 33, providing further urgent measures to deal with the epidemiological emergency from COVID-19, G.U. (16 May 2020) 125.

<sup>32</sup> DPCM May 2020, G.U. (17 May 2020) 126.

<sup>33</sup> DPCM 11 June 2020, G.U. (11 June 2020) 147. The measures provided therein were subsequently extended till 31 July 2020 by DPCM 14 July 2020, G.U. (14 July 2020) 176.

<sup>34</sup> The director of the anaesthesia and resuscitation unit of the San Raffaele hospital in Milan, professor Alberto Zangrillo, stated in some interviews, published on newspapers, that the COVID-19 had “clinically” disappeared, as no new cases had been observed in his hospital (see the interview on *La Stampa* (Turin, 31 May

2020), <<https://www.lastampa.it/cronaca/2020/05/31/news/zangrillo-san-raffaele-il-coronavirus-clinicamente-e-sparito-torniamo-alla-vita-normale-1.38912263>>). Although the members of the CTS and of the ISS (the Higher Institute of Health) were surprised and worried about such a declaration, even the deputy minister of health stated that the virus circulation was very low (see the interview on *Il Fatto quotidiano* (Milan, 13 June 2020) 4).

<sup>35</sup> DPCM 7 August 2020, G.U. (8 August 2020) 198.

<sup>36</sup> Order of the President of the Sardinia Region, (11 August 2020), 38. With order (16 August 2020), 41, discotheques have been closed again.

<sup>37</sup>Cf. Johan Giesecke (n 15) 8. People became immune to the virus for a number of factors, such as the development of antibodies after having survived to the illness or after having been vaccinated.

(and especially Germany and UK) and it was going to hit Italy later.

At the beginning of September 2020, although the number of cases increased marginally during the summer, the epidemic situation seemed to be under control: the DPCM of 7 September 2020 made some minor changes to measures and protocols and issued specific measures to assure the reopening of schools.<sup>38</sup>

### **8. The Second Wave and the Approach Based on Regional Measures (October 2020-February 2021)**

The effects of the relaxation of the containment and mitigation measures during the summer 2020 became clear during the autumn. The epidemic slope began to rise quickly and became steep (so called second wave of the pandemic: October-November 2020), so that measures had to be adopted to control the spread of the virus and to avoid another strong lockdown. Thus, the new measures focused more on regulating private and public activities than in restricting movements of persons. However, certain restrictive measures had to be adopted

With the decree-law of 7 October 2020, n. 125 the obligation to use face masks at any time and in every place, even in open air places (of course, except at home) was established for the first time since the beginning of the pandemic.<sup>39</sup> The DPCM of 13 October 2020 established safety measures and protocols to assure the safe opening of commercial and retail activities and ordered the closure of discotheques.<sup>40</sup> As the pandemic slope was still rising, the DPCM of 18 October 2020 established new stricter protocols for certain activities and that attendance of high schools should be in mixed mode (50% of students in class and 50% at home, through distance learning) also in order to reduce the crowding on public transportation mainly used by students.<sup>41</sup> The pandemic was still raising, so the DPCM of 24 October 2020 ordered that at least 75% of students should attend classes from home, ordered the closure of restaurants at 18 (so to avoid crowding at dinner time without establishing the

complete closure of restaurants) and the complete closure of gyms (even if they had reopened since 15 June under the respect of specific safety measures).<sup>42</sup>

The DPCM 3 November 2020 introduced a system of different containment measures and limitations to movements on a regional basis, according to the exceeding of some specific thresholds (so called red, orange and yellow areas) and established new measures, such as the closure of high schools and universities (so allowing only distance learning), the obligation to always wear facial masks at school and the curfew (from 22 to 5, so to avoid evening gatherings of people). The new system was based on the application of increasingly tougher measures according to the regional level of the pandemic: every Friday the Minister of health, on the basis of the analysis of a scientific body, declared in which area any of the 20 Italian regions would be included as from the coming Sunday (and, later, from the coming Monday, in order to respond to the requests of restaurant owners and their clients). Although a strong lockdown during the Christmas holidays had been proposed by many scientists, the Government issued the decree-law of 18 December 2020, n. 17, which established only certain limitations of movement during the Christmas holidays (no mobility towards other town and regions, except between the closest small towns; and strong restrictions of mobility only during the holidays and the weekends of the Christmas period), the closure of theatres, bingo, etc.<sup>43</sup>

Such measures succeeded in lowering the curve of the pandemic (notwithstanding a small increase of cases at the beginning of January 2021), so that the decree-law of 5 January 2021, n. 1 established a step-by-step reopening of high schools.

