LUISS

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# Locked down:

## in their quest to fight the COVID-19 pandemic, have Italy, France and Spain undermined the principles of the rule of law as enshrined in their Constitutions?

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[1] ECO, U., *Come si fa una tesi di laurea*, Milano, La nave di Teseo, 5th ed., 2020.

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# Introduction

In 1st century BC, Marcus Tullius Cicero, a well-known orator, statesman and lawyer of the late Roman Republic, wrote in his dialogue «On the Laws» a sentence which has remained famous ever since: «*salus populi suprema lex esto*», in English «let the well-being of the population be the supreme law».[1] However, the word «*salus*» has a number of other possible meanings. Coincidentally, the very first one given by the Online Latin Dictionary happens to be «health».[2] Thus, the maxim may be also rendered in English to imply that the supreme rule of a State shall be the preservation of the sanitary welfare of its citizens.

This is exactly the principle which has been adopted worldwide over the last year and a half, as a pandemic caused by an infectious disease, the COVID-19, ravaged the entire planet. Starting from China, it soon spiraled out of control, reaching the whole globe and leaving no country unaffected. The death toll has been tremendous: as of early June 2021, it stands to nearly 3 million human lives lost. To all of this we must add the effects of the ensuing socio-economic disruption and overflood of sanitary systems. To try and limit such dreadful consequences, governments all over the world have enacted exceptional rules. At first, they banned gatherings and closed activities but, then, as these norms proved insufficient to stop the spread of the disease, they had to resort to an extreme measure: the «stay-at-home» order. Citizens were confined within their residences, with no possibility to go out except for a few, specified reasons.

Such a nightmarish scenario repeated, in some cases, more than once as several waves of contagion struck in sequence. However, was it admissible under rule of law principles? Is confining citizens at home something that, though pushing the borders of the democratic system, manages not to breach them? Or

[1] CICERO, M. T., *De legibus*, Book III, 1st century BC (now available on *Latin Library*, https://www.thelatinlibrary.com/cicero/leg3.shtml#4)
[2] see *sălūs*, in Online Latin-English Dictionary, https://tinyurl.com/yywcw4tk

is it a norm that, having been modeled after authoritarian regimes like China, must be considered foreign to the spirit of democratic Constitutions?

To try and answer this research question, we have divided our dissertation in four parts. First, we will give a detailed overview of the progression of the pandemic, starting from its origin at the end of December 2019. After a worldwide outline, we will devote one Chapter to each of the three countries we have selected as our object of analysis: Italy, France and Spain. Behind this choice lie several reasons. First and foremost, there is the linguistic criterion: picking up these three countries allowed us to carry out our analysis on original legislative texts, rather than relying on translations. This also means that we had direct access to comments provided by scholars, allowing us a deep insight into the way anti-COVID measures were received among experts in the field. Their contributions were drawn both from academic sources, such as journals, as well as from more "informal" ones like blogs. Last but not least, the choice of these three specific countries depends on the logic of comparing the most similar cases: Italy, France and Spain are Mediterranean rule of law States which enacted very similar strategies to try and contain the spread of the virus. More precisely, Italy was the very first one to apply the measure of the lockdown as a generalized «stay-at-home»: most other Western countries, including the other two featured in our work, later copied its response. As such, our dissertation will place Italy as the central country, dedicating proportionally more space to the analysis of its norms. This is also evident by the choice of the deadline: since the COVID-19 is an ongoing crisis that will probably not subside for many months to come, we had to pick a date to stop our analysis. Coherently with the central spot reserved to Italy, we chose February 14, 2021, i.e. the day its Conte II Government left office. The arbitrariness of this selection is evident: we try partially to correct it by "updating" our discussion in the conclusion, as well as by trying to quote any relevant ruling or example throughout our entire work even if it took place after the above-mentioned date.

As regards the theoretical discussion, we first review, in Part II, the emergency legislation as it was before the COVID-19 emergency broke out.

After explaining the link between Constitution and human rights and analyzing how the latter can be restricted during crises (Chapter 5), we dedicate Chapters 6 to 8 to quote any relevant provision, from the international to the primary legislation level. The opportunity of choosing Italy, France and Spain returns, as their common participation in all major international human rights treaties means that they are bound by the very same norms. Such rules, together with the national ones specific to each single country, allow us to gather a number of principles constituting the "rule of law", which we discuss in Chapter 9. Dividing its components into formal and substantive ones, we outline the roadmap of the last two Parts: Part III deals with the former tenets, namely the principle of legality (Chapter 11), the centrality of Parliaments (Chapter 12) and the need for legal certainty (Chapter 13). For each of them, we try to assess whether or not it was jeopardized during the pandemic. Part IV, finally, is dedicated to determine whether anti-COVID measures were proportional. Thus, it starts by listing the components of proportionality in Chapter 14 and, then, follows Aharon Barak's approach to the concept, verifying whether the measures had a proper purpose, were necessary (Chapter 16) and balanced adequately with conflicting rights (Chapter 17). Before this, however, we carry out an important preliminary analysis in Chapter 15: we try to understand whether the liberty impacted upon by «stay-at-home» orders was personal freedom, i.e. a reinforced right, or freedom of movement, i.e. a right that can be limited.

We hope that, by the end of this work, the reader will not only have developed a personal idea on the way this emergency was managed by the governments of the three countries, but they will also have considered the underlying assumption behind these pages: the tenet that the rule of law remains fundamental especially during emergencies as serious as the ones we have been witnessing. As such, writing a book-length work to verify its respect, far from being a pedant exercise, is even more important than at normal times. Our hope is that, by the conclusion of our journey, our reader will have been led to agree on this point.

Finally, let us end this introduction on a brief terminological *caveat*: all throughout the pandemic, a certain confusion has arisen among general public and policymakers alike on the correct way to refer to the enemies we have been facing. Scientifically, «COVID-19», written entirely in capital letters, is the name of the disease, while «SARS-CoV-2», spelled thus, is the name of the virus which causes it. However, more often than not, the two terms have been used interchangeably, even in the titles of official legislation. Throughout our work, instead, we shall always attempt to employ them in the correct way. A similar discourse applies for the word «lockdown»: throughout the emergency, it has been used so widely as to mean any package of restrictive measures, regardless of whether or not they also included restrictions to mobility like the «stay-at-home» orders. In spite of the title, our thesis focuses on the latter ones. This is due both to a concrete reason, i.e. the impossibility of properly analyzing any right which may have been infringed upon during the pandemic, and a more «philosophical» one: the idea that «stay-at-home» orders were not only the most visible – and, thus, interesting to analyze – effect of anti-COVID legislation, but also the cornerstone of all other restrictions.

As we shall see, not all rights have the same force: as such, it would perfectly be possible to find «stay-at-home» orders unconstitutional while school or business closures are not. However, since personal freedom, as we are going to see, is the most important existing liberty, if we concluded that it was infringed upon in a disproportional way, then this could hopefully lead to a more stringent assessment also of all other norms in the event of another similar crisis.

# Part I. The pandemic and governments' responses

## Chapter 1 – A brief overview until February 14, 2021

On December 31, 2019, the Municipal Health Commission of the city of Wuhan, located in the Chinese central province of Hubei, issued a public statement about an outbreak of "pneumonia of unknown cause", with 27 cases detected. The announcement was immediately picked up by the World Health Organization, which activated its protocols the very next day.[1] The mysterious disease, which almost immediately rekindled memories of the 2002 Severe Acute Respiratory Syndrome (SARS) epidemic,[2] prompted local authorities to act swiftly and, on January 1, the Huanan Seafood Wholesale Market of Wuhan, identified as a possible source, was shut down. Meanwhile, samples collected in the place suggested that the cause of the illness could be a new type of coronavirus.[3] This word designates a family of pathogens characterized by spikes on their surface, shaped like a crown, in Latin *corona.*[4] Before that moment, only six of them had been known to infect humans: beyond the one responsible for the SARS, we can also mention the virus causing the Middle East Respiratory Syndrome (MERS), whose outbreaks in recent years had also received significant attention.[5]

On January 9, the discovery of the seventh member of the family was officially announced: it was dubbed "2019-nCoV", meaning "novel coronavirus of 2019", and its genome sequence was made publicly available the next day.[6] Meanwhile, the contagion progressed, with the first death occurring on January 11 and several more countries being affected by the 23.[7] On that day, in a move

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[1] WHO*, COVID-19 timeline in the Western Pacific*,
https://tinyurl.com/ejmuvt4j
[2] BBC, *China pneumonia outbreak: Mystery virus probed in Wuhan,*
https://www.bbc.com/news/world-asia-china-50984025
[3] ECDC, *Timeline of ECDC's response to Covid-19*,
https://www.ecdc.europa.eu/en/covid-19/timeline-ecdc-response
[4] EpiCentro, *What are coronaviruses?*
https://www.epicentro.iss.it/en/coronavirus/about
[5] WHO, *Severe Acute Respiratory Syndorme*
https://www.who.int/health-topics/severe-acute-respiratory-syndrome#tab=tab_1
-, *Middle East respiratory syndrome coronavirus (MERS-CoV),*
https://tinyurl.com/ffd5z47r
[6] ECDC, see above note 3
[7] BRYSON TAYLOR, D., *A Timeline of the Coronavirus Pandemic*,
https://www.nytimes.com/article/coronavirus-timeline.html

defined by the WHO as «unprecedented»[8], Chinese authorities enacted a full lockdown of Wuhan: the city was completely sealed off by the rest of the country, with all public transportation suppressed both within and across its boundaries. Then, as time passed by, measures were tightened and furtherly extended to basically cover the entirety of Hubei: all non-essential shops and public facilities were shut down, people were only allowed out of their houses in specific circumstances and face-mask wearing was made mandatory in public places all over the country.[9] Wuhan transformed into a world-shocking ghost town: the demands of the epidemic also forced the authorities to carry out impressive organizational feats, such as building field hospitals in ten days.[10] Such a tough strategy, which lasted until April, nevertheless bore important results, and infections were brought under control again.[11]

However, while the virus was contained in its birthplace, it soon spread out of control worldwide, giving way to the first fully global pandemic since the devastating 1918 Spanish flu. Already on January 30, the WHO's Director General officially declared the spread of the new disease a public health emergency of international concern: in the previous days, it had reached North America and Europe.[12] The terrible enemy eventually got a name on February 11: COVID-19, meaning "Coronavirus disease of 2019", with the pathogen being renamed by the International Committee on the Taxonomy of Viruses as "SARS-CoV-2", to differentiate it from the first SARS coronavirus.[13] On

[8] Reuters, *Wuhan lockdown 'unprecedented', shows commitment to contain virus: WHO representative in China,*
https://www.reuters.com/article/us-china-health-who-idUSKBN1ZM1G9
[9] GRAHAM-HARRISON, E. – KUO, L., *China's coronavirus lockdown strategy: brutal but effective,*
https://tinyurl.com/2p975uk3
[10] Johns Hopkins University Coronavirus Resource Center, *Hubei timeline,*
https://coronavirus.jhu.edu/data/hubei-timeline
[11] ZHEMING, Y. et al., *Modelling the effects of Wuhan's lockdown during Covid-19, China*, in *Bulletin of the WHO*, 2020, 98, 484 ff.
[12] WHO, *Who Director-General's statement on IHR Emergency Committe on Novel Coronavirus (2019-nCov),*
https://tinyurl.com/44hudtj3
Think Global Health, *Timeline of the Coronavirus*,
https://www.thinkglobalhealth.org/article/updated-timeline-coronavirus
[13] WHO, *Naming the coronavirus disease (COVID-19) and the virus that causes it,*
https://tinyurl.com/2bsf57wr

February 26, cases outside China surpassed the ones registered inside the country: on the same day, Brazil confirmed its first occurrence, meaning that COVID-19 had now touched all six continents, as Egypt had already been hit on the 14. Antarctica would, then, follow suit in December 2020.[14] Thus, on March 11, the WHO officially declared the spread of the disease a pandemic.[15]

The increase in cases forced a huge number of governments to adopt drastic measures in an effort to curb the spread of the contagion. Travel bans had been in place since the situation first worsened in China at the end of January. However, as the diffusion went on, the interventions were progressively tightened. Starting from Italy, the first severely impacted Western country and also, for a time, the most affected one worldwide,[16] «half of humanity» experienced some sort of confinement or restrictions throughout March and April.[17] Such «extraordinary measures» included «the cancelling of public events, travel restrictions, individual and mass quarantine, the closure of schools and businesses, and limitation of trade».[18] Nearly 70% of world students were affected by school closures which, at their peak, were enacted by 166 nations at country-level, according to UNESCO figures.[19]

The most affected continent was Europe, which became the new epicenter of the pandemic by mid-March.[20] At the end of the month, worldwide cases exceeded one million, a figure that would triple by the following 30 days and later reach 4 million within just one week.[21] During that period, the US took over

[14] Think Global Health, see above note 12
[15] WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*,
https://tinyurl.com/v6pk5s3v
[16] Think Global Health, see above note 12
[17] SAFI, M., Coronavirus. *From unknown virus to global crisis – timeline*,
https://tinyurl.com/7469h29x
[18] PETROV, J., *The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?*, in *The Theory And Practice Of Legislation*, 2020, VIII.1-2, 72.
[19] UNESCO, *Education: from disruption to recovery*,
https://en.unesco.org/covid19/educationresponse
[20] BBC, *Coronavirus: Europe now epicentre of the pandemic, says WHO,*
https://www.bbc.com/news/world-europe-51876784
[21] Think Global Health, see above note 12

as the world's most affected country, a sad primacy it has maintained as of the following winter.[22]

At the beginning of May, 84 countries had officially declared some sort of state of emergency, with many others treating the situation in a *de facto* similar manner.[23] However, as the boreal summer approached, the situation gradually improved, leading most States to progressively ease their restrictions. Still, significant spikes continued to occur, hitting for instance Brazil and the US in the first week of July. In spite of this, major indicators, though continuing to grow, remained stable until roughly the end of the season.[24] Then, at the beginning of the September, the situation in Europe suddenly turned as serious as it had been in March. Just as, at the end of the month, total worldwide deaths passed the one million threshold, many countries saw the first signals of what would become a second wave.[25] The most critical month was, in this respect, November, when a number of nations which had suffered the first blow found themselves in the midst of a second outbreak. In some cases, larger countries like the United States or Brazil experienced «a mix between the still ongoing first wave and a probably second wave in certain local geographic regions»[26]. Many governments thus resorted again to lockdown measures. In spite of them, daily new cases and deaths continued to grow steeply, peaking at the end of January, when the global number of victims surpassed two millions.[27]

From that moment on, the situation appears to be rather ambiguous. On the one hand, in fact, all major trends seem to be markedly decreasing.[28]

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[22] Johns Hopkins University Coronavirus Resource Center, https://coronavirus.jhu.edu/map.html

[23] BAR-SIMAN-TOV, I., *Covid-19 meets politics: the novel coronavirus as a novel challenge for legislatures*, in *The Theory and Practice of Legislation*, 2020, VIII.1-2, 25.

[24] Worldometer, *Coronavirus cases*, https://www.worldometers.info/coronavirus/coronavirus-cases/
-, *Coronavirus death toll*, https://www.worldometers.info/coronavirus/coronavirus-cases/

[25] Think Global Health, see above note 12

[26] DIAZ, R.S. – CONSTANT VERGARA, T.R., *The COVID-19 second wave: A perspective to be explored,* in *The Brazilian Journal of Infectious Diseases*, 2021, XXV.1, 1 ff.

[27] ELLIS, R., COVID-19 Deaths top 2 millions, https://www.webmd.com/lung/news/20210118/covid-19-deaths-top-2-million-globally

[28] Worldometer, see above note 24

Moreover, the development of several effective vaccines, which started to be administered as early as December, first allowed to see a light at the end of the pandemic tunnel. On the other hand, however, the emergence of new, more aggressive variants could undercut such optimism. Thus, at the moment, it is fairly impossible to make accurate predictions about the future course of the pandemic, let alone its definitive conclusion.[29]

Within this general framework, it would be an euphemism to say that Italy, France and Spain did not fare well in containing COVID-19. Since the first reported case, which occurred already in January 2020 for all three countries,[30] they have been constantly engulfed by the contagion. A quick look at data provided by Johns Hopkins University leaves no doubts whatsoever: as of February 14, France, Spain and Italy are the 5th, 6th and 7th nation worldwide, respectively, for total number of cases. Spain does slightly better as regards the count of victims, falling in the 10th place, while Italy and France still occupy the 6th and 7th position.[31] Finally, Italy's numbers are especially tragic in respect of deaths per 100,000 inhabitants: in this ranking, it places 7th, but rises to the second spot, after the UK, when medium and small countries are excluded.[32]

It is no wonder, thus, that the three of them had to employ, almost from the beginning, some among the harshest tactics for the containment of COVID-19. Italy, in particular, as the first badly hit Western country, paved the way, with its measures, for the subsequent adoption of similar methods by a huge number of other States.[33] That's why we shall begin by reviewing Rome's decisions and, then, we will consider the other two countries.

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[29] STEENHUYSEN, J. – KELLAND, K., *'When will it end?': How a changing virus is reshaping scientists' views on COVID-19,* https://www.reuters.com/article/us-health-coronavirus-variants-insight-idUSKBN2AV1T1

[30] Think Global Health, see above note 12

[31] Johns Hopkins University Coronavirus Resource Center, see above note 22

[32] ibidem, *Mortality analises*, https://coronavirus.jhu.edu/data/mortality

[33] ANSA, *COVID-19: Other countries are learning from Italy – WHO,* https://tinyurl.com/4v8tdkjt

## Chapter 2 – Italy: from the COVID-19 to the end of the Conte II Government

Despite being one of the worst hit countries in the world, Italy was also among the very first to mobilize against the new threat. Already on January 22, 2020, the Ministry of Health activated a «coronavirus task force»[1]. Three days later, it took extensive measures of surveillance vis-à-vis passengers coming from areas affected by outbreaks.[2] Then on January 30th, all air traffic from China was interdicted.[3] The next day, after the WHO had officially declared the virus a public emergency, Italy aligned by proclaiming itself a national State of Emergency through a Decision by the Council of Ministers. Aimed at combatting the «health risk arising from the emergence of pathologies deriving from transmissible viral agents», it was established for six months[4].

In spite of this, for three weeks roughly, the country fared relatively well in containing the contagion. Then, on February 20, its first COVID-19 endemic case was detected in Codogno, a small town in the Northern region of Lombardy. Suddenly, the contagion surged and, the next day, Roberto Speranza and Attilio Fontana, respectively Minister of Health and President of the Lombardy Region,[5] adopted the first restrictive provisions: in Codogno and Castiglione d'Adda, small towns directly affected by the clusters, and all their neighboring cities public and private events were forbidden, non-essential shops were closed,

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[1] Servizio Studi della Camera dei Deputati*, Iniziative adottate al fine di prevenire la diffusione del coronavirus*, https://www.camera.it/temiap/t/news/post-OCD15-13917

[2] Ordinanza del Ministro della Salute 25 gennaio 2020 – «Misure profilattiche contro il nuovo Coronavirus (2019 – nCov)», https://www.gazzettaufficiale.it/eli/id/2020/01/27/20A00618/sg

[3] Ordinanza del Ministro della Salute 30 gennaio 2020 - «Misure profilattiche contro il nuovo Coronavirus (2019 - nCoV)», https://www.gazzettaufficiale.it/eli/id/2020/02/01/20A00738/sg

[4] Delibera del Consiglio dei Ministri 31 gennaio 2020 - «Dichiarazione dello stato di emergenza in conseguenza del rischio sanitario connesso all'insorgenza di patologie derivanti da agenti virali trasmissibili», https://www.gazzettaufficiale.it/eli/id/2020/02/01/20A00737/sg
We have decided to render the Italian word "*Delibera*" as "Decision". When not otherwise stated, all translations in English are provided by the writer.

[5] Regions, in Italian *Regioni*, are the twenty top administrative units of the Italian Republic. Some of them correspond to well-known historical regions such as Sicily, Sardinia, Piedmont or Lombardy itself (see https://tinyurl.com/8yx4a4rn)

schools were shut down and public transportation was grounded.[6] On that same day, another Ordinance by Speranza quarantined all individuals who had been in contact with confirmed COVID-19 cases.[7]

As the contagion progressed, on February 23, 2020, three acts were adopted in a single day, somewhat anticipating the «normative flood»[8] that would befall Italy over the following weeks. The most important one was the decree-law n.6: being a piece of primary legislation, it tried to outline in general terms the measures that could be adopted to contrast the spread of the epidemics. Thus, its article 1 gave the authorities the duty to enforce «any measures of containment and management suitable and proportional to the evolution of the epidemiological situation». Apart from the provision already taken in the affected Lombard towns, such interventions could include, *inter alia*, preventing people from entering and leaving a territory; shutting down museums, cinemas, cultural venues and public offices; and imposing the use of personal safety protection devices (art.1). Such norms were to be adopted through the notorious Decree of the President of the Council of Ministers (DPCM), formally an administrative act whose constitutionality, as we shall see at length in Part III, has been the subject of much debate (art.3.1).[9]

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[6] Ordinanza del Ministro della Salute d'intesa con il Presidente della Regione Lombardia 21 febbraio 2020,
https://tinyurl.com/asjah5um

[7] Ordinanza del Ministro della Salute 21 febbraio 2020 – «Ulteriori misure profilattiche contro la diffusione della malattia infettiva COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/02/22/20A01220/sg

[8] Metaphor employed by several authors such as LUCENTI, who pleads to «stop the normative deluge» (*Corona virus, appello (personale) alle forze di Governo: fermate la decretazione d'emergenza!,* https://tinyurl.com/47apn5sp); MARINI, who laments a «flooding and physiologically uncoordinated mass of normative acts», (*Le deroghe costituzionali da parte dei decreti-legge*, in MARINI, F.S. – SCACCIA, G., *Emergenza COVID-19 e ordinamento costituzionale*, Torino, Giappichelli, 2020, 63); and LAURIA, who speaks about a «deluge of decrees and Ordinances» by both the Government and the Regions (*Coronavirus, da governo e regioni un diluvio di decreti e ordinanze . La Lombardia ultima nella classifica delle norme anti-Covid*, https://tinyurl.com/3ftjsaff)

[9] Decreto-legge 23 febbraio 2020 n.6 - «Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/02/23/20G00020/sg
later converted by the Legge 5 marzo 2020, n.13
https://www.gazzettaufficiale.it/eli/id/2020/03/09/20G00028/sg

The new controversial rules were put in practice on the very same day, when the Italian Prime Minister, Giuseppe Conte, emanated a DPCM which effectively locked down eleven towns: the Lombard ones already affected by the previous ordnance and Vo', in the neighboring region of Veneto, which had been previously subject to similar dispositions.[10] Meanwhile, an Ordinance by the Minister of Health shut down educational institutions, cinemas and museums and forbade public gatherings all over the territory of Lombardy.[11] Similar dispositions were also taken by nearby Regions of Emilia-Romagna,[12] Piedmont,[13] and Trentino-Alto Adige/Südtirol.[14]

Still, the contagion kept going and, on March 1, a new DPCM was issued that first divided the Italian territory into three areas of risk. Measures were confirmed for the eleven cities of the "red zone" and for the Regions of the second tier of alarm – in this last case, they were extended to Pesaro and Urbino, in central Marche, and Savona, in Liguria – while milder provisions, such as the interdiction of school trips, were first applied to the whole country.[15]

[10] DPCM 23 Febbraio 2020 - «Disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/02/23/20A01228/sg

[11] Ordinanza del Ministro della Salute 23 Febbraio 2020 - «Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19. Regione Lombardia»
https://www.gazzettaufficiale.it/eli/id/2020/02/25/20A01273/sg

[12] Ordinanza contingibile e urgente n. 1 del Ministro della Salute, d'intesa con il Presidente della Regione Emilia-Romagna, recante «Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da Covid- 2019»,
https://tinyurl.com/sj28k95c

[13] Ordinanza contingibile e urgente n. 1 del Ministro della Salute, d'intesa con il Presidente della Regione Piemonte, recante «Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da Covid- 2019»,
https://tinyurl.com/5mrnzkhd

[14] Ordinanza presidenziale contingibile e urgente della Provincia Autonoma di Bolzano n.1 del 23 febbraio 2020, «Primi interventi urgenti di protezione civile in relazione al rischio sanitario connesso con patologie derivanti da agenti virali»,
https://www.camera.it/temiap/2020/02/25/OCD177-4311.pdf
Ordinanza del Presidente della Provincia Autonoma di Trento, «Primi interventi urgenti di protezione civile in relazione al rischio sanitario connesso con patologie derivanti da agenti virali»,
https://tinyurl.com/4nuer2ry

[15] DPCM 1 Marzo 2020 - «Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/03/01/20A01381/sg

However, it was not enough and, three days later, a first, drastic nationwide intervention was enacted as schools and educational institutions of all levels were shut down.[16]

The real crackdown, however, occurred on the days of 8 and 9 March. First, a new DPCM was enacted that introduced a full lockdown of a part of the Italian population: Lombardy and fourteen other provinces were sealed off, and their citizens were forbidden from leaving their home «with the exception of movements motivated by proven work exigencies or necessity situations or […] health reasons» (Art.1.a). As per individuals who had tested positive to COVID-19 or been put into quarantine, such exceptions did not apply and they were subject to the «absolute prohibition» of moving from their residence or home (Art.1.c).[17] As it is known, the diffusion of drafts of the act by the press before its official enactment led frightened people to perform the so-called «flight from the North», boarding *en masse* the trains departing for the South at the station of Milan.[18] Also as a consequence of this, the very next day, a further DPCM inaugurated the national lockdown by extending the measures to the whole territory. Accordingly, it also put a stop to national professional sport competitions, which had previously been spared by the shutdown.[19] Overnight, 60 million people were forced to «stay at home», only allowed to leave through self-certification. As a result, on March 11, Conte proceeded to close all

[16] DPCM 4 marzo 2020 - «Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale», https://www.gazzettaufficiale.it/eli/id/2020/03/04/20A01475/sg

[17] DPCM 8 marzo 2020 - «Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19» https://www.gazzettaufficiale.it/eli/id/2020/03/08/20A01522/

[18] Falcioni, D., *Coronavirus, "fuga" da Milano: la stazione ferroviaria presa d'assalto da centinaia di persone,* https://tinyurl.com/mm7cxumu

[19] DPCM 9 marzo 2020 - «Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale» https://www.gazzettaufficiale.it/eli/id/2020/03/09/20A01558/sg

restaurants and personal service such as barber shops and hair and beauty salons.[20]

It were very harsh weeks for the country, which saw its intensive care unit admissions soar steeply to the point of reaching, at the beginning of April, the impressive figure of 4068.[21] Unsurprisingly, «it was the first country in the world in terms of deaths ascribed to COVID-19».[22] As a result, measures became ever more restrictive: on March 20, a new Ordinance by the Minister of Health closed all public parks and gardens and prevented outdoor fitness unless it be done «in proximity of one's home».[23] Another similarly doubtful intervention was performed by the same authority on the 22 as he prohibited all citizens from moving from the town they were currently in.[24] However, the very same provision was also enacted by a new DPCM of the same day, whose article 1.b repeated the exact wording; letter A, instead, introduced an even harsher shutdown of economic activities. Limited exceptions were the enterprises of public utility or strategic relevance and a number of businesses performing wholesale trade.[25]

Such a deluge of normative acts had ignited, as we shall see in detail in Part III, huge polemics vis-à-vis not only their number, but also their very legitimacy under the principle of legality. As such, on March 25, the government

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[20] DPCM 11 marzo 2020 - «Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale» https://www.gazzettaufficiale.it/eli/id/2020/03/11/20A01605/sg

[21] Statista, *Number of COVID-19 patients in ICU in Italy since February 24, 2020*, https://tinyurl.com/4nuzyty8

[22] LA MAESTRA, S., et al., *Epidemiological trends of COVID-19 epidemic in Italy over March 2020: From 1000 to 100 000 cases*, in *Journal of Medical Virology*, 2020, XCII.10, 1956 ff.

