

Judicial Review and Restrictive Measures. How Has the Intensity and Scope of Judicial Review Changed During COVID-19 in Italy?

Chiara Feliziani, Viviana Di Capua and Ilde Forgione

Abstract. The article aims to analyse how the intensity and scope of judicial review has changed during COVID-19 pandemic. In doing this, the analysis will start from a brief critical review of the main legislative and administrative acts issued by the Italian Government to face the crisis. Then, the contribution will focus on the most relevant judicial review adopted during the pandemic to verify the legitimacy of the Regional and Municipal emergency acts which contain restrictive measures.

Keywords: Public Health Emergency, COVID-19 Pandemic, Italian Strategy, Restrictive Measures, Judicial Review

1. Introduction

Italy as a State was born in 1861. After a period of monarchy, in 1946 the Italian form of government became that of a parliamentary republic.¹ The Head of State² is the President of Italian Republic which is elected by the Parliament in joint session every seven years.³ The fundamental law of the State is the Constitution (or Constitutional Charter) which was adopted by the Constituent Assembly on 22 December 1947 and entered into force on 1 January 1948.⁴

As in other modern democracies inspired by liberal constitutionalism theory⁵, in Italy there is the principle of separation of powers. This means that the three powers of the State do not belong to a single body. On the contrary, the legislative power belongs to the Parliament⁶, the executive power belongs to the Government⁷ and, finally, the judicial power belongs to the judiciary.⁸

However, it should be pointed out that there are two cases in which legislative power is (mainly) exercised by the Government. These are the cases of both the Law-Decree and the Legislative Decree.⁹

In the first scenario, according to article 77 Cost., “in exceptional cases of need and urgency,” for example the Covid-19 pandemic, the Government can adopt a decree which has the same legal value of an ordinary law.¹⁰ However, such a decree loses its effectiveness if it is not converted into law by the Parliament within sixty days from its publication.¹¹ In the second scenario, according to article 76 Cost., the Parliament can delegate the legislative power to the Government by a delegation law containing the principles and criteria that must be followed in exercising the delegation.¹²

Thus, in the above mentioned scenarios, the legislative power is concretely exercised by the Government, but the Parliament carries a sort of check on such exercise. In the case of the Law-Decree the control follows the exercise of legislative power by the Government, while in the case of the Legislative Decree the parliamentary control precedes the exercise of legislative power by the Government. As it will be clearly highlighted in section 2 section of this article, both of these types of legislative acts were used extensively during the Covid-19 pandemic.

¹ Albeit its unitary conception, Chiara Feliziani drafted Sections 1 and 3, Viviana Di Capua drafted Section 2, while Ilde Forgione drafted Section 2.1.

² See articles 1 and 55-96 of the Italian Constitution.

³ See articles 83-91 Const.

⁴ Roberto Bin and Giovanni Pitruzzella, *Diritto costituzionale* (Giappichelli 2021) 138.

⁵ Montesquieu, *De l'esprit des lois*, 1748.

⁶ See articles 55-82 Cost.

⁷ See articles 92-100 Const.

⁸ See articles 101-113 Const.

⁹ Roberto Bin and Giovanni Pitruzzella, *Diritto costituzionale*, (Giappichelli 2021) 386.

¹⁰ *Ibidem*, 391.

¹¹ *Ibidem*, cit., 391.

¹² *Ibidem*, cit., 386.

As far as the judicial power is concerned, it should be pointed out that in Italy there is a system based on the principle of double jurisdiction, ordinary jurisdiction and administrative jurisdiction.¹³ The double jurisdiction system has been substantially “created” or “drawn” by the legislature before the advent of the Republic - see both Act 20 March 1865 n. 2248 - Annex E and Act 31 March 1889 n. 5992 - and then it was then confirmed by the Constituent Assembly.¹⁴

In particular, administrative jurisdiction is exercised by the administrative judge¹⁵, whether the Regional Administrative Court (i.e. TAR) in the first instance or the Council of State on appeal. The main task of the administrative law system is opining about the legitimacy of the exercise of power by the public administration¹⁶. As will be clearly highlighted in the below discussion, during the Covid-19 pandemic, the administrative judges have played a very important role with regard to the many administrative measures that were adopted to cope with the health emergency.

Given that, the research presented in this article will first focus on the legislative and administrative measures that were adopted in Italy in response to the pandemic. Second, the article will offer a detailed overview of the “pandemic case law”. More specifically, it will analyse the judicial review made by the Italian administrative judges on the administrative acts adopted during the pandemic and, in particular, on those concerning the freedom of movement. Third, the research will give account of the relationship between the law of the pandemic and the role of Courts, especially analysing the impact of such a legislation on the main features of the judicial review. Finally, the article will formulate some conclusive remarks.

2. Normative Analysis

In Italy, the response of public authorities to the Covid-19 pandemic divided itself in a sequence of legislative and administrative acts aimed, on the one hand, at containing the spread of the contagion and easing the pressure on the national health service through a series of precautionary measures of increasing intensity, affecting the exercise of

some of the most important personal freedoms guaranteed by the Constitution, and, on the other, at supporting the national economy indirectly affected by the crisis.