### **9. The Third Wave and the Introduction of the “White Zone”**

The DPCM of 2 March 2021 established a set of different rules for the different “coloured” areas and introduced a new “white zone”, where only very basic prophylactic measures had to be

<sup>38</sup> DPCM 7 September 2020, G.U. (7 September 2020) 222.

<sup>39</sup> Decree-law 7 October 2020, n. 125, providing urgent measures connected with the extension of the declaration of the epidemiological state of emergency from COVID-19 and for the operational continuity of the COVID alert system, as well as for the implementation of Directive (EU) 2020/739, 3 June 2020, G.U. (7 October 2020) 248.

<sup>40</sup> DPCM 13 October 2020, G.U. (13 October 2020) 253.

<sup>41</sup> DPCM 18 October 2020, G.U. (18 October 2020) 258.

<sup>42</sup> DPCM 24 October 2020, G.U. (25 October 2020) 265.

<sup>43</sup> Unfortunately, the containment measures have been *de facto* counteracted by another State measure. In order to promote the use of cashless payments tools (so to prevent the use of cash and limiting tax evasion), the ministerial decree 24 November 2020, n. 156 (issued according to art. 1, par. 288, 27 December 2019, 160), established a State cashback for purchases in (physical) shops using cashless tools. As online purchases had been excluded from the cashback, this encouraged purchases in shops instead than online purchases, so causing crowds in the Christmas period.

followed (but not, for example, the obligation to wear face masks also in open air).

The system based on the different regional restrictions (providing for different colours of the regions, corresponding to the application of increasingly stronger restrictive measures) was modified by the decree-law of 13 March 2021 n. 30,<sup>44</sup> enacted by a newly appointed Government, which gave a primary application of the criteria of the number of contagions (establishing that in the case of more than 250 new infected people every 100.000 persons in a week the region would be classified as red) and established stricter measures for specific periods (e.g. during Easter 2021, as established also by the DPCM of 2 March 2021).<sup>45</sup> Other measures were established as well, as the possibility for workers to avail themselves of the smart or home working in case of the quarantine of sons younger less 14 years old.

In March-April 2021, the third wave of the virus began to lower, so the decree-law of 18 May 2021, n. 65 progressively raised the curfew hour (from 22 to 23, as from 18 May 2021, and to 24 from 7 June 2021) which was abolished (in yellow areas) as from 21 June 2021. Commercial activities were progressively fully reopened in yellow areas with the only need to respect safety protocols: restaurants (also in their indoor spaces) as from 1 June 2021; commercial businesses located in markets and shopping centres as from 22 May; fitness centres and gyms from 24 May and indoor swimming pools as from 1 July; ski places as from 22 May; betting rooms, bingo halls and casinos as from 1 July; amusement parks as from 15 June; and cultural, social and recreation centres as from 1 July. The decree-law changed the parameters used to define the colours of the regions, weighting more the percentage of occupancy of beds in the medical area and in intensive care for COVID-19 patients.<sup>46</sup> During the summer 2021 all of the Italian regions progressively qualified as white areas and remain in such a condition (except for Sicily, which was in yellow zone from 30 August till 9 October 2021). Very limited areas (specific cities) had been declared red zones for a limited amount of time during the summer and autumn 2021.

On the side of the safety measures, the fight to Coronavirus has been boosted by the vaccination campaign, which began in Italy, as in many European countries, on 27 December 2020.

## **Section II: The Main Legal Problems of the Italian Response to COVID-19**

### **10. Issues and Problems of the Italian Response to COVID-19**

The COVID-19 pandemic affected every area of society and lives of people. The management of the pandemic, in Italy as well as in most countries, was mainly based on limitations to movements, economic activities, religious practices, education, and so on, in order to assure personal distancing and thus to limit the spread of the virus.