[23] Ordinanza del Ministro della Salute 20 marzo 2020 - « Ulteriori misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale», https://www.gazzettaufficiale.it/eli/id/2020/03/20/20A01797/sg

[24] Ordinanza del Ministro della Salute 22 marzo 2020 - «Ulteriori misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale», https://www.gazzettaufficiale.it/eli/id/2020/03/22/20A01806/sg

[25] DPCM 22 marzo 2020 - «Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale» https://www.gazzettaufficiale.it/eli/id/2020/03/22/20A01807/sg

reverted to primary legislation via a new decree-law, the n.19/2020, which first tried to outline a systematic regulation of the emergency management. Thus, its article 1 provides a detailed yet closed list of the twenty-nine types of measures that can be enacted: they shall be enforced through DPCMs having a maximum validity of thirty days. Until their adoption, «cases of extreme necessity and urgency» may be normed through Ordinance by the Ministry of Health (art.2, par. 2). Moreover, all the effects of the previously issued acts are preserved (art.2, par. 3). As regards the very tricky issue of the relation between national and regional acts, article 3 tries to provide a general framework by stating that the Regions can only enact measures more restrictive than governmental ones. In this way, the executive hoped to put a stop to the confusion created among the citizens by the overlapping of norms of different ranking: unfortunately, as we shall see in Part III, this succeeded only to a certain degree. Particularly interesting to our analysis will be article 4, titled «Sanctions and controls»: it establishes that non-compliance with the norms shall be subject to administrative fines.[26] Until that moment, instead, the previous decree-law of February 23 punished it through article 650 of the Criminal Code, «Non-compliance with provisions of the Authority», an offence that can lead to up to 3 months of detention or a €206 sanction.[27]

As March ended, Italy entered the toughest phase of the epidemics, as we have already seen. Thus, the restrictive measures, initially meant to end on April 3, were prolonged until the 13 of the same month by a new DPCM issued two days before the deadline. Article 1, par.3 of the same act also suspended all sessions of training of athletes of all levels: until that moment, professional and top ones had been still allowed to practice.[28]

[26] Decreto-legge 25 marzo 2020, n.19 - «Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/03/25/20G00035/sg
Later converted by the Legge 22 maggio 2020, n.35,
https://www.gazzettaufficiale.it/eli/id/2020/05/23/20G00057/sg
[27] D.L. 23 febbraio 2020, n.6, art.3, par.4, see above note 9
[28] DPCM 1 aprile 2020 - «Disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, recante misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19, applicabili

For this reason, we can say that first decade of April was the period with the toughest restrictive measures: most industrial and economic enterprises were closed, people could not leave their home except for a few, strict reasons, and any kind of public activity was suspended. However, thing started to change already on April 10: on that day, a new DPCM was issued which, while confirming most of the restrictions until May 3, allowed a number of industries and economic businesses to reopen. Among them, we may also count a series of retailers which, it can be argued, do not sell exactly "necessity goods" such as toy, photo, or even perfume shops. Thus, it seems hard to reconcile their opening with the obligation to get out of one's home only for «necessity reasons», as still established by the decree.[29]

Normative clarity was hardly present also in the DPCM passed on April 26, which inaugurated the so-called «Phase 2»: more economic businesses were permitted to resume, and citizens could now also move to get back to their home or residence and, most importantly, but only within their region of residence, to visit their "*congiunti"*. This word, which may be translated in English as "relatives" or "kinsmen", ignited harsh polemics because of its vague meaning under Italian law, as we shall analyze more in detail in Chapter 13. Bars and restaurants were allowed to sell takeaway food.[30]

Finally, between May 16 and May 17, first a decree-law and then a DPCM removed most limits to circulation of people within Regions and to economic activities. Restaurants, bars and personal services reopened on May 18, while gyms, swimming pools and similar facilities had to wait until the 25. Mobility within Regions was allowed again starting from June 3 and, twelve days later,

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sull'intero territorio nazionale»,
https://www.gazzettaufficiale.it/eli/id/2020/04/02/20A01976/sg

[29] DPCM 10 aprile 2020 - «Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, recante misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale»,
https://www.gazzettaufficiale.it/eli/id/2020/04/11/20A02179/sg

[30] DPCM 26 aprile 2020 - «Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale»,
https://www.gazzettaufficiale.it/eli/id/2020/04/27/20A02352/sg

cinemas and theaters could also reopen: as summer began, Italy had more or less returned to normal life, with a few exceptions such as the requirement to wear face masks in closed public spaces.[31]

Deaths, new cases and ICU admissions on a daily basis all remained to low levels. In spite of this, on July 29, the Council of Ministers decided to extend the state of emergency until October 15.[32] This came amidst vibrant polemics by both the opposition parties in Parliament and a part of the academic world, arguing, as we shall see in Chapter 11, both that the emergency itself had ended and that it was unacceptable that the State needed to resort to an extraordinary tool to carry out its tasks.[33]

Two weeks later, on August 16, the first of a long list of new restrictive provisions was enacted as an Ordinance by the Ministry of Health imposed again the closure of disco clubs and dance venues, while mandating out-door mask-wearing between 6 pm and 6 am in public spaces more susceptible to create

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[31] Decreto-legge 16 maggio 2020, n.33 - «Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/05/16/20G00051/sg
Later converted by the Legge 14 luglio 2020, n.74,
https://www.gazzettaufficiale.it/eli/id/2020/05/16/20G00051/sg
DPCM 17 Maggio 2020 - «Disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, recante misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19, e del decreto-legge 16 maggio 2020, n. 33, recante ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/05/17/20A02717/sg
DPCM 11 giugno 2020 - «Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, recante misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19, e del decreto-legge 16 maggio 2020, n. 33, recante ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/06/11/20A03194/sg

[32] Delibera del Consiglio dei Ministri 29 luglio 2020 - «Proroga dello stato di emergenza in conseguenza del rischio sanitario connesso all'insorgenza di patologie derivanti da agenti virali trasmissibili»,
https://www.gazzettaufficiale.it/eli/id/2020/07/30/20A04213/sg

[33] Adnkronos, *Cassese: "Proroga emergenza è illegittima e inopportuna,*
https://tinyurl.com/6vw5pzxnj
-, *Salvini cita Cassese: "Proroga stato d'emergenza è illegittima",*
https://tinyurl.com/5dr6eh2d
-, *Meloni attacca: "Conte mente",*
https://tinyurl.com/js2xva2y

gatherings.[34] As the second wave started, Italy reacted with the decree-law n.125 on October 7, again extending the state of emergency, this time until January 31, 2020, and giving the government the possibility to basically mandate out-door mask-wearing, in addition to the already existing indoor obligation, at any time.[35]

From that moment, we can argue that the «normative deluge» entered its most acute phase, with ever more restrictive rules being imposed sometimes within the span of days.[36] Indeed, the three-weeks period from October 13 to November 3 saw the emanation of four DPCMs. At first, on October 13, the rule on mandatory outdoor mask-wearing was enacted, while amatorial contact sports were forbidden, as were private parties.[37] Then, on the 18 of the same month, opening hours of restaurants and bars were limited and festivals and fairs were suspended, as were all nonprofessional sport events.[38] Swimming pools, gyms and similar venues were conceded one week to adjust to existing sanitary

[34] Ordinanza del Ministro della Salute 16 agosto 2020 - «Ulteriori misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19.»,
https://www.gazzettaufficiale.it/eli/id/2020/08/17/20A04564/sg

[35] Decreto-legge 7 ottobre 2020, n.125 - «Misure urgenti connesse con la proroga della dichiarazione dello stato di emergenza epidemiologica da COVID-19 e per la continuita' operativa del sistema di allerta COVID, nonche' per l'attuazione della direttiva (UE) 2020/739 del 3 giugno 2020»,
https://www.gazzettaufficiale.it/eli/id/2020/10/07/20G00144/sg
Later converted by the Legge 27 novembre 2020, n. 159,
https://www.gazzettaufficiale.it/eli/id/2020/12/03/20G00182/sg

[36] For a funny yet poignant reflection on the huge number of DPCMs, see ALEGI, G., *Dpcm 22, racconto semi-serio per una diversa gestione della pandemia*,
https://formiche.net/2020/11/dpcm-pandemia-alegi/

[37] DPCM 13 ottobre 2020 - «Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, convertito, con modificazioni, dalla legge 25 maggio 2020, n. 35, recante «Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19», e del decreto-legge 16 maggio 2020, n. 33, convertito, con modificazioni, dalla legge 14 luglio 2020, n. 74, recante «Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/10/13/20A05563/sg

[38] DPCM 18 ottobre 2020 - «Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, convertito, con modificazioni, dalla legge 25 maggio 2020, n. 35, recante «Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19», e del decreto-legge 16 maggio 2020, n. 33, convertito, con modificazioni, dalla legge 14 luglio 2020, n. 74, recante «Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/10/18/20A05727/sg

protocols.[39] However, as the result was deemed insufficient, the following October 24 DPCM shut them down again together with cinemas, theatres and betting centers. High schools and universities had to resort to digital learning to a minimum 75% percentage, while bars, restaurants, pubs, pastry and ice-cream shops were allowed to perform table service only from 5 am to 6 pm, and to a maximum of 4 people per table unless they all live together.[40]

Such an impressive series of norms peaked on November 3, when a final DPCM was issued, creating the normative framework that continues to govern Italy as of the following spring. First, it imposed a national curfew by prohibiting all movements between 10 pm and 5 am, with the by-then notorious exceptions (art.1, par.3). Second, it introduced a three-tier system with progressively more restrictive measures for each Region on the basis of its epidemiological risk. At the first level, named "yellow zone", apart from all the previously mentioned restrictions, shopping centers must close at weekends and high schools must resort to digital learning in full. At the second level, "orange zones" add, to such measures, the full closure of bars and restaurants (if not for takeaway service) and the prohibition to leave one's city of residence if not for the essential reasons (art.2). Finally, "red zones", the territories with the most serious epidemiological situation, are *de facto* back into lockdown as it had been after April 10 (art.3). There are, however, a series of important differences that, as we shall see in Chapter 17, were the cause of much debate, as religious celebrations and the opening of barber shops remained allowed. Since this system was first enacted, Regions have moved among the three tiers several times. As per article 2, paragraph 2 of the decree, such a "passage" takes place through an Ordinance of

[39] COMMIS, S., *Nuovo Dpcm: palestre e piscine aperte o chiuse? Una settimana per salvarne l'apertura*,
https://tinyurl.com/2v9uc37t

[40] DPCM 24 ottobre 2020 - «Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, convertito, con modificazioni, dalla legge 25 maggio 2020, n. 35, recante «Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19», e del decreto-legge 16 maggio 2020, n. 33, convertito, con modificazioni, dalla legge 14 luglio 2020, n. 74, recante «Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19», https://www.gazzettaufficiale.it/eli/id/2020/10/25/20A05861/sg

the Ministry of Health «in agreement with the President of the involved Region.»[41]

In spite of this system, the contagion remained high throughout the whole of November, with all major indicators peaking at around its middle. On the 25, the number of patients in ICUs due to COVID-19 reached its second highest after the April 3 maximum: 3868.[42] Previously, Italy had reported, in a single day, more than forty thousand new positive cases.[43]

It is easy to understand why, with such data, the upcoming of the Christmas period was looked at in fear by the Government, worried that the festivities may turn into an occasion to reinforce the spread of the contagion. Thus, new rules were enacted that prohibited interregional mobility between December 21 and January 6, 2021. On Christmas Day, on the following one and on January 1, such a restriction was tightened to prevent exit from one's city of residence. This measures, in a normative duplication which we had already witnessed throughout the course of the pandemic, were first enacted through a decree-law and, then, repeated the next day via DPCM. The latter also prolonged the curfew until 7 am on New Year's Day (art.1, par.3).[44] Also in this case, huge debates would be spurred both by the provisions of the decrees and by the new normative framework established: article 1, par.1 of the decree-law, indeed, extended the

[41] DPCM 3 novembre 2020 - «Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, convertito, con modificazioni, dalla legge 25 maggio 2020, n. 35, recante «Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19», e del decreto-legge 16 maggio 2020, n. 33, convertito, con modificazioni, dalla legge 14 luglio 2020, n. 74, recante «Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19»», https://www.gazzettaufficiale.it/eli/id/2020/11/04/20A06109/sg

[42] Statistichecoronavirus.it, *Crescita terapie intensive in Italia,* https://statistichecoronavirus.it/coronavirus-italia/terapie-intensive/

[43] Il Sole 24 Ore, *Coronavirus in Italia, i dati e la mappa,* https://lab24.ilsole24ore.com/coronavirus/

[44] DPCM 3 dicembre 2020 - «Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, convertito, con modificazioni, dalla legge 22 maggio 2020, n. 35, recante: «Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19» e del decreto-legge 16 maggio 2020, n. 33, convertito, con modificazioni, dalla legge 14 luglio 2020, n. 74, recante: «Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19», nonche' del decreto-legge 2 dicembre 2020, n. 158, recante: «Disposizioni urgenti per fronteggiare i rischi sanitari connessi alla diffusione del virus COVID-19». », https://www.gazzettaufficiale.it/eli/id/2020/12/03/20A06767/sg

maximum duration of the DPCMs from the previous thirty days to fifty.[45] However, after some days, the Government again changed its mind and introduced a further decree-law which created a peculiar «calendar of restrictions»[46]: in addition to the previous measures, from December 24 to January 6, the Italian territory as a whole alternated between the regime of the "red zone" and the one of the "yellow zone" almost on daily basis. This meant, for instance, a new, prolonged general closure of bars and restaurants. To make matters even more complicated, as the Government tried to heed the protests that had arisen from many quarters against the perceived discriminatory and disproportional nature of the restrictions, it introduced some peculiar exceptions. As such, in the days where all of Italy was "orange zone" (December 28, 29, 30 and January 4), people living in towns with no more than five thousand inhabitants were allowed to move to a maximum distance of 30 km from their borders, but with the impossibility of reaching capitals of provinces. Throughout the entire period, instead, all citizens were permitted to move «towards a single private home, located in the same Region, once a day, in a time span between 5 am and 10 pm and within the limit of two people beyond the ones already living there», with children under 14 years of age, people with disabilities and not self-sufficient individuals being excluded from the count.[47]

Moving into 2021, the decree-law n.1 of January 5 extended the measures: interregional movement was prohibited for ten more days and Italy again reverted in full to the "orange zone" in the 9-10 weekend. On the other days, the three-tiers system was repristinated, but with the introduction of more stringent criteria to move to a higher set of restrictions. For "red zones", the possibility of

[45] Decreto-legge 2 dicembre 2020, n. 158 - «Disposizioni urgenti per fronteggiare i rischi sanitari connessi alla diffusione del virus COVID-19»,
https://www.gazzettaufficiale.it/eli/id/2020/12/02/20G00184/sg
[46] SkyTG24, *Decreto Natale, nuova stretta dal 24 dicembre al 6 gennaio: il calendario dei divieti,*
https://tg24.sky.it/cronaca/2020/12/19/calendario-divieti-natale-2020#02
[47] Decreto-legge 18 dicembre 2020, n.172 - «Ulteriori disposizioni urgenti per fronteggiare i rischi sanitari connessi alla diffusione del virus COVID-19.»,
https://www.gazzettaufficiale.it/eli/id/2020/12/18/20G00196/sg
Later converted by the Legge 29 gennaio 2021, n.6,
https://www.gazzettaufficiale.it/eli/id/2021/01/30/21G00008/sg

visiting friends or relatives within the same Region, which we have already seen, was restricted to the same town.[48]

On January 14, it was time for another "tandem" as, once again, a DPCM and a decree-law were issued on the same day. Among the novelties, the prorogation of the prohibition of movement among Regions until February 15; the reopening of museums for Regions in "yellow zone", but only at weekdays; the interdiction for bars to sell takeaway food after 6 pm; and the introduction of the "white zone", for Regions with the lowest risk of contagion, where most restrictions would cease to apply.[49]

Finally, on February 12, one day before the Conte Government was replaced by the new executive led by Mario Draghi, the decree-law n.12 extended the prohibition of moving among Regions until the 25 of the month.[50]

Eventually, we can say that the performance of the Conte II government on the pandemic was rather ambiguous. As regards the statistics of the contagion, most data were, at mid-February, in a phase of stabilization, though the danger of a "third wave" seemed to be around the corner.[51] On the other hand, the deployment of vaccines had initially fared well, with Italy sporting, on February

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[48] Decreto-legge 5 gennaio 2021, n.1 - «Ulteriori disposizioni urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19.», https://www.gazzettaufficiale.it/eli/id/2021/01/05/21G00001/sg

[49] Decreto-legge 14 gennaio 2021, n.2 - «Ulteriori disposizioni urgenti in materia di contenimento e prevenzione dell'emergenza epidemiologica da COVID-19 e di svolgimento delle elezioni per l'anno 2021.», https://www.gazzettaufficiale.it/eli/id/2021/01/14/21G00002/sg
Later converted by the Legge 14 marzo 2021, n.29, https://www.gazzettaufficiale.it/eli/id/2021/03/12/21G00038/sg
DPCM 14 gennaio 2021 - «Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, convertito, con modificazioni, dalla legge 22 maggio 2020, n. 35, recante «Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19», del decreto-legge 16 maggio 2020, n. 33, convertito, con modificazioni, dalla legge 14 luglio 2020, n. 74, recante «Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19», e del decreto-legge 14 gennaio 2021 n. 2, recante «Ulteriori *disposizioni* urgenti in materia di contenimento e prevenzione dell'emergenza epidemiologica da COVID-19 e di svolgimento delle elezioni per l'anno 2021» », https://www.gazzettaufficiale.it/eli/id/2021/01/15/21A00221/sg

[50] Decreto-legge 12 febbraio 2021 - «Ulteriori disposizioni urgenti in materia di contenimento dell'emergenza epidemiologica da COVID-19.», https://www.gazzettaufficiale.it/eli/id/2021/02/12/21G00016/sg

[51] *Il Sole 24 Ore,* see note 43 above

13, a higher percentage of fully vaccinated people than most fellow EU countries, ranking 9th worldwide. On the following day, however, it had already lost four positions, a trend that was continuing to fall steeply, opening serious doubts about the quality of the vaccination plan left by the Conte executive to its successor.[52] Moreover, as we already know, Italy has fared particularly bad as regards mortality, placing second, among great nations, in terms of deaths per one hundred thousand inhabitants.[53]

When the Conte II Government left office, 93 356 Italian citizens had lost their lives. In the Italian language, there is a specific word to refer to such a catastrophic outcome: "*Caporetto*", the name of the disastrous WWI battle of October 24, 1917 where the Italian Army was routed by the attacking Austro-German forces, losing 11 600 men. Thus, to give a proportion of the magnitude of the COVID-19 tragedy, we can, by a simple division, arrive at the sad conclusion that, in a little less than one year, it is as if Italy had suffered more than eight Caporettos.[54]

[52] Our World in Data, *Share of the fully vaccinated people against COVID-19*, https://tinyurl.com/knc8zhzp
[53] Johns Hopkins University Resource Center, see above Chapter 1, note 12
[54] MIELE, P., *24 Ottobre 1917: Caporetto, la disfatta umana e militare dell'Italia. Intervista ad Arrigo Petacco*, https://tinyurl.com/3jc778hv

## Chapter 3 – France: the new State of Health Emergency

At the beginning of the pandemic, measures in France closely trailed the ones taken in Italy, with Air France, the national flag carrier, suspending all flights to mainland China on January 30.[1] On the same day, the Minister of Health, Agnès Buzyn, issued an order[2] quarantining all people coming from Wuhan.[3] On February 15, a Chinese 80-years-old tourist died in the Republic's territory, becoming the first COVID-19 death outside of Asia: the first French national would follow suit on the 26, in Paris.[4] In the attempt not to be caught unprepared, France arranged, already on the 23, a plan to react to the pandemic, articulated in four steps.[5] Stage 2 was enacted on February 28, when a number of clusters appeared in several areas of the country.[6] The next day, the prefect of the Oise, a Northern department[7] affected by a severe outbreak, prohibited all gatherings for two weeks.[8] Likewise, the new Minister of Health, Olivier Véran, first imposed a national restriction by forbidding all gatherings of more than five

[1] France24, *Air France suspends all flights to mainland China over coronavirus outbreak until February 9,*
*https://tinyurl.com/fxxsbrfm*

[2] By the English word "order" we will translate the French term "*arrêté"* which refers to «an act coming from an administrative authority other than the President of the Republic or the Prime Minister» (https://tinyurl.com/nuw9b6fp). We have discarded "decree" because, in the hierarchy of norms, "*arrêts"* are inferior to them. Coherently, we shall use the term "Ordinance" to translate the word "*ordonnance*", as we had already done with the Italian "*ordinanza*", though other sources use the word "order" to refer to this kind of normative act (see for instance https://tinyurl.com/wukz9kuy ).

[3] Arrêté de la Ministre des Solidarités et de la Santé du 30 janvier 2020 relatif à la situation des personnes ayant séjourné dans une zone atteinte par l'épidémie de virus 2019-nCov, https://www.legifrance.gouv.fr/loda/id/LEGITEXT000041519518/2020-02-01/

[4] BBC, *Coronavirus: First death confirmed in Europe,*
https://www.bbc.com/news/world-europe-51514837
CROUIN, A., *BREAKING: First French national dies from coronavirus*,
https://tinyurl.com/ns6pcczr

[5] BERGER, D. – CHAVEROU, E., *Covid-19 : quand et comment la France a réagi (ou pas),*
https://www.franceculture.fr/politique/covid-19-quand-et-comment-la-france-a-reagi-ou-pas

[6] CHARRIER, P., *« Ça nous est tombé dessus d'un coup » : retour dans l'Oise, premier foyer de l'épidémie de Covid-19,*
https://tinyurl.com/dfee7tx8

[7] Departments, in French «départements», are the second-level administrative units of the French Republic behind the Regions (https://tinyurl.com/v45ckp7)

[8] Arrêté du Préfet de l'Oise du 29 février 2020 portant interdiction des rassemblements dans le département de l'Oise à compter du dimanche 1er mars,
https://www.facebook.com/773130686143610/posts/2587477584708902/

thousand people in closed space.[9] Regardless, the epidemics progressed swiftly, with daily new cases reaching the three digits at the beginning of March.[10] Already on the 5, all French metropolitan regions, as well as the overseas department of Guiana, in Latin American continent, had been touched by the virus.[11] Thus, on March 9, Véran tightened the previously established limit to bar all gatherings of more than one thousand people.[12]

However, in a manner similar to Italy, France had to change its course of actions several times over a matter of days. On the evening of March 12, President of the Republic Emmanuel Macron addressed the citizens in a televised speech where he announced the closure of all educational facilities starting from the next Monday.[13] In the next two days, Véran seemed to have borrowed Italy's attitude to redundant legislation, as he divided new measures between two different orders. The first one, on March 13, furtherly tightened the previous ban on gatherings by restricting it to one hundred people.[14] The second one, on the following day, officialized the closure of schools and educational facilities (art.2) while also shutting down conference halls, shopping malls, restaurants and liquor stores, dance and gaming halls, libraries, exposition venues, indoor sport centers and museums (art.1).[15] However, in a much controversial move,

[9] Arrêté du Ministre des Solidarités et de la Santé du 4 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, https://www.legifrance.gouv.fr/loda/id/LEGIARTI000041701118/2020-03-08/

[10] Worldometers, *France*, https://www.worldometers.info/coronavirus/country/france/

[11] Le Monde, *Le point sur l'épidémie due au coronavirus en France : 423 cas, 7 morts et toutes les régions désormais touchées*, https://tinyurl.com/ab57urz3

[12] Arrêté du Ministre des Solidarités et de la Santé du 9 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, https://www.legifrance.gouv.fr/loda/id/LEGIARTI000041705020/2020-03-10/
For our use of the word "order", see above note 2

[13] MACRON, E., *Adresse aux Français*, 12 March 2020, https://www.elysee.fr/emmanuel-macron/2020/03/12/adresse-aux-francais

[14] Arrêté du Ministre des Solidarités et de la Santé du 13 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, https://www.legifrance.gouv.fr/loda/id/LEGIARTI000041724816/2020-03-14/

[15] Arrêté du Ministre des Solidarités et de la Santé du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, https://www.legifrance.gouv.fr/loda/id/LEGIARTI000041725858/2020-03-15/

the first round of the national municipal elections, scheduled on the 15, was still held.

It was, however, France's last attempt at keeping a semblance of normality: on the following day, Monday 16, the country had to follow Italy in resorting to the extreme measure of a national lockdown. A decree signed by Prime Minister Édouard Philippe prohibited all citizens to leave their home except for five, specific cases: reaching the workplace; purchasing essential goods; health reasons; compelling family motivations, including assisting vulnerable people and child-care; and «short movements, in proximity of one's domicile, for physical exercises», but «excluding any sport activity», or for the needs of pet animals. Also in this case, just like in Italy, people needed to carry a document allowing to justify that their displacement be included within one of the above-mentioned exception cases.[16] The next day, a new decree established that the penalty for breaching these rules would be a criminal contravention of the 4th class,[17] i.e., under the French Criminal Code, a fine of up to 750 euros.[18]

Up to that moment, French authorities had confronted the pandemic via instruments of ordinary law. As we shall see in Part II, had they decided that the situation required an extraordinary normative framework, they had at least three different legal institutions they could have resorted to: the state of emergency,[19] the state of siege,[20] and the «exceptional powers» granted to the President of the Republic by article 16 of the Constitution, «when the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of

[16] Décret du Premier Ministre n.2020-260 du 16 mars 2020 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041728476
[17] Décret du Premier Ministre n.2020-264 du 17 mars 2020 portant création d'une contravention réprimant la violation des mesures destinées à prévenir et limiter les conséquences des menaces sanitaires graves sur la santé de la population, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041731767?r=NVOhImG2JA
[18] French Criminal Code, art. 131-13, https://tinyurl.com/hypkzbhj
[19] Loi n. 55-385 du 3 avril 1955 relative à l'état d'urgence, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000695350/
[20] Constitution of October 4, 1958, Art.36, https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000006527507/

its international commitments are under serious and immediate threat, and when the proper functioning of the constitutional public authorities is interrupted».[21]

In spite of this, the Government deemed it necessary to create a whole new legal tool. Thus, on March 23, the Parliament passed an extremely controversial law, creating the "state of health emergency". This new institution was inserted into an *ad hoc* chapter of the Code of Public Health. The emergency can be declared by decree of the Council of Ministers «in case of sanitary catastrophe endangering, by its nature and seriousness, the health of the population» (art. L. 3131-12) for one month: after this deadline, it can only be extended through law (art. L. 3131-13). In derogation of this, however, article 4 of the March 23 law proclaimed it for two months, until May 23. During this period, under art. L-3131-15 of the Code, the Prime Minister can take by decree any of the following measures: restrict or prohibit the circulation of people in certain places or at certain times as well as any gatherings in public spaces; forbid citizens from exiting their home, and order quarantines and isolations for those affected by the contagion; enact the shutdown of any venue open to the public, the requisition of any necessary goods or services, and any other required limitation of the freedom of enterprise; and impose price controls if needed. The government can also take a number of measures normally falling into the domain of the law, on the basis of article 38 of the Constitution (art.11). Particularly controversial, as we shall see, are the dispositions of art.2, par.4, establishing the penalties for disobeying the norms: while disrespecting requisitions is punished by six months of reclusion and a €10 000 euros fine, defying rules on restrictions and lockdowns twice within fifteen days is subject to a 5$^{th}$-class sanction (up to €1 500), and doing it more than three times within a 30-days span leads to a €3 750 fine, six months of imprisonment (replaceable, under the provisions of the

[21] ibidem, art.16,
https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000019241008/
English text: https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958

French Criminal Code, by works of public utility), and, if the breach was committed via a vehicle, suspension of up to 3 years of the driving license.[22]

In immediate application of the law, a decree of the same day extended the national lockdown until April 15. People could leave their home only for the reasons we have already seen in the March 16 decree, with the addition of movements authorized by requirement of administrative, judicial or police authorities, and with a clarification of the criteria for outdoor exercise, allowed for maximum one hour per day and within a 1-km radius around one's domicile. The same limits applied to exits for the sake of pet animals and for simple walks: the latter could only be taken with people of the same household (art.3). Just like in Italy, any public or private gathering was prohibited, with the exceptions of those «indispensable to the continuance of the life of the Nation» (art. 7). A small difference between the two countries could be found with regard to places of worship, which could remain open, though only to house funeral services with a maximum of 20 attendees (art.8, par. IV). All shops and retailers had to close: reading the Annex to the law listing the essential activities which could stay open, we discover a much stricter approach than the Italian one, with the only doubtful listing being «hotels»[23].

Indeed, the French government seems, from the very beginning, to have adopted a somewhat more active approach than its Italian counterpart, trying to regulate the period of the emergency as much as possible. On March 26, for instance, as many as seventeen Ordinances were issued on the most diverse subjects. Particularly debated, to use an euphemism, was the n.2020-303, dealing with the «adaptation of criminal procedure norms». In practice, it extended a number of deadlines and spans withing the field of criminal justice. The most disputed provision was article 16, prolonging every preventive detention or house arrest which would have expired during the emergency period, though

[22] Loi n.2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041746313?r=Fz7i1PeqVO

[23] Décret du Premier Ministre n.2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041746694?r=39MHRU5dBL

only once for each procedure. The extension was of three months, reduced to two if the incurred punishment was inferior or equal to five years.[24]

This was not, however, the only postponement of a deadline which arose a huge controversy: on March 30, 2020, an organic law was passed which modified the terms for requiring a QPC. In French Constitutional law, a QPC, which is short for «*Question Prioritaire de Constitutionnalité*», "Priority Question of Constitutionality", is the *a posteriori* constitutionality review of a law by the Constitutional Council.[25] It can be raised by any person who is party to a judicial process when they maintain that a law infringes the rights and liberties guaranteed by the Constitution. The court which is holding the proceeding verifies whether the requirements set by the law are met and, if it is the case, refers the matter to the highest jurisdiction of its order, which may be either the Cassation Court or the Council of State. The latter, in turn, will decide whether or not to involve the Constitutional Council: its decision, as well as the one of the previous court, is to be taken within three months.[26] However, the organic law of March 30 suspended both terms until June 30.[27] Moreover, even though article 46 of the Constitution clearly establishes that every organic law can only be analyzed by the Parliament at least fifteen days after having been deposited, in this case it was examined after only one day. In spite of this, the Constitutional Council, which under article 61 must be seized to review every organic law before its enactment, stated that it could not be considered contrary

[24] Ordonnance du Président de la République n.2020-303 du 25 mars 2020 portant adaptation de règles de procédure pénale sur le fondement de la loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041755529/
Circulaire du 26 mars 2020 de présentation des dispositions de l'ordonnance n°2020-303 du 25 mars 2020 portant adaptation de règles de procédure pénale sur le fondement de la loi n°2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 https://www.legifrance.gouv.fr/circulaire/id/44950

[25] *La question prioritaire de constitutionnalité,* https://www.conseil-constitutionnel.fr/decisions/la-qpc

[26] CERF, E., et al., *Le confinement forcé général est-il légal? France, droits fondamentaux et urgence sanitaire*, Paris, Institut des droits de l'homme de Barreau de Paris and Institute for Human Rights of European Lawyers, 2020, 43.

[27] Loi organique n.2020-365 du 30 mars 2020 d'urgence pour faire face à l'épidémie de covid-19, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041768067/

to the Constitution by virtue of «particular circumstances».[28] As we shall see in Part IV, it would be only the first of a number of controversial rulings by top courts of the French judiciary system over the following months.