On 31 January 2020, even before the World Health Organisation declared a global pandemic, the Council of Ministers approved, for the duration of six months, the state of emergency as a result of the health risk related to the outbreak of diseases resulting from transmissible viral agents¹⁷ and gave the Head of the Civil Protection Department the power to issue ordinances in derogation of any provision in force and in compliance with the general principles of the legal system.¹⁸ Starting from 3 February 2020 onward, ordinances were issued by the Head of the Civil Protection Department to coordinate interventions aimed at managing the evolving emergency.¹⁹

The beginning of the pandemic in Italy established the conditions for the preparation of a specific management strategy, which, in the absence of a pandemic plan, was considerably simplified in terms of communication. The strategy was only codified towards the middle of the first phase of the pandemic, finding precise regulation in Annex 10 to the Decree of the President of the Council of Ministers (D.P.C.M.) of 26 April 2020.²⁰

The first pillar of the emergency management regulatory system is the Law-Decrees no. 6 of 23 February 2020 (Urgent measures on the containment and management of the epidemiological emergency from COVID-19), converted, with modifications, into Law no. 13 of 5 March 2020, which gives the competent authorities the power to adopt precautionary measures to contain the spread of the disease among the population.²¹ The decree created the regulatory bases for the construction of two parallel systems of measures differentiated on a territorial basis, consisting, on the one hand, of the implementing Decrees of the President of the Council of Ministers (D.P.C.M.) and a long sequence of administrative acts of various kinds (ordinances, ministerial decrees, circulars, directives, etc.) and, on the other hand, of a plurality of ordinances, clarifications and decrees of the Regions and Municipalities, issued for the specific purpose of addressing the critical

¹³ See articles 111-113 Const. Moreover, see Luca Mannori and Bernardo Sordi, *Storia del diritto amministrativo* (Manuali Laterza 2013) 305; Aldo Travi, *Lezioni di giustizia amministrativa* (Giappichelli 2021) 13.

¹⁴ Aldo Travi, *Lezioni di giustizia amministrativa* (Giappichelli 2021) 13.

¹⁵ See article 103, par. 1, and 113 Const.; Legislative Decree 2 July 2010 No. 104 - Annex 1.

¹⁶ See article 103, par. 1, Cost.. *Amplius*, Aldo Travi, *Lezioni di giustizia amministrativa*, (Giappichelli 2021) 178.

¹⁷ See article 7, paragraph 1, lett. c), and the articles 12, paragraph 1, of Legislative Decree 2 January 2018, No. 1 (Civil Protection Code).

¹⁸ See the article 25 of Legislative Decree No. 1/2018.

¹⁹ On this point, see Matteo Gnes, ‘Le misure nazionali di contenimento dell’epidemia da Covid-19’ (2020) *Giornale di Diritto Amministrativo* 3, 282 ss.

²⁰ See the Annex 10 of D.P.C.M. of 26 April 2020, which contained the principles for health risk monitoring.

²¹ See, in particular, the article 1 (Urgent measures to avoid the spread of COVID-19) of Law-Decree No. 6/2020.

issues arising in the territories of reference.²² Article 1 provides, that in the municipalities or areas 'infected', the authorities may adopt any containment and management measure that is appropriate and proportionate to the evolution of the epidemiological situation²³. This is followed by a non-exhaustive though extensive list of typical measures, including.²⁴ The competent authorities are also given the power to take further precautionary measures in municipalities and areas not yet affected by the infection, without, however, specifying their content.²⁵ In order to implement the law, several D.P.C.M. are issued, providing measures that affect constitutionally guaranteed rights and freedoms, including freedom of movement and residence²⁶ and freedom of assembly and association²⁷ at an increasing scope of jurisdictional application, starting with limited application and, subsequently, extending to the entire nation.²⁸

Article 3, paragraph 2, of Law-Decree no. 6/2020 also conveys the ability, in cases of extreme necessity and urgency and pending the adoption of the D.P.C.M., for the authorities responsible for health emergencies - the Minister of Health, the President of the Region and the Mayor - to take typical and atypical measures to resolve any criticalities that are territorially localised (for example, any outbreaks of infection).²⁹ The purpose of regulating the conditions and methods of intervention of the regions and the municipalities is to combine the national dimension of the emergency with the different territorial concentration of the virus and to ensure a prompt reaction to the occurrence of critical situations in limited areas.³⁰ However, the extreme generality of the legislation has allowed the regional and local authorities to adopt more restrictive measures than

the national measures by means of ordinances of necessity and urgency. The Campania Region, for example, with ordinance no. 15 of 13 March 2020, prohibited individuals residing in the region from leaving their homes, residence, domicile or abode except for work, health or necessity reasons, and in the clarification no. 6 of 14 March 2020, precluded individuals from carrying out in public places or places open to the public not only recreational or leisure activities, but also sports and motor activities individually, in the proximity of the home and in compliance with the rules on interpersonal safety distance, although the fact that such activities were expressly permitted at national level by art. 1 paragraph 1, lett. b) of the Order of the Minister of Health of 20 March 2020.³¹ The violation of these obligations is linked to the application of a criminal sanction³² and of home isolation with active health surveillance (quarantine), which is in this way stripped of its precautionary purpose, resulting in a sanctioning character, as is also shown by the use of the terms "transgression" and "transgressor".³³