Other measures were taken in order to control the spread of the virus (e.g. the tracking of cases) and to take care of affected persons, as, for example, the strengthening of hospital emergency departments and the creation of special units to visit patients at home.

Only after the development of COVID-19 vaccines (as from the end of 2020) the approach to the pandemic slightly changed, focusing more on finding the way to vaccinate as many persons in the shortest time as possible than in imposing strong measures of personal distancing. Nonetheless, basic safety measures as personal distancing, use of facial masks, avoidance of crowded gatherings had to be maintained.

This research focuses only on the main legal problems concerning the government public health measures to control the spread of COVID-19. Other measures and issues, such as the care of COVID-19 patients, the public communication on the pandemic and the management of its economic and social consequences will be only briefly addressed in this research.

It must be underlined that the factual situation strongly influenced the choice of the measures that have been established. In fact, due to the lack of a vaccine to prevent the disease, the long healing times of people affected by COVID-19 and the scarce resources to treat the persons who have been strongly hit by the virus, it was necessary to fight the spread of the virus with the only available tool, namely by imposing a "personal distancing" (also incorrectly defined as "social distancing") amongst people. In fact, given the difficulty of identifying contagious subjects (as even asymptomatic people could spread the virus), and the difficulty of reconstructing the chain of contagion (with the "contact-tracing" systems and techniques), the solution adopted to address both the first epidemic wave, and, albeit in a lighter way, the second and

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<sup>44</sup> Decree-law 13 March 2021, 30, providing for urgent measures to deal with the spread of COVID-19 and support interventions for workers with minor children in distance learning or quarantine.

<sup>45</sup> DPCM 2 March 2021, G.U. (2 March 2021) 17.

<sup>46</sup> Decree-law 18 May 2021, 65, providing urgent measures relating to the epidemiological emergency from COVID-19.



third waves, was the limitation of personal and social relations.

### 11. The Regulatory Tools Available to the Government to Deal with the Emergency

In the field of health protection, the fundamental principles are provided by article 32 of the Italian Constitution, that, on the one hand, recognizes that “the Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent”<sup>47</sup> and, on the other hand, that limitations of people’s freedom may be established by law for reasons related to public health, so that “no one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person”<sup>48</sup>. Moreover, article 16 of the Constitution provides that “every citizen has the right to reside and travel freely in any part of the country, except for such general limitations as may be established by law for reasons of health or security. No restriction may be imposed for political reasons”.<sup>49</sup>

It must be stressed that the Italian Constitution does not provide or regulate special emergency powers of the Government, except as concerns the possibility that the Government may be vested of the “necessary powers” in the case of war<sup>50</sup> and as concerns its power to issue temporary legislation in case of necessity and urgency (so called decree-laws).<sup>51</sup>

However, certain emergency powers are established by the ordinary legislation. In certain

cases, emergency powers are given to specific authorities in specific situations. In other cases, the legislation assigns to certain public authorities (e.g. the Minister of Health or the Minister of the Interior, the prefect, the mayor), in cases of urgent need concerning certain situations broadly defined (usually, in order to protect public security and health) the power to adopt the most appropriate measure, even by derogating to the current legislation<sup>52</sup>. As such power is attributed by law, it is not considered to be illegal but as a “safety valve” of the legal system, necessary to deal with unforeseen and/or unforeseeable situations that risk to endanger the legal system itself or its purposes, as the safety and health of its associates<sup>53</sup>. Although the possibility to issue such urgent orders is “extra-ordinary” and provides huge discretionary powers to the public authority as concerns the specific measures to adopt, it is based on a situation of “urgency” and it is meticulously regulated in terms of competence and legitimacy. The Constitutional Court declared the legality of such powers, provided that they would meet certain requirements, such as their “limited temporal duration according to the necessity and urgency; adequate motivation; effective publication in cases where the measure is not individual; compliance with the general principles of the legal system”<sup>54</sup>.

The legislation in force at the time of the spread of the pandemic (which comprises rules even dating back to the pre-republican period, but still in force) assigned emergency powers (i.e. the power to issue urgent orders), to deal with situations of health danger or health emergency, to specific authorities.

<sup>47</sup> Art. 32, paragraph 1, Italian Constitution.