Meanwhile, the pandemic continued to rampage, with daily and total deaths rising steeply into and throughout all of April.[29] On the 8, 7148 people were in Reanimation Units.[30] Thus, unsurprisingly, on the 13, two days before the end of the lockdown, Macron addressed again the population via TV to announce that it would extended until May 11.[31]

On that day, a new decree officially initiated the process of "deconfinement", already announced by Philippe in a speech before the National Assembly on April 28.[32] The French territory was divided into red and green zones, on the basis of the epidemiological risk. The self-declaration was no longer necessary if the movements were limited to a 100-kilometers radius from one's residence (art.3). Mask-wearing was made mandatory on public transports for all people above 11 years of age (art.4, par.II). Gatherings and reunions of more than ten people, except the essential ones, remained forbidden (art.7). Lakes, water bodies and beaches could not be accessed, a restriction that also applied to public parks and gardens within red zones (art.9). Primary schools and kindergartens were allowed to reopen under extremely strict limitations, such as

[28] Décision du Conseil Constitutionnel n.2020-799 du 26 mars 2020, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041768084
[29] Worldometer, see above note 65
[30] MARTIN, C., *Coronavirus: 541 morts en 24 heures à l'hôpital, 7148 personnes en réanimation,* https://tinyurl.com/28t3sb2e
[31] Décret du Premier Ministre n.2020-423 du 14 avril 2020 complétant le décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041797938?r=uWY6vdI65c
MACRON, E., *Adresse aux Français*, 13 April 2020, https://www.elysee.fr/emmanuel-macron/2020/04/13/adresse-aux-francais-13-avril-2020
[32] Déclaration de M. Édouard Philippe, Premier ministre, sur la stratégie nationale de déconfinement suite à l'épidémie de covid-19 à compter du 11 mai 2020 : reprise progressive des cours, ouverture des magasins, télétravail, port de masques, distanciation sociale, déplacements, transports en communs, isolement des personnes contaminées..., à l'Assemblée nationale le 28 avril 2020, https://tinyurl.com/m73s3k93

not housing more than children at once (art.11). Most shops, however, remained closed, as were places of worship.[33]

On the same day as the decree, a law was also passed extending the state of health emergency until July 10. [34] The Constitutional Council, seized at once by Macron, the President of the Senate, more than sixty deputies and as many senators all of left-wing area, essentially validated the act in a decision issued the same day.[35]

As all major indicators, just like elsewhere, progressively improved over the whole of May and, then, of the summer, deconfinement advanced accordingly. On May 20, students were allowed into institutions of higher education for limited activities such as laboratories or libraries and, on the 22, after a ruling of the Council of State, places of worship were reopened, as were parks and gardens on the 28.[36] Then, on May 31, a new decree opened a new phase of deconfinement: a number of other educational venues were allowed to reopen, the limits on movement were suppressed, bars and restaurants could again perform indoor table service, except in a few territories classified in "orange zone".[37] Demonstrations such as parades and gatherings were permitted

[33] Décret du Premier Ministre n.2020-548 du 11 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041865329
[34] Loi n.2020-546 du 11 mai 2020 prorogeant l'état d'urgence sanitaire et complétant ses dispositions,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041865244?r=q3NPg5hkYF
[35] Décision du Conseil Constiutionnel n.2020-800 DC du 11 mai 2020,
https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041865262/
[36] Décret du Premier Ministre n.2020-604 du 20 mai 2020 complétant le décret n° 2020-548 du 11 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041897835?r=y1QR8Nacxh
Décret du Premier Ministre n.2020-618 du 22 mai 2020 complétant le décret n° 2020-548 du 11 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041903745/
Décret du Premier Ministre n.2020-645 du 28 mai 2020 complétant le décret n° 2020-548 du 11 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041930509?r=4QZ17OmZSq
[37] Décret du Premier Ministre n.2020-663 du 31 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence

on June 14[38] and, a week later, cinemas could reopen, all pupils of primary and first-degree secondary schools had to return to present learning, group sports could resume.[39]

In practice, this first wave can be considered to have ended in France on July 10, when the State of Health emergency came to an end, except in Guiana and Mayotte, where it would remain in place until October 30. In spite of this, the rest of the French territory was placed under a transitional regime until the same day by the law of July 9 «organizing the exit from the State of Health Emergency».[40] The provision allowed the Prime Minister to take, by decree, most of the same measures appliable when the Emergency was ongoing, thus igniting huge debates not only at the Parliamentary level,[41] but also by the doctrine.[42] The law was immediately applied as, on July 10, a decree maintained some of the restrictions for the entirety of France, such as the limitations on the number of guests which could be housed by restaurants and bars (art.40, par.II.2), the closure of dance halls (art.45., par. I) and the imposition of mask-wearing and generic sanitary measures when needed (*ex plurimis*, art.1).[43]

For roughly one month, France lived a relatively calm situation, even though daily cases rose again already from August, reaching a by-then unprecedented record already before the month had even ended. Deaths and

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sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041939818?r=LiCb3TTl3c

[38] Décret du Premier Ministre n.2020-724 du 14 juin 2020 modifiant le décret n° 2020-663 du 31 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire,
https://tinyurl.com/4kfhjfe9

[39] Décret du Premier Ministre n.2020-759 du 21 juin 2020 modifiant le décret n° 2020-663 du 31 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042020786?r=AEDSKInMzQ

[40] Loi n.2020-856 du 9 juillet 2020 organisant la sortie de l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042101318?r=tMIxAp2cSv

[41] Le Monde, *La sortie « organisée » de l'état d'urgence sanitaire adoptée par le Parlement*,
https://tinyurl.com/53u3362u

[42] CERF,E. ET AL.*, op.cit.,* 81

[43] Décret du Premier Ministre n.2020-860 du 10 juillet 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans les territoires sortis de l'état d'urgence sanitaire et dans ceux où il a été prorogé,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042105897?r=ElUenGG7Nc

admissions in reanimation units, on the other hand, would follow suit after some weeks, by the end of the summer, anticipating the second wave.[44] Thus, a number of Departments tried to fight it by mandating generalized mask-wearing, as was the case for the areas of Paris,[45] Strasbourg,[46] Lyon[47] and many others.

At the end of the month, thus, these zones were also among the first ones to again experience serious restrictions: in the departments of Aix-Marseille and Guadeloupe restaurants and bars had to close again, while in other areas of concern their opening hours were limited and venues like sport halls also had to shut their doors.[48] However, the second wave was unstoppable: at mid-October, daily new cases all over the French territory numbered around thirty thousands. Thus, the government again proclaimed the State of Health Emergency starting from the 17.[49] After a last toughening of measures through the imposition of a curfew from 21 pm to 6 am over more than fifty departments,[50] the situation was so dire as to require a second lockdown, announced by President Macron in a televised address on October 28.[51] Debuting from the next day, it was regulated by a new decree which had, nonetheless, less strict rules than the first time:[52]

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[44] Franceinfo, *INFOGRAPHIES. Covid-19 : morts, hospitalisations, vaccins... Suivez l'évolution de l'épidémie en France et dans le monde*,
https://tinyurl.com/fbfftfp8

[45] Arrêté du Préfet de Police de Paris n.2020-00666 rendant obligatoire le port du masque à Paris et sur les emprises des trois aéroports parisiens,
https://tinyurl.com/2wntb9ax

[46] Communiqué du presse du Préfet du Bas-Rhin, 28 aout 2020,
https://tinyurl.com/s8hzvr5n

[47] Arrêté du Préfet du Rhone du 31/08/2020 portant obligation du port du masque de protection pour les personnes de onze ans ou plus sur la voie publique ou dans les lieux ouverts au public de la ville de Lyon,
https://tinyurl.com/ycvpnfy9

[48] Franceinfo, *Fermeture de bars et restaurants, jauges réduites, rassemblements limités... Ce qu'il faut retenir des nouvelles restrictions sanitaires annoncées par le gouvernement,*
https://tinyurl.com/nc47cds3

[49] Décret du Premier Ministre n-2020-1257 du 14 octobre 2020 déclarant l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042424377?r=XocyqYbMYB

[50] Vie Publique Française, *Covid-19 : couvre-feu nocturne pour 54 départements*,
https://tinyurl.com/2kp4y4hb

[51] MACRON, E., *Adresse aux Français*, 28 October 2020,
https://www.elysee.fr/emmanuel-macron/2020/10/28/adresse-aux-francais-28-octobre

[52] Décret du Premier Ministre n.2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état

notably, educational institutions up to high schools could remain open (Section 4, Chapter 2) and the limit on maximum attendees at worship services was raised to thirty people (art.47). Some activities in the area of stages and professional formations were also allowed (art. 35) as were visits to nursing homes.[53]

Throughout the whole of November, as France remained confined, the epidemic continued to rage: on the 7, the country registered nearly 89 000 new cases in a single day.[54] On the 12, Prime Minister Castex declared that one out of four deaths in the nation were occurring due to COVID-19; the following day, 932 people lost their lives, marking the peak of the second wave.[55]

It is hardly surprising, thus, that the Government was very cautious in lifting the restrictions. On November 14, the State of Health Emergency was again extended, until February 16.[56]. A first relaxation thus happened only on November 28: among the novelties, the possibility to exercise outdoor within a 20-km radius from one's residence.[57] Two weeks later, on December 15, the lockdown ended, replaced by a general curfew from 20 pm to 6 am, with the only exception of Christmas Night.[58]

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d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042475143?r=ZwdgA5q9d0

[53] MACRON, E., see above note 51

[54] Worldometers, see above note 10

[55] TERREL, A., *Covid-19 : "En France, un décès sur quatre est actuellement dû à cette maladie", assure Castex*,
https://tinyurl.com/85vt5ss

[56] Loi n.2020-1379 du 14 novembre 2020 autorisant la prorogation de l'état d'urgence sanitaire et portant diverses mesures de gestion de la crise sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042520662?r=9EGUND616g

[57] Décret du Premier Ministre n.2020-1454 du 27 novembre 2020 modifiant le décret n° 2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042574467?r=1gC2244hE2

[58] Décret du Premier Ministre n.2020-1582 du 14 décembre 2020 modifiant les décrets n° 2020-1262 du 16 octobre 2020 et n° 2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042665612?r=42Wv7lZ9jG

In January, despite France having started its vaccination campaign,[59] daily new cases resumed a steady growth, while deaths remained more or less stable after having lowered as a consequence of the second lockdown. Thus, on January 15, the curfew was moved forth to 6 pm and, on the 31, shopping malls above a certain size had to close again.[60] Finally, on February 15, the State of Health Emergency was prolonged until June 1, and the transitional regime until the end of the year (articles 2 and 3).[61] Thus, it is to be expected that exceptional measures will continue to populate the French legal system for many months to come.

[59] GHOBRI, S., et al., *VIDÉO - Coronavirus : la campagne de vaccination commence finalement ce mercredi à Nice,*
https://tinyurl.com/bkyk4w3z

[60] Décret du Premier Ministre n.2021-31 du 15 janvier 2021 modifiant les décrets n° 2020-1262 du 16 octobre 2020 et n° 2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042993250?r=NEXmSPap89
Décret du Premier Ministre n.2021-99 du 30 janvier 2021 modifiant les décrets n° 2020-1262 du 16 octobre 2020 et n° 2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire,
https://tinyurl.com/9u92p9ua

[61] Loi n.2021-160 du 15 février 2021 prorogeant l'état d'urgence sanitaire,
https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043134078?r=FwIJEjvOBH

## Chapter 4 – Spain: from national lockdown to decentralization

Compared to Italy and France, Spain acted with a somewhat greater delay. This was in spite of the fact that its territory was among the worst hit ones already by mid-February, when active cases had already reached the figure of several hundreds.[1]

When, at the beginning of March, the situation exploded, the Council of Ministers first reacted by prohibiting all flights and ferries coming from Italy, where, as we have seen, the outbreak had already spun out of control.[2] At the same time, it prohibited gatherings of more than one thousand people in the most affected territories, such as the capital Madrid, whose Autonomous Community[3] had already resorted to close all schools for two weeks.[4] This measure was later adopted, within two days, by the rest of the local governments.[5] Finally, on March 14, Spain had no choice but to follow Italy's way and adopt a national lockdown. The Royal Decree n.463/2020 proclaimed the state of alarm for fifteen days under article 116 of the Constitution (art.1): the freedom of circulation was limited, except for essential reasons very similar to the ones we have already seen in France and Italy such as purchasing primary goods, going to work, or assisting children, elderly or disabled people (art.7); and all shops were closed with the usual exceptions (art.10). Notable exclusions were

[1] Worldometers, *Spain Coronavirus Cases*, https://www.worldometers.info/coronavirus/country/spain/

[2] Acuerdo del Consejo de Ministros de 10 de marzo de 2020, por el que se establecen medidas excepcionales para limitar la propagación y el contagio por el COVID-19, mediante la prohibición de los vuelos directos entre la República italiana y los aeropuertos españoles, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-3433
Acuerdo del Consejo de Ministros de 12 de marzo de 2020, por el que se establecen medidas excepcionales para limitar la propagación y el contagio por el COVID-19, mediante la prohibición de entrada de buques de pasaje procedentes de la República italiana y de cruceros de cualquier origen con destino a puertos españoles
https://www.boe.es/eli/es/o/2020/03/12/pcm216/con

[3] The Autonomous Communities are the 17 top-level administrative units of the Kingdom of Spain. Madrid is located in the one of the same name. Together with the two Autonomous Cities, Ceuta and Melilla, they are collectively known as «the Autonomies», term that we will employ as well during our work (see https://tinyurl.com/ympm53z7 )

[4] Orden 338/2020, de 9 de marzo, de la Consejería de Sanidad, por la que se adoptan medidas preventivas y recomendaciones de salud pública en la Comunidad de Madrid como consecuencia de la situación y evolución del coronavirus (COVID-19), https://www.bocm.es/boletin/CM_Orden_BOCM/2020/03/10/BOCM-20200310-1.PDF

[5] El País, *9,5 millones de estudiantes se quedan dos semanas sin clase en España,* https://tinyurl.com/5ea6vp22

hairdressers, closed only after two days amidst much polemics,[6] and places of worship which, though forced to respect the required sanitary measures, could remain open (art.11).[7] An important *caveat*: according to a sentence of 2016 of the Constitutional Tribunal, this decree bears the same ranking of a primary law, and so do all the ones proroguing the state of alarm. This was motivated by its ability to innovate the ordinary legal system.[8]

This, however, was only the starting point. Until May, indeed, the Government and its Ministries would produce an impressive 209 different normative acts, creating in Spain problems similar to Italy as regards the continuous changing of rules, the possibility of limiting fundamental rights with secondary norms, and the confusion created among the citizens also by the possibility for decentralized territories to introduce norms diverging from the national ones.[9] Particularly criticized, in doctrine, was the absence of a proper regime of sanctions, as we shall see in Chapter 13. To make an example out of many, on March 17, a further decree had to specify that sanitary and veterinary centers were not included among the activities which had to shut down.[10]

Since its proclamation, the state of alarm was prolonged six times, lasting until June 21.[11] This was also due to the toughness of the epidemics in Spain, hitting some areas so hard as to force them to resort to field hospitals or to

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[6] CABALLERO, F., *El Gobierno cambia de criterio y ordena el cierre de peluquerías durante el estado de alarma*, https://www.boe.es/buscar/doc.php?id=BOE-A-2020-3692

[7] Real Decreto 463/2020, de 14 de marzo, por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19, https://www.boe.es/buscar/doc.php?id=BOE-A-2020-3692

[8] See Tribunal Constitucional, Sentencia 83/2016, de 28 de abril, *Fundamentos juridicos*, par.10, http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/24935; Gutiérrez Mayo, E., *¿Cuál es el valor normativo de la declaración del Estado de Alarma? ¿Es susceptible de control por los Tribunales?*, https://tinyurl.com/55zmu4ef

[9] RINCÓN, R., *El estado de alarma: un bosque de 209 normas excepcionales,* https://tinyurl.com/xmttv6ys

[10] Real Decreto 465/2020, de 17 de marzo, por el que se modifica el Real Decreto 463/2020, de 14 de marzo, por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19., https://www.boe.es/buscar/doc.php?id=BOE-A-2020-3828

[11] LECUMBERRI BASCOA, G.*, El Derecho de excepción, una perspectiva de derecho comparado. España: estado de alarma*, Bruxelles, European Parliament Research Service, 2020, 40-41.

improvised morgues.[12] The sanitary system was affected so badly as to be forced to issue orders preventing some patients, such as elders coming from nursing homes, from being admitted into hospitals.[13] This arrived to the point that «one out of three deaths for COVID during the first wave [i.e., roughly fifteen out of forty-six thousand people] died in their residence or in an old people's home», according to the National Institute of Statistics.[14]

Thus, unsurprisingly, the measures remained particularly severe all over the course of the first wave. On March 29, a decree-law established a mandatory paid leave for all workers of non-essential services until April 9.[15] It was, in a sense, a measure very similar to the one taken by Italy during roughly the same period.[16] In those days, Spain also reached its peak of daily new deaths, the shocking figure of 996.[17] The month of April Saw the country having the highest excess mortality in the European Union: compared to the monthly average of the previous four years, nearly 80% more people died.[18]

The «de-escalation» only came on April 24, with the third extension of the state of alarm, as the Decree 492/2020 allowed children below the age of 14 to go out with a responsible adult when the latter was performing any of the allowed

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[12] GARCIA REY, M., *Madrid emula el hospital milagro de Wuhan: así tratan en Ifema a los primeros pacientes,*
https://tinyurl.com/cdcx8mpe
VELASQUEZ LOAIZA, V., *FOTOS | Instalaciones usadas como hospitales y morgues por el coronavirus*,
https://tinyurl.com/44dvprxh

[13] CABALLERO, F., *Un documento de un hospital de Madrid confirma que había órdenes de rechazar a los ancianos de residencias con síntomas de coronavirus,*
https://tinyurl.com/vv83hd56

[14] ORDAZ, A. et al., *Uno de cada tres fallecidos por COVID durante la primera ola murió en su casa o en una residencia,*
https://tinyurl.com/3x3e5abu

[15] Real Decreto-ley 10/2020, de 29 de marzo, por el que se regula un permiso retribuido recuperable para las personas trabajadoras por cuenta ajena que no presten servicios esenciales, con el fin de reducir la movilidad de la población en el contexto de la lucha contra el COVID-19,
https://www.boe.es/buscar/act.php?id=BOE-A-2020-4166

[16] see above, Chapter 2

[17] Worldometers, see above note 1

[18] EUROSTAT, *Excess mortality in the European Union between January 2020 and January 2021*,
https://tinyurl.com/5emps94k

activities. The decision, criticized by both the public opinion and experts for its rigidity, was partially corrected by an order of the Ministry of Health, now permitting children to take a maximum-1 hour walk within 1 kilometer of their residence from 9 am to 9 pm.[19]

Then, on April 28, the Council of Ministers approved an Agreement detailing a «Plan for the Transition towards a New Normality». It envisaged a four-steps process each territory had to go through as its epidemiological risk lowered. In phase "0", the whole of Spain would be subject to small relief measures such as allowing restaurants to sell takeaway food or permitting the entire population to go out to do physical or sport exercise at particular times of the day depending on one's age.[20] In phase 1, small sales were allowed to reopen, as were places of worship (to a maximum 30% capacity) and restaurants for outdoor service (with a maximum 50% capacity). Movements were always allowed inside one's province of residence and professional sport leagues could resume their trainings. In phase 2, cinemas and theaters reopened their doors, restaurants reverted to limited indoor service and cultural venues could also restart. Finally, restrictions were furtherly eased in phase 3, when general mobility returned . Permanence in each phase would last at least two weeks and, just like in Italy, changes happened through orders of the Minister of Health.[21]

When this system debuted on May 4, the whole of Spain was in phase 0, with the exception of some islands with a better epidemiological situation, which started from the 1.[22] After roughly six weeks of progress, all territories reached the final step, «New Normality», on June 21, when the state of alarm ended. The

[19] Orden del Ministro de Sanidad SND/370/2020, de 25 de abril, sobre las condiciones en las que deben desarrollarse los desplazamientos por parte de la población infantil durante la situación de crisis sanitaria ocasionada por el COVID-19, https://www.boe.es/boe/dias/2020/04/25/pdfs/BOE-A-2020-4665.pdf

[20] Orden del Ministro de Sanidad SND/380/2020, de 30 de abril, sobre las condiciones en las que se puede realizar actividad física no profesional al aire libre durante la situación de crisis sanitaria ocasionada por el COVID-19, https://www.boe.es/eli/es/o/2020/04/30/snd380

[21] Consejo de Ministros de España, *Plan de desescalada,* 28 April 2020, https://tinyurl.com/2pzpk52b
El Derecho*, Infografía. Desescalada: fechas y fases*, https://elderecho.com/infografia-desescalada-fechas-fases

[22] Consejo de Ministros de España, see note above

new state of affairs was disciplined by a decree-law issued on the 9 of the month. The previous restrictions disappeared in favor of the minimal health measures we have already seen in the other two countries, such as mask-wearing (in this case, also outdoor, unless a 1.5 meters social distancing could be ensured; art.6), the encouraging of smart working whenever possible (art.7, par.1.e) or the adaptation of public transportation to the evolution of the epidemics (chapter III).[23]

Despite Spain knowing, during summer, just like most other Western countries, a deceleration of the contagion, the pandemic remained more visible than in Italy and France. The new rise in active new cases, indeed, when one looks at the curves, can be observed starting from as early as mid-July.[24] By that period, the country kept registering more than forty active outbreaks, forcing Autonomous Communities to resort to localized lockdowns.[25] Suffice it to say that, starting from Catalonia, all of them individually issued orders to always wear a mask when in public, regardless of the maintenance of safe distance.[26]

Then, in September, when the second wave was approaching, the Community of Madrid was again the first one to took serious restrictions. By September 25, forty-five areas of its territory were sealed off, as people could only enter and leave for essential reasons (art.1), the maximum capacity and the opening hours of restaurants, shops, places of worship and sport centers were limited (art. 2,4,5,7) and parks and public gardens were closed (art.9).[27] Such

[23] Real Decreto-ley 21/2020, de 9 de junio, de medidas urgentes de prevención, contención y coordinación para hacer frente a la crisis sanitaria ocasionada por el COVID-19, https://www.boe.es/buscar/doc.php?id=BOE-A-2020-5895

[24] Worldometers, see above note 1

[25] La Voz de Galicia, *Preocupación por los 45 brotes activos en 15 comunidades autónomas*, https://tinyurl.com/sdmxrjcw

[26] Generalitat de Catalunya, *Uso obligatorio de la mascarilla*, https://web.gencat.cat/es/actualitat/detall/Us-obligatori-de-la-mascareta-00001
GUISADO, P., et al., *Cronología de la pandemia: un año desde el estado de alarma*, https://tinyurl.com/4re7surn

[27] Orden de la Presidenta de la Comunidad de Madrid 1226/2020, de 25 de Septiembre, de la Consejería de Sanidad, por la que se adoptan medidas específicas temporales y excepcionales por razón de salud pública para la contención del COVID-19 en núcleos de población correspondientes a determinadas zonas básicas de salud, como consecuencia de la evolución epidemiológica, https://tinyurl.com/59f4xyjk

measures were furtherly extended on October 2,[28] only to be partially quashed, however, by an 8 October ruling of the High Court of Justice of Madrid.[29]

In response, the Government proclaimed the state of alarm a second time the very next day to reimpose the same norms.[30] Then, on October 25, right after Spain had passed the bar of 1 million contagions, the state of alarm was extended to the whole territory with the Royal Decree n.926.[31] The law gave Autonomous Communities the possibility of taking such measures as introducing a curfew between 22 pm and 7, close their borders and limit the attendance at worship services (art. 5 and 6). In both cases, the exceptions were the ones we should now know by heart. Gatherings, both public and private, could not exceed six attendees (art.7).

This means that, ever since then, Spain has been, much like Italy, a mosaic of different norms as each Autonomy could tighten or soften the restrictions depending on the evolution of the pandemic. The only time when the Government reimposed a national discipline was the Christmas period: under a 2 December Agreement between the Autonomies and the Interregional Council of the National Health System, restrictions were modulated in order to keep the possible new escalation at bay. Thus, internal mobility among the territories was prevented, except for seeing one's relatives, but the curfew could be delayed

[28] Orden de la Presidenta de la Comunidad de Madrid 1273/2020, de 1 de octubre, de la Consejería de Sanidad, por la que se establecen medidas preventivas en determinados municipios de la Comunidad de Madrid en ejecución de la Orden del Ministro de Sanidad, de 30 de septiembre de 2020, por la que se aprueban actuaciones coordinadas en salud pública, http://www.madrid.org/wleg_pub/secure/normativas/listadoNormativas.jsf#no-back-button

[29] Tribunal Superior de Justicia de Madrid, Sala de lo Contencioso-Administrativo, sección Octava, Auto n.128/2020, https://www.poderjudicial.es/search/openDocument/4508ffdf28c886ff

[30] Real Decreto 900/2020, de 9 de octubre, por el que se declara el estado de alarma para responder ante situaciones de especial riesgo por transmisión no controlada de infecciones causadas por el SARS-CoV-2, https://www.boe.es/buscar/act.php?id=BOE-A-2020-12109

[31] Real Decreto 926/2020, de 25 de octubre, por el que se declara el estado de alarma para contener la propagación de infecciones causadas por el SARS-CoV-2, https://www.boe.es/buscar/doc.php?id=BOE-A-2020-12898

until 1:30 am on Christmas and New Year's Night.[32] Accordingly, each Community took its own restrictions for the Festivities.[33]

This lack of a full national discipline had contrasting effects on the evolution of the epidemiological situation. On the one hand, in fact, Spain managed to keep its daily new deaths figures far from the dreadful peaks of the first wave. On the other hand, the number of new cases, contained during the autumn second wave, exploded already by mid-January, anticipating the third wave.[34] In spite of this, the Government refused to concede the Autonomies the possibility of toughening measures by, for instance, anticipating the curfew.[35] Meanwhile, the vaccination campaign debuted and proceeded fairly well, with Spain having immunized one million people already by February 12.[36] In spite of this, on the 14, its overall death toll stood at 65 449 lives lost, a figure which has continued to grow ever since.[37]

[32] Consejo Interregional - Sistema Nacional de Salud, Acuerdo por el que se prevén medidas de salud pública frente a COVID-19 para la celebración de las Fiestas Navideñas, 2 Diciembre 2020,
https://tinyurl.com/wy3mywsy
[33] SÁNCHEZ, J., *Restricciones en Nochebuena y Navidad: Medidas para viajar, reuniones y toque de queda en cada comunidad*,
https://www.elmundo.es/espana/2020/12/22/5fe19ca321efa0a3688b4598.html
[34] Worldometers, see above note 1
[35] PÉREZ, P., *El Gobierno rechaza adelantar el toque de queda, como pedían 13 autonomías,*
https://cincodias.elpais.com/cincodias/2021/01/20/economia/1611146627_457820.html
[36] GUISADO, P., see above note 23
[37] Worldometer, see above note 1

# Part II. The Constitutions, the States of Emergency and the rule of law

## Chapter 5 – Introduction: Constitutions, human rights and emergency clauses

Ever since, on August 26, 1789, the Declaration of the Rights of Man and Citizen stated that «any society which lacks a sure guarantee of rights or a fixed separation of powers, has no constitution»[1], an inextricable link has existed between modern constitutional nation-States and the safeguard of basic human rights. This idea is represented by the portrayal of the Constitution as the expression of the central values of a society, the ones it has elected as its very foundation.[2]

However, constitutional rights are, usually, hardly absolute. First and foremost, for basically every existing freedom, we may find a competing one, meaning that the expansion of the first will inevitably come at the expenses of the second, and *vice versa*.[3] A clear example may be the right to privacy vis-à-vis the freedom of information. Second, and that is what we are interested in for our analysis, there may be cases, in a situation of emergency, where personal freedoms need be limited for the sake of the common good. In such circumstances, an «emergency law» may arise which takes the place of the usually accepted norms.[4] According to Villareal, there are three main models which Constitutions use to tackle such situations. At one end, we have the «business-as-usual» archetype, theorizing that there is no need to resort to extraordinary norms, since all emergencies can be confronted via the already existing ones. At the other, there is the extralegal model, where responses to crises can only be found outside of the previously established laws. For instance, the German philosopher Carl Schmitt famously argued that «sovereign is he who

[1] Declaration of the Rights of Man and Citizen, decreed by the National Assembly in the sessions of 20th, 21st, 23rd, 24th and 26th August, 1789, accepted by the King, Contemporary print in the Musée Carnavalet, Paris. Reproduced in G. Duby, *Histoire de la France*, Paris, Larousse, 1971, II, 306, (trans. A. Lentin).

[2] CARETTI, P. – DE SIERVO, U., *Diritto Costituzionale e Pubblico*, Turin, Giappichelli, 2014, 480; United Nations, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices,*
https://tinyurl.com/bc777ddy

[3] Ontario Human Rights Commission*, Policy on Competing Human Rights*, http://www.ohrc.on.ca/en/policy-competing-human-rights/1-introduction

[4] ALIBRANDI, A., *Il diritto di eccezione: una prospettiva di diritto comparato. Italia: stato di emergenza*. Bruxelles, European Parliament Research Service, 2020, 1.

decides on the exception»,[5] as regards both its existence and the measures needed to overcome it.[6] Finally, there is a middle ground archetype, named «constitutional dictatorship», where emergencies are still managed through exceptional regimes, as in the extralegal framework, but such regimes have been previously determined and regulated by the law, which has established, for instance, the criteria for their enactment, duration, and the kind of measures that can be taken.[7]

Needless to say, usually, in modern rule of law countries like the three we are dealing with, the only accepted model is either the first or the third one. This is the very view adopted by the European Commission for Democracy Through Law, an advisory body of the Council of Europe also known as "Venice Commission". In its opinion, there are two constitutional models to tackle emergencies, rather than the three of Villareal: the «sovereignty approach», where the crisis lies outside the existing regulation, and the «rule of law approach», referring to preexisting laws. In the view of the Commission, not only international law, but «virtually all national legal orders» employ the second model.[8] This is because one of the key principles they must conform to is the supremacy of the law: for the United Nations, this means that «all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated»[9]. Thus, there is no possibility, even in the most exceptional crises, that a public authority be given the chance to legislate outside of the existing norms. At most, it will be granted exceptional powers, but such powers need be «provided for by the law» and their

[5] MCCONKEY, M.. *Anarchy, Sovereignty, and the State of Exception: Schmitt's Challenge*, in *The Independent Review*, 2013, XVII.3, 415 ff.
[6] NICOTRA, I. A., *Pandemia Costituzionale*, Napoli, Editoriale Scientifica, 2021, 33.
[7] VILLAREAL, P.A. *Public Health Emergencies and Constitutionalism Before COVID-19: Between the National and the International*, in ALBERT, R. - ROZNAI, Y. (eds), *Constitutionalism under extreme conditions. Law, emergency, exceptions*, Cham: Springer, 2020, 220-221.
[8] European Commission for Democracy Through Law (Venice Commission), *Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections,* taken note of by the Venice Commission on 19 June 2020 by a written procedure replacing the 123rd plenary session, par.8, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)014-e
[9] UN and the Rule of Law, *What is the rule of Law*, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/

«duration, circumstance and scope» subject to «strict limits», as must also be any derogation from human rights they may bring about, according to the definition given by the Venice Commission.[10] In this way, it will also be possible to determine whether, in tackling a crisis, a government has abused its authority. And since, in modern constitutional States, as the name itself suggests, the supreme law is the Constitution, this is exactly the point we shall depart from to review the emergency norms in the Italian, Spanish and French legal systems. It is, indeed, the Constitution which sets the basis for all other sources of law, whether they be internal, such as primary legislation (what we commonly know as «law») or external, such as the international law. However, to proceed more effectively from the general to the particular, we have decided to first analyze the international level and then descend to national Constitutions and subordinate norms.