The subsequent Law-Decree no. 19 of 25 March 2020 (Urgent measures to deal with the epidemiological emergency caused by COVID-19), converted, with amendments, into Law no. 35 of 22 May 2020, corrects the critical issues that arose at the regional and local levels during the validity of the first one.³⁴ The decree concentrates the power to manage the emergency in the hands of the President of the Council of Ministers, to allow him to maintain the 'direction' of the operation and, at the same time, subjects the power of ordinance of the regions and mayors to a series of assumptions and limits that are precisely defined³⁵. More specifically, it provides that the measures to contain the contagion must be adopted, ordinarily, by the President of the Council of Ministers, with one or

²² On this point, it is allowed postpone Viviana Di Capua, 'Il nemico invisibile. La battaglia contro il Covid-19 divisa tra Stato e Regioni' (20 maggio 2020) Osservatorio Emergenza Covid-19 <<https://www.federalismi.it/ApiOpenFilePDF.cfm?artid=43500&dpath=document&dfile=19052020153424.pdf&content=Il%2Bnemicoinvisibile%2E%2BLa%2Bbattaglia%2Bcontro%2Bil%2BCovid%2D19%2Bdivisa%2Btra%2BStato%2Be%2BRegioni%2B%2D%2Bstato%2B%2D%2Bpaper%2B%2D%2B>> accessed 30 July 2021.

²³ See the article 1, paragraph 1, of Law-Decree No. 6/2020.

²⁴ For example, a ban on entering or leaving the municipality or area concerned.

²⁵ See the article 2, paragraph 1, of Law-Decree No. 6/2020.

²⁶ See the article 16 Const.

²⁷ See the article 17 Const.

²⁸ More specifically, the D.P.C.M. of 9 March 2020 established a ban on all movements of individuals entering, leaving and moving within the territories,

allowing only those seeking to travel for proven work requirements or situations of necessity or by health reasons to do so; a strong recommendation for people with a temperature of over 37.5°C to remain at home; the suspension of demonstrations of all kinds, banning all forms of assemblage of people in public places or places open to the public, etc.; and a ban on the assembly of people in public places or places open to the public.

²⁹ Viviana Di Capua and Ilde Forgiione, 'Salus rei publicae e potere d'ordinanza regionale e sindacale nell'emergenza Covid-19' (2020) *Giornale di Diritto Amministrativo* 3, 330 ss.

³⁰ *Ibidem*, 334.

³¹ Viviana Di Capua, *Il nemico invisibile. La battaglia contro il Covid-19 divisa tra Stato e Regioni*, 335.

³² See the article 650 of the Criminal Code.

³³ *Ibidem*.

³⁴ Viviana Di Capua, Ilde Forgiione, 'Salus rei publicae e potere d'ordinanza regionale e sindacale nell'emergenza Covid-19', cit., 331.

³⁵ *Ibidem*.

more decrees and, depending on whether they concern the regional or national territory, also by the President of the Region concerned or by the President of the Conference of Regions and Autonomous Provinces, who also has the power of initiative.³⁶ However, in an emergency, the Regions may intervene under certain conditions: the exercise of the power of regional ordinance, limited to the adoption of measures that are more restrictive than those already in force, may take place only while the decrees of the President of the Council of Ministers are pending and with limited effectiveness until that time, as well as resort to specific situations of aggravation of the health risk occurring in the regional territory or in a part of it and exclusively within the scope of the activities of their respective competences, without further affecting production activities and those of strategic importance for the national economy.³⁷ These limitations also apply to the powers of ordinance attributed to the Regions in the field of public health by any provision of law previously in force, highlighting in this way the legislative will to close any possible gap opened to the exercise of regional powers by other regulatory provisions not expressly referred to the decree.³⁸ Lastly, Mayors are precluded from adopting contingent and urgent ordinances to face emergencies in contrast with state or regional measures or exceed the limits of paragraph 1, which apply to regional ordinances.³⁹

An interpretation in line with the centripetal orientation underlying the regulatory design, based on the conviction that the policy of mitigation and response to the pandemic emergency must be uniform and homogeneous throughout the national territory⁴⁰, leads to the conclusion that trade union ordinances, in order to be legitimate:

³⁶ See the article 2 of Law-Decree No. 19/2020.

³⁷ Viviana Di Capua, Ilde Forgiione, *'Salus rei publicae e potere d'ordinanza regionale e sindacale nell'emergenza Covid-19'*, 331-332.

³⁸ See the article 2, paragraph 1, of Law-Decree No. 19/2020.

³⁹ See the article 3, paragraph 2, of Law-Decree No. 19/2020.

⁴⁰ Roberto Cherchi, Andrea Deffenu, *'Fonti e provvedimenti dell'emergenza sanitaria Covid-19: prime riflessioni'* (2020) *Diritti Regionali* 1, 648 ss. (670).

⁴¹ Roberto Cherchi, Andrea Deffenu, *'Fonti e provvedimenti dell'emergenza sanitaria Covid-19: prime riflessioni'* *Diritti Regionali* (2020) cit., 676. On this point, see also Ilde Forgiione, *'La gestione locale dell'emergenza da Covid-19. Il ruolo delle ordinanze sindacali, tra sussidiarietà e autonomia'* (2020) *Il diritto dell'economia* 2, 71 ss., in part. 89, who considers admissible, despite the pervasiveness of the executive's actions "an area of integrated and implemented intervention [of the national and regional measures] [...], in a subsidiary function and in loyal cooperation, as well as [...] one of its own, a guide

a) may not derogate national and regional measures by increasing or relaxing their requirements;

b) may have an implementing or supplementary content (in this case, in the absence or with minimal exercise of discretion);

c) may regulate areas that are not already governed by over-regulation acts, provided that they are limited to the introduction of prescriptions with exclusively local effect⁴¹;

d) take the form only of the adoption of one of the measures defined in advance by the emergency legislation.