<sup>48</sup> Art. 32, paragraph 2, the Italian Constitution.

<sup>49</sup> Art. 16, Italian Constitution.

<sup>50</sup> Art. 78, Italian Constitution, establishes that «Parliament has the authority to declare a state of war and vest the necessary powers into the Government».

<sup>51</sup> Art. Art. 77, Italian Constitution, establishes that «The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of such introduction. Such a measure shall lose effect from the beginning if it is not transposed into law by Parliament within sixty days of its publication. Parliament may regulate the legal relations arisen from the rejected measure».

<sup>52</sup> E.g., the power to issue urgent orders is provided by art. 2, royal decree 18 June 1931, 773 (consolidated act of public security laws), that provides that the prefect «in the event of urgency or for serious public necessity, has the right to adopt the measures necessary for the protection of public order and public safety».

<sup>53</sup> The definition of the power of ordinance as a “safety valve”, to be found in all of the modern legal systems, at the disposal of the administration, in order to evade the strict conditions established by the legislation, is provided by Massimo Severo Giannini, *Lezioni di diritto amministrativo* (Milano, Giuffrè, 1950), 102, and *Diritto amministrativo* (Milano, Giuffrè, 1993, 267), and was subsequently taken up by both legal science and by case law (see the judgments of Consiglio di Stato, section V, 7 December 1973, 1601, (1973) Consiglio di Stato, I, 1907, and of 9 February 2001, 580, (2001) Foro amministrativo, 427, for which «the contingent and urgent ordinance [...] is characterized by the absence of any legislative predetermination of the content, in order to allow it those margins of elasticity indispensable to guarantee efficiency and effectiveness and to make it adequate to provide for cases of urgency [...], on condition, however, that its enactment is preceded by the observance of all the guarantees set by the legal system»). On the limits and trends in the field of emergency powers, see Matteo Gnes, ‘I limiti del potere d’urgenza’, (2005) *Rivista trimestrale di diritto pubblico*, 641.

<sup>54</sup> Constitutional Court, 2 July 1956, 8.

In the first place, according to the consolidated text of the health laws of 1934, the Minister of the Interior, who at that time was entrusted with health functions in relation to the protection of the community, has the power to issue “special ordinances for the visit and disinfection of houses, for the organization of medical services and aid and for the precautionary measures to be taken against the spread of the disease itself”.<sup>55</sup>

Secondly, the 1978 law establishing the national health service attributes to the State the competence in the field of international prophylaxis<sup>56</sup> and provides that in situations of urgency and danger for the health the Minister of Health or the president of the region or the major (according to the geographical extension of the emergency) can issue urgent temporary orders.<sup>57</sup>

Thirdly, other emergency powers are provided for by art. 117 of the legislative decree 31 March 1998, n. 112, which attributes to the mayor, as representative of the local community, the power to adopt contingent and urgent orders in the case of health and public hygiene emergencies of an exclusively local nature. Similar powers are vested in the State or the regions according to the geographical extension of the emergency. In addition, other urgent powers, to deal with situations that endanger public safety and urban safety, are attributed to the mayor by the consolidated law on the organization of local authorities.<sup>58</sup>

Finally, other powers - aimed at protecting life, physical integrity, assets, settlements, animals and the environment from damage or the danger of damage deriving from disasters of natural origin or deriving from human activity - are attributed to the bodies operating within the national civil protection system.<sup>59</sup>

Moreover, it may be remembered that, in order to prevent epidemics, especially of the flu type, it has long been foreseen by the World Health Organization that States adopt national pandemic plans.<sup>60</sup> However, the most recent pandemic plan was approved in Italy in 2006.

<sup>55</sup> Art. 261, royal decree (27 July 1934), 1265.

<sup>56</sup> According to the provisions of Article 117 of the Constitution, as reformed in 2001.

<sup>57</sup> Art. 6 and 32, law 23 December 1978, 833, respectively articles 6 and 32.

<sup>58</sup> Art. 50 and 54, Legislative Decree 18 August 2000, 267.

<sup>59</sup> Law 24 February 1992, 225 and now legislative decree (2 January 2018), 1.