Indeed, as Western, European rule of law countries, France, Italy and Spain are members of all most important international systems of human rights protection. Thus, international norms apply to the three of them in the same way, while at the national level, in spite of «common constitutional traditions»,[11] each State has its own rules. As such, placing international norms before the Constitution, despite being contrary to the actual ranking of the sources of law, allows us to better highlight differences after having previously reviewed the similarities.

The international human rights agreements we have singled out are the three most important ones for the legal systems of our analysis: the International Covenant on Civil and Political Rights (ICCPR), a 1966 United Nations Treaty, which entered into force in 1976;[12] the European Convention on Human Rights

[10] Venice Commission, *Rule of Law Checklist*, adopted by the Venice Commission at its 106th Plenary Session, Venice, 2016,
https://tinyurl.com/ym3yjmpe
[11] Treaty on European Union, art.6., par.3,
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M006
[12] International Covenant on Civil and Political Rights,
https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

(ECHR), which entered into force in 1953;[13] and the Charter of Fundamental Rights of the European Union (Charter of Nice), proclaimed in 2000 and given binding legal force in 2009.[14] Commonly, one also considers another UN document: the 1948 Universal Declaration of Human Rights. However, differently from the other three instruments we have mentioned, it is not a Treaty and, thus, has no binding force on its signatory countries, though it does also contain a general limitation clause.[15]

Needless to say, the COVID-19 crisis has impacted on such a number of freedoms that, for every single one of them, we may find a specific legal instrument protecting it. For instance, the right to education features prominently in the 1989 UN Convention on the Rights of the Child, another treaty of which Italy, France and Spain are all parties.[16] However, consistently with the approach we have taken, we have selected instruments of general protection for two main reasons. First, as we have anticipated in the Introduction, the very concept of such a measure as the lockdown necessarily entails a wide-ranging restriction of rights, so as to render impossible focusing on every single one of them. Second, and most importantly to our analysis, not all rights have the same force. There are, indeed, two special categories of freedoms: absolute ones, which cannot be derogated in any case,[17] and reinforced freedoms, which are ordinarily subject to limitations, but such restrictions cannot be furtherly extended. The presence of such special rights is considered another fundamental feature of emergency powers under rule of law.[18] Indeed, as we shall see in Chapter 15, much of the debate surrounding the legitimacy of the lockdown revolves around the issue of

[13] European Convention for the Protection of Human Rights and Fundamental Freedoms, https://www.echr.coe.int/documents/convention_eng.pdf
[14] Charter of Fundamental Rights of the European Union, https://www.europarl.europa.eu/charter/pdf/text_en.pdf
[15] Universal Declaration of Human Rights, art.29, par.3, https://www.un.org/en/about-us/universal-declaration-of-human-rights
ZAMFIR, I., *The Universal Declaration of Human Rights and its relevance for the European Union,* Bruxelles, European Parliament Research Service, 2018, https://tinyurl.com/6thnvbrb
[16] Convention on the Rights of the Child, *ex plurimis* art.24., par.2e, https://www.ohchr.org/en/professionalinterest/pages/crc.aspx
[17] BARAK, A., *Proportionality – Constitutional Rights and Their Limitations*, Tel-Aviv, Nevo Publishing, 2010, 27 (eng. New York, Cambridge University Press, 2012).
[18] Venice Commission, see above note 8

whether it infringes upon a reinforced right, i.e. personal freedom, or on a relative one, namely the freedom of movement.

Still, each right has, usually, its own specific limitation clause, whose importance cannot be underestimated.[19] First, its wording may qualify a freedom as absolute or reinforced even if the emergency provisions fail to do so. One example may be article 14 of the ECHR, which is about freedom from discrimination.[20] Second, the ordinary limitations that a freedom may know are a good yardstick to evaluate how far the Government has gone in derogating from it through the emergency powers.

Indeed, the difference between an exceptional «derogation» - also called «suspension» - of a right and the ordinary «limitation» it can know is not always clear. Usually, the doctrine argues that, while the former is a «temporary deviation»[21] that infringes upon the «essential nucleus»[22] of a freedom, the latter is a restrictions which is justified also in normal circumstances, «for a specified number of public reasons».[23] Among said reasons, it is very common to already find the very same values that emergency norms try to safeguard, such as public order or health. As such, the only difference between the two kinds of limitations seems to be the extension of the intervention conceded to the Government. Indeed, even if emergency powers allow a State to go as far as to completely suspend a right, such a measure needs to abide by the same formal principles which also govern ordinary limitations: this means that it cannot be either disproportional or unreasonable. Thus, «limitations» and «suspensions» may differ in intensity, but the scrutiny that human rights courts conduct on them are «qualitatively» the same.[24]

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[19] BARAK, A., *op.cit*., 141.
[20] ECHR, art. 14, see above note 11
[21] FERNÁNDEZ, G., *Within the Margin of Error: Derogations, Limitations, and the Advancement of Human Rights*, in *Philippine Law Journal*, 2019, XCII.1, 4.
[22] ROMBOLI, S., *L'ordinanza n.40/2020 del Tribunal Constitucional Spagnolo: Covid-19 ed esercizio del diritto di manifestazione*, in *Quaderni Costituzionali*, 2020, 4, 846.
[23] HIGGINS, R., *Derogations Under Human Rights Treaties*, in *British Yearbook of International Law*, 1976, XLVIII.1, 281.
[24] VARDANYAN, V., *The impact of the Covid-19 pandemic on human rights and the*

In conclusion, even though we now limit to general clauses, when we will deal with the infringement of the specific freedoms during the COVID-19 pandemic in Part IV, it will be necessary that we return on the same documents and analyze the precise norms that govern it.

After this quite long premise, let us now delve into the world of emergency provisions. Under what conditions could Italy, France and Spain limit fundamental rights during a crisis like the one we have been witnessing?

*rule of law,* Report for the Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights), 2020, par.22.

## Chapter 6 – The international level

Starting from the international legal system, let us first analyze the International Covenant on Civil and Political Rights (ICCPR). Adopted through a 1966 Resolution by the United Nations Assembly, it has entered into force ten years later, after having been ratified by thirty-five States. Currently, it has 173 parties: Spain, Italy and France ratified it in 1977, 1978 and 1980, respectively.[1] To them, therefore, the treaty is legally binding: non-compliance with its provisions results in international responsibility. The general limitation clause of is found in article 4:

«*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin*» (par.1).[2]

There are, however, under paragraph 2, a number of rights which cannot be derogated from in any case. They are «the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion».[3]

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[1] ICCPR, see above Chapter 5, note 10.
[2] ibidem
[3] American Association for the International Commission of Jurist, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* 1984, par.58, https://tinyurl.com/2wn3mhb9

Finally, paragraph 3 states that, if a State wants to activate the derogation mechanism provided for by the article, it must inform the other Parties to the Covenant through the intermediary of the Secretary-General of the United Nations.

To better interpret the article, one may refer to the 1984 Siracusa Principles, adopted by a number of distinguished experts, from which we have derived the list of non-derogable rights. They clarify each and every aspect of the text, from the meaning of «public emergency» to the general principles that should guide the action of any State.

The formulation of article 4 was borrowed from the preliminary text of the Covenant by the drafters of the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR).[4] The treaty, which came into full effect in 1953, binds the forty-seven member States of the Council of Europe, the leading regional organization on the issue.[5] It was the first such international instrument to establish a Court to ensure its enforcement: the famous European Court of Human Rights (ECtHR).[6] Whenever individuals feel that a State has violated a right guaranteed by the Convention, they can, under certain conditions, address the Court, whose ruling will be binding. As such, the ECHR is one of the most important international accords for human rights protection: its prescriptions are usually incorporated into national legislations, and have had an immeasurable influence on the evolution of the interpretation of certain freedoms.[7]

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[4] EL ZEIDY, M., *The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations,* in San Diego International Law Journal, 2003, 4, 279.

[5] The Council of Europe is sometimes confused with the European Council and the Council of the European Union, which are, instead, two organs of the European Union, a completely different international organization. Suffice it to say that the CoE has 47 members, the EU 27.

[6] Council of Europe, *The European Convention on Human Rights - how does it work?*, https://www.coe.int/en/web/impact-convention-human-rights/how-it-works
Just like the international organizations they belong to, the European Court of Human Rights and the Court of Justice of the European Union must not be confused, either.

[7] European Court of Human Rights – Public Relations Unit, *The ECHR in 50 Questions*, https://www.echr.coe.int/Documents/50Questions_ENG.pdf

The basic text of the Convention features 54 articles. To us, the most important is n.15, «Derogation in time of emergency»:

«*In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

*2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*

*3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.*»[8]

As we see, paragraph 1 is basically the same as what we have read in ICCPR. The number of non-derogable rights is, instead, shorter: it comprises the right to life, the freedom from torture, the freedom from slavery and the right not to be held guilty for a behavior that was not considered a crime when it was enacted (*nullum crimen sine lege)*. To them, we must now add the prohibition of death penalty at any time, introduced by the Sixth Protocol, and the right not to be tried or punished twice for the same act (*ne bis in idem*), enshrined by the Seventh.[9] Both of them have been ratified by nearly all Council of Europe members, including Italy, France, and Spain.[10] Moreover, as we have seen in

[8] ECHR, see above chapter 5, note 11

[9] MOKHTAR, A., *Human rights obligations v. derogations: article 14 of the European convention on human rights* [sic], in *The International Journal of Human Rights,* 2004, VIII.1, 74.

[10] Council of Europe, *Details of Treaty No.114 - Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty,*
https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114
*-, Chart of signatures and ratifications of Treaty 117 - Protocol No. 7 to the Convention for the*

Chapter 5, there may be cases when a right, though in theory derogable, is expressed in such a way as to make in clear that it cannot be limited at any time.

To our analysis, particularly important is paragraph 3: it details a specific procedure a State must employ to activate the derogation mechanism. Since the beginning of the COVID-19 pandemic, ten countries have filed the official notice. As of mid-February 2021, none of them had withdrawn it except Georgia and Latvia: the latter subsequently reactivated the mechanism. [11] Most importantly for us, among the ten above-mentioned States are not included either Italy, France and Spain. The choice not to activate the procedure of article 15 has been met with widespread criticism. It has been argued, for instance, that the extent of the restrictions imposed is not compatible with what the Convention allows in ordinary circumstances,[12] and that it would have been better if they had been enacted under the strict procedural and substantive guarantees listed by the article.[13] Moreover, its enforcement could also have had important political advantages.[14] On the other hand, however, and that is the thesis we will follow, it is true that, whenever the official mechanism of derogation has been used, the Court has usually conceded a wider «margin of appreciation» to member States when evaluating the measures they had enacted.[15] This is in accord with the reasoning we have already seen in Chapter 5, but appears in contradiction with the wording of article 15 which seemingly requires «particularly strict

*Protection of Human Rights and Fundamental Freedoms*,
https://tinyurl.com/8dafv65p

[11] ibidem, *Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) - Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic*,
https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354

[12] Osservatorio Permanente sulla Legalità Costituzionale, *Esposto al Consiglio d'Europa*, September 11, 2020,
https://tinyurl.com/2r4u7usn

[13] COSTA, J.-P., *Le recours à l'article 15 de la Convention européenne des droits de l'homme,*
https://tinyurl.com/yhepxpzr

[14] ARGENTINI, M., *"Fase 1" di contrasto al Covid-19, ordinamento italiano e tutela dei diritti umani alla luce della CEDU*, *in Freedom, Security & Justice: European Legal Studies*, 2020, 2, 174-175.

[15] ECtHR, *Ireland v. United Kingdom*, n.5310/71, 1977, par.207,
https://www.refworld.org/cases,ECHR,3ae6b7004.html
The concept was then adopted by the Inter-American human rights law and the UN Human Rights Commission (BARAK, A., *op.cit*., 418). Barak prefers to employ the phrase «zone of proportionality», which shares some similarities to the margin of appreciation but is not totally equivalent (see *op.cit.,* 420).

scrutiny».[16] Its adoption could, then, have allowed the Governments to impose even larger restrictions. Moreover, as we already know, «the rights of the Convention that could be subject to derogation already feature limitation clauses, either explicit or implicit, which allow even huge infringements» if this is necessary to face a public crisis.[17] And, «even without any emergency», limitations for protecting public health and order are normally allowed by the Convention if they are «legal and proportionate»,[18] and it can be expected that, given the seriousness of the COVID-19 crisis, the Court will concede member States an even greater «room of maneuver» when employing them.[19]

That is why, in the end, we agree with the view that activating article 15 is a right of the Governments whose exploitation would have been «convenient» for them in this situation of calamity,[20] while individual freedoms are certainly much more strictly protected by ordinary provisions.[21] Indeed, for some authors, the article would be even apt to cover exceptional interventions to safeguard public order from social tension that may arise due to the socio-economic consequences of the pandemic.[22] And even without the activation of such official procedures, it is normal that international and national courts exercise extreme prudence when reviewing the choices made by governments in exceptional contexts.[23]

Nevertheless, the prohibition to limit rights in an unreasonable way is reinforced by article 18: «the restrictions permitted under this Convention to the

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[16] LUGARÀ, R., *Emergenza sanitaria e articolo 15 CEDU: perché la Corte europea dovrebbe intensificare il sindacato sulle deroghe ai diritti fondamentali*, in *Osservatorio Costituzionale*, 2020, 3, 359.
[17] ibidem, 372
[18] DZEHTSIAROU, K., *COVID-19 and the European Convention on Human Rights*, https://tinyurl.com/2am485w3
[19] LUGARÀ, R., see above note 16
[20] ZARRA, G., *Sulla compatibilità di misure restrittive, adottate in Italia e nella Regione Campania per contenere l'epidemia di COVID-19, con gli articoli 5 e 2 del Protocollo n. 4 CEDU*, in *Diritti umani e diritto internazionale. Rivista quadrimestrale*, 2020, XIV.2, 592
[21] TOUZE, S., *La restriction vaudra toujours mieux que la dérogation,* https://tinyurl.com/49pwnd23
[22] ARGENTINI, M., *op.cit*., 173-174.
[23] BURATTI, A., *Tra regola ed eccezione. Le ragioni del costituzionalismo di fronte all'emergenza,* in MARINI, F.S. – SCACCIA, G, *op.cit.*, 5.

said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed». It is a prescription clearly meant to prevent any abuse of power even when enacting ordinarily consented limitations.[24] As such, it reinforces our theory of the existence of a mere quantitative difference between them and extraordinary derogations, with both needing to abide by similar criteria.

Finally, let's see what the EU law says as regards derogation from human rights. The relevant text is the Charter of Fundamental Rights of the European Union: first proclaimed in 2000 in Nice (hence its alternative name «Charter of Nice»),[25] it has received binding legal force with the entry into force of the Treaty of Lisbon in 2009.[26] As such, its respect is due by all twenty-seven member States of the Union. The general derogation clause is article 52, whose paragraph 1 reads:

*«Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*».

The Charter of Nice has, however, an important flaw when compared to the other two systems we have seen: on one hand, member States are bound to its respect, overseen by the Court of Justice of the EU. On the other hand, however, this only applies when they are «implementing EU law, notably when they are applying EU regulations or decisions or implementing EU directives».[27] Clearly, the lockdown measures taken as a consequence of the COVID-19 crisis

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[24] TSAMPI, A., *The New Doctrine on Misuse of Power under Article 18 ECHR: Is It about the System of Contre-Pouvoirs within the State after All?,* in *Netherlands Quarterly of Human Rights*, 2020, XXXVIII.2, 136D.

[25] Charter of Fundamental Rights of the European Union, see above Chapter 5, note 12

[26] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, art.6, par.1,, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT

[27] European E-Justice Portal, *Fundamental Rights*, https://e-justice.europa.eu/content_fundamental_rights-176-en.do

have hugely infringed on some fundamental principles of the EU legal system, such as the freedom of movement (enshrined, *ex plurimis*, by article 3, paragraph 2 of the Treaty on European Union).[28] However, for our analysis, we are not taking into account this specific issue, remaining on the more general «stay-at-home orders». The impairment of free circulation within the EU space can, on the other hand, be considered a consequence of them.

Still, EU law is not completely irrelevant: on the contrary, some of the principles it imposes upon its member States are central to our reflection. For instance, article 2 of the above-mentioned Treaty on European Union solemnly proclaims that it «is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights». In case a State is suspected or found to have breached them, subsequent article 7 outlines a procedure which may end up with the country losing some of the privileges it enjoys as a member of the Union. This may go as far as to deprive its representatives in the Council of their voting rights.[29] The procedure was activated twice in recent years, against Poland and Hungary,[30] but it seems unlikely that a crisis like the COVID-19 will ever be regarded as a reason for implementing such an instrument. This is especially true because «stay-at-home» measures were implemented, during the first wave of the pandemic, by one third of EU Members.[31]

Thus, in conclusion, it appears clear that all three international instruments we have surveyed will give us a more general framework during our analysis but, at the moment, it is unlikely that they will have any practical significance in repressing possible violations of human rights in the wake of the COVID-19 pandemic. That is also because the first and foremost benchmark for the controversial measures we have witnessed is, obviously, the national legislation.

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[28] Treaty on European Union (Consolidated version), art.3, par.2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT

[29] ibidem, art.2 and art.7. For the difference between the Council of the EU and the Council of Europe, see above note 5

[30] PECH, L. – GROGAN, J., *Article 7 EU*, https://tinyurl.com/5xcdm37u

[31] CERF, E., et al., *op.cit.*, 43

As we will see, indeed, it already takes care of encompassing the international law we have been reviewing. Accordingly, the time has come to delve into the national legal system of the three countries.

## Chapter 7 – The constitutional level

As we have seen in Chapter 5, Constitutional law knows three models to manage emergencies: «business-as-usual», «constitutional dictatorship», and the extralegal one. If we consider the three countries we are studying, we see that their Constitutional legislators made different choices: while France and Spain's wrote down a number of emergency clauses, aligning to the second model, the Italian Constitutional Assembly decided to exclude them altogether, fearing that they may open up the way to another authoritarian deviation similar to the fascist regime.[1]

Thus, Italian Constitution can be considered to feature a «business-as-usual» type of emergency management. Its only general provision about a possible situation of crisis is the very short article 78, on the state of war:

«*Parliament has the authority to declare a state of war and vest the necessary powers into the Government*».[2]

In the wake of the pandemic, a few commentators have suggested resorting to this provision, arguing that, by extensive interpretation, it could have allowed a better constitutional justification of the emergency legislation.[3] However, on the issue, we agree with the view of the majority that article 78 is a norm which

[1] A brief history of the debate on the opportunity of including general emergency clauses in the Italian Constituent Assembly can be found in ALIBRANDI, *op.cit*., 4-5

[2] Italian Constitution, art.78,
https://www.senato.it/1025?sezione=127&articolo_numero_articolo=78
English text: https://tinyurl.com/2vkf5wev

[3] For instance, CARLESIMO argues that the state of war «could have been uniformed to the state of health emergency» (*Stato di diritto e pandemia. Uno sguardo alle costituzioni emergenziali di Francia, Spagna e Germania e Ungheria ed un paragone con l'Italia*, https://tinyurl.com/uekzjks7); similarly, TORRE asks «wouldn't it have been better, considering the peculiarity of the emergency at issue, if the Parliament had stripped itself of its own powers, following a path already indicated by the Constitution?» (*La Costituzione sotto stress ai tempi del Coronavirus*, in *BioLaw Journal*, 2020, 1S, 67); CELOTTO, A., also invokes art.78 through an evolutive interpretation of the notion of "war"(*Necessitas non habet legem?*, Modena, Mucchi, 2020, 60, ref. by NICOTRA, I. A., *op.cit*., 124).

refers to a specific concept, war, seen as a «conflict among human beings».[4] Thus, a natural calamity such as a pandemic cannot be included.[5]

This means that all emergency provisions in the Italian Constitution can only be found within specific clauses. On the one hand, we have the ones dedicated to the possibility of limiting single rights: as we have said, we'll see them in Part IV. On the other, we have two articles detailing the emergency powers which can be attributed to the Government. The first, article 120, outlines that it «can act for bodies of the regions, metropolitan cities, provinces and municipalities if the latter fail to comply with international rules and treaties or EU legislation, or in the case of grave danger for public safety and security, or whenever such action is necessary to preserve legal or economic unity and in particular to guarantee the basic level of benefits relating to civil and social entitlements, regardless of the geographic borders of local authorities»[6]. It is included in Title V of the Constitution, dedicated to the Regions and, as such, is mostly about the relation between their authority and that of the central State.

The second provision we are interested in is article 77, which specifies a peculiar normative instrument: the decree-law (*decreto-legge*). It is a piece of primary legislation (meaning that, in the hierarchy of norms, it places at the same level of a parliamentary law) issued by the Government. In the Italian Constitution, indeed, there are two cases when the legislative authority can be seized by the Executive, in a breach of Montesquieu's principle of the separation of powers.[7] The first is the legislative decree (*decreto legislativo*): under article 76, the Parliament can delegate the exercise of the legislative function to the Government, but only when «principles and criteria have been established and only for a limited time and for specified purposes». The second case, and that's

[4] RESCIGNO, F., *La gestione del coronavirus e l'impianto costituzionale. Il fine non giustifica ogni mezzo*, in *Osservatorio Costituzionale*, 2020, 3, 260.
[5] LUCARELLI, A., *Costituzione, fonti del diritto ed emergenza sanitaria,* in *Rivista AIC,* 2020, 2, 567, which also quotes a list of further commentators agreeing with this view.
[6] Italian Constitution, art.120, see above note 2
[7] *Separation of powers*, in *Enc. Britann.*, https://www.britannica.com/topic/separation-of-powers

the object of our analysis, is article 77, which establishes an act that the Government may employ when required by urgencies:

«*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*».[8]

The decree-law is exactly, as we have seen in Part I, the kind of primary instrument which has been used by the Italian Government since the beginning of the emergency: in the year we are considering, it has issued twenty-nine such acts.[9] However, as we already know, they have often been employed in a way which is apparently very different from the one conceded by the wording of the article. They have, indeed, been used to delegated the adoption of specific measures to another act, the infamous DPCM. Whether or not this is admissible under the Italian Constitution has perhaps been the greatest point of contention on the legitimacy of the measures adopted by the Government since the beginning of the pandemic. As such, it will be a central point of our analysis in Part III.

Moving to the French Constitution, we immediately find several general emergency clauses. This is due not only to the confluence, in the current text, of provisions dating back to previous, turbulent periods of the history of the

[8] Italian Constitution, art.77, see above note 2

[9] *Raccolta degli atti recanti misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19. Raccolta degli atti emanati dal Governo*, in *Gazzetta Ufficiale della Repubblica Italiana*, https://www.gazzettaufficiale.it/attiAssociati/1/?areaNode=13

country,[10] but also to the very circumstances surrounding the birth of the Constitution. As it is known, it was drafted in 1958, when France was enmeshed in the bloody war of Algerian independence and the risk of a military coup seemed concrete.[11] Moreover, the country was also reminiscent of its disastrous defeat of June 1940 against the Nazi invaders, attributed by President Charles de Gaulle to the absence of special institutions, in the Constitution of the period, to face such crises.[12] As such, the text of October 4, 1958, which inaugurated the French Fifth Republic (the regime which has survived until today) tries to regulate emergencies as much as possible. The first and foremost provision is article 16:

*«Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council.*

*He shall address the Nation and inform it of such measures*».[13]

The activation of this article must fulfill a series of requirements, listed in the following paragraphs: the functioning of Constitutional authorities, including Parliament, must be guaranteed, the Constitutional Council must be consulted and, after thirty days, it can be addressed on the matter by the President or sixty members of either House. After sixty days, instead, the Council reviews the issue as of its right, without the need of being seized. Since the entry into force of the Constitution, article 16 was only activated once, in 1961.[14] With the pandemic,

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[10] LANDAIS, C. – FERRAN, P., *La Constitution et la guerre. La guerre est-elle une affaire constitutionnelle?*, in *Nouveaux Cahiers du Conseil Constitutionnel*, 2016, 51.
[11] COMBIS, H., *"Oui à la France, non à la dictature !" Il y a 60 ans, la Cinquième République,* https://tinyurl.com/6yu7p927
[12] LANDAIS, C. – FERRAN, P., *op.cit.*
[13] Constitution of October 4, 1958, art.16, see Chapter 3, note 21
[14] ViePublique.fr, *Quels sont les pouvoirs exceptionnels définis par l'article 16 de la Constitution ?* ,
https://tinyurl.com/zht8sxds

its provisions have become a useful yardstick to evaluate those of the new state of health emergency, as we shall see in Part III.

The next norm we may be interested in is the proclamation of the state of siege, which can be found in article 36:

«*A state of siege shall be decreed in the Council of Ministers.*

*The extension thereof after a period of twelve days may be authorized solely by Parliament*».[15]

Much like the state of war in the Italian Constitution, however, it cannot be employed during such a crisis as a pandemic. Article L2121-1 of the Defense Code clarifies it very well, stating that the state of siege can only be declared «in case of imminent danger deriving from a foreign war or an armed insurrection».[16]

As such, the regime which most closely resembles the state of health emergency, and the most immediate reference for judging its disposition, is the «simple» state of emergency, established by a law of 1955, also adopted in the context of the War of Algerian Independence.[17] However, since it is a piece of primary legislation, we'll review it later on when dealing with sources of law of this rank. This is not simply a pedantic work organization: all institutions called "state of emergency" are, usually, detailed in primary norms. As such, we'll be able to compare the French one with its homonyms in the Italian and Spanish legal systems: as we will see, striking differences exist despite them being named in the same way.

Accordingly, the last provision of the French Constitution we are interested in is article 38, detailing the power of the Government to issue ordinances:

«*In order to implement its program, the Government may ask Parliament*

[15] Constitution of October 4, 1958, art.36, see above Chapter 3, note 21
[16] French Defense Code, art.L-2121-1, par.1, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006539784/
[17] CERF, E., et al., *op.cit.*, 80

*for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law.*

*Ordinances shall be issued in the Council of Ministers, after consultation with the Council of State. They shall come into force upon publication, but shall lapse in the event of failure to table before Parliament the Bill to ratify them by the date set by the Enabling Act. They may only be ratified in explicit terms*.

*At the end of the period referred to in the first paragraph hereinabove Ordinances may be amended solely by an Act of Parliament in those areas governed by statute law».*[18]

This provision is the basis employed by the Law on the State of Health Emergency to delegate to the Government the power to infringe upon fundamental freedoms, since they are normally under the domain of the law, as required by article 34 of the Constitution. Therefore, it will return pin our discussion.

Finally, let's move a little to the South and analyze the Spanish Constitution. Similarly to its French homologue, it knows several states of emergencies. During the pandemic, the Government resorted to the first one, the state of alarm. Just like the other two, named «state of exception» and «state of siege» respectively, it is regulated by article 116:

*«An organic law shall regulate the states of alarm, emergency and siege (martial law) and the corresponding competences and limitations.*

*A state of alarm shall be declared by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorization the said period my not be extended. The decree shall specify the territorial area to which the effects of the proclamation shall apply».*

[18] Constitution of October 4, 1958, art.38, see above Chapter 3, note 21

The article goes on to say that, during all three of the states of emergency, the Congress cannot be dissolved and must be automatically summoned if not in session. If it has previously been disbanded or its term has expired, then its competencies are transferred to its Standing Committee (par.5) . The principle of responsibility of both the Government and its agents remains unmodified (par.6).[19]

As we have read, the state of alarm must meet a series of requirements, regulated by an organic law. However, before descending to a norm of lower level, the Constitution itself specifies some of these conditions. Thus, article 169 establishes that, when any of the three states of emergency is in effect, constitutional reform is not possible. Moreover, article 55 lists the right which can be suspended: personal freedom (art.17), inviolability of one's domicile and secrecy of correspondence (art.18), freedom of residence and movement (art.19), freedom of expression and press (art.20), freedom of assembly (art.21), freedom of strike (art.28) and right to collective labor dispute measures (art.37).[20] Such measures can be equally adopted during both state of exception and siege (with the only difference being the rights of the detainees, only derogable in the latter case). By exclusion, one can number the rights which, not being included here, are to be considered as either absolute or reinforced: examples are the freedom to life, physical and personal integrity, and the freedom from torture, all enshrined in article 14, or the right of defense, protected by article 24.

There is, however, a fundamental provision we have not mentioned: the derogable rights can be suspended, as we have read, but only in the States of exception and siege. The state of alarm is not mentioned in the article. As such, the only limitations to fundamental rights it can bring about are the ones listed in Article 11 of the organic law which regulates in detail the three regimes: the

[19] Spanish Constitution of 1978, art.116,
https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229
English text: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf
[20] DÍEZ PARRA, I., *El derecho de excepción: una perspectiva de derecho comparado. España: estado de alarma*. Bruxelles, European Parliament Research Service, 2020, 36.

n.4 of 1981. We will see it in a moment, as we delve into primary legislation. For the time being, suffice it to anticipate that the derogations it concedes during a state of alarm are much more restricted than the ones we have just read and, as such, much of the academic debate which has engulfed Spain during the COVID-19 crisis has been about whether it would have been more appropriate to declare a state of exception.

Finally, we only have to consider the ordinary instrument allowing the Government to intervene «in cases of extraordinary and urgent need»: the decree-law, detailed in article 86 of the Constitution. Very similar to the Italian one, it allows the Executive to «sue temporary legislative provision», provided that they do not affect «the regulation of the basic State institutions, the rights, duties and liberties contained in Title 1, the system of the Autonomous Communities, or the General Electoral Law».[21] Thus, a first main difference is the explicit provision of what the decree-law cannot regulate, with a second one being the time given to the Parliament to accept or repeal it: thirty days rather than sixty (par.2). However, during the emergency, most of the provisions which are most interesting to us have been adopted through decrees of the Council of Ministers, officially issued by the King of Spain as Royal Decrees under article 62, paragraph F of the Constitution. That's why we will pick them as the object of our analysis in the next chapter, together with the Organic Law of 1981 we have already mentioned.[22]

[21] Spanish Constitution of 1978, art.86, see above note 19

[22] In general terms, an organic law is a «fundamental law or constitution of a particular state or nation, either written or unwritten, that defines and establishes the manner in which its government will be organized» (*Organic Law,* in *West's Encyclopedia of American Law*, 2008, https://tinyurl.com/2w6p238h) , with the Constitution being a particular type of it. As such, in most legal systems, organic laws have the same force as the Constitution or are placed right below it, above ordinary legislation. However, this is not the case in Spain, where «all laws, as we have said, as expression of popular will belong to the same category» (Sentencia Tribunal Constitucional n.213/1996, 19 de diciembre, par. 9A, https://tinyurl.com/sfcxvu43), and ordinary and organic laws are only differentiated by virtue of their matter of competence, with only the latter ones being able to regulate those listed in article 81 of the Constitution (development of fundamental rights and public freedoms, approval of Statutes of Autonomies regulation of the general electoral system and a number of other issues established by the Charter).