The D.P.C.M. of 26 April 2020 marks the start of a new phase of emergency management, marked by a progressive relaxation of the measures previously in place.⁴² With regard to freedom of movement, the situations of necessity that justify movements are extended to include meetings with relatives, provided that the prohibition on gathering is respected, that interpersonal distances of at least one metre are maintained and that individual protection devices (masks) are used.⁴³ In addition, there is no longer any spatial limit for motor and sports activities, which are allowed at a safe distance between persons of at least one metre for the former and two metres for the latter. In essence, barriers to movement within the municipal area are partially eliminated, while those to movement between regions remain. Quarantine remains compulsory only for persons returning from abroad, and a total ban is introduced on those suffering from symptoms of respiratory infection and fever (greater than 37.5°C) on moving from home and limiting social contacts.⁴⁴ It introduces an obligation for the population to wear masks in (only) enclosed places, where it is not possible to guarantee a safe interpersonal distance. Funeral

and direction for town life". This in as much as "the Local Authorities don't only have the job of carrying out decisions taken elsewhere, as the last link in the institutional chain, but the must also be a primary institutional spokesman, with the task of adapting, adjusting, informing and balancing on the basis of factual reality".

⁴² Fabio Giglioni, *'Le misure di contrasto alla diffusione dell'epidemia nella fase due'* (2020) *Giornale di Diritto Amministrativo* 4, 414 ss.

⁴³ The Ministry of the Interior Circular No. 15350 of 2 May 2020 specifies that the expression "relatives" includes "spouses, relationships of kinship, affinity and civil union", as well as relationships characterized by "lasting and significant sharing of life and affections" (cfr. Court of Cassation, sez. IV. 10 November 2014, No. 46351).

⁴⁴ The Ministry of the Interior Circular No. 15350 has clarified that the regulation reinforces the preceding measure, consisting of a strong recommendation, and imposing on these individuals "a true and real duty".

ceremonies are permitted, limited to the participation of relatives, compliance with the rules on social distancing and preference for open-air celebrations.

Of particular interest is the provision contained in art. 2, paragraph 11, which attributes to the Regions the function of monitoring the trend of the epidemiological situation in their respective territories, in order to guarantee the safe performance of production activities. Any aggravation of the health risk, identified by applying the principles indicated in annex 10 and the criteria established by the Decree of the Minister of Health of 20 April 2020, entitles the President of the Region to promptly propose the necessary and urgent restrictive measures for the productive activities in the affected regional territory, for the purpose of exercising the power of ordinance under art. 2, paragraph 2, of Law-Decree no. 19/2020.

The regulation also introduces an important limitation on the exercise of the power of regional ordinance which, with regard to economic activities, is anchored to the existence of an actual risk of contagion, the inspection of which presupposes the application of criteria predetermined by the decree, and to the obligation to consult the Minister of Health before adopting the most restrictive measures. The aim is to put a stop to the practice followed by some Regions of further depressing economic activities based in the territory concerned, often on the basis of an increase in the risk of contagion not measured on certain, unambiguous and uniform parameters.

Another important innovation concerns the introduction and codification of the “Principles for health risk monitoring” in Annex 10 to the decree, which are useful for maintaining or moving from one phase to another of pandemic management. The provisions of the D.P.C.M. of 26 April 2020 were partly “absorbed” by Law-Decree no. 33 of 16 May 2020 (Further urgent measures to tackle the epidemiological emergency caused by COVID-19), converted, with amendments, into Law no. 74 of 14 July 2020. It was therefore preferred to define, with a primary source of legislation, the legal regulation of the movement of natural persons and the

exercise of economic activities on the national territory.⁴⁵

With regard to freedom of movement, from 18 May 2020, intra-regional restrictive measures ceased to be effective, and from 3 June 2020, inter-regional restrictive measures ceased to be effective, subject to any reiteration or new adoption exclusively in relation to specific areas of the same territory affected by a worsening of the epidemiological situation, in compliance with the principles of adequacy and proportionality.⁴⁶ From the latter date, travellers were also allowed to move to and from abroad, subject to the same conditions for any future limitation.⁴⁷

The power to issue a trade union order undergoes a further contraction, evident in the provision that allows its exercise limited to the temporary closure of specific public areas or areas open to the public where it is impossible to adequately ensure compliance with social distancing.⁴⁸ Finally, the framework of sanctions and controls is clarified and enriched: the violation of the decrees and ordinances issued in implementation of the decree, unless the fact constitutes an offence other than that provided for in art. 650 c.p., is punished with the administrative sanction referred to in art. 4, paragraph 1, of Law-Decree no. 19/2020⁴⁹. If the infringement is committed in the exercise of a business activity, the accessory sanction of the closure of the business or activity for a period of between 5 and 30 days is added.⁵⁰

In implementation of Law-Decree no. 33/2020, the D.P.C.M. of 17 May 2020 was issued, allowing the resumption of further economic activities, access to “green areas”, and the performance of recreational and leisure activities, while respecting social distancing. The D.P.C.M. of 11 June 2020 marks the end of the lock-down and a resumption of mobility outside national borders and economic activities, although with persistent exceptions and in compliance with biosecurity rules. At the same time, the Council of Ministers decided to extend the state of emergency, at the beginning until 15 October 2020, then until 31 January 2021 and 30 April 2021, and finally until 31 July 2021.