<sup>60</sup> World Health Organization, *Pandemic influenza preparedness and response: a WHO guidance document* (Geneva, WHO, 2009); *Whole-of-society pandemic readiness. WHO guidelines for pandemic preparedness and response in the non-health sector* (Geneva, WHO, July 2009); *Pandemic Influenza Risk Management Guidance*

## 12. The Intertwining of Regulations and the Development of a New Pandemic Emergency Legislation

The intertwining of the various legislation, which attribute emergency powers to State, regional and local authorities has resulted in regulatory chaos, partly as a result of the regional articulation of competences in health matters. To give a broad idea of the regulatory chaos that arose as a consequence of the pandemic, during the Government chaired by Giuseppe Conte, that dealt with the most difficult phases of the pandemic (from its beginning until 13 February 2021), the following regulatory acts have been issued to manage the pandemic: 4 decisions of the Council of Ministers to declare and then extend the State of emergency (31 January 2020, 29 July 2020, 7 October 2020 and 13 January 2021), 31 decree-laws, 23 DPCM, more than sixty orders of Head of the Civil protection department, more than 30 orders of the extraordinary Commissioner for the COVID-19 emergency, more than one hundred orders and circulars of the Minister of Health, a few hundred orders of the presidents of the regions, and probably a few thousands orders of the mayors (taking account that in Italy there are around eight thousands municipalities).

Such confusion has been accentuated by commentators, journalists, politicians and some public figures, some of whom have contested the very existence of a health emergency, sometimes making confusion between the declaration of a state of emergency (according to the civil protection legislation) and the existence of a health emergency.

In order to shed some light on the intertwining of the different tools used, it is necessary to illustrate which tools have been used, for what purposes and with what limits<sup>61</sup>.

First of all, in chronological order, there are the civil protection measures, issued on the basis of the civil protection legislation and having as a legal prerequisite the declaration of a state of emergency. Situations of emergency are typically managed

(Geneva, WHO, 2017); *A checklist for pandemic influenza risk and impact management: building capacity for pandemic response* (Geneva, WHO, 2018).

<sup>61</sup> For a detailed description of the measures and the legal debate, see Matteo Gnes, ‘Le misure nazionali di contenimento dell’epidemia da COVID-19’ (2020) *Giornale di diritto amministrativo*, 282; Fabio Giglioni, ‘Le misure di contrasto alla diffusione dell’epidemia nella fase due’ (2020) *Giornale di diritto amministrativo* 414; and Angelo Golia, Laura Hering, Carolyn Moser and Tom Sparks, ‘Constitutions and contagion. European constitutional systems and the COVID-19 pandemic’ (2021) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 81, 147 <<https://www.nomos-elibrary.de/10.17104/0044-2348-2021-1-147>>.

under the civil protection legislation provisions and, in case of emergencies of a supra-regional dimension, by the Civil protection department of the Presidency of the Council of Ministers, which is the body best equipped to carry out the relevant organizational tasks. That department, acting in close cooperation with the Minister of Health, was given such tasks: allocation of funds, and collection of citizens' donations in support of the national health system, hiring of staff, as well as the purchase of medical devices. The latter task was subsequently entrusted to the extraordinary Commissioner for the COVID-19 emergency, due to the difficulty of finding such instruments in the national territory<sup>62</sup>. As the Civil protection department does not have specific competence in health matters, it was assisted by the Technical-Scientific Committee set up by a civil protection ordinance (*Comitato tecnico scientifico* – CTS)<sup>63</sup>.

Secondly, the Government issued few decree-laws to redesign the emergency system to manage the COVID-19 pandemic and to typify the containment measures to be used by itself and by the other public authorities involved (consisting of stringent limitations on personal freedom, freedom of movement, economic freedoms, freedom of assembly, and so on), to regulate the methods of carrying out judicial activity, to allocate funds, as well as to establish measures aimed at alleviating the economic and social impact of the epidemic. With the decree-laws, in particular, an attempt was made to coordinate the possibility of intervention of the presidents of the regions and of the mayors, in order to avoid the issue of regional and local measures contrasting with the national ones, establishing, according to the different stage of the pandemic, the measures which regional and local authorities would be able to issue.