## Chapter 8 – The primary legislation and administrative level

As we have seen in Part I, the legislation against COVID-19 has been enacted, for the most part, through administrative powers, defined by the Oxford Reference dictionary as

«*discretionary powers of an executive nature that are conferred by legislation on government ministers, public and local authorities, and other bodies and persons for the purpose of giving detailed effect to broadly defined policy*».[1]

«Every sphere of public administration»[2] possesses such authority, from the local town council to the top of the system, which is the executive power – usually, in modern countries, the Government.[3] Under the principle of legality, one of the key features of modern rule of law, such authority needs to be grounded in laws of the Parliament, which is exactly primary level legislation.[4] That's why the chapter will be structured in the following way: first, we will analyze the specific dispositions about states of emergencies. Second, we will scan the legal system in search of the provisions laying the foundation for the administrative powers employed by the members of the Governments in taking on the pandemic. Since every sphere of public administration, as we have just read, possesses such an authority, we could continue our analysis all the way down to local administrators. However, as we have already stated multiple times, sub-national levels of government are excluded by our research. As such, we will not take into account, for instance, the discretionary power granted to mayors. Obviously, we will also not consider the laws enacted to specifically target the COVID-19 pandemic: respectively, the two decree-laws n.6 and 19 of 2020 for Italy, the law n.2020-290 establishing the state of health emergency for France, and the numerous Decrees issued in Spain. For all of them, we have

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[1] *Administrative Powers*, in *Oxford Reference*, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095351936

[2] ibidem

[3] CARETTI, U. – DE, SIERVO, P.*, op.cit.*, 243

[4] ROBSON, W.A. AND PAGE, E. C., *Administrative law*, in *Encyclopedia Britannica*, https://www.britannica.com/topic/administrative-law.
See also the definition given by the United Nations of the concept of supremacy of law (Chapter 5, note 7).

already analyzed their dispositions in Part I: as such, this chapter will be dedicated to inquire the primary legislation as it was before the pandemic, in order to be able to determine, later on, whether the introduction of whole new norms was pointless or even dangerous to the rule of law.

Starting, as always, from Italy, the main law we are interested in is the Legislative Decree n.1 of 2018, titled «Code of the Civil Protection», with the Civil Protection being «the system that performs the civil protection function consisting of a set of skills and activities aimed at protecting safety and life, physical integrity and property, settlements, animals and the environment from damage or threat of damage caused by disasters of natural origin or man-made», as stated by its article 1, paragraph 1.[5] Such calamities, under article 7, are grouped into three types: those which can be confronted through ordinary activity; those who require the coordination of several administrative units and must be faced through extraordinary means; and those «which, by reason of their intensity or extension, must, with immediate intervention, be faced with extraordinary means and powers to be employed during limited and predefined periods of time pursuant to Art. 24» (par. 1c). As one can imagine, the COVID-19 pandemic fits exactly into this last category. When such a crisis arises, the Council of Ministers declares the national state of emergency, as was the case on January 31, 2020 (art.24, par.1).[6] It can last no more than twenty-four months (par.3). The crisis can be combatted through acts called «Ordinances of Civil Protection»: the power to issue them, despite pertaining officially to the Prime Minister under article 5, is exercised by the Head of the Service. Article 25 establishes that such norms be emanated «in derogation to any current provision, within the limits and with the methods indicated in the resolution of the state of emergency and in the respect for the general principles of the legal system and European Union rules» (par.1). They can dispose a series of measures, for the most part relating to the organization of relief interventions or to the

[5] Decreto Legislativo 2 gennaio 2018, n. 1 - «Codice della protezione civile», https://www.gazzettaufficiale.it/eli/id/2018/1/22/18G00011/sg
English text: https://tinyurl.com/2wdnuxbn
[6] see above Chapter 1, note 4

reconstruction of damaged infrastructures. The provision which, in our opinion, would lay the most plausible foundation to the measures adopted for the COVID-19 emergency is the following one: «implementation of interventions, including structural measures, to reduce the residual risk in the areas affected by disasters, closely linked to the event and aimed primarily at protecting public and private safety, in line with existing planning and planning tools» (par. 2d).

To all of this, we must add the power of ordinance attributed to the Minister of Health by article 32 of the Law of December 23, 1978, establishing the National Health System: he or she can «issue contingent and urgent ordinances on hygiene, public health and veterinary police, valid on the whole national territory or a part of it including more than one Region».[7]

Moving to France, the first and foremost provision we must take into account, as we had anticipated, is the law n.55-385 of April 3, 1955 on the state of emergency.[8] It can be declared, by decree of the Council of Ministers (art.2), over the whole territory or a part of it, both in case of a danger which threatens the public order or «in the case of events displaying, due to their nature and seriousness, the character of public calamity» (art.1). Its duration cannot exceed twelve days: when this term expires, it can only be prolonged through a law of the Parliament (art.2). The measures which can be taken have been modified a number of times, especially after the state of urgency was most recently proclaimed for nearly two years in the wake of the tragic terrorist attacks of November 13, 2015. When it ended, some of its provisions were, controversially, even integrated into the ordinary legal system through the Law against terrorism of October 30, 2017[9]. Most of them, such as the power to dissolve associations (art.6-1), mandate requisitions of weapons and ammunitions of certain

[7] Legge 23 dicembre 1978, n.833 - «Istituzione del Servizio Sanitario Nazionale», art.32, https://www.gazzettaufficiale.it/eli/id/1978/12/28/078U0833/sg

[8] Loi n.55-385 du 3 avril 1955 relative à l'état d'urgence, see above Chapter 3, note 7

[9] ViePublique.fr, *De l'état d'urgence à la loi renforçant la sécurité intérieure et la lutte contre le terrorisme,*
https://tinyurl.com/3p6yytku
CERF, E., et al., *op.cit*., 80
The Editorial Board of the New York Times, *Emmanuel Macron's Unfettered Powers,*
https://www.nytimes.com/2017/06/12/opinion/emmanuel-macron-terrorism-france.html

categories (art.9) or perquisitions (art.11) and block websites promoting terrorism (ibidem) are mostly related to the preservation of public order. Among the provisions which could have been used to fight the COVID-19 pandemic, we find the possibility of forbidding circulation (art.5, par.1), imposing the temporary closure of exhibition centers, liquor stores and places of reunion of any kind (art.8) and placing under house arrest any person «whose behavior represents a threat to public safety or order» (art.6). Likewise, any gathering likely to incite or provoke disorders can be interdicted (art.8, par.2).

In spite of such measures being clearly designed with the primary goal to restore law and order in the wake of such events as terrorist attacks or armed insurrections (indeed, these were also the cases when they were activated in the past)[10], most of the debate surrounding the action of the Government during the COVID-19 pandemic revolved around whether or not it would have been appropriate to use them instead of introducing a whole new exceptional regime such as the state of health emergency.

Indeed, neither the law of 1955 nor any of its derivations were ever employed to tackle the pandemic. On the one hand, the prefects resorted to the Code on the Territorial Collectivities, in particular its articles L2212-2, paragraph 5 (the municipal police cares to prevent and put a stop to epidemic or contagious diseases) and L2215-1, paragraph 1 («the representative of the State [the prefect indeed, …] can take […] any measure related to the safeguard of health, safety and public peace»)[11]. On the other hand, the Prime Minister and the Minister of Health employed article L3131-1 of the Code of Public Health – as it was before being modified by the Law on the state of health emergency. The norm closely resembled its homologue in Italy, as we can read:

«*in the event of a serious sanitary danger demanding emergency measures, notably under the threat of an epidemic, the Minister of Health can,*

[10] ViePublique.fr, *État d'urgence et autres régimes d'exception (article 16, état de siège),* https://tinyurl.com/yjsz8bzu
[11] Code général des collectivités territoriales, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070633/2021-04-06/

*by motivated order, command in the interest of public health any measure which is proportional to the existing risks and appropriate to the circumstances of time and place so as to prevent and limit the consequences of such threats on the health of the population*».[12]

The most attentive readers will certainly raise a question: why was this provision employed by both Ministers when it clearly attributes such powers only to the one in charge of Health? This is another point of contention, as we will see later on.

Finally, Spain is the only country among the three which did not enact a totally new legislation for the pandemic, resorting to the Organic Law n.4 of 1981 which regulates the three states foreseen by article 116 of the Constitution. It mandates that they can be enacted «when extraordinary circumstances prevent the safeguard of normality through the ordinary powers of the competent Authorities» (art.1, par.1). The measures adopted must be «strictly indispensable» and «proportional to the circumstances» (par.2) and cannot interrupt «the normal functioning of the constitutional powers of the State» (par.3). Whoever has suffered a damage as a result of them maintains the right to demand compensation before a judge (art.3).[13]

The remainder of the law is divided into three chapters, one dedicated to each state of emergency. Thus, we are mostly interested in the second one, which regulates the state of alarm. It can be declared in the wake of a number of «serious alterations of normalcy», including exactly «health crises such as epidemics or grave situations of contamination» (art.4, par.b). As it happened during the COVID-19 pandemic, such declaration takes the form of a Decree of the Council of Ministers, determining the «territorial scope, the duration and the effects of the state of alarm». It cannot last longer than fifteen days: after this deadline, its prorogation must be approved by the Congress of Deputies. Non-

[12] Code de la Santé Publique, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072665/?isSuggest=true
[13] Ley Orgánica 4/1981, de 1 de junio, de los estados de alarma, excepción y sitio, https://www.boe.es/buscar/act.php?id=BOE-A-1981-12774

compliance with the measures adopted is sanctioned «according to the laws» (art.10, par.1). Said norms can command limitations of circulation and permanence of people or vehicles at certain times or in certain places, requisitions, personal obligations, temporary occupations of factories, industries or any other space, with the exception of private houses, rationings of food or services and any order to ensure supply of primary goods (art.11). Beside them, competent authorities may also resort to the norms on the fight against infectious diseases, on the protection of the environment, on the treat of waters or forest fires (art.12).

Do these provisions offer adequate legal basis for the measures adopted during the pandemic? To many, the answer is not, and the Government should rather have looked at the following Chapter, which regulates the state of exception. Far more detailed than the previous one, it directly states the conditions for the suspension of any of the fundamental rights which could be infringed. Some of the provisions more closely resemble the one taken during the pandemic. Thus, under the state of exception, the Government can not only limit circulation, but also demand people to prove their identity and declare their route whilst displacing (art.20, par.1), as well as impose any citizen to preventively declare any movement outside of their place of residence or, on the contrary, establish their temporary dwelling in a certain place (par.4). Similarly, gatherings and manifestations can be subject to preventive authorization (art.22, par.1), lest they be performed by political parties, trade unions or employers' federations (par.3). Most importantly, industries or businesses which may endanger public order can be temporarily suspended, and exhibition centers, liquor stores and similar places can be shut down (art.26). Whether or not these provisions would have been a more solid foundations for the measures taken during the pandemic will be a central point of our analysis in Parts III and IV.

Beside the Organic Law, the Spanish legal system knows a number of primary provisions dedicated to the protection of public health. Thus, the shutdown of industries and businesses when a sanitary risk is underway is

allowed by article 26 of the General Health Law;[14] the control of ill people, of their close contacts and their surrounding environment is expressly authorized by article 3 of the Organic Law n.3/1986 on Special Measures in Matters of Public Health;[15] and article 54, paragraph 2f of the General Law of Public Health allows to take any measure «coherent with current legislation in case of reasonable risks to public health». It cannot exceed the «required duration» and must «in any case respect the principle of proportionality».[16]

None of these articles, however, was relevant in authorizing the administrative power of the Minister of Health: all of his orders, in their recitals, make reference to the Decrees emanated during the pandemic. Still, the concept of proportional measure continues to feature prominently.[17]

Indeed, as we have seen, any time a public authority is given the power to take exceptional measures or to derogate from the law, whether it be in international, constitutional or primary norms, it must respect a number of stringent requirements. Even when such rules are not explicitly stated, as in the case of ordinances like the ones conceded to the French prefects or to the Ministries of Health, it is still necessary to abide by a number of conditions established by constitutional jurisprudence. Though each of the three legal system has its own different tradition of administrative powers, we can build a unified model of the principle of legality by comparing all the legislation we have just scanned. Thus, we can say that in France, Italy or Spain, the conferment of exceptional powers upon the government must respect the following criteria: first, it must adhere to the general tenets of the legal systems, meaning that any measure allowed must be proportional, temporary, and cannot innovate any

[14] Ley 14/1986, de 25 de abril, General de Sanidad, art.26, https://www.boe.es/buscar/act.php?id=BOE-A-1986-10499

[15] Ley Orgánica 3/1986, de 14 de abril, de Medidas Especiales en Materia de Salud Pública, art.3, https://boe.es/buscar/act.php?id=BOE-A-1986-10498

[16] Ley 33/2011, de 4 de octubre, General de Salud Pública, https://www.boe.es/buscar/doc.php?id=BOE-A-2011-15623

[17] For instance, the preamble of the Royal Decree 463/2020, establishing the national lockdown, explicitly declares that «the measures of the present decree are indispensable to tackle the situation and result proportional to its extreme seriousness», see above Chapter 4, note 7

domain reserved solely to laws of the Parliament;[18] second, it must clearly indicate the authority vested, the measures it can take, and the sectors of the legal systems which are derogated.[19]

The reason for their existence is simple: were they absent, the State would violate the rule of law by giving its public authorities a blank check. The Venice Commission states this very well by listing the «prevention of abuse of powers» as one of the foundations of this principle: it is necessary that «the discretionary power of the officials is not unlimited, and it is regulated by law»[20].

We can divide the two elements of this phrase to recognize the merit and formal requirements we have already mentioned[21]. Thus, in the next Chapter, we will review the basic tenets of the rule of law in order to build a yardstick that will, then, allow us to more thoroughly inquire the new legislation enacted to combat the COVID-19 pandemic in Parts III and IV.

[18] The last sentence is expressed by the principle known, in Italian, as «*riserva di legge*»: the French and Spanish names are direct translation «*réserve de loi* and *reserva de ley*». English knows no direct rendering apart from the much wider concept of «rule of law».
[19] For a brief bibliography on the criteria regulating the administrative powers in each country, see ALIBRANDI, A., *op.cit*.; MANFREDI, G., *Potere di Ordinanza*, in *Enciclopedia Treccani*, https://tinyurl.com/ayyuuru9; WEIL, P. - POUYAUD, D., *Chapitre premier. La limitation par le droit : le principe de légalité*, in PROSPER, W. (ed.), *Le droit administratif,* Paris, Presses Universitaires de France, 2017, 77 ff ; MUÑOZ MACHADO, S., *Tratado de Derecho Administrativo y Derecho Público General. Tomo III : Los principios de constitucionalidad y legalidad*, Madrid, Agencia Estatal BOE, 2015. ARGENTINI, M., also points out that the ECtHR employs similar criteria: «when the law establishes a delegation to the administrative authorities, such delegation must indicate precisely the boundaries of the subsequent delegated legislation, as one must hold that a "blank delegation" does not fit the requirement of legislative predetermination demanded by the Court» (*op.cit*., 162).
[20] Council of Europe – Venice Commission, *Rule of Law*, https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN
[21] Declaration of the Rights of Man and Citizen, art.6, see above Chapter 5, note 1

## Chapter 9 – The rule of law

The rule of law is a concept so wide as to render almost impossible a comprehensive analysis.[1] Indeed, most international organizations, rather than adopt a «positive» definition, usually resort to describing its core elements.[2] And yet, the notion is so central as to be quoted in a number of legal documents, both at the international and the national level. For instance, as we have already seen in Chapter 5, it represents one of the core values of the EU.[3] Similarly, it is one of the three central tenets of the Council of Europe, together with human rights and democracy.[4] It also features prominently in the Spanish Constitution, both in the Preamble («the Nation proclaims its will to […] consolidate a State of Law which ensures the rule of law as an expression of the popular will») and in article 1 («Spain is hereby established as a social and democratic State, subject to the rule of law»)[5].

In the French and Italian texts, instead, and this shall be a good starting point for our analysis, the concept of «rule of law» does not appear, replaced by another, fundamental tenet: democracy. Both States define themselves as democratic republics in the very first article. Does this mean that they are not

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[1] ZANGHELLINI, A., *The Foundations of the Rule of Law*, in *Yale Journal of Law & the Humanities*, 2016, XXVIII.2, 213 ff.

[2] For instance, for the Venice Commission, « the Rule of Law was indefinable… Rather than searching for a theoretical definition, it therefore took an operational approach and concentrated on identifying the core elements of the Rule of Law» (see above Chapter 8, note 17) while for the European Commission, «the rule of law includes principles such as...» (*2020 Rule of Law Report – Question and answers*, https://tinyurl.com/2nmk5dkf). Among direct definitions, see the one given by the UN which we have already reported in Chapter 5, note 7: «the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards».

[3] Treaty on EU, art.2, par.1, see above Chapter 6, note 28

[4] Venice Commission, see above Chapter 8, note 17

[5] Spanish Constitution of 1978, Preamble and art.1, see above Chapter 7, note 19 .
We use interchangeably the concept of «rule of law» and its German equivalent «*Rechtstaat*»: most other languages use a direct translation of the latter (in Italian «*stato di diritto*», in Spanish «*estado de derecho*», in French «*état de droit*» and so on). The two terms are not identical, but an analysis of the differences between them is beyond the scope of our work. To give just an hint of their complex interrelation, suffice it to say that, in the official translation of the Spanish Constitution we are using, the phrase «*Estado de Derecho*» is rendered here as «State of Law» rather than «rule of law»: this last wording is employed for «*imperio de la ley*», literally «domain of the law». A brief bibliography about their difference can be found in BARAK, *op.cit*., 227.

rule of law countries? Of course, the answer is no. Both Constitution are disseminated of principles which, taken together, create a rule of law system. What are said principles?

The official portal of the French Republic lists three: respect for hierarchy of norms, equality of all citizens before the law, and independent justice.[6] Starting from them, we can build our own definition to use it in our research, by recalling many concepts we have already analyzed in previous chapters.

The concept of hierarchy of norms is, perhaps, the one that most distinguishes rule of law from a mere «rule by law» or «law of rules»: in this latter regime, nothing precludes the government from changing the norms whenever it chooses.[7] Thus, as we have already seen in the previous chapters, one of the key aims of the rule of law is keep the public authority from carrying out abuses. This is done through the principle of legality: «all the subjects of law, individual citizens and legal entities, […] public authorities and private institutions or organizations should abide by the law and by all the other normative acts based on it»,[8] as we have already seen extensively in Chapter 8. Laws, however, are not all of the same force: they are, indeed, arranged in a hierarchy. This has been the case since antiquity, where some acts bore more importance than others: in Latin, the ones emanated by top authorities, either the Senate or the Emperor, were called «*constitutiones*», hence our term «Constitution»[9]. As we have seen in Chapter 5, it places above any other norm, being the expression of the central values of a society. This helps to guarantee that the rights of everyone are preserved, preventing a «tyranny of the majority»[10]. Such a goal is achieved through a number of tools, from the

[6] ViePublique.fr, *Qu'est-ce que l'État de droit ?,* https://www.vie-publique.fr/parole-dexpert/270286-quest-ce-que-letat-de-droit

[7] TUSHNET, M., *Rule by Law or Rule of Law?*, in *Asia Pacific Law Review*, 2014, XXII.2, 80.

[8] DRAGHICI, T. – STOIAN, A., *The principle of legality, principle of public law*, in *International Conference KNOWLEDGE-BASED ORGANIZATION*, 2015, XXI.2, 513.

[9] ROBUSTELLI, F., *Che cos'è una costituzione per le scienze sociali?,* https://www.lacooltura.com/2018/01/costituzione-scienze-sociali-67208/

[10] BISARYA, S., correctly argues that «the ultimate test of the rule of law is whether or not it protects against tyranny» (*The Foundations of the Rule of Law – Time to Think and Act Politically,* https://tinyurl.com/mjk3kpbc)

requirements of particularly burdensome procedures to amend the Constitution,[11] to the imposition of limits on the legislative power,[12] to the provision that some principles be never changed until its text is in effect.[13] That's why, in the end, «respect for the hierarchy of laws is fundamental to the rule of law».[14]

If, however, all of this aims to protect the right of every citizen, we are directly led to the second core principle of rule of law: human rights. According to the UN, «there is no rule of law within societies if human rights are not protected and vice versa»[15]. It stems that, in a constitutional democracy, fundamental freedoms «cannot be limited unless such a limitation is authorized by law». If the «authorization chain» cannot be traced back to a constitutional justification, the limitation becomes void[16]. Obviously, this mere formal aspect is not enough to establish a rule of law. The reason is simple: if the principle were limited to a tenet of formal legality, then it could also apply to regimes severely violating human rights.[17] As Zanghellini puts it, «the rule of law, according to the substantive conception, is not exhausted by procedural and formal requirements for, while insisting on these requirements, the rule of law additionally demands that law be, in some nontrivial sense, substantively just»[18].

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[11] Mainly through four types of requirements: supermajorities, referenda, double-decision rules or reference to constituent units (BÖCKENFÖRDE, M., *Constitutional Amendment Procedures*, Stockholm, International IDEA, 2nd ed. 2017, 6).

[12] We have seen, for instance, that both French and Spanish Constitution establish that certain matters can only be regulated through organic laws.

[13] ŽALIMAS, D., *Eternity Clauses: a Safeguard of Democratic Order and Constitutional Identity*, https://tinyurl.com/4wt7nzpu

[14] CLEGG, M., et. al., *The hierarchy of laws - Understanding and Implementing the Legal Frameworks that Govern Elections*, Arlington, International Foundation for Electoral Systems, 2016, 1.

[15] United Nations, *Rule of Law and Human Rights*, https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/

[16] BARAK, A., *op.cit*., 107

[17] Ibidem, 230. Similarly, ELLIS, M., points out that «the problem with a strictly formal definition of the rule of law is that it provides no guidance vis-à-vis regimes that establish clear legal rules yet commit egregious human rights violations and flout international obligations» (*Toward A Common Ground Definition Of The Rule Of Law Incorporating Substantive Principles Of Justice*, in *University of Pittsburgh Law Review*, 2010, LXXII.2, 194).

[18] ZANGHELLINI, A., *op.cit.,* 214

It appears clear, then, that it must also feature a substantial aspect on the protection of fundamental freedoms. They can only be limited under a series of criteria. We have seen a large list of them when reviewing *ad hoc* provisions in the previous chapters. We can sum them up through a very concise yet rich concept: any limitation or derogation must be proportional.

This however, is not enough: the law mandating such limitations – but the same goes for any other law - also needs to be «clear, publicized, and stable»[19]. This tenet is known as «legal certainty»: on the one hand, it requires normative clarity, that is to say that the law should be accessible, easily interpreted even by people who are not specialists and consistent through time. The last requirement also entails the fundamental rule of «*nullum crimen and nulla poena sine lege*», meaning that nobody can be either charged with nor face punishment for an act that, when it was committed, was not considered a crime by the law.[20] This right not be subject to retroactive criminal legislation is, as we have seen, considered absolute by all major texts on human rights.

What happens, however, if these principles are breached? The rule of law requires that both formal and substantive aspects are ensured through a number of other values which are just as important: first, the right of access to justice to everyone, in order to let them claim reparation for any infringement of their fundamental freedoms; [21] second, the independence and impartiality of the judiciary; and third, the principle of separation of powers. These are considered the procedural foundations of the rule of law. [22] Separation of powers, in

[19] World Justice Project, *What is the Rule of Law?,* https://tinyurl.com/jymvj2ah
The requirements grow to be as numerous as eight in FULLER, L.: generality, publicity, perspectivity, intelligibility, consistency, practicability, stability and congruence (*The Morality of Law*, New Haven, Yale University Press, 1964, ref. by WALDRON, J., *The Rule of Law and the Importance of Procedure*, in *NOMOS: American Society for Political and Legal Philosophy*, L, 2011, 5-6). The Venice Commission, instead, only lists three: the law must be certain, foreseeable and easy to understand (see above Chapter 8, note 17).
[20] KEDIA, B., *Nullum crimen sine lege in international criminal law: myth or fact?,* in *International Journal of International Law*, 2015, I.2, 1 ff.
[21] LawTeacher.net, *Access to Justice and Rule of Law*, https://tinyurl.com/cutd9jb4
[22] WALDRON, J., *The Rule of Law*, in *The Stanford Encyclopedia of Philosophy,* 2020, https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=rule-of-law

particular, is central to the analysis of such an emergency as COVID-19 since, even during a situation like this, «Government officials must obey the rules which Parliament has enacted and this can only be ensured if the courts have the jurisdiction to enforce the legal limits which govern the exercise of executive power».[23] The «rules which Parliament has enacted» are, as we already know, the expression of the general will, and that is the reason why they shall always prevail over governmental authority: «in a Democracy the Rule of Law means Parliament is supreme over the Executive».[24] Indeed, as the legislature represents the population, we can assume that «laws will be just if they are informed by general consent»[25], provided that such consent takes minority rights into due consideration.[26] If that is the case, then democracy becomes a fundamental tenet of rule of law, and we can argue with the that the two concepts are «interlinked and mutually reinforcing».[27] This also allows us, returning to the starting point, to define France and Italy as rule of law countries through their provision to be democratic republics. But since the democratic procedures are also considered a fundamental prerequisite of the principle of legality, as they promote accountability and limit the powers of the majority, we have just carried out a circular analysis, and showed that all the core elements of the rule of law are intertwined to each other.[28] After having eviscerated them, we can now select the ones which are most relevant to our analysis to determine whether or not they were respected in the face of the COVID-19 pandemic.

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[23] MEYERSON, D., *The Rule of Law and the Separation of Powers*, in *Macquarie Law Journal*, 2004, IV, 2.

[24] HUNT, M., *In a Democracy the Rule of Law means Parliament is supreme over the Executive,* https://tinyurl.com/9bmcfw9n

[25] BEDNER, A., *An Elementary Approach to the Rule of Law,* in *Hague Journal on the Rule of Law*, 2010, II.1, 62.

[26] PATRICK, J., strongly states that «constitutional democracy in our time requires majority rule with minority rights» (*Majority Rule and Minority Rights, https://tinyurl.com/45d9myf3)*

[27] Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 19 September 2012, par. 5, http://unrol.org/files/Official%20Draft%20Resolution.pdf. Rule of Law, democracy and human rights are defined as «intertwined and partly overlapping» also in the Checklist of the Venice Commission (see above Chapter 5, note 8)

[28] Venice Commission, Rule of Law Checklist, see above chapter 5, note 8, par.50

# Part III. The formal aspects: the principle of legality, the centrality of Parliaments and legal certainty

## Chapter 10 – Introduction: formal and substantive aspects of the rule of law

In the previous chapter, we have adopted highlighted formal, substantive elements and procedural components of the rule of law. Such a distinction is shared by some authors,[1] but many other sources do not employ it, preferring to focus on the inherent interrelation among all elements. For instance, the Checklist of the Venice Commission divides the rule of law into five core parts: legality, legal certainty, prevention of abuse of powers, equality before the law, and access to justice.[2] Bingham, on the other hand, enumerates eight tenets: «law should be accessible, clear and predictable; questions of legal right and liability should be decided by application of the law; the law of the land should apply equally to all, except when objective difference requires differentiation; public officials should exercise their powers in good faith, and not exceed their powers; the law must protect fundamental rights; a method should be provided, at reasonable cost, to resolve civil disputes; adjudicative procedures must be provided by the state should be fair; the rule of law requires the state to comply with its obligations in international law».[3]

In some cases, the same component may be considered formal by some authors and procedural or substantive by others. Thus, Raz, whilst defending a view of the rule of law made up by only formal elements, includes an independent judiciary,[4] while Barak has it derived from a substantive conception

[1] For instance, WALDRON, J., writing for The Stanford Encyclopedia of Philosophy, adopts this very categorization (*op.cit*.); BEDNER, on the other hand, calls procedural elements «controlling mechanism» (*op.cit*.) while LAUTENBACH, G., also states that a distinction can be made «between formal and substantive views on the rule of law», with the former ones focusing on procedural elements (*The Concept of the Rule of Law and the European Court of Human Rights*, Oxford, Oxford University Press, 2013, 20-21).

[2] Venice Commission, Rule of Law Checklist, see above chapter 5, note 8,

[3] BINGHAM, L., *The Rule of Law*, in *The Cambridge Law Journal*, 2007, LXVI.1, ref. by LawTeacher.net, *The Rule of Law Lecture*, https://www.lawteacher.net/lectures/public-law/the-rule-of-law/#citethis

[4] RAZ, J., *The Rule of Law and its Virtue*, in RAZ, J., *The authority of law: Essays on Law and Morality*, Oxford, Clarendon Press, 1979, 210-211.

and notices how other core values, such as the subordination of the executive to the legislative, can be ascribed either to the formal or to the substantive aspect.[5]

However, for our analysis, we will stick to a two-fold distinction, separating formal aspects, inquired in Part III, from substantive elements, featured in Part IV. This is due to two main reasons. First, we believe that this is the best way to provide a more ordered exposition. Second, and most importantly, lies a motive central to our very thesis: the distinction of importance between substantive issues, which are to be assessed in the most rigid way, and formal questions, whose oversight, on the other hand, may be "forgiven" out of necessity under certain criteria. As we will see, this is exactly what many commentators have proposed to justify the actions of the three Governments. Of course, it is a rather strong theory, which needs to be proven: this is, in a sense, the core of our research, and we will develop it in the last chapters of both Parts.

The three formal components of the rule of law we have selected for our analysis are those which have been apparently the most jeopardized during the COVID-19 pandemic: the principle of legality, the respect for the centrality of Parliaments, and the need for legal certainty.

As such, we will start by considering, in Chapter 11, whether or not the measures taken were consistent with established laws, including the principle of legality of exceptional administrative powers which we have detailed in Chapter 8. Obviously, this kind of analysis will be very different for the three countries featured in our research. As we know, while Spain has employed previously existing norms, Italy and France have instituted brand new emergency regimes. Needless to say, though, both still need to be assessed against Constitutional provisions and the supreme principles of their legal systems. Then, in Chapter 12, we will ask ourselves whether or not the measures respected the separation of powers, that is to say the centrality of Parliaments. Finally, we will wrap up

[5] BARAK, A., *op.cit*., 231. Very similarly, CRAIG, P., affirms that «the constraints imposed through judicial review are in part procedural and in part substantive» (*Definition and conceptualisation of the rule of law and the role of judicial independence therein*, in CRAIG, P. et al., *Rule of Law in Europe. Perspectives from practitioners and academics,* s.l., European Judicial Training Network, 2019, 7).