⁴⁵ Fabio Gigliani, ‘Le misure di contrasto alla diffusione dell’epidemia nella fase *due*’ (2020) *Giornale di Diritto Amministrativo*, 414–415.

⁴⁶ See article 1, paragraphs 1 and 3, Law-Decree No. 33/2020.

⁴⁷ See article 1, paragraph 4, Law-Decree No. 33/2020.

⁴⁸ See article 1 paragraph 9, Law-Decree No. 33/2020.

⁴⁹ The article 4, paragraph 1, Law-Decree no. 19/2020, establishes that: “Unless the fact constitutes a crime, failure to comply with the containment measures

referred to in article 1, paragraph 2, identified and applied with the measures adopted pursuant to Article 2, paragraph 1, or article 3, is punished with the sanction administrative payment of a sum from € 400 to € 3.000 e the penalties provided for in the article are not applied 650 of the Criminal Code or any other provision of the law attribution of powers for health reasons, referred to in Article 3, paragraph 3. If failure to comply with the aforementioned measures occurs by using a vehicle the penalties are increased up to one third”.

⁵⁰ See article 2, paragraph 1, Law-Decree No. 33/2020.

Moreover, Law-Decree no. 125 of 7 October 2020, converted, with amendments, into Law no. 159 of 27 November 2020, modifies the power of ordinance of the Regions in the sector of economic activities, introducing the obligation of a prior agreement with the Minister of Health in the hypotheses in which they decide to adopt measures that go beyond what is prescribed by the national measures.⁵¹ The purpose of this provision is to prevent the Regions from issuing more restrictive ordinances concerning the economic activities present on the territory, compromising the unitary strategy of crisis management.

The exponential increase in contagions is matched by the adoption of mitigation measures of progressively increasing intensity⁵²: obligation to carry a mask at all times and to wear it in indoor and outdoor places, if it is not possible to respect the interpersonal safety distance; possibility of closing to the public, after 9 p.m., streets or squares in urban centres where the risk of assemblages is high; suspension of the activities of dance halls, discos and similar places, indoors and outdoors; prohibition of parties in all places; suspension of school trips; restrictions on the activities of restaurants, bars, pubs, ice cream parlours, pastry shops and similar establishments, which are allowed until 6 p.m. with table service, until midnight with take-away and without time restrictions with home delivery; suspension of events, competitions and other sporting events; suspension of contact sports; obligation to hold events exclusively in static form; suspension of conferences, congresses and other events; obligation to hold meetings in public administrations in telematic mode; and “strong recommendation” to individuals not to travel, even by public or private means of transport, except for work, study, health reasons, situations of necessity, or to carry out activities or use services that are not suspended.

The increased pressure on the health system in some Regions has led the Government to partially modify the strategy followed up to that moment and to divide the national territory into three areas (“yellow zone”, “orange zone” and “red zone”) characterised by a scenario of medium, high and maximum severity within which to place the Regions or parts of them that present a more or less critical situation.⁵³ The identification of the Regions to be included in the areas of high and maximum risk is the responsibility of the Minister of Health,

who will issue an order, having consulted the Presidents of the Regions concerned, on the basis of the monitoring of epidemiological data as established by the document “Elements of preparation and response to COVID-19 in the autumn-winter season” and on the basis of the data processed by the “direction cabin”, subject to the opinion of the technical-scientific Committee. The intensity of the mitigation measures is proportional to the severity of the risk in the areas considered: for example, it is foreseen to block intra-municipal mobility in the Regions characterised by a scenario of maximum severity, to close non-essential services, and to limit the activities of catering services, home delivery and take-away.

2.1. Jurisprudential Analysis

The judicial review has mainly concerned the legitimacy of administrative measures for the management of the emergency, in the legal form of ordinances, with which the Regions and Municipalities have ordered stricter measures to contain the contagion than those prescribed by the national emergency measures. The main contentious took place, therefore, before the Regional Administrative Tribunals (TAR) and the Council of State.

The intervention of the Constitutional Court, which is responsible for the judicial review of the constitutional legitimacy of laws and acts equalized (Law-Decrees and Legislative Decrees), has been limited to only two cases. In the first, the Constitutional Court, by order no. 4 of 14 January 2021, suspended the effectiveness of the Law of the Valle d’Aosta Region no. 11 of 9 December 2020, following an appeal by the President of the Council of Ministers.⁵⁴ The challenged Law had allowed certain social and economic activities to be carried out, even in derogation of the prohibitions established by the State legislation on the subject of combating the Covid-19 pandemic. In fact, the regional legislation, which overlapped with that of the State, dictated in the exercise of the exclusive competence in the field of international prophylaxis under Article 117, paragraph 2, letter q) of the Constitution, had in itself exposed to the concrete and current risk that the infection might increase in intensity, since it had provided for less rigorous measures. Taking into account that the way in which Covid-19 spread made any worsening of the risk, even at local level, likely to compromise, in an

⁵¹ See article 1, paragraph 2, letter a), of Law-Decree No. 125/2020.