Thirdly, the main normative instrument used by the Government during the first and second wave of COVID-19 was the decree of the President of the Council of Ministers (DPCM). Such instrument was issued not on the basis of the civil protection discipline (which actually provides for the possibility to use such instrument), but following the procedure established by the decree-law n. 6 and then n. 19 of 2020. The DPCM were used to establish the concrete measures limiting the freedoms of citizens deemed necessary to ensure personal distancing and thus contain the spread of the epidemic, as well as to establish some

commissioners or commissions acting in support to the Presidency of the Council, such as the extraordinary Commissioner for the COVID-19 emergency or the committee of experts for the start of “phase two”.<sup>64</sup>

Fourthly, various measures have been adopted with ministerial orders, as well as with ministerial circulars (which, especially those issued by the Ministry of Health and of the Interior have a strong regulatory relevance). In particular, the ordinances of the Minister of Health (or of the Minister of Infrastructure and transport) were used to establish restrictive measures, often pending the adoption of the same measures with DPCM, or as technical decisions to execute the rules established by the DPCM.

### 13. The Legal Issues Concerning the COVID-19 Response

The management of the COVID-19 has been challenged not only from an organizational perspective (which will be addressed below) but also from a normative point of view, challenging the legality of the measures under at least four different perspectives. First, it was contested that the Government had the power to intervene in the field of health, which is a competence that it shares with the regions. Secondly, it was challenged that the Government was infringing the rules of the Constitution protecting the personal freedom. Thirdly, the use of DPCM (instead of decree-laws) has been contested. Fourth, the proportionality of the measures has been questioned.

The issues have been the object of public debate, thus creating some uncertainties in the public opinion. They have been the object of decisions of administrative courts (which held the powers to have been exercised according to the Constitutional principles and, usually, according to the principles of administrative action) and of civil and criminal judges (one of which doubted about the constitutionality of the DPCM, thus referring such an issue to the Constitutional Court).

The first problem concerns the legislative competence. The Italian National health system is managed at the regional level, and the twenty regions (one of which is divided in two autonomous provinces with the same legislative powers and competences of the regions) have legislative and administrative powers in the field of the so-called

<sup>62</sup> The commissioner was established with art. 122, the legislative decree 18, (2020) and appointed with the Prime Minister Decree, (18 March 2020).

<sup>63</sup> Order of the Head of the Civil protection department (3 February 2020), 630.

<sup>64</sup> The DPCM 10 April 2020 set up a “Committee of economic and social experts”, headed by Dr Vittorio

Colao, with the task to provide recommendations regarding the methodology to be followed and the conditions to be implemented in order to decide on the openings of the industrial and production activities in the month of May 2020 and so on. The reports have been published on the website of the Italian Government.

exclusive and concurrent competences as defined by the Constitution. In the field of health regulation the State maintains exclusive competence only as concerns the “international prophylaxis”.

With the decree-laws n. 6 (and especially n. 19) of 2020 the Government tried to coordinate the emergency powers at disposal of regional and local authorities, defining the measures that could be adopted (which may be interpreted as prohibiting to enact measures not enlisted in the decree-law). However, this caused both political and legal problems.

Putting it simply, especially at the beginning of the emergency, local authorities wanted to issue orders to show their voters that they were not sitting on their hands, and, later on, when the situation was improving, that they were willing to re-open the commercial activities before the dates established by the Government. The Government, on the opposite, took the hard task to keep the pandemic under control, enacting tough measures as progressively restricting the free movement of persons, following the evolution of the pandemic<sup>65</sup>.

So, the Government had to counteract regional orders contrasting with the national decisions in front of the administrative tribunals (beginning with one of the earliest orders taken to counteract the pandemic, i.e. the order of the President of the Marche Region of 25 February 2020, n. 1)<sup>66</sup> or to counteract orders of the mayors by annulling them through a special annulment power conferred to the Minister of the Interior (as such emergency powers are issued by the major acting as local representative of the Minister of the Interior).<sup>67</sup> Finally, in order to counteract decisions taken by the regions with regional legislation, the Government had to challenge the competence of the regions in issuing such decisions in front of the Constitutional Court.