Part III by inquiring, in Chapter 13, an issue that has characterized all three countries: the clarity and certainty of measures, including the principle of non-retroactivity of criminal legislation.

Of course, there are a number of other topics which could have been equally important: for instance, the issue of access to justice. However, in general, it seems to us that this question can be left aside for two main reasons. First, most measures which could impair said right pertain to specific procedural dispositions issued to organize trials in conditions of safety. As such, reviewing them would be beyond the scope of our work.[6] Second, and perhaps most importantly, courts have never ceased to issue rulings on the topic we are most interested it, that is to say the admissibility of «stay-at-home» measures. Indeed, many of them will also feature prominently in our research. A complete different question is whether or not said sentences were too lenient towards government measures.[7] As a matter of fact, the issue of the evolution of the jurisprudences in all of the three countries will be a strong argument in support of our thesis, as we will in Chapter 17. As regards the respect of the rule of law, however, it seems to us that such tenets as the independence of the judiciary or the right of defense were not really called into question: "filo-government" rulings may be challenged and questioned in a democracy, but it takes more than that to determine that a country has foregone the autonomy of its judiciary order.[8] After

[6] Apart from the ones we have quoted in Part I, see *ex plurimis* CANESTRINI, N., *Covid-19 Italian Emergency Legislation and Infection of the Rule of Law*, in *New Journal of European Criminal Law*, 2020, XI.2, 116 ff.; JEAN, J.-P., *Les systèmes de justice face à la pandemie du Covid-19*, https://tinyurl.com/2nnescdh; DE RUYSSCHER, M., *L'accès à la justice durant la crise du Coronavirus*, https://tinyurl.com/bcpt2w8v; GONZÁLEZ FERNÁNDEZ, A. I., *El impacto de la COVID-19 en la administración de justicia. La necesidad de impulsar la mediación en el ámbito civil*, in *Revista de Mediación*, 2020, XIII.2

[7] For instance, CECILI, M., and CHIAPPETTA, A., criticize the «deference» of administrative judges in Italy while commending the «more incisive control» performed by ordinary ones (*Come la pandemia Covid-19 ha influenzato l'ordinamento giuridico italiano*, in MARINI, F.S. – SCACCIA, G., *Emergenza COVID-19 e ordinamento costituzionale*, Torino, Giappichelli, 2020, 35 ff.); similarly DEFFENU, A., and LAFFAILLE, F., call the French Council of State «weak protector of freedoms» (*Stato di emergenza sanitaria e Covid-19: (breve) lettura francese di un fenómeno giuridico abnorme*, https://tinyurl.com/3pzyvdnv).

[8] And indeed, as LUGARÀ, R. points out, the persistence of procedural guarantees is, for instance, one of the fundamental criteria employed by the ECtHR while reviewing exceptional measures (*op.cit*., 362)

all, the very existence of an increasing number of rulings denying the legitimacy of the lockdown measures is the best confirmation of our thesis.

Finally, a brief *caveat*: we have long reflected whether it would have been more appropriate to organize these last two Parts in a manner similar to the first one. This means that we would have again dedicated a chapter to each country, rather than focusing on the elements of the rule of law. In the end, however, we have decided to stick by our original idea because such an organization appears, in our opinion, more suitable to a work of comparative law. It will allow us, indeed, to analyze all the possible aspects of a given issue and, when focusing on a single country, to have terms of comparison immediately at hand, rather than being forced to continuously reference other chapters. We hope that this will improve the overall quality and clearness of our work. Of course, however, the best judge of our decision can only be the reader.

## Chapter 11 – The principle of legality

The principle of legality occupies a special place amongst the elements of the rule of law: in the words of Lupo and Piccirilli, «few other principles of law constitute such an important cornerstone of the constitutional and administrative architecture».[1] Analyzing the compliance of lockdown measures with «existing laws» may seem an impossible task, given the amount of norms that such an expression may refer to. However, our work is greatly helped by the fact that we have already selected the relevant provisions in chapters 7 and 8.

Starting, as always, from Italy, let us depart from the very beginning: the declaration of the state of emergency, established by the Decision by the Council of Ministers of January 31, 2020.[2] It seems to us that it should be considered perfectly lawful and appropriate to the situation. Not everyone agrees on this point: for instance, a famous ruling by the Justice of the Peace of Frosinone, a town in Lazio, found that the declaration was illegitimate.[3] The judge argued that the Code of Civil Protection, which we have examined extensively in Chapter 8, makes no reference to the hypothesis of declaring a state of emergency for sanitary risks. As such, the Decision of January 31 must be considered unlawful and, as a consequence, so must be all subsequent administrative acts.

Such a reasoning appears, indeed, rather questionable: as we already know, article 7, par. C of the Legislative Decree n.1/2018 simply establishes that the nationwide state of emergency can be declared in the event of «emergencies of national importance connected with natural origin or man-made disasters».[4] Since the norm is formulated in general terms, it is unclear why one would affirm, as the judge does, that the word «disasters» can only refer to such events as «earthquakes, avalanches, floods or fires», excluding epidemics like COVID-

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[1] LUPO, N. – PICCIRILLI, G., *The Relocation of the Legality Principle by the European Courts' Case Law: An Italian Perspective*, in *European Constitutional Law Review*, 2015, XI.1, 56.
[2] Delibera del Consiglio dei Ministri 31 gennaio 2020, see above Chapter 2, note 4
[3] Giudice di Pace di Frosinone, Sentenza n.516/2020, 29 luglio, par. A, https://tinyurl.com/2hjy946h
The Justice of the Peace, in Italian «*Giudice di Pace*», is an honorary judge tasked with settling small claims, i.e. «disputes involving movable assets with a value of €5 000 or less», in both civil and criminal matter (https://tinyurl.com/3yp3k7hd)
[4] DECRETO LEGISLATIVO 2 gennaio 2018, n. 1, see above Chapter 8, note 5

19. Thus, we would definitely conclude that the declaration of the state of emergency was not only admissible, but also necessary to activate the response mechanisms arranged by the Code.[5]

If, however, it was legitimate to declare the state of emergency, was its repeated prorogation admissible as well? According to Sabino Cassese, former Constitutional Justice, it was not: the July extension of the regime was «illegitimate and inappropriate», given the fact that, in that period, he argued, Italy knew no emergency at all. His position was later shared by the leaders of the two principal opposition parties in the Parliament.[6] Similarly, the Permanent Observatory on Constitutional Legality, an institution made up by Law Professors from all around the country, defined the possible prorogation of the state of emergency as a «constitutional breach»[7].

Such ideas are, in our view, untenable. Even though the emergency did indeed subside in summer, as all data confirm, we very well know that the pandemic was far from over, as shown by subsequent developments.[8] Most importantly, in Italy, as we have seen in Part II, the state of emergency, in itself, gives no special powers to the Government, except those needed to organize relief and response to calamities. The confusion may arise from the fact that article 1, paragraph 1 of decree-law n.19 states that the measures can only be applied as long as the state of emergency is in effect. This, however, must be considered a mere matter of coordination: the wording could well be modified so as to make its norms outlive the exceptional regime. Thus, Prime Minister Conte may have had a point when, in a speech before the Chamber of the Deputies on July 29, warned that there was no legal correlation between the restrictive measures and the declaration of the state of emergency:

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[5] A more detailed critical analysis of the ruling is carried out by ESPOSITO, V., who even provides an etymological inquiry to show that the Italian word «*calamità*», here translated as «disaster», can very well apply to the COVID-19 crisis (*Emergenza Covid-19: nota in margine alla pronuncia del GdP Frosinone*, https://tinyurl.com/vctj29yv)

[6] see above Chapter 2, note 34

[7] Osservatorio permanente sulla Legalità Costituzionale, *No a Proroghe dello Stato di Emergenza*, Press Release of October 28, 2020, https://tinyurl.com/uxveuh4w

[8] Il Sole 24 Ore, see above Chapter 2, note 43

«Today, judging by some pages and answers on socials media, there are people who are following us, citizens who have been convinced that the extension of the state of emergency means getting back into lockdown, thus implying more restrictive measures starting from August 1. This is wrong».[9]

If, however, the Decision of January 31 is not the source of the exceptional powers granted to the Government, what is it? What «authorization chain» can we outline linking the infamous DPCMs to the Italian Constitution? As we have seen in Chapter 2, they are administrative acts: as such, we must identify a primary norm allowing them. In itself, indeed, the phrase «decree of the President of the Council of Ministers» simply refers to a ministerial decree issued by the authority of the same name, a form which may be taken by a number of specific acts. The content of each one of them is defined by the single law of authorization. Generally, they deal with «technical questions» such as the nomination of top officers of the Ministries.[10]

In this case, however, what is the primary norm allowing the DPCM used during the pandemic? Almost all scholars, and we agree with them, maintain that they cannot be traced back to the Code of Civil Protection.[11] On the one hand, indeed, the ordinances it foresees must be emanated through the Head of the Service, as we already know: this has not happened during the pandemic, where DPCMs were directly passed by the Prime Minister. On the other hand, nowhere

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[9] Speech of Prime Minister Giuseppe Conte (Transcript), Assembly of the Chamber of Deputies, XVIII Legislature, Session n. 382 of July 29, 2020, https://www.camera.it/leg18/410?idSeduta=0382&tipo=stenografico

[10] Diritto.it, *DPCM, significato e requisiti*, https://www.diritto.it/dpcm-significato-e-requisiti/; CARETTI, U. – DE, SIERVO, P., *op.cit*., 268.
A special thanks goes to our cousin Daniele, as passionate about this debate as we are.

[11] For LUCARELLI, A., «the Code of Civil Protection is unrelated to the current issue» (*op.cit.,* 568); CONZUTTI, A. et al. similarly see a «deviation from the discipline of the Legislative Decree 1/2018» (*Il codice della protezione civile alla luce della (vorticosa) disciplina dell'emergenza da Covid-19*, http://www.contabilita-pubblica.it/Archivio%202020/Dottrina/CSI.pdf); CATELANI, E., also highlights the difference between the framework of the Code and the actions of the Government (*I poteri del governo nell'emergenza: temporaneità o effetti stabili?,* in *Quaderni Costituzionali*, 2020, 4, 729-730). NICOTRA, I. A., also adds the consideration that the intervention of the Civil Protection System is foreseen for such events as earthquakes, volcanic eruptions, seaquakes and so on, while in the case of epidemics it is only eventual. However, it seems to us that this view is very similar to the belief that health crises are not included in the Code and, therefore, declaring the state of emergency to fight them is illegitimate: an idea we have just disproven (*op.cit*., 61).

does the Code confer the authority to emanate measures as restrictive and invasive as the ones we have been witnessing: article 25, paragraph 2d, which he have analyzed in chapter 8, deals with generic «interventions […] to reduce residual risks».[12] If this were not enough, there is an even clearer proof: Ordinances of Civil Protection, as distinct acts from the DPCMs, have continued to be issued throughout the emergency.[13] Thus, it is clear that the two things are not one and the same.

As a consequence, we can conclude that the DPCMs used to tackle the COVID-19 pandemic are a totally new administrative act,[14] authorized by the decree-laws n.6 of February 23 and n. 19 of March 25, 2020. It the legitimacy of these primary norms which we shall, then, evaluate.[15]

So, starting from the very beginning, do the decree-law define with sufficient precision the authorities charged and the measures they can take? The answer is ambiguous, as a number of problems arise at a very first glance. The list of provisions which can be enacted is clearly not closed, as article 2 of the decree-law of February openly states that «competent authorities can adopt further measures of containment and management of the crisis […] outside of the cases outlined in article 1, paragraph 1»[16]. This passage was denounced as inadmissible even by commentators who otherwise justify the action of the government.[17] Indeed, the vague expression «competent authorities» does not

[12] D.L. 2 gennaio 2018, n. 1, art.25, par.2d, see above Chapter 8, note 5
[13] Protezione Civile, *Normativa emergenza coronavirus*, https://tinyurl.com/2e579rcj
[14] FRANCAVIGLIA, M., uses the phrase «fabricated *ex novo*» (*Decretazione d'urgenza, poteri di ordinanza e riserve di legge. La produzione normativa nell'emergenza Covid-19 alla luce del principio di legalità sostanziale*, in *Rivista di Diritto Pubblico*, 2020, 2, 363).
[15] CARAVITA, B., sees instead a double legitimacy for the DPCMs as both new acts and ordinances of Civil Protection *(L'Italia ai tempi del coronavirus: rileggendo la Costituzione italiana*, in *federalismi.it*, 2020, 6, vii)
[16] D.L. 23 febbraio 2020, n.6, art.2, see above Chapter 2, note 9
[17] see for instance MORELLI, A., *Il Re del Piccolo Principe ai Tempi del Coronavirus. Qualche riflessione su ordine istituzionale e principio di ragionevolezza dello stato di emergenza*, in *Diritti regionali. Rivista di diritto delle autonomie territoriali*, 2020, 1, 525 («the normative technique employed does not appear incompatible with the constitutitonal framework […] while lacks and feats of dubious legitimacy are to be found in specific provisions too generic and in any case unfit to establish a clear definition of competences»); BIGNAMI, M., «it seems unquestionable that art.2 of the D.L. n.6/2020 […] was unconstitutional» (*Di nuovo tra*

satisfy the requirement of indicating with sufficient precision who is tasked with issuing the norms.[18] Most importantly, such a lax formulation, opening the way to measures not listed in the law, has a more serious consequence: the «stay-at-home» orders enacted through the two DPCMs of March 8 and 9 had no ground in a primary norm. If one reads the list of measures allowed to the Government by article 2 of the decree-law n.6, there is no possibility of preventing people from leaving their residence. [19] Thus, we should conclude, as some commentators and a number of judges do, that all the DPCMs issued until March 25 are unconstitutional, as the norms of the decree-law n.6 are too vague to represent a proper authorization.[20]

However, in our opinion, there may be a way to «save» the DPCM: we could include them into a particular category of ordinances, the «*extra ordinem*». ones. This kind of acts, as the name itself suggests, operate outside of the existing legal order. Most importantly, as they are meant to quell situations of crisis or

*apocalittici e integrati*, in MARINI, F.S. – SCACCIA, G., *Emergenza COVID-19 e ordinamento costituzionale*, Torino, Giappichelli, 2020, 44).

[18] As such, MABELLINI, S., speaks about «approximative ways and prerequisites for the application» of the measures (*La problemica tenuta delle riserve di legge nella gestione policentrica dell'emergenza sanitaria*, in MARINI, F.S. – SCACCIA, G., *op.cit.*, 53); BELLETTI, M., similarly denounces the «lack of closed-listing» (*La "confusione" nel sistema delle fonti ai tempi della gestione dell'emergenza da Covid-19 mette a dura prova gerarchia e legalità*, in *Osservatorio Costituzionale*, 2020, 1, 179); MONE, D., warns that article 2 of the decree-law «disrespects the requirement set by constitutional and administrative jurisprudence» (*Il Covid-19 in Italia: salute e altri diritti fondamentali fra potere di ordinanza statale e regionale*, in *Diritto Pubblico Europeo-Rassegna onlin*e, 2020, 1, 5).; OLIVETTI, M., even fears that the norms of the decree «could recall the *dictator*» (*Così le norme contro il virus possono rievocare il «dictator»,* https://tinyurl.com/3nyutfmp*);* and DE NES, M., notices how the law is «extremely generic with no limits on either contents or timing» (*Emergenza Covid-19 e bilanciamento di diritti costituzionali: quale spazio per la legalità sostanziale*, in *BLJ* 2020, 2, 5).

[19] MAZZAROLLI, L.A. even shows that the first DPCMs never referenced any primary act (*«Riserva di legge» e «principio di legalità» in tempo di emergenza nazionale. Di un parlamentarismo che non regge e cede il passo a una sorta di presidenzialismo extra ordinem, con ovvio, conseguente strapotere delle pp.aa. La reiterata e prolungata violazione degli artt. 16, 70 ss., 77 Cost., per tacer d'altri*, https://tinyurl.com/a9mt96z3); see also DI COSIMO, G., *Quel che resta della libertà di circolazione al tempo del Coronavirus*, https://tinyurl.com/wzfyd958

[20] See *ex plurimis* ESPOSITO, V., *op.cit.*, MOBILI, M., *Lockdown, cambio di rotta sulla legittimità dei Dpcm e i giudici dicono sì alle multe*, https://tinyurl.com/2kszmu67*;* LORENZO, L., *DPCM E COSTITUZIONE. Un approfondimento per interrogarsi sugli strumenti giuridici utilizzati in emergenza coronavirus e sulla loro adeguatezza rispetto al dettato costituzionale*, https://www.altalex.com/documents/news/2020/05/11/dpcm-e-costituzione

emergency, the authorizing law only needs to set their aim, requirements, object, and delegated authority.[21] Their compatibility with the Italian republican order has long been established.[22] This line of reasoning is employed by a number of commentators. In their opinion, besides the formal decree-law, the DPCMs are grounded in the very state of necessity resulting from the COVID-19 crisis, either directly[23] or through the mediation of some values which can be traced in the Constitutional texts.[24]

Still, it is appropriate to precise two aspects. First, the idea that necessity itself may create law is not particularly welcome in the Italian legal system: though defended by illustrious authors, such as Santi Romano,[25] it is foreign to the spirit of the 1948 Constitution which, as we have seen in Chapter 7, tries to regulate any possible crisis *secundum ordinem*, not even including general emergency clauses.

Second, and most importantly, we should not forget that we are debating on a purely formal level: regardless of the source employed, the admissibility of the limitations imposed is far from being demonstrated. Indeed, our reflection may even seem tedious, given that the subsequent decree-law n.19 basically

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[21] DELLA GIUSTINA, C., *Le ordinanze extra-ordinem durante l'emergenza Covid-19*, https://tinyurl.com/4fv3fcu7

[22] RAFFIOTTA, E., *Sulla legittimità dei provvedimenti del governo a contrasto dell'emergenza virale da coronavirus*, in *BioLaw Journal*, 2020, 1S, 98; RONGA, U.*, Il Governo nell'emergenza (permanente). Sistema delle fonti e modello legislativo a partire dal caso Covid-19*, in *Nomos*, 2020, 1, 24.

[23] AZZARITI, G., theorizes that, when sudden events endanger the survival of the State, necessity itself may become a source of law, legitimizing, in this specific case, that the government claimed by itself an *extra ordinem* power (*Il diritto costituzionale d'eccezione*, in *Costituzionalismo.it,* 2020, 1); CALAMO SPECCHIA, M., points that, even though necessity as a source places outside of the existing legal order, it is not necessarily unconstitutional if it is used to justify acts aimed at saving the Constitution rather than at overthrowing it (*Principio di legalità e stato di necessità al tempo del "COVID-19"*, in *Osservatorio Costituzionale*, 2020, 3, 142 ff.).

[24] For instance LUCIANI, M., argues that the supremacy of public welfare and the survival of the nation can be deduced from articles such as n.5, which postulates the «unity and indivisibility» of the Republic, or 139, stating the eternity of the republican form (*Il sistema delle fonti del diritto alla prova dell'emergenza*, https://www.giurcost.org/LIBERAMICORUM/luciani_scrittiCostanzo.pdf ).

[25] Romano, S., *Sui decreti-legge e lo stato di assedio in occasione del terremoto di Messina e di Reggio-Calabria,* in *Rivista di diritto pubblico e della pubblica amministrazione in Italia*, 1909, 1, 251 ff. (now available at https://tinyurl.com/ssv7u8dn)

solved the issue by eliminating the «blank check» provision of article 2, giving a list of detailed measures, and establishing a maximum duration for the DPCMs.[26] Thus, from a strictly formal point of view, the regulation of the acts may seem compatible with the Italian legal system.

However, if we delve a little more into the issue, we see that things may not be so smooth. There is, indeed, a preliminary question we should have posed ourself: is the use of an administrative tool to mandate such impactful measures admissible in the first place? In our opinion, this involves the hierarchy of norms and, thus, the centrality of Parliament. As such, we postpone the second part of the debate to the next Chapter, when we will also give a final assessment on the infamous DPCMs.

A similar path can be trodden as regards France. Also in this case, we have a first phase of measures taken by a number of authorities with the most diverse legal backgrounds, as we have shown in Chapter 8. Apart from being criticized for the confusion that their quantity may have created among citizens, some of these acts were also challenged due to their insufficient justification. The greatest target was, obviously the Decree of the Prime Minister of March 16 which instituted the first national lockdown.[27] As we have seen, it was founded on article L.3131-1 of the Code on Public Health. However, the wording of this norm was clear: the authority mentioned was not the Prime Minister, but rather the Minister of Health.[28] This was not simply a matter of mere formalism: as most commentators pointed out, the measures taken by the former figure can only be justified through his ordinary police powers. Do they include the

[26] In spite of this, Annibale Marini, former President of the Constitutional Court, still held that the principle of temporariness was not satisfied, as it should have affected the single measures, rather than the general act (*Marini: "Dpcm senza termini è incostituzionale",* https://tinyurl.com/36shmt4y*)*

[27] Décret du Premier Ministre n.2020-260 du 16 mars 2020, see above Chapter 3, note 16

[28] PECH, A., *De maux en mots : les premiers temps d'une gestion incertaine du COVID-19,* http://www.journal-du-droit-administratif.fr/?p=3137

possibility to infringe personal freedoms in a way as large as the one we have witnessed? To many, the answer is no.[29]

Indeed, even the Council of State could only validate the lockdown decree by referencing a very peculiar theory: that of the «exceptional circumstances».[30] Very similar to the one on the state of necessity which we have seen for Italy, in the French legal system it is grounded in two landmark sentences: *Heyriès*, of 1918, and *Dames Dol et Laurent*, of the following year.[31] The basic reasoning of both rulings is very similar: extreme circumstances (in those cases, the First World War) lead to an extension of the powers of the administration. As we have seen in Chapter 3, an analogous concept was also employed by the Constitutional Council to validate the organic law which postponed the deadlines for QPCs. However, the reference to necessity, albeit shared by various commentators,[32] is debatable for the very same reasons we have seen when dealing with Italy: the idea that, in a rule of law country, juridical norms can be created by someone else than the legislator appears dangerous and questionable. If it must be applied, this can only happen under strict requirements.

Indeed, paradoxically, even though we can say that such a debate was cut short by the approval of the law on the state of health emergency, some scholars point out that personal freedoms would have been much safer under the rigid

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[29] see *ex plurimis* BOUDON, J., *De quelques problèmes juridiques et politiques dans les circonstances actuelles,* https://tinyurl.com/hbthz6x6; and *Note complémentaire sur l'illégalité du décret n° 2020-260 du 16 mars*, https://tinyurl.com/zbsyz8et

[30] Conseil d'Etat, ordonnance 22 mars 2020, n.439674, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000041782274/
-, décision 22 décembre 2020, n.439804, https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-12-22/439804

[31] Conseil d'Etat, arrêt 28 juin 1918, n.63412, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007637204/
-, arrêt 28 février 1919, n.61593, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007637155/

[32] SYMCHOWICZ, N., *Urgence sanitaire et police administrative : point d'étape*, https://tinyurl.com/53b2jfzu; ROUSSEAU, D. (interview), *Coronavirus : « La théorie des circonstances exceptionnelles permet une extension des pouvoirs de l'exécutif* », https://tinyurl.com/6sr937m7; GELBLAT, A. – MARGUET, L., *État d'urgence sanitaire : la doctrine dans tous ses états?*, http://journals.openedition.org/revdh/9066

criteria of the theory of exceptional circumstances than under those normally employed in the scrutiny of a law of the Parliament.[33]

As we know, the fact itself of instituting a whole new regime was met with harsh criticism. On the one hand, it was argued that its introduction did not fit the spirit of the international texts on human rights, as its restrictive provisions would now add permanently to the ones already established by previous laws.[34] This is because the authorizing norms, formulated in general terms, are now part of the French legal system, and will survive the COVID-19 pandemic. On the other hand, the provisions themselves came under attack. Indeed, they do seem to pose some problems for the vagueness of their wording (some commentators attack the phrase «sanitary catastrophe» as too general) and the extension of the powers allowed to the Government, which can now subject the entirety of the population to measures which were, previously, only appliable to individuals.[35] Some authors go as far as to call them «a total reversal» of the principles of democracy, rendering freedom the exception rather than the norm.[36]

Indeed, even though we certainly do not agree with such an apocalyptic view, we do align with the belief of the majority of the scholars, who maintain that the law on the state of health emergency was unnecessary. As we know, the French legal system already had several regimes to tackle crises.

Which one of them would have better suited the requirements of the COVID-19 crisis? A few authors have pointed at article 16 of the Constitution, but the majority opinion, which appears correct, is that it would have been unfit,

[33] GELBLAT, A. – MARGUET, L, *op.cit.*
[34] CERF, E., et al., *op.cit*., 239; GELBLAT, A. – MARGUET, L, *op.cit.*
[35] SYMCHOWICZ, N., *Urgence sanitaire et police administrative : point d'étape*, https://tinyurl.com/s85wd2u6; PLATON, S., *Reinventing the wheel…and rolling over fundamental freedoms? The Covid-19 epidemic in France and the "State of Health Emergency*", in *The Theory and Practice of Legislation*, 2020, VIII.3, 293 ff; DEFFENU, A. - LAFFAILLE, F., *op.cit*., 198.
[36] SIZAIRE, V., *Un colosse aux pieds d'argile*, http://journals.openedition.org/revdh/8976

as the prerequisite for its activation (the endangerment of a public institution) was not met.[37]

Instead, most scholars maintain that the answer was the law on the state of emergency. It could have either been modified, to better suit the case of a pandemic,[38] or outright activated, as the prerequisite of a «public calamity» was fully satisfied by such a crisis as the COVID-19.[39] The latter statement is clearly remindful of the Italian debate on whether or not the state of emergency envisaged in the Civil Protection Code could fit the current pandemic. One could argue that the two laws deal with two different topics: in the case of France, it is mostly about the safeguard of public order, while the Italian Decree is meant to tackle natural disasters. However, in the opinion of many authors, also including the writer, the reference to a «public calamity» in the French text confirms that it was fully adequate to tackle COVID as well.[40]

Thus, even though nothing prevented the Parliament from establishing a state of health emergency,[41] whose norms also seem to meet both the requirement of temporariness (their maximum duration and the criteria for their prorogation are clearly stated) and clearly designation of authorities, we can definitely conclude that it was not needed.

On the contrary, the few who defend the initiative of the Government mostly rely on two arguments. On the one hand, they hold that the state of health emergency, which had lasted two years between 2015 and 2017, was excessively

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[37] ANDRIANTSIMBAZOVINA, J., *Les régimes de crise à l'épreuve des circonstances sanitaires exceptionnelles, Revues des Droits et Libertés Fondamentaux*, 2020, 20; BEAUD, O., *La surprenante invocation de l'article 16 dans le débat sur le report du second tour des élections municipales*, https://tinyurl.com/7kf5m2mk

[38] SIZAIRE, V., *op.cit.*; PITCHO, B., and PETKOVA, M., also agree with this view, though holding that the new law sets sufficiently strict requirements (*L'Etat d'urgence sanitaire : comment ? Pourquoi ?,* https://tinyurl.com/yn6uyxs4)

[39] LETTERON, R., *L'état d'urgence sanitaire, objet juridique non identifié, http://libertescheries.blogspot.com/2020/03/letat-durgence-sanitaire-objet.html ;* GELBLAT, A. – MARGUET, L.*, op.cit.*

[40] As also noted by BEAUD, O., and GUÉRIN-BARGUES, C., among many others (*L'état d'urgence sanitaire: était-il judicieux de créer un nouveau régime d'exception*?, in *Recueil Dalloz*, 2020, 16, 891 ff.)

[41] As also recognised by the Constitutional Council (Décision n° 2020-800 DC du 11 mai 2020, see above Chapter 3, note 35)

remindful of the fight against terrorism,[42] thus evocating «bad memories»[43] and requiring a brand new tool to also capture the obedience of the population. On the other hand, it is argued that the fact itself of enacting a law, rather than resorting to a barrage of uncoordinated administrative decrees, is democratically sounder, as it brings Parliament back onto the scene.[44]

This, however, is a rather strong assertion, as one of the greatest critiques to the new legal institute was exactly its conferral of an excessive authority on the Government vis-à-vis the legislative body. Thus, we have arrived, also for France, to the issue of the centrality of Parliament under the new norms, signaling that we have exhausted our analysis for the present chapter.

As such, we only have to analyze the legitimacy of the declaration of the state of alarm in Spain. Following the same procedure we have adopted in the previous two cases, let us first review the juridical requirements for its proclamation. It seems to us that we can state, without any fear of being disproven, that they are met even more strictly than in either Italy or France. In both of them, indeed, we have to imply the reference to a pandemic by an etymological analysis of the texts on the states of emergency. In Spain, instead, as we have already seen in Chapter 8, the Organic Law on the matter declares explicitly that the state of alarm can be established during «health crises such as epidemics or grave situations of contamination»[45].