⁵² First with D.P.C.M. of 13 October 2020 and subsequently with D.P.C.M. of 24 October 2020.

⁵³ Established by the Health Ministry’s Decree of 30 April 2020 and composed of Higher Institute of Health,

Health Ministry and three representatives of the Regions (Lombardy for the North, Umbria for the centre and Campania for the South).

⁵⁴ See Constitutional Court, order 14 January 2021, No. 4.

irreparable way, people's health and the public interest in a unitary management at national level of the pandemic, which, moreover, did not preclude regional diversifications in the framework of a loyal cooperation.

In the second case, the Constitutional Court, by judgment no. 37 of 12 March 2021, declared the constitutional unlawfulness of Articles 1, 2 and 4, paragraphs 1, 2 and 3 of the Law of the Region of Valle d'Aosta no. 11 of 9 December 2020, for violation of art. 117, paragraph 2, letter q), of the Constitution, because those provisions substituted the sequence of regulations drawn up by the State legislature specifically to combat Covid-19, imposing an autonomous and alternative sequence of regulations, which is instead governed by regional legislative provisions and the orders of the President of the Region.⁵⁵

Administrative jurisprudence, in Phases 1 and 2 of the emergency, was mainly oriented towards rejecting the requests for precautionary suspension of the contested measures, except in very rare cases.⁵⁶ The Regional Administrative Court (TAR) of Campania, Naples, section V, by decree no. 416 of 18 March 2020, found ordinance no. 15, and the related clarification no. 6, of the Campania Region to be lawful both because they were based on a number of provisions of Law-Decree no. 6/2020, considered to be the legal basis of the power to adopt measures related to regionally localised situations, with the consequent exclusion of any possible conflict between such measures and those laid down for the entire national territory, and the increase in the number of infections in the Region justifying the extreme gravity and urgency of the more restrictive measures.⁵⁷ Similarly, the TAR of Calabria, Catanzaro, Section I, with presidential decree no. 165 of 28 March 2020, rejected the request for precautionary suspension of the compulsory quarantine order made by a farm worker who had gone to work in the fields, since, in the current pandemic phase, when comparing conflicting interests, it is necessary to give precedence to the public interest inherent in the protection of the community and the need to stem any risk of contagion.⁵⁸ The TAR of Sardinia, Cagliari, section I, by presidential decree no. 122 of 7 April 2020, rejected the application for precautionary suspension of ordinances no. 9 of 31

March 2020 and no. 9 of 31 March 2020 and no. 10 of 2 April 2020, by which the Mayor of Pula had ordered strict limitations, for health reasons related to the emergency in progress, to go out to buy food, in the assessment of conflicting interests, in the current emergency situation, in the face of a compression of certain individual freedoms must be granted prevalence to the measures taken to protect public health.⁵⁹

The decision of the Sardinian judges was, moreover, confirmed by the Council of State which, by presidential decree no. 2020 of 17 April 2020, declared inadmissible the appeal suggested against presidential decree no. 122/2020, stating that the assessment, as a national priority, of the general interest in the strict prevention of Covid-19, does not allow to consider unreasonably compressed, for the period of the emergency, the rights, although significant and fundamental, of private individuals in relation to needs - such as, for example, food supply methods - which, obviously, can be regulated in terms of timing and criteria, in the collective interest certainly prevailing over the individual interest.⁶⁰ The TAR of Sicily, Palermo, by presidential decree no. 458 of 17 April 2020, rejected the application for the suspension of the contingent and urgent ordinance no. 16 of 11 April 2020, by which the President of the Region of Sicily reiterated the prohibition - already provided by the ordinance no. 6 of 19 March 2020 - of any outdoor motor activity, also in individual form, including that of minors accompanied by their parents, since art. 3, paragraph 2, of the Law-Decree n. 19/2020 has peremptorily forbidden only the Mayors to adopt contingent and urgent ordinances aimed at facing the emergency in contrast with the state or regional measures or exceeding the limits of paragraph 1, while a similar prohibition does not appear to be sanctioned for the Regions.⁶¹ The TAR of Veneto, by presidential decree no. 205 of 21 April 2020, rejected the request for precautionary suspension of ordinance no. 23 of 14 April 2020 by the mayor of the municipality of Santa Giustina, which ordered the temporary closure of the cemeteries, since the damage asserted - that is, the preclusion of the exercise of the right of worship and access to the tomb of the son - had already been largely experienced and the remaining period of closure of the cemetery, if compared to that already

⁵⁵ Constitutional Court, judgment 12 March 2021, No. 37.

⁵⁶ On this point, it is allowed postpone Viviana Di Capua, 'La regolazione del rischio di emergenza e la regolazione del «panico del rischio» nella pandemia Covid-19' (2020) P.A. Persona e Amministrazione, 2, 301 ss.

⁵⁷ See TAR Campania, Naples, section V, decree 18 March 2020, No. 416.

⁵⁸ See Calabria, Catanzaro, Section I, presidential decree 28 March 2020, No. 165.

⁵⁹ TAR Sardinia, Cagliari, section I, presidential decree 7 April 2020, No. 122.

⁶⁰ Council of State, presidential decree 17 April 2020, No. 2020.