The Constitutional Court, for the first time of its history, issued a preliminary order and finally a judgment, establishing that the area of “international prophylaxis” is an area of

indisputable State-level competence, which necessarily entails “uniformity at the national level” and that the duties of regions with regard to the COVID-19 response were delegated to them by the State legislator, and did not entitle the regions to act independently in fighting the virus.<sup>68</sup>

The second issue concerns the legal qualification of the “lockdown” measures enacted nationwide in March-May 2020 and locally even more recently (so called “red areas”, which may be established also by administrative order of the competent authority, usually the President of the concerned region). In case the measures that prevented people to get out from their homes (except for reasons of work, necessity or health) would be considered as a limitation of “personal freedom”, protected by article 13 of the Constitution, not only a specific legal rule would be necessary, but even a specific order of a judge. In case such measures are considered as limiting only the freedom to freely circulate, protected by article 16 of the Constitution, the judicial order is not required by the constitution, and only a legal provision empowering the administration is necessary.

Although administrative judges considered the measures adopted as a limitation to circulation (and also of other rights, not of the personal freedom), some ordinary (i.e. civil and criminal) judges (called to judge on administrative sanctions or for the crime of false declarations to the police officers) considered such measures as a breach of personal freedom (and/or that the DPCM was not an appropriate instrument to establish such measures) and deemed such measures as being illegal.<sup>69</sup>

The third issue concerns the use of DPCM, as some judges and legal writers assumed that the restrictions should be imposed by decree-law.

Both issues have been faced by the Constitutional Court, which established that the decree-law n. 19 of 2020 did not confer upon the President of the Council of Ministers legislative

<sup>65</sup> The restrictive measures taken by the Government have been criticized especially by the entrepreneurs whose activities have been closed, which organised demonstrations and protests under the hashtag #IoApro (i.e. “I open”). On the opposite, a criminal investigation is being carried out by the public prosecutor of the town of Bergamo (which has been strongly hit by the pandemic, with a huge number of deaths) for the delays in establishing the lockdown. It has been discussed if an earlier adoption of such a measure could have saved lives: see e.g. Raffaele Palladino, Jordy Bollon, Luca Ragazzoni and Francesco Barone-Adesi, ‘Excess deaths and hospital admissions for COVID-19 due to a late implementation of the lockdown in Italy’ (2020) *International Journal of Environmental Research and Public Health* 17, 5644.

<sup>66</sup> See order of the president of the Administrative Tribunal of the Marche Region, 56 (27 February 2020), and order of the Administrative Tribunal, 63, (5 March 2020)

<sup>67</sup> See opinion of the Council of State, (7 April 2020), 735, concerning the annulment of the order of the mayor of Messina, 105, (5 April 2020), which restricted access to Sicily in a more stringent way than that provided by the State rules.

<sup>68</sup> Constitutional Court, order 4 (14 January 2021) and judgment 37, (12 March 2021) available (also in English) on the website of the Constitutional Court, <[www.cortecostituzionale.it](http://www.cortecostituzionale.it)>.

<sup>69</sup> See judgments of the justice of peace of Frosinone 515 and 516 (15 July 2020); Tribunal of Reggio Emilia, judgment 54 (27 January 2021).

functions in breach of Articles 76 and 77 of the Constitution. Rather, those provisions have been considered as simply vesting the President of the Council of Ministers with the task to execute, with general administrative acts, measures that were sufficiently detailed therein, so that the DPCM were used simply as administrative acts to execute the measures that the decree-law had previously typified.<sup>70</sup>

Finally, the proportionality of the measures has been challenged in front of the administrative judges, who have almost always upheld the decisions taken by the public authorities and, in the case of conflicts between State authorities and regional authorities, usually in favour of the State.

For example, the Council of State upheld the decisions imposing quarantines on workers who had close contacts with infected persons<sup>71</sup> or those imposing the curfew and an early closing time for restaurants, considering the interest of public health as superior to the right to work and to exercise an economic activity, taking in account that the economic loss would have been compensated by the Government<sup>72</sup> and also the decision to impose the use of facial masks to the students (older than 6 years old and except in case of health problems) at school.<sup>73</sup>

On the opposite, in some cases administrative judges condemned the public administrations for lack of transparency, ordering them, and especially the Minister of Health, to disclose information, health plans, the minutes of the technical bodies involved in the decision-making process.<sup>74</sup>

## Final section: problems and lessons for the future

### 14. The Problems of the Italian Response to COVID-19

The measures which were devoted more attention (also because they limited the fundamental rights of people, even the possibilities to go to the church or to vote) and which were probably the most effective

in containing and mitigating the pandemic were the rules providing for personal and social distancing.