The constatation that the regime «deals with serious alterations of normalcy caused by natural or social events»[46] is used by commentators to oppose the most widespread critique against the action of the Government: the

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[42] SCHOENHER, D., *Les libertés, victimes collatérales du covid-19?*, https://tinyurl.com/muzyj3jy
[43] LETTERON, R., *op.cit.*
[44] TRUCHET, D., *Covid-19 : point de vue d'un «administrativiste sanitaire»* , https://tinyurl.com/47v5eb5c; DE BECHILLON, D., *Le Conseil d'État refuse d'imposer le confinement total mais impose un durcissement de la règlementation sur les sorties et les marchés couverts, https://tinyurl.com/4fsmjmw;* TAWIL, E., *Lutte contre le covid-19 : les nouvelles mesures de police administrative restrictives de libertés adoptées par le gouvernement,* https://www.labase-lextenso.fr/gazette-du-palais/GPL377a6; SCHOENHER, D, *op.cit*.
[45] Ley Orgánica 4/1981, art.4, par.b, see above Chapter 8, note 12
[46] GONZÁLEZ VEGA, I., *Constitución y estado de alarma*, https://www.iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1197841

extent of the infringement of rights enacted is incompatible with the norms on the state of alarm, and would have required the proclamation of the state of exception. Only in this last case, indeed, is it possible to suspend the fundamental freedoms of the citizens as it has been done. The state of alarm, instead, as we already know, only allows for "limitations".[47]

This debate even reached the political level, as the arguments we have just seen were used by *Vox*, a right-wing populist opposition Party, to seize both Royal Decrees establishing the two states of alarm before the Constitutional Tribunal.[48] The claims are currently unanswered: the Court, though admitting both of them, refused to suspend the second decree.[49] On the other hand, it rejected a writ of *amparo* issued by the Secretary General of the Party, because such procedure cannot be directed against acts bearing force of law.[50]

Now, on the one hand, in 2016, the Constitutional Tribunal itself established that, differently from the state of exception, the state of alarm allows no suspension of fundamental rights.[51] It appears clear, however, that in order to determine whether or not the freedoms of the Spanish people have indeed been suspended, we should delve into the merit of the measures enacted. As such, we

[47] See for instance the opinions of Vera Santos, J.M. and Cano, J.C., referenced in VELASCO, F., *¿Hay que declarar el Estado de excepción?, https://tinyurl.com/rcmcsk8u;* a similar thesis is defended by ALEGRE ÁVILA, J. M. – SÁNCHEZ LAMELAS, A., *Nota en relación a la crisis sanitaria generada por la actual emergencia vírica, https://tinyurl.com/ybrxxaws*

[48] Recurso inconstitucionalidad, Diputados del Grupo Parlamentario Vox en el Congreso de los Diputados, Real Decreto 463/2020, de 14 de marzo, https://tinyurl.com/5ua3w4dr; Recurso inconstitucionalidad, Diputados del Grupo Parlamentario Vox en el Congreso de los Diputados, Real Decreto 926/2020, de 25 de octubre, https://tinyurl.com/22yfm59w;

[49] Europa Press, *El TC admite a trámite el recurso de Vox contra el estado de alarma*, https://tinyurl.com/tw779c; Economist&Jurist, *El TC admite a trámite el recurso de inconstitucionalidad presentado por VOX contra el decreto que regula el estado de alarma y sus prórrogas*, https://tinyurl.com/2p6n3e4h;

[50] BRUNET, J. M., *El Constitucional rechaza dar amparo a Vox contra el estado de alarma*, https://tinyurl.com/zf43ysy2. In the Spanish Constitutional system, the constitutional legitimacy of a law can only be challenged through the *recurso de incostitucionalidad*, but the only figures who can activate it are the President of the Government, the Ombudsman or fifty Deputies or Senators. Individuals can, on the other hand, resort to the *amparo* which, however, only targets sub-legislative decisions (see Tribunal Constitucional de España, *El recurso de inconstitucionalidad*, https://tinyurl.com/y9xeubu6 and *El recurso de amparo*, https://tinyurl.com/t7nsbhm5)

[51] Tribunal Constitucional, Sentencia 83/2016, de 28 de abril, see above Chapter 4, note 8

need to postpone our judgment until Part IV, when we will review the substantial issues.

On the other hand, as regards the formal, *a priori* question, the idea that the conditions set by the COVID-19 pandemic fit much more appropriately the state of alarm than the state of exception seems absolutely correct. Similarly to article 16 of the French Constitution, the state of exception appears designed to counter «threats endangering the normal enjoyment of fundamental freedoms or functioning of democratic institutions».[52] As such, the prerequisites to declare it are not met in this case.[53] Thus, we maintain that it was correct both to resort to the state of alarm and to maintain it throughout the pandemic. The latter assertion is rejected by some commentators who, just like in Italy, hold either that the exceptional regime should have been abandoned after the first phase, or that it should never have been used at all, as there were a huge number of ordinary norms already sufficient to deal with COVID-19 effectively.[54]

Indeed, as we have seen in Chapter 8, the general sanitary laws do not lack even "open" provisions allowing to take any necessary measure to counter sanitary crises.[55] However, it is a view that should definitely be contested: on the one hand, similarly to the French case, referencing too many laws without an organic text may have created confusion and lack of coordination.[56] On the other

[52] REVENGA SÁNCHEZ, M., *Dimensiones constitucionales de la crisis del coronavirus en España: una crónica de urgencia*, in GONZÁLEZ MARTÍN, N. - VALADÉS, D. (eds.), *Emergencia Sanitaria Por Covid-19. Derecho Constitucional Comparado*, s.l., Universidad Nacional Autónoma de México, 2020, 77 ff..; ÁLVAREZ GARCÍA, V. J., *El coronavirus (COVID-19): respuestas jurídicas frente a una situación de emergencia sanitaria*, in *El Cronista del Estado Social y Democrático de Derecho*, 2020, 86, 10.

[53] See the opinion of ZAMORA, F.J., in VELASCO, F., *op.cit.*

[54] JAVIER DIAZ, P., *op.cit.*

[55] NOGUEIRA LÓPEZ, A., makes explicit reference both to the Organic Law n.3/1986 and to the General Public Health Law (*Confinar el coronavirus. entre el viejo derecho sectorial y el derecho de excepción*, in *El Cronista del Estado Social y Democrático de Derecho*, 2020, 86, 25 ff.); ÁLVAREZ GARCÍA, V. J, while favoring the adoption of the state of alarm, defines ordinary provisions as numerous and appropriate (*op.cit.*, 21).

[56] VILLAVERDE, I., *COVID-19: la gran prueba de estrés para los sistemas constitucionales (y para los constitucionalistas)*, https://tinyurl.com/fmmn7jt7. To give another example, NOGUEIRA LÓPEZ, A., while stating that the sanitary laws and the state of alarm does not seem to have concrete differences as regards the measures which can be adopted, still argues that resorting to the exceptional regime increased the effectiveness of government's response (*op.cit.*, 29 ff.)

hand, as Cormacain puts it, nothing is more appropriate to a rule of law country than keeping ordinary legislation «socially distanced» from emergency norms.[57] Thus, the state of alarm may also create the very positive precedent of confining such incisive infringements on personal freedoms into exceptionality.

This, however, does not mean that the way the regime was employed by the Sánchez Government is free from critical issues. At the beginning, indeed, Royal Decree 463/2020 did seemingly respect the requirements of the principle of legality, by imposing temporary measures and clearly designating competent authorities.[58] During the second wave, however, the state of alarm, after having but in place for the first required fifteen days, was extended for six months, until May 9, 2021.[59] This is, actually, not a completely new event: when the regime had been used in 2010 during the strike of air traffic controllers, it had been extended for four weeks after its initial institution. Thus, doctrinal complaints claiming that each prorogation can only last as long as the initial period of tenure, that is to say fifteen months, were strong already in that circumstance.[60] In our view, it is at least problematic that, in a democracy, the executive can receive such large powers for as long as half a year, as also noted by some scholars.[61] After all, «the declaration of the state of emergency should be always issued for a specific period of time, which moreover should not be excessively long».[62] This is even truer when one considers that any deviation from ordinary legality, as we know, must be justified by the strict needs of the situation. Thus, six months seem too long a period: how can it legitimately be reckoned that the necessity of having a state of alarm will not be over long before that deadline?

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[57] CORMACAIN, R.*, Keeping Covid-19 emergency legislation socially distant from ordinary legislation: principles for the structure of emergency legislation*, in *The Theory and Practice of Legislation* 2020, VIII.3, 245 ff.

[58] ÁLVAREZ GARCÍA, V. J, *op.cit.*

[59] Real Decreto 956/2020, de 3 de noviembre, por el que se prorroga el estado de alarma declarado por el Real Decreto 926/2020, de 25 de octubre, por el que se declara el estado de alarma para contener la propagación de infecciones causadas por el SARS-CoV-2, https://www.boe.es/buscar/doc.php?id=BOE-A-2020-13494

[60] LECUMBERRI BEASCOA, G., *op.cit.,* 33

[61] ORELLANA GÓMEZ, P. A., *Sobre la constitucionalidad de prorrogar el estado de alarma por más de 15 días,* https://tinyurl.com/vutzxyfc

[62] Venice Commission, see above Chapter 5, note 8, par.78

The counter-argument that such an authorization is in any case legitimate because it is conceded by the Parliament, the representative of the people, was also used in Italy and France. However, it is untenable when dealing with a rule of law country.[63] As we have already seen, such a concept requires that there exist limits which even the legislative authority cannot trespass. The principle of separation of powers is one of them. As we know, it has been one among the most jeopardized during the pandemic, when, just like in any situation of crisis, the executive tends to unduly strengthen its authority, even in an inevitable way.[64] Whether or not this exceeds the boundaries of the rule of law is a serious matter that cannot simply be dismissed by referencing the parliamentary authorization.[65] Instead, it needs to be assessed as thoroughly as possible. This is exactly what we will try to do in the next Chapter.

[63] PÉREZ ROJO, J., *De nuevo con el estado de alarma*, https://www.eldiario.es/contracorriente/nuevo-alarma_132_7385013.html

[64] NICOTRA, I. A., *op.cit*., 15. On the point, see also the commendable reflection by CALVI, A. for *Internazionale* (*L'emergenza rafforza il potere e logora i diritti*, https://tinyurl.com/72vtu39m)

[65] As BARAK, A., points out, «legal authorization to limit a constitutional right is not sufficient. Legality does note qual legitimacy» (*op.cit*., 245).

## Chapter 12 – The centrality of Parliaments

The importance of the issue we are going to debate cannot be underestimated. As we already know, not only is the centrality of Parliament a fundamental component of the rule of law in a democratic country, but its importance rises particularly during crises such as the COVID-19 pandemic, when the involvement of the legislative body supports and strengthens the legitimacy of the emergency governance while also watching over the respect of human rights and formal democratic procedures.[1]

Of course, when dealing with such a topic, there is the concrete risk of "invading" domains other than law, winding up into political science. However, there is an easy way to avoid this: just like in the previous chapter, we must keep in mind the legal framework of the relations between Governments and Parliaments as it is – or should be - in ordinary times. Thus, it will be simple to provide our assessment without abandoning the juridical realm. On the other hand, this also means that we will not delve into the analysis of specifically political issues such as the conduct of the executives during the crisis; nor will we include the otherwise central theme of the functionality of Parliaments in the wake of the interdiction of gathering required by sanitary concerns.[2] Without these topics, our research may clearly seem maimed. However, besides the obvious need of sticking to the subject of our dissertation, there is another reason behind this choice: as we have consistently repeated, the aim of our work is to analyze the compatibility of the emergency legislations with the principles of the rule of law, as enshrined in the Constitutions of Italy, France and Spain, in order to verify whether or not they need be modified or ameliorated should another similar event ever occur. Thus, if we found out that one of the three exceptional frameworks is not compatible with the principle of separation of powers, as it confers too a large authority over the executive, then this critical point would not be fixed simply through a more cooperative behavior on the executive's part. O

[1] PETROV, J., *op.cit.*, 77; GRIGLIO, E., *Parliamentary oversight under the Covid-19 emergency: striving against executive dominance*, in *The Theory and Practice of Legislation*, 2020, VIII.1-2, 52.

[2] For an oversight of the procedures employed by Assemblies in Europe to continue their activity even during the harshest phase of the epidemic, see GIGLIO, E., *op.cit.*

the contrary, if we conclude that the emergency legislation is acceptable, we will know that any further issue between the legislative bodies and the Governments will pertain to the realm of politics, rather than law, and its solution will need to be found there.

After this not so short introduction, let us start our journey, as always, by Italy, finally reviewing the infamous DPCMs. Surprisingly enough, however, our analysis might reveal totally unnecessary. On March 4, 2021, indeed, both the Committee on Constitutional Affairs and the Committee on Legislation of the Chamber of Deputies (the lower House of the Parliament) officially asked the Government to «overcome» this legal tool. The reason, expressed by both Assemblies, was the need to «rationalize» the system of legal sources of the emergency. Thus, they requested to revert to primary acts for general provisions, still leaving specific norms to ordinances of the Minister of Health.[3] Indeed, the use of the instrument of the DPCM had got to the point where, as we know from Chapter 2, the one of November 3, instituting the mechanism of the «zones», had itself outlined the general framework, delegating its application to furtherly subordinate acts such as ministerial ordinances.[4] In this way, it is as if a totally new hierarchy of legal sources had been created where the Parliament was never involved.[5]

As we know, however, similar critiques had surfaced from many quarters all over the year the DPCMs were employed. Ever since the very first of them were enacted, including the one of March 9 which instituted the national

[3] Conversione in legge del decreto-legge 14 gennaio 2021, n. 2, recante ulteriori disposizioni urgenti in materia di contenimento e prevenzione dell'emergenza epidemiologica da COVID-19 e di svolgimento delle elezioni per l'anno 2021. C. 2921 Governo, approvato dal Senato. (Parere alla Commissione I), in *Atti Parlamentari*, Comitato permanente per i pareri della I Commissione della Camera dei Deputati, XVIII Legislatura, *Verbale online*, 4 marzo 2021, https://tinyurl.com/2z9x86zh; Conversione in legge, con modificazioni, del decreto-legge 14 gennaio 2021, n. 2 recante ulteriori disposizioni urgenti in materia di contenimento e prevenzione dell'emergenza epidemiologica da COVID-19 e di svolgimento delle elezioni per l'anno 2021. C. 2921 Governo, approvato dal Senato (Parere alla Commissione XII), in *Atti Parlamentari*, Comitato per la Legislazione della Camera dei Deputati, XVIII Legislatura, *Verbale online*, 4 marzo 2021, https://tinyurl.com/rhczex2k

[4] DPCM 3 Novembre 2020, see above Chapter 2, note 41

[5] The necessity of a primary law is correctly pointed out also by NICOTRA, I. A., *op.cit.*, 73.

lockdown, commentators reacted angrily, speaking, to provide only a few examples, of hierarchy of norms who had become an optional, of «juridical *monstrum* proper of an authoritarian Head of State»[6], of «evident elusions of constitutional legality» [7] and even of norms which could recall the Roman *dictator*.[8]

What were the reasons of such a tenacious opposition, even shared by former Justices of the Constitutional Court?[9] For the most part, commentators highlighted two huge problems. Both of them, however, shared a common background: the idea that the DPCM must be abandoned because it excluded the Parliament.

Thus, on the one hand, we have authors who focus on this exact issue, noticing that the DPCM, as an administrative act issued by the President of the Council of Ministers, needs not be converted into a law.[10] As such, it is not subject to the scrutiny of the Houses,[11] the President of the Republic,[12] or the Constitutional Court.[13] Moreover, it also alters the very essence of the Italian political system, conferring too a large power upon the President of the Council who, by the Italian Constitution, should merely possess a role of coordination and general direction of government policies.[14]

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[6] RATTO TRABUCCO, F., *Prime note al d.p.c.m. 8 marzo 2020: con l'emergenza Coronavirus la gerarchia delle fonti diventa un optional*, https://www.lexitalia.it/a/2020/121654

[7] MITROTTI, A., *Il D.P.C.M. come inedito strumento di gestione statale dell'emergenza da Covid-19*, in DOLSO, G. P. et al., *Virus In Fabula. Diritti E istituzioni ai tempi del Covid-19*, Trieste, EUT Edizioni Università di Trieste, 2020, 167.

[8] OLIVETTI, M., *op.cit.*

[9] Such as Sabino Cassese, who openly called the DPCMs «illegal» (CASSESE, S. (interview), "*Sabino Cassese: «Dpcm Conte Illegali"/ "Consulta li Boccerà, Gravi colpe Del Governo*»", https://tinyurl.com/ch2rkefd) or former President Antonio Baldassarre, who declared that they were «fully uncostitutional» (BALDASSARRE, A. (interview), *Baldassarre: "Dpcm in tutto incostituzionale",* https://tinyurl.com/8at77hty)

[10] MEZZETTI, L., *La pandemia de la Constitución: el impacto del COVID-19 en el Sistema constitucional italiano*, in GONZÁLEZ MARTÍN, N. - VALADÉS, D. (eds.), *op.cit.*, 104.

[11] MARINI, A. (interview), *op.cit.*

[12] CLEMENTI, F., *Quando l'emergenza restringe le libertà meglio un decreto legge che un Dpcm,* https://tinyurl.com/m4xctyjt

[13] MITROTTI, A., *Il D.P.C.M. come inedito strumento di gestione statale dell'emergenza da Covid-19*, in DOLSO, G. P. et al., *Virus In Fabula. Diritti E istituzioni ai tempi del Covid-19*, Trieste, EUT Edizioni Università di Trieste, 2020, 167.

[14] SORRENTINO, F., *Riflessioni minime sull'emergenza coronavirus*, in *Costituzionalismo.it* 2020, 1, 131 ff.; MEZZETTI, L., *op.cit., 105.* According to article 95 of the Constitution, « The President

From all of this directly stems the second main problem: the DPCM, as a secondary act, is unfit to limit personal freedoms in a way as large as the one witnessed during the pandemic. This is because, in the Italian Constitution, all the fundamental rights are protected through the instrument of «*riserva di legge*», which we have analyzed at the end of Chapter 8: this means that they can only be regulated through a primary norm. Again, this is not only a formal question: a law of the Parliament, being issued by the representative of the will of the people, guarantees that any infringement of fundamental freedoms will be subject to democratic scrutiny.[15] That is why we agree with the view, advanced by several authors, that it was utterly problematic to impose such stringent limitations through administrative decrees.[16] Instead, the Government should rather have resorted to an instrument already foreseen by the Constitution, that is to say the decree-law,[17] expressly designed to counter «extraordinary cases of necessity and urgency»[18]. In this way, the hierarchy of norms would have been better respected,[19] without the need for the Government to take *extra ordinem* powers.[20] Most importantly, the «*riserva di legge*» would also have been preserved, as the decree-laws, being primary acts, fit it perfectly, as both the doctrine and the jurisprudence have long established.[21]

Of course, one may counter-argue that it is perfectly normal that a Government regulates a crisis through administrative acts. After all, that is precisely what has happened in France, for instance. The very spirit of emergency ordinances would allow this. As such, the authors who defend the

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of the Council conducts and holds responsibility for the general policy of the Government. The President of the Council ensures the coherence of political and administrative policies, by promoting and coordinating the activity of the Ministers» (see above Chapter 7, note 2).

[15] VENANZONI, A., *L'innominabile attuale. L'emergenza Covid-19 tra diritti fondamentali e stato di eccezione*, in *Quaderni costituzionali*, 2020, 1, 502.

[16] SILVESTRI, G., *Covid-19 e Costituzione*, https://www.unicost.eu/covid-19-e-costituzione/; CLEMENTI, F., "*Il lascito della gestione normativa dell'emergenza: tre riforme ormai ineludibili*", in *Osservatorio Costituzionale* 2020, 3.

[17] CAVINO, M., *Covid-19. Una prima lettura dei provvedimenti adottati dal Governo,* https://tinyurl.com/zrbsf5e6

[18] Italian Constitution, art.77, see above Chapter 7, note 2

[19] CLEMENTI, F., *op. ult. cit*., 39; DE NES, M., *op.cit.*, 6.

[20] LUCARELLI, *op.cit.*, 566.

[21] MABELLINI, S., *op.cit.*; CARAVITA, B., *op.cit*, v.

legitimacy of the DPCMs maintain exactly that there is nothing problematic with them, as they follow the principle of an authorizing act (the decree laws n.6 and 19/2020) and an executive ordinance.[22] This idea was formulated by the former President of the Constitutional Court Gustavo Zagrebelsky in the following terms: «the Government did not usurp powers it had not received»[23]. It was also employed by members of the Conte Government themselves to defend their action,[24] as well as by judges who validated the sanctions imposed in application of the decrees.[25]

However, we have already disproven this view in the previous Chapter, by reminding that, in a rule of law country, acts of the Parliament remain subordinate to superior constitutional principles. As such, declaring that a possible violation of the hierarchy norms is justified only because the legislator has authorized it is untenable. Most importantly, in the case of Italy, there is a further problem: the use of the DPCMs was allowed through decree-laws. However, these acts are emanated, as we know, by the Government. This means that, basically, it is as if the executive had authorized itself to emanate ordinances which limited personal freedoms.[26] This contradicts, in our view, the very meaning of the word «delegation», which presupposes a subject A delegating an authority to a subject B.[27] Of course, one may argue that, since both decree-laws were later converted by the Parliament, the delegation was ultimately conferred in a correct way. Such a theory, however, can be disproven by referencing the fact that, in the Italian legal system, the decree-law is not considered totally equivalent to an act of the Houses. Since it is emanated by the Government, it encounters limits the ordinary laws do not have: according to article 15, par.2 of

[22] Such are, for instance, the reasons advanced by BIGNAMI, M., *op.cit.*, 41 ff;
[23] ZAGREBELSKY, G. (interview), *Coronavirus e decreti, Zagrebelsky: "Chi dice Costituzione violata non sa di cosa sta parlando"*, https://tinyurl.com/28hy4a6p
[24] Such as the Minister of Health Roberto Speranza in his infamous book *Perché guariremo. Dai giorni più duri a una nuova idea di salute*, s.l., Feltrinelli, 2020.
[25] MOBILI, M., *op.cit.*
[26] SIMONELLI, M. A., explicitly speaks of «self-delegation» (*Il Covid-19 e la gestione governativa dello stato di emergenza. Una riflessione a caldo,* https://tinyurl.com/46xnz97u)
[27] The Oxford Advanced Learner's Dictionary defines «delegation» as «the process of giving somebody work or responsibilities that would usually be yours» (Oxford, Oxford University Press, 2010, 8th ed.).

the law n.400/1988, it cannot regulate the matters which presuppose a control by the Parliament on the activity of the executive.[28] The very first case quoted by the text is art.76 of the Constitution: the Government cannot, by decree-law, confer a legislative delegation upon itself.[29] Thus, if the self-assumption of authority in the case of the DPCM were admissible, then it would also be in all the cases excluded by the law we have just mentioned, such as regulating the matters which the Constitutions reserves to the Assembly of the Parliament,[30] or restoring provisions which the Constitutional Court has declared illegitimate.

It thus appears clear that the validity of the action of the Italian Government cannot be referred to ordinary norms. Indeed, the most convincing attempts, in our opinion, are those who quote superior juridical concepts, such as the fact that the Parliament has acquiesced to the DPCMs (*qui tacet consentire videtur*),[31] the state of necessity created by the crisis (*necessitas facit legem*),[32] or the greater speed and efficiency guaranteed by an administrative decree, compared to a law.[33]

However, one cannot, in our opinion, overlook the greatest problem posed by the choice of this kind of tool: that is to say, the reversal of the hierarchy of norms.[34] As we had anticipated at the beginning, the use of the DPCM creates a sort of closed circuit of legal sources: the decree-law, which should function as an emergency act, takes the place of an ordinary law, and the DPCM, upon which the Parliament has no control, replaces the decree-law. As a consequence, huge

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[28] SORRENTINO, F., *Le fonti del diritto italiano*, Milano, Wolters Kluwer, 2019, 3rd ed, 136.
[29] Legge 23 agosto 1988, n. 400 - «Disciplina dell'attività di Governo e ordinamento della Presidenza del Consiglio dei Ministri», art.15, par.2a, https://www.gazzettaufficiale.it/eli/id/1988/09/12/088G0458/sg
[30] They are «constitutional and electoral matters, delegating legislation, ratification of international treaties and the approval of budgets and accounts». By article 72, par.4 of the Constitution, they can only be regulated through laws enacted by the entirety of the Houses, while the approval of acts on other subjects can be delegated to their Committees.
[31] LO GULLO, M., *Diritto amministrativo e Diritto pubblico dell'economia nell'emergenza sanitaria. Sezione I. Protezione civile e interventi delle autorità sanitarie per contrastare la pandemia*, in FRIGESSI DI RATTALMA, M., *La pandemia da covid-19 : profili di diritto nazionale, dell'Unione Europea ed internazionale*, Torino, Giappichelli, 2020, 104; LALLI, A., *Organi e procedure amministrative dell'emergenza Covid-19*, in MARINI, F.S. – SCACCIA, G., *op.cit.*, 224
[32] VENANZONI, A., *op.cit*., 494
[33] BIGNAMI, M., *op.cit*.

confusions in the respect of the hierarchy can be witnessed, such as decree-laws referencing the provisions of DPCMs,[35] though the latter should be a subordinate act, and even, as we have seen, DPCMs establishing general rules, rather than specific ones. A further problem is also that such decrees remain subject to the same obligation as every other administrative act, meaning that they should be motivated and proportional. It is clear, however, that if they become an ordinary tool of management of a crisis like the COVID-19 pandemic, such requirements can hardly be met. As a consequence, all the DPCMs used by the Conte II Government had recurring problems. As highlighted by various judiciary rulings, not only did they present a lack of motivation, by referring to minutes of sessions of the Technical and Scientific Committee which were, at the time the DPCM was enacted, not accessible to the general public, [36] but they also lost the feature of temporariness, given their continuous renovation every fifteen or thirty days.[37]

After all, even authors who defended the DPCMs through the requirement of necessity concede that the decree-law would have been a better choice and that if, as it has happened, the emergency had gone on for several months, the Parliament should have recovered its centrality.[38] In a sense, this is exactly what occurred after the arrival of the Draghi Government: after initially extending the restrictive measures with a DPCM on March 2, it only resorted to decree-laws. One can easily imagine that this depends, at least in part, on the request advanced by the two Committees by which we have opened our discussion. Indeed, a greater attention towards the respect of the hierarchy of norms is now seemingly shared by all political actors: when the Draghi Government was debating the decree-law n.52 of April 22, 2021, the Presidency of the Republic requested the elimination of a provision by which the disposition of the act could have been

[35] GIGLIOTTI, A., *Sulla illegittimità dei DPCM in una recente sentenza del Tribunale di Reggio Emilia,* https://tinyurl.com/hs74dwc
[36] Tribunale Ordinario di Roma, Sezione Sesta Civile, Ordinanza 16 dicembre 2020, giudice Alessio Liberati, *Considerato in Diritto*, par.2 https://tinyurl.com/askp42zk
[37] TAR Lazio, Sezione Prima, Ordinanza n.7468/2020, del 4 Dicembre, https://tinyurl.com/5wsxc9xb
[38] DI COSIMO, G., *op.cit.*; LUCIANI, M., *op.cit.*, 10.

modified through subordinate Decisions of the Council of Ministers.[39] As such, the season of the DPCMs has apparently been archived, as the Chamber had demanded. After all, the problems that they posed on the relation between the Executive and Parliament were not unknown even to the Conte II Government itself: as we have seen in Part I, it included into decree-law n.19/2020 a norm imposing that either the President of the Council or another member of the executive must report to the Parliament on the adopted measures every fifteen days.[40] This provision was adopted also as a result of the concerns raised by MPs, who pointed at the fact that the only formal addresses by the Government to the Assembly since the start of the emergency had been two statements by the Minister of Health dating as far back as 26 and 27 February.[41] In spite of this, the DPCMs had continued to be criticized even by members of the majority Parties.[42] This reached the point where the ministers of *Italia Viva*, the formation which opened the crisis leading to the end of the Conte II Government, quoted them to support their claim that the President of the Council was disrespecting democratic procedures and institutions.[43] Thus, one can say that the DPCMs had been doomed for a long time.

This means that we are left with only one question: will this peculiar normative act survive judicial scrutiny in the future proceedings on the emergency measures? Giving an answer is pretty difficult because until now, as we will see in Part IV, all the judges who declared the illegitimacy of the DPCMs did so mostly on substantial grounds, rather than on formal ones. The Constitutional Court, instead, has not yet issued a sentence on the matter: on the contrary, in the text of a ruling centered on the division of competences during the pandemic between the State and the Aosta Valley Region, it hastened to clarify that «in this judgment, the legitimacy of the DPCMs […] is not at

[39] FIAMMERI, B., *La Lega si astiene, irritazione di Draghi. Il vaglio del Quirinale ferma le delibere*, https://tinyurl.com/kabnzrcp
[40] D.L. 25 marzo 2020, n.19, art. 2, par.5, see above Chapter 2, note 27.
[41] GRIGLIO, E., *op.cit*., 59
[42] DELRIO, G. (interview), *"Ora basta con i Dpcm, il governo ascolti il Parlamento", dice Delrio,* https://www.agi.it/politica/news/2020-04-29/fase-2-misure-dpcm-delrio-8468047/
[43] La lettera di Teresa Bellanova, Elena Bonetti e Ivan Scalfarotto al Presidente del Consiglio, 13 January 2021, https://tinyurl.com/2k9xakux

issue».[44] A similar cautiousness was also employed as the Court declared inadmissible a conflict over the attribution of powers addressed by two Deputies. Both of them had claimed that the actions of the Government maimed their constitutional functions. In the ruling, the Justices separated the competence of the single MP, which consists in debating and voting, from the legislative authority itself, which instead pertains to the entirety of the Chamber. Thus, it should be the entire Assembly to raise the issue about the DPCMs.[45]

Such a prudence was indeed foreseeable: it is absolutely improbable, in our view, that the Constitutional Court will really ever strike down the legislative provisions authorizing the DPCMs, for it would mean creating serious problems of social order and legal certainty. On the other hand, it is equally likely that it will exclude the possibility of again using such an instrument in the future. The reason is simple: as any expert in Italian Constitutional law knows, the Court has, for many years, tried to stop the phenomenon of the transformation of the decree-law into an ordinary normative act.[46] As such, it will probably have even harsher words against a tool which could represent the final displacement of the usual hierarchy of norms. Obviously, only the future will reveal us the answer.

All of this seems to suggest that the DPCM will remain but an episode in the constitutional history of the country. This is not the case in France, where the state of health emergency has now perpetually found its way into the ordinary legal system. Many commentators outline the worrying points of this regime especially on the relation between the Government and the Houses. Sometimes, they go as far as to use alarmed phrases similar to the ones we have seen in Italy: for Altwegg-Boussac, the new law «perturbates» the constitutional functions a Parliament should carry out in a democracy. The most obvious term of comparison for making such an assertion is the "old" state of emergency: in the opinion of the author, it compensated the exceptional powers granted to the

[44] Corte Costituzionale, sentenza n.37/2021, *Considerato in diritto*, par.9.1, https://www.giurcost.org/decisioni/2021/0037s-21.html
[45] Corte Costituzionale, ordinanza nn. 66 e 67/2021, https://tinyurl.com/jy46dasb
[46] SORRENTINO, F., *op. ult. cit*., 132; CARETTI, P., - DE SIERVO, U., *op.cit*., 277.

Government by strengthening Parliamentary control, while the new institute, on the contrary, weakens it.[47] What are the critical points inspiring such a concern?

First, there is the issue of the duration of the state of health emergency. As we already know, it can last one month before Parliamentary authorization comes into play; in the "simple" state of emergency, on the other hand, not only is the deadline reduced to twelve days, but there is also a "caducity clause", absent in the new law, establishing that the regime ends automatically fifteen days after the date of resignation of the Government or of dissolution of the National Assembly.[48] This means that, on the other hand, the state of health emergency could easily continue even after the lower House has ceased its term.