⁶¹ TAR Sicily, Palermo, presidential decree 17 April 2020, No. 458.

suffered and to the previous period of undisputed exercise (even daily) of the right, does not appear to be of such temporal importance as to aggravate in a decisive manner the damage already suffered.⁶²

This orientation has continued also in subsequent phases. The TAR of Sicily, Palermo, by precautionary decree no. 60 of 21 January 2021, rejected the application for precautionary suspension of regional ordinance no. 10 of 16 January 2021 of the President of the Region, which excluded the applicability, in the regional territory, of the provisions of art. 3 of the D.P.C.M. of 14 January 2021, which authorises travel, once a day, to a single private dwelling, within the limits of two persons, on the grounds that there is no proof of irreparable harm to the fundamental rights of the person, merely because there is a further restriction on freedom of movement.⁶³ The decision was confirmed in second instance, since the Administrative Justice Council, by monocratic decree no. 61 of 25 January 2021, declared the appeal against the TAR decree inadmissible.⁶⁴

Among the very rare cases in which the request for precautionary measures has been accepted, it is worth mentioning TAR of Campania, Naples, presidential decree no. 436 of 21 March 2020, which suspended the injunction to observe the quarantine obligation, since the movement was justified by the applicant's need to assist his mother.⁶⁵ TAR of Toscana, sec. II, sentence no. 334 of 5 March 2021, which annulled order no. 3 of 22 January 2021 of the President of the Tuscany Region, in the part where he had allowed only those who had their own general practitioner in the region to return to Tuscany from other regions to their homes.⁶⁶

It is worth remembering, however, that during the autumn season, when the resurgence of the virus coincided with the resumption of teaching activities in schools of all levels and in universities, the priority subject of administrative litigation became the legitimacy of the orders adopted by the Regions and the Mayors to suspend teaching in the presence of children. Restricting ourselves to a few essential points, in order not to leave the subject matter of the investigation, the orientation of the administrative judges has not been univocal: some pronouncements have 'cancelled' the regional and

trade union ordinances that had suspended teaching in the presence.⁶⁷

It may be noted that, since the measures adopted during the emergency are very limited in time, sometimes lasting only a few days, the precautionary protection before the administrative judge, in the form of emergency protection, has ended up enclosing, in this phase, all the protection that the entire system of judicial guarantees can offer in general.

The governmental power of extraordinary annulment, currently governed by art. 2, paragraph 3, letter p), of Law no. 400 of 23 August 1988 (Discipline of Government activity and organisation of the Presidency of the Council of Ministers), and by art. 138 of Legislative Decree no. 267 of 18 August 2000 (Consolidated act of the laws on the organisation of local authorities), is particularly effective in ensuring the primacy of the law and legal certainty in an emergency context. The institution was used to annul Order No 105 of 5 April 2020, which the Mayor of Messina adopted pursuant to Article 50 of Legislative Decree No 267/2000, in order to require anyone intending to cross the Straits of Messina to register on the portal available on the institutional web page of the Municipality of Messina (providing a series of personal identification data and relating to the place of origin, the place of destination and the reasons for the transit), and to obtain the municipal authorisation to move.⁶⁸ The ordinance was supposed to take effect from 00.01 on 8 April 2020 until 13 April 2020. However, on 7 April, the Presidency of the Council of Ministers requested the intervention of the Council of State, in an advisory capacity, by forwarding a request for an opinion to the Minister of the Interior to start the procedure for extraordinary governmental annulment in order to remove the trade union ordinance. The request was motivated by multiple profiles of illegitimacy of the act (including, violation of law, incompetence, unreasonableness, etc.), as well as by the need to protect the unity of the legal system that risked being compromised by local measures adopted outside the perimeter outlined by the emergency national (legislative and general administrative) acts.

⁶² TAR Veneto, presidential decree 21 April 2020, No. 205.

⁶³ The TAR of Sicily, Palermo, by precautionary decree No. 60, 21 January 2021.

⁶⁴ Administrative Justice Council, by monocratic decree No. 61, 25 January 2021.

⁶⁵ TAR of Campania, Naples, presidential decree No. 436 of 21 March 2020.

⁶⁶ TAR of Toscana, sec. II, sentence No. 334, 5 March 2021.

⁶⁷ Compare TAR Campania, section V, presidential decree, 19 October 2020, No. 1921 and 1922; Naples, section V, monocratic decree No. 142, 20 January 2021; TAR Campania, Naples, section V, monocratic decree no. 153 22 January 2021), others, on the other hand, have 'excused' the actions of local authorities (TAR Campania, Naples, section V, decree No. 302, 16 February 2021.

⁶⁸ Available at <www.sipassaacondizione.comune.messina.it> or at <<https://comune.messina.it>> accessed 30 July 2021.

The Council of State pronounced a favourable judgment on the request for an opinion in a very short time, allowing the procedure to be concluded with the Decree of the President of the Republic of 9 April which, fully accepting the reasons, annulled the ordinance of the Mayor of Messina.⁶⁹ Through a residual institution of the monarchic State, which has raised many doubts on its compatibility with the constitutionalisation of territorial and local autonomies resulting from the reform of Title V of the Constitution, the Government has been able to recover the 'direction' of the crisis management operation, avoiding a further (and unjustified) limitation of the faculties of enjoyment of civil rights and fundamental freedoms already strongly compressed by the emergency legislation.