Such measures were accompanied by other prophylactic measures. On the one hand, those aimed at tracking and isolating the contacts of affected people (“contacts of cases”), and, on the other hand, the care, at home (for the less serious cases) or in the hospital (for the severe cases) of patients. Such measures needed a re-arrangement of the health system, with the institution of special mobile care units (in order to visit patients at home and thus limiting the pressure and crowds at the emergency departments of the hospitals) and the simplification of procedures to acquire personal protective equipment (i.e. PPE, such as face masks, gloves, protective coveralls or eyewear protection, as well as for medical devices such as surgical masks, and exploration gloves and gowns) and breathing devices, which were not sufficient to deal with the huge amount of patients.

Lot of mistakes were found to have occurred. For example, residences for the elderly people have been used to take care of less serious COVID-19 patients, thus spreading (through the healthcare personnel) the virus in the whole structure; hospitals became an outbreak place for the virus; the contact tracing system adopted did not work, both because the number of cases was too high and because the app was too complex to be effective;<sup>75</sup> and the face masks imported from abroad had to follow special simplified and faster procedures, so derogating to the rules established at the EU level. Such simplification had been envisaged by the European Commission,<sup>76</sup> however, the misinterpretation and misapplication of both EU rules and national emergency legislation led to the distribution of millions of defective and unsafe facemasks.

### 15. Lessons From the COVID-19 Pandemic

At least four lessons may be learned from the COVID-19 pandemic.

<sup>70</sup> Constitutional Court, 198, (22 October 2021).

<sup>71</sup> Council of State, Sect. III, presidential decree 1553, (30 March 2020).

<sup>72</sup> Council of State, Sect. I, opinion 850, (3 May 2021); and Sect. III, order 2493, (11 May 2021)

<sup>73</sup> The first instance administrative courts had some doubts on the necessity to impose the use of facial masks at school; however the Council of State upheld the obligation to use facial masks with the only exception of students with certified problems of breathing caused by the prolonged use of facial masks: see Council of State, order 304 (26 January 2021), Administrative Court of Lazio, order 837 (13 February 2021) and judgment 2102 (19 February 2021) (declaring the administrative decision to be disproportionate) and Council of State decrees 1804, (2 April 2021), 1832 (7 April 2021), and

1840 (8 April 2021)(upholding the obligation to use facial masks, also because it had been re-established by law).

<sup>74</sup> See e.g. Council of State, Sect. III, judgment (9 July 2021), 5213.

<sup>75</sup> Contact tracing was based on both the traditional interview system to trace the contacts of the cases and on the use of an App (named *Immuni*) that had to be voluntarily downloaded and installed by the people on their mobile phone. However, in order to respect the privacy of the infected person and to avoid misuse of it, it was too complicated to be used and did not get enough users to be effective.

<sup>76</sup> Cf. Commission recommendation (EU) 2020/403 (13 March 2020) on conformity assessment and market surveillance procedures within the context of the COVID-19 threat.

First: it is necessary to rethink or re-evaluate the relationship between science and technology, on the one hand, and politics and administration, on the other. And, above all, the role of judges, repeatedly called upon to resolve the complex conflicts that have arisen between the various political decision-makers concerned, citizens and economic activities.

Second: it is necessary to carefully analyse the legal management of the emergency, as it was necessary to set up a brand-new legal system to face it, based on administrative acts that suspended legislation and citizens' rights.

Third: attention must be paid to the medical-health management of the emergency, especially as regards its organizational issues, relating to the tools used to contain and mitigate the epidemic.

Fourth: with reference to the "administrative" management of the emergency, attention must be paid to the application of pandemic plans, to the (excessive) administrative simplifications, to the procurement of medical devices and medical equipment, as well as to the tools necessary to keep the most important activities going (as educational activities).<sup>77</sup>

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<sup>77</sup> See Matteo Gnes, 'La risposta italiana all'epidemia da COVID-19' (2021) *Giornale di diritto amministrativo*, 277.