Although the administrative cases have mainly concerned the legitimacy of regional and trade union ordinances adopting more restrictive measures or in contrast with the national measures, it is important to mention opinion no. 850 of 13 May 2021, issued by the I section of the Council of State, during the extraordinary appeal, which ruled that the use of the Decree of the President of the Council of Ministers as a source of implementation of the primary emergency legislation was legitimate. More specifically, the judges declared the legitimacy of the D.P.C.M. of 24 October 2020 and 3 November 2020, which implemented the provisions of the Law-Decreets governing emergency management. The recourse to implementing decrees made by the previous Law-Decreets is, in fact, consistent with the system of sources for two reasons: first, because the detailed and analytical disciplinary of the regulated cases is not reserved to the primary legislation, and second, because the Law-Decreets, although agile and rapidly approved by Parliament, would not have allowed, in the current historical context, the adaptability and flexibility necessary to adhere to the continuous changeability of the objective conditions of development and trend of the pandemic. The executive instrument of the D.P.C.M., on the other hand, ensures, to a greater extent, the adaptability and flexibility required by the current emergency situation.⁷⁰

The emergency legislation did not reshape the role of administrative judges, nor did it extend the intensity and density of judicial review. In fact, it has been widely observed that jurisprudence did not enter into the merits of the discretion of the

public authorities, essentially confirming the strategy followed for the management of the emergency. Rather, the judges kept within the narrow confines of the law, without extending their power to assess administrative or legislative intervention, precisely recognizing the need for a uniform assessment of the measures to be taken and the need to balance the rights at issue, such as the right to movement and education, with the protection of collective health.

3. Concluding Remarks

The research developed above has firstly focused on the measures – both legislative and administrative– adopted in Italy to cope with the Covid-19 pandemic. In section 2.a, the article provides an account of the legislative and administrative acts aimed, on the one hand, at supporting the national economy elements indirectly affected by the crisis and, on the other hand at containing the spread of the virus and easing the pressure on the national health service. Nevertheless, in so doing, the research has underlined that some of those measures have also affected the exercise of important personal freedoms guaranteed by the Constitution, such as the freedom of movement.

Secondly, the study has offered a detailed overview of the Italian "pandemic case law". More specifically, in section 2.b, the article analysed the jurisprudence of both the Constitutional Court and administrative Courts (i.e. Regional Administrative Tribunals – TAR and Council of State) respectively concerning legislative and administrative acts adopted during the pandemic. However, while "the intervention of the Constitutional Court (...) has been limited to only two cases" (i.e. Const. Court, ord., 14 January 2021 n. 4 and Const. Court, sent., 12 March 2021 n. 37), the administrative case law is very abundant and varied.

In more detail, the analysis on the administrative jurisprudence focused on the intensity of the judicial review made by the Italian administrative judges on those acts concerning the freedom of movement. In doing so, the research pointed out that – in both phase one and two of the emergency – the administrative decisions were "mainly oriented towards rejecting the request for precautionary suspension of the contested measures, except in very rare cases". However,

⁶⁹ Council of State, section I, opinion No. 735/2020, 7 April 2020. For a comment, see Antonio Ruggeri, 'Non persuasivo il parere reso, dietro sollecitazione del Governo, dal Consiglio di Stato su un'ordinanza del Sindaco De Luca relativa all'attraversamento dello stretto di Messina' (10 April 2020) ConsultaOnline; Nicola Pignatelli, 'L'annullamento straordinario ex art. 138

TUEL di un'ordinanza comunale: il Covid-19 non "chiude" lo stretto di Messina' (14 April 2020) *Diritti Regionali*, 1, 555 ss.; Viviana Di Capua, *Il potere governativo di annullamento straordinario e il mito della Fenice (2021) Il Diritto dell'Economia*, 1, 247 ss.

⁷⁰ Council of State, section I, opinion No. 850 of 13 May 2021.

“among the very rare cases in which the request for precautionary measures has been accepted”, the article mentioned TAR of Campania, Naples, presidential decree 21 March 2020 n. 436 and TAR of Toscana, Florence, 5 March 2021 n. 334. Moreover, the article underlined that since October 2020 “the prior subject of administrative litigation became the legitimacy of the orders adopted by the Regions and the Mayors to suspend teaching in the presence of children” and that, in this regard, “the orientation of the administrative judges has not been univocal”.

Thirdly, in section 2.c the research has given account of the relationship between the law of the pandemic and the role of Courts, especially analysing the impact of such a legislation on the main features of the judicial review. In doing so, the article has pointed out that “the emergency legislation did not reshape the role of administrative judges, nor did it extend the

intensity and density of judicial review”. On the contrary, Italian “judges kept within the narrow confines of the law, without extending their power to access administrative or legislative” acts.

Moreover, the article has also remarked that “since the measures adopted during the emergency are very limited in time (...), the precautionary protection before the administrative judge, in the form of emergency protection, has ended up enclosing, in this phase, all the protections that the entire system of judicial guarantees can offer (...)”. These considerations shed light on a particular aspect of the emergency system that has remained at least partially in the shadows: the protection before the administrative court did not prove to be an effective instrument of reaction towards illegitimate measures, highly restrictive of constitutionally guaranteed freedoms and rights (see, for instance, Campania Region ordinance n. 15/2020).