Secondly, we have to consider the magnitude of the powers conceded to the Government by the new regime, as it allows the executive to regulate, by ordinance, as many as nine domains normally reserved to the law. Such a disposition, though coherent with article 38 of the Constitution, seems excessively permissive,[49] especially when one considers that, on the contrary, all the measures conceded by the state of emergency are issued through either ministerial decrees or prefectural orders. As such, the new law seems much more remindful, in the view of some authors, of the powers granted by the mechanism foreseen in article 16 of the Constitution.[50] After all, as we have already seen in the previous Chapter, the state of health emergency is also problematic for the very intensity of the measures it allows: while the law of 1955 mostly concerns individual provisions, the entirety of the population can now be affected.[51] If we want, this creates a problem very similar to Italy: even if the formal aspects of the new law were free from critical issues, it lays the ground for such a large infringement of rights as to require the most serious collaboration by all institutional actors. Of course, this has not happened: for many authors, the very problem behind the state of health emergency is that it seems to reveal a will by

[47] ALTWEGG-BOUSSAC, M., *La fin des apparences*, http://journals.openedition.org/revdh/9022
[48] PLATON, S., *op.cit*., 303
[49] GELBLAT, A. – MARGUET, L., *op.cit.*
[50] SÉE, A., *Les Libertés Économiques en Période De Crise Sanitaire : Un Premier État Des Lieux*, https://tinyurl.com/vck9a9tc
[51] SIZAIRE, V., see above Chapter 11, note 35

the Government to unduly centralize powers. This can be caught even by apparent minutiae, such as the provision that the new regime can be ended through a decree of the Council of Ministers before the deadline established by the law of the Parliament has expired.[52] This means that an administrative acts takes precedence over a primary norm, in a violation of the hierarchy very similar to the one which has angered Italian commentators for nearly one year: however, while there it seems to have ended, as we have seen, in France it is now crystallized in a permanent law. Of course, the above-said centralization of authority was also evident in the possibly even more controversial law of July 9, 2020 on the exit from the state of health emergency, which, simply on the basis of the uncertain evolution of the pandemic, gave the Prime Ministers powers very similar to the ones he had while the regime was in effect. This was, understandably, shelled with critiques by a number of human rights associations.[53]

Most seriously, the law of July 9, 2020 featured absolutely no parliamentary control.[54] This is sadly coherent with the fact that, while the state of health emergency was in full effect, said control was already severely reduced vis-à-vis the one exercised during the "simple" state of emergency. In the latter case, in fact, article 4-1 imposes every administrative authority to transmit to the Houses the acts it enforces during the tenure of the exceptional regime. On the contrary, the new norms simply force the Government to keep the Parliament informed of the measures it applies. This provision, which was the result of a long battle involving the Council of State, the Government, and both Houses of the Assembly, had an important concrete result in the case: since it was included in Chapter I of the law of March 23, 2020, it submitted to parliamentary scrutiny only the acts taken in application of the state of emergency, but not the ones foreseen by the other Chapters of the statute, which included the economic

[52] RENARD, S., *L'état d'urgence Sanitaire : droit d'exception et Exceptions au Droit*, https://tinyurl.com/4ctsanrv
[53] See Commission Consultative Nationales des Droits de l'Homme, *Une sortie de l'état d'urgence sanitaire en trompe l'œil : les menaces sur les droits et libertés perdurent,* https://tinyurl.com/y33fd5t8,
[54] CERF, E., et al., *op.cit*., 207.

measures and the controversial postponement of the second round of the municipal elections.[55] This was dubbed by some authors as an «intellectual absurdity»[56], with others lamenting that, in any case, this whole «façade of parliamentary scrutiny» under the state of health emergency is but a useless «paper tiger» which will, at most, produce academic reports.[57]

It therefore appears clear that the new norms envisaged by the French State bear a huge number of problems. Consequently, we cannot but agree with those commentators who maintain that the guard must remain high at all times, especially considering that the legal system of the Republic is not new at integrating exceptional provisions into ordinary rules, as we have consistently shown. Thus, the worrying possibility that the state of health emergency might normalize and «become an easily abused tool» is a sad reality.[58]

Similar preoccupations, as we may imagine, are expressed by the Spanish authors as regards the measures enacted by their government. In this last case as well, in fact, we have the very same framework as the other two countries: scholars attack both the choice of the normative instrument and the extension of the powers allowed to the executive.

The first point rests, as we know, on the debate on whether or not fundamental rights were suspended during the pandemic: if this was the case, then the state of exception should have been declared, rather than the state of alarm. Since this has to do with the substance of the provisions, we have to postpone our analysis until the last chapter. Instead, now we focus on another issue which is equally important: the constatation that the state of exception requires a greater parliamentary involvement than the state of alarm. In the former case, in fact, not only must the Congress of Deputies (the lower House) authorize the executive to declare the regime, but it also approves the content of

[55] BEAUD, O. – GUÉRIN BARGUES, C., *op.cit.*
[56] ALTWEGG-BOUSSAC, M., *op.cit.*
[57] CASSIA, P., *L'état d'urgence sanitaire: remède, placebo ou venin juridique?*, https://tinyurl.com/2ybrhrre
[58] PAMELIN, D., *La Francia e il Covid-19: la creazione del nuovo stato d'urgenza sanitaria",* in *Osservatorio Costituzionale*, 2020, 3, 317.

the Decree with the measures which the Government can take.[59] Accordingly, the Chamber must also consent if the executive requests further powers.[60] In the state of alarm, on the other end, the Congress is only involved to prolong the regime after its initial declaration by the Council of Ministers.[61] This means that, as regards the measures themselves, all the advantages linked to a parliamentary debate, such as the involvement of the opposition or the strict justification of the norms which are being issued, are missing.[62]

Secondly, there is the amplitude of the powers conceded by the Royal Decrees, «surely exorbitant»[63] in the opinion of some authors as they consent to all the Ministries recognized as "competent authorities" to dictate the measures foreseen in article 11 of the Organic Law – meaning, all the possible acts enforcing the lockdown.[64] The Parliament, on its part, seems to have contented with imposing upon the Government a duty of weekly reporting on the measures enacted, similarly to what had already been done in Italy and in France.[65]

It is clear, however, that if we continued to tread this path, we would end up in that very same political realm we had tried to stay away from. Indeed, as we have argued in the previous Chapter, the choice of going for the state of alarm seems fundamentally correct, given the different prerequisites of the state of exception. As such, arguing that the Sánchez Government should have opted for the latter is, in our view, a matter of political opportunity rather than of juridical criticalities, if we stick by the formal requirements. It appears clear, however, that if we shall conclude, later on, that the infringements of fundamental rights were indeed suspensions, then our final assessment would be totally different.

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[59] Ley Orgánica 4/1981, art.13 and 14, see above Chapter 8, note 12
[60] Ibidem, art.15, par.1
[61] Ibidem, art.6, par.2
[62] RUIZ MIGUEL, C., ref. by VILLANUEVA, N., *Los juristas avisan: se están aplicando medidas propias del estado de excepción,* https://tinyurl.com/r5a2nbrp*;* REVENGA SÁNCHEZ, M.*, op.cit., 78*
[63] CUTANDA, B. L., *Análisis de urgencia de las medidas administrativas del estado de alarma*, https://tinyurl.com/dm9932f4
[64] Real Decreto 463/2020, art.4, par.3, see above Chapter 4, note 7
[65] REVENGA SÁNCHEZ, M., *op.cit*., 83

In spite of this, as we have tried consistently to prove, formal criteria are anything but unimportant. Indeed, if we are to give a final comprehensive judgment, we can state that a common problem regarding all three countries was the attitude, by their Governments, not to take into consideration the exceptionality of the situation. It may well be that, formally speaking, the DPCMs, the law on the state of health emergency and the six-months long state of alarm are all perfectly correct. On the other hand, in our opinion, one should also remember that the COVID-19 pandemic was not an ordinary crisis: as it entailed the greatest limitation of human rights and fundamental freedoms democratic societies had ever seen after WWII,[66] institutional collaboration should have become a central tenet of their response.[67]

This is also due to another important reason: if Parliament and Government are rowing at opposite directions, one may imagine that normative clarity and, as a result, compliance with the emergency norms will be severely impaired. Unfortunately, as we are going to see in next Chapter, this is exactly what has happened in all of the three countries.

[66] JOVIČIĆ, S., *COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights*, in *ERA Forum*, 2021, 21, 545.
[67] See the very poignant reflection by the President of the Italian Constitutional Court, CARTABIA, M., *L'attività della Corte costituzionale nel 2019*, https://www.cortecostituzionale.it/jsp/consulta/composizione/relazione_annuale.do

## Chapter 13 – Legal certainty: normative clarity and *nullum crimen sine lege*

When writing an academic dissertation, a certain degree of research would be expected. However, we find ourselves in a very peculiar position: if we wanted, we could pen this chapter by referencing our personal experience only. Even if, in fact, our entire work deals with a subject whose importance in everyone's day-to-day life has been unquestionable, this section in particular has to do with, in a sense, its most concrete aspect: the application of the anti-COVID rules in tangible situations.

As we should perfectly know by now, Italy, France and Spain were anything but close-fisted at issuing norms to combat the pandemic. On the contrary, their huge number, and their different ranking, prompted commentators to employ metaphors such as «forest» or «flood», which we have already quoted in previous chapters. In itself, this «legislative inflation» alone would suffice to jeopardize normative clarity, as Caussignac points out.[1] To this, however, we may add the trend to change norms within a few days' notice. The clearest example, as we have seen in Chapter 2, was Italy, where sometimes regulations changed before they had even entered into force, or were modified hours before taking effect. We may quote, for instance, the stop to skiing activities, which should have started on February 16, on the evening of the previous day.[2]

Now, on the one hand, this is, in a sense, an inevitable issue during a catastrophe. In 1940, Cecil Carr opened an article about the «Crisis legislation in Britain» during World War II with a very poignant maxim: «if hard cases make bad laws, emergency makes worse».[3] «Gaps, inconsistencies under-defined terms and lack of stability» will be very common problems, especially during an event as changing as a pandemic.[4] To this, we may add a point that

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[1] CAUSSIGNAC, G., *Clear Legislation*, https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/cl-lc/index.html.
A special thanks goes to our dear friend Alessandro for the hints and suggestions about this Chapter.

[2] Open, *Coronavirus, Speranza firma lo stop alle attività sciistiche fino al 5 marzo (e dà ragione al Cts). Le Regioni: «Ennesima mazzata»*, https://tinyurl.com/4f8rafvk

[3] CARR, C.T., *Crisis legislation in Britain*, in *Columbia Law Review*, 1940, XL.8, 1309.

[4] PETROV, J., *op.cit*., 78

will become a central argument of our reasoning in the next Part: it is perfectly normal that, in a democratic context, emergency norms lose force as time passes by. This means that the occasions of conflict and contradiction with the pre-existing legal framework will multiply ever more, forcing the legislator to corrective interventions. Such contrasts have been numerous throughout the pandemic, often receiving extensive attention in the media: to give a recent example, let us consider the public outrage sparked, in Italy, by the possibility of travelling abroad for tourism on Easter days, while the country was on lockdown.[5] Indeed, it has happened many times that the government of one of the three countries relaxed previously announced norms after a public backlash. At the end of April 2020, for instance, during the first deconfinement, the Spanish executive was forced to loosen the dispositions on the displacement of children after both citizens and public experts had considered the initial proposal excessively rigid, as we have reviewed in Chapter 4.[6] Italy, on the other hand, witnessed an even more bizarre situation when, on April 26, the Conte government announced that, starting from May 4, citizens would be allowed to visit their "*congiunti*", a word clearly intended, if one listens to the official press conference, to mean blood relatives.[7] The public reaction was so furious that, within three days, the scope of application had been extended as far as to include any «person sharing a stable bond»,[8] as also stated by the FAQs section on the official website of the government.[9] To give another example, at the end of the year, the DPCM of December, regulating the Christmas period, allowed citizens

[5] GUERZONI, M – SARZANINI, F., *Covid e viaggi all'estero, la nuova ordinanza di Speranza e le regole per Pasqua: la lista dei Paesi con obbligo di isolamento di 5 giorni e tampone al rientro*, https://tinyurl.com/vp8rrh3a

[6] GÓMEZ, P. – VILAR, M. P., *Sorpresa y escaso apoyo entre expertos y padres a la fórmula elegida para dejar salir a los niños*, https://tinyurl.com/v6yh4bd2

[7] *Fase Due, Conferenza Stampa Del Presidente Conte*. YouTube. Uploaded by La Repubblica. April 26, 2020, https://www.youtube.com/watch?v=BuwooHHEwwI, «We only add also the possibility of movements aimed at visiting "congiunti". We are aware that many families have been separated, many family units, parents and children… children and grandchildren with grandparents. We thus want to allow them some visits but pay attention [...] we are not saying that from now on, from May 4th, private family parties, family gatherings are permitted» (min 14:37)

[8] ARCANGELI, M., *I congiunti sono anche gli amici*, https://www.ilpost.it/massimoarcangeli/2020/04/30/i-congiunti-sono-anche-gli-amici/

[9] Avvenire.it, *Fase 2. Tra i «congiunti» che si possono incontrare anche i fidanzati (non gli amici),* https://www.avvenire.it/attualita/pagine/congiunti-fase-due-domande-frequenti

to always move to return to their «residence, domicile, or home».[10] By the last word, we have translated a term, «*abitazione*», which has no precise meaning in Italian law. Again, if one listens at the press conference and looks at the FAQs on the issue, it appears clear that it was meant to allow cohabitating couples to reunite, regardless of the legal title by which they occupied their common house.[11] In spite of this, there was absolutely no certainty on how such a rule should be interpreted.[12] In the personal experience of the writer, there have been all kind of readings: both people not allowed to visit their partner, and a friend who phoned the official number instituted by the Government to clarify doubts and was answered that her boyfriend, coming from another Region, could consider her home as his «*abitazione*».[13] This was in spite of the fact that he had been there twice in three years, and for no more than ten days each time. It is clear, however, that if this were the correct interpretation, than there would have been no point in issuing this norm rather than simply allowing any couple of partners to meet.

We could quote a potentially endless number of similar examples. Apart from practice, however, we are also interested in theory: why, in all three countries, were norms so confused as to arise complaints which continue to the moment we are writing this text?[14] In our opinion, the main problems are two.

First, we have the tendency to refer, in normative acts, to the content of other acts. This was the case both for the DPCM of March 8, 2020 in Italy and for the Royal Decree 463/2020 in Spain. The latter even used this technique as

[10] DPCM 3 dicembre 2020, art.1, par.4, see above Chapter 2, note 44
[11] GIRARDI, A., *Dpcm dicembre, via libera agli spostamenti per tornare alla propria abitazione*, https://tinyurl.com/6642fvdw
[12] COLUZZI, T., *Dpcm gennaio, le regole sui ricongiungimenti: ok ai partner, no ai fidanzati*, https://tinyurl.com/y6339rpn, which offers an interpretation completely different from the one experienced by the writer
[13] The author would like to thank his dear friend Silvia for sharing her story with him.
[14] SÁNCHEZ, L. – SÉNÉCAT, A., *Covid-19 : des restrictions imprévisibles, arbitraires, voire contradictoires créent un sentiment « d'insécurité juridique »*, https://tinyurl.com/23rtzswt; DÍAZ, P. J., *Sobre la constitucionalidad de la declaración del estado de alarma y sus prórrogas por la Covid-19*, https://tinyurl.com/ax32m6d8

regards the regime of the sanctions,[15] meaning that there was no precise possible foreknowledge, by the citizens, of what they might incur.[16] This is a violation of a most serious principle of the rule of law: the need that any criminal behavior be defined in advance, expressed by the Latin sentence "*nullum crimen, nulla poena sine praevia lege poenali*". Instead, Spain was force to recur to other laws which, obviously, do not categorize free circulation as a crime.[17] As such, any possible defiant behavior had to be referred to other cases, such as the obstruction of authority defined in article 36, paragraph 6 of the Organic Law on Citizens' Security.[18] This is, of course, a major problem, as the principle of certainty of crimes and punishments is, as we have seen in Chapter 9, central in any rule of law country.

However, it was hardly unique to Spain: Italy, according to many commentators, fared no better. In this case, the main issue are two: the fact itself of enacting limitations of fundamental freedoms through administrative acts,[19] and the infamous article 2 of the decree-law n.6/2020. Taken together, they mean that the DPCMs of March 8 and 9, 2020, which locked down at first parts of the North and, then, the whole country, criminalized a behavior, exiting one's home, which had not been qualified as such by a law of the Parliament. This patent violation of the principle of *nulla poena* has been denounced by several authors: as we know, however, the situation was then solved by the following decree of March 25.[20]

Finally, French legislation had a different, but related critical aspect: in this case, the principle jeopardized was, in the opinion of the authors, the *ne bis*

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[15] As its article 20 states that non-complying with anti-Covid restrictions «will be sanctioned by the laws», referring article 10 of the Organic Law n.4/1981 which, however, simply repeats the very same phrase.

[16] LÓPEZ-FONSECA, O., *Sanciones por incumplir el estado de alarma: desde una multa de 100 euros hasta un año de prisión,* https://tinyurl.com/a7fh95wn

[17] ALONSO-CUEVILLAS I SAYROL, J., *La discutible legalidad de las sanciones por incumplimiento del confinamiento durante el estado de alarma*, https://tinyurl.com/2wkbb8tp

[18] Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana, art.36, par.6,
https://www.boe.es/buscar/doc.php?id=BOE-A-2015-3442
English text: https://tinyurl.com/3ej3ryxu

[19] RATTO TRABUCCO, F., *op.cit.*

[20] Ibidem; LORENZO, L., *op.cit.*; FRANCAVIGLIA, M., *op.cit.*, 37.

*in idem*, meaning that «no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted», as stated by article 50 of the Charter of Nice.[21] In spite of this, the French lockdown regulations, as we know, stated that people sanctioned for violations of the rules more than three times within 30 days risked up to six months of imprisonment and a €3750 fine. This was considered not only disproportional,[22] but also able to punish the same behavior (the fourth violation) twice.[23] Moreover, since in France a person can challenge any administrative sanction within 45 days, how is this compatible with the fact that, within a shorter delay, that same provision may be the basis for a criminal indictment? These were the very arguments by which the Cassation Court seized the Constitutional Council in a QPC in May 2020. In their subsequent ruling, the Supreme Justices once again validated fully the action of the legislator, by claiming that the measures enacted are sufficiently clear, operate since the fourth violation – thus, punish distinct facts – and, most importantly, that the seriousness of the repressed behavior during the pandemic demanded such an approach.[24]

As we may imagine, this ruling was also subject to huge criticism. The article at issue, indeed, had been further accused of lacking precision and leaving too wide a discretion to law enforcement agents.[25] This is exactly the second main point of our Chapter: the insufficient accuracy of anti-Covid regulations. Debates on what constitutes a valid reason to go out, indeed, have been flourishing in all three countries since the pandemic began. Terms such as «necessity» or «proximity» sparked extensive discussion on how they should

[21] Charter of Nice, see above Chapter 5, note 12
[22] DE COMBLES DE NAYVES, P., *Ne rajoutons pas l'arbitraire à la catastrophe sanitaire*, https://tinyurl.com/2fazf78w
[23] KRIEF-SEMITKO, C., *Les droit fondamentaux à l'aune de la pandémie «Covid-19»,* in CERF, E., et al., *op.cit*., 275.
[24] Conseil Constitutionnel, Décision n° 2020-846/847/848 QPC du 26 juin 2020, https://www.conseil-constitutionnel.fr/decision/2020/2020846_847_848QPC.htm
[25] JACQUIN, J.-B., *Confinement : le délit de non-respect est validé par le Conseil constitutionnel,* https://tinyurl.com/5bk8vdpk

have been interpreted.[26] Their lax meaning had exactly the effect that the margin of appreciation left to police agents was so large as to be incompatible with a democracy.[27] In our personal experience, it has happened many times that the same norm be interpreted in two opposite ways, so that the same behavior was prohibited to someone and consented to someone else, or that somebody addressed a competent authority to ask for clarification on the meaning of a norm, only to be answered: «it depends on the opinion of the agent who controls you». The extension of the powers allowed to the law enforcement corps was so wide that a number of officers we have addressed had to deny being interviewed for this dissertation because, they said, the anti-COVID norms are so lax as to prevent them from linking their name to a precise interpretation.

However, in our view, this situation was, in a sense, inevitable. As we have tried to show extensively throughout this Part, the lockdown regulations contrast in many ways with the pre-existing legal system of liberal democracies. As such, it is predictable that the more time passes since the beginning of the emergency, the more the authorities will be forced to relax the norms, and the greater occasions of conflict will arise. After all, the «stay-at-home» mind frame, which officers tried to spread among the population, is unlikely to survive for too many time. The examples we have provided in this Chapter confirm this: after one month and a half of seclusion, both in Italy and Spain a public reaction broke out against the continuance of too rigid norms.

It is also clear, however, that the genetic problems will only be worsened if the Government acts on the basis of politics rather than implementing proportional or reasonable measures. A clear example can be the saga of the Italian curfew: in effect since November, as we know, it came under a barrage

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[26] BELLETTI, M., *op.cit.*, 185-186; GIULIANI, M., *Confinement, couvre-feu : qu'est-ce qu'un motif familial impérieux ?*, https://www.marieclaire.fr/deplacement-motif-imperieux,1348432.asp; AMOEUDO-SOUTO, C. A., *Vigilar y castigar el confinamiento forzoso. Problemas de la potestad sancionadora al servicio del estado de alarma sanitaria*, in *El Cronista del Estado Social y Democrático de Derecho*, 2020, 86, 70.

[27] PORTONERA, G., *Coronavirus e sanzioni: il preoccupante "zelo" delle forze dell'ordine,* https://tinyurl.com/fvz7yw5x*;* PleineVie.fr, *Confinement : ce que la police ou la gendarmerie a le droit (ou non) de vous demander pendant un contrôle,* https://tinyurl.com/y5xu9m54*.* Both sources denounce excessively zealous police agents.

of criticism at the end of April, when the Draghi Government enacted a partial reopening, but left the measure in place.[28] This, however, clearly contrasted the fact that restaurants were allowed to re-open (albeit only for outdoor service) until 10 pm. How can one conciliate the two rules? The Ministry of Regional Affairs, Mariastella Gelmini, advanced the interpretation that people could be served until that hour and, then, return to their residence after the beginning of the curfew, without the fear of being sanctioned. In response, however, Carlo Sibilia, Under Secretary of the Ministry of Interior, defended the more rigid view: by 10 pm, citizens must already have got home.[29] This last interpretation should, in theory, be more reliable, as it comes from an officer occupying a post more closely related to internal security. However, it is completely untenable, as both cinemas and outdoor sports venues, two other activities allowed to reopen, have coherently regulated themselves to close at 10 pm. As such, people can stay there until that hour, and it is obvious that, afterwards, they will need some time to return to their residence regardless of the fact that the curfew has already started.

This episode may seem anecdotal but, in our view, it summarizes perfectly what we have said, showing how government officers themselves can easily engender confusion among citizens. This gets even worse if, as it is exactly the case with the Italian curfew, the maintenance of a given rule depends more on political reasons than on actual scientific needs.[30] Indeed, the absence of a clear

[28] DECRETO-LEGGE 22 aprile 2021, n. 52 - «Misure urgenti per la graduale ripresa delle attività economiche e sociali nel rispetto delle esigenze di contenimento della diffusione dell'epidemia da COVID-19», https://www.gazzettaufficiale.it/eli/id/2021/04/22/21G00064/sg

[29] Il Fatto Quotidiano, *Coprifuoco, Gelmini: "Chi va a cena può stare al tavolo fino alle 22". La smentita di Sibilia: "No a interpretazioni, a quell'ora a casa"*, https://tinyurl.com/swa6jzz8

[30] The two officers pertain to different political areas: the former is a representative of the right-wing Party *Forza Italia*, while Sibilia belongs to the left-wing populist formation *MoVimento 5 Stelle*. Throughout the pandemic, as it has also happened elsewhere, the two fields have divided on how to combat the contagion, with the ruling left-wing pushing for a more rigid strategy, while the right-wing has consistently pressured for reopening. Since the Draghi executive, a national unity government, took office, this battle has been transferred within its very ranks, which now comprise two right-wing parties, *Forza Italia* itself and the Northern League, with the curfew being one of their main targets. Polemics were also fueled by the Scientific Technical Committee denouncing that the government had decided to keep the measure without consulting them (AGI, *Polemiche sul coprifuoco alle 22. Il Cts: "Non siamo stati consultati"*, https://tinyurl.com/yzbn5s2m)

proportional nature in many anti-COVID regulations has been a huge problem ever since they were first enacted. That is why we are going to dedicate the last Part of our work to this very aspect.

# Part IV. The substantive aspects: the principle of proportionality

## Chapter 14 – Introduction: the components of proportionality

When reviewing the formal aspects of the rule of law, we have seen that, in many cases, their disrespect has been justified by recalling the exceptional situation created by the COVID-19 pandemic. This has happened both in Italy, via reference to the state of necessity, and in France, where the theory of exceptional circumstances has been rediscovered. Can we do the same for the substantive issues as well?

The answer, in our opinion, is in the negative. While, indeed, the formal procedures can be saved by exceptional needs, the same cannot go for the measures themselves. One of the basic principles of the rule of law, indeed, is that any limitation of fundamental rights must be proportional. As Lenaerts puts it, «our core values as European are absolute. They are not up for balancing».[1] This corresponds to what we have already seen in Chapter 5, as we made the distinction among absolute, reinforced and relative rights.

As such, the second chapter of this section will be dedicated to inquire exactly this: whether or not anti-COVID measures impacted upon freedoms which were not up to limitation. This means, in detail, that we will try to establish whether the «stay-at-home» orders infringed upon freedom of circulation or personal freedom. In the first case, we are dealing with a relative right, whose restriction is well possible. In the second case, however, we are before a reinforced right, which cannot receive further limitations beyond those normally allowed by the Constitution. If, then, we find that anti-COVID measures maimed the personal freedom of citizens, then they are automatically null.

Of course, this does not mean that, on the contrary, a relative right can receive any limitation. Instead, as we have seen in Chapter 6, any restriction of a freedom must necessarily adhere to the criterion of proportionality. This concept has a long history and a series of possible constitutive elements. For instance, in the EU, the most employed requirements are usually three: adequacy

[1] LENAERTS, K., *Limits on Limitations: The Essence of Fundamental Rights in the EU,* in *German Law Journal*, 2019, XX.6, 779.

(the measures enacted must be suitable to reach the aim set by the legislator), minimal intervention (the restrictions of a freedom must be as modest as possible) and proportionality *stricto sensu* (or balancing), which requires a proper balancing between any conflicting right.[2] The core features remain the same throughout all theories, even though the names or the definitions of the single components vary. For instance, the Italian tradition knows only two elements: reasonableness (*ragionevolezza*) and proportionality itself, with the former corresponding to balancing and the latter to the minimal intervention.[3] For our work, however, we will make reference to the partition proposed by Aharon Barak, former President of the Israeli Supreme Court, who divides proportionality into three main elements: proper purpose, necessity (corresponding to the above-mentioned minimal intervention) and balancing or proportionality *stricto sensu*.[4] We have selected his theory because it most suited the roadmap of our dissertation.

Indeed, once we have terminated the analysis of whether or not the measures impacted upon reinforced rights in Chapter 15, we will move to 16 and, after briefly reviewing the issue of the proper purpose, we will perform the necessity test. Was it there a way to effectively combat COVID-19 without recurring to something as invasive as the mandatory «stay-at-home»? Of course, this may seem like an invasion of epidemiology, a field even more far from law than political science. However, even though we will necessarily make reference to medical publications, we will never lose sight of our main target, which is not to determine the effectiveness of lockdown measures (something we clearly lack the competence to do), but to establish whether or not they were the best suitable way to stop the pandemic, as the necessity test requires.

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[2] ÁLVAREZ GARCÍA, V. J., *op.cit.*, 6.

[3] MARINO, G., *I principi di ragionevolezza e proporzionalità nel diritto amministrativo*, https://tinyurl.com/y22p2jr5 . In general, however, the Italian Constitutional Court assigns no precise meaning to any of the terms (CARTABIA, M., *I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana*, https://tinyurl.com/239w4mmw )

[4] BARAK, A., *op.cit*. He actually lists a fourth requirement, rational connection, but agrees with many commentators on its very little usefulness.

After all, even in the case that there was no better scientific alternative, we still are left with the last component of proportionality: balancing. A measure may well be the only one medically valid, but it still cannot be accepted if it disproportionately impacts upon the conflicting rights at stake. Of course, also in this case, there is the serious problem that lockdown provisions maimed a huge number of fundamental freedoms, so that analyzing every single one of them would be impossible. That is why we have chosen another path: we will try to show how balancing was concretely performed by the judges of the three countries in a number of relevant sentences, dealing with diverse rights. Even taking into consideration that not every one of them has the same importance, we can trace a clear path: whereas at the beginning of the pandemic the judiciary contented with validating any measures not appearing «manifestly disproportional», as time progressed the attitude has changed and the requirements have grown much stricter.

This not only shows how the proportionality test can be conducted in very different ways, but also supports the core argument of our work: the idea that lockdown measures may be considered acceptable, but they are not likely to survive in a democratic system for too long.

## Chapter 15 – Personal freedom or freedom of movement?

To defend the actions taken by the Governments of Italy, France and Spain, commentators usually maintain that they should be considered limitations of the freedom of movement.

Indeed, all the texts on human rights we have reviewed in Part II list a number of cases where this right can be restricted. For the ICCPR, they are «national security, public order, public health or morals or the rights and freedoms of others»[1], while the ECHR adds prevention of crime.[2] «Health and security» are also the possible reasons specified in article 16 of the Italian Constitution,[3] while the French one is silent on the matter and the Spanish text, on the contrary, has no specific limitation clause for this right (detailed in article 19), but allows its suspension under the state of exception.[4] Thus, in general, the more plausible explanation is exactly to refer the «stay-at-home» orders as perfectly justifiable restrictions of the freedom of movement for sanitary reasons.[5]

On the contrary, the authors who denounce them as inadmissible affirm that they are infringements of personal freedom. As we know, this is a reinforced right, meaning that it cannot be restricted further than what is normally allowed by the law. On the point, article 9 of the ICCPR is clear: «Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. *No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law* [italics added]».[6] On the other hand, article 5 of the ECHR, after repeating the very same concept, gives a list of six possible exceptions: beyond those normally consented to maintain public order (such as the detention of convicted or suspected criminals), there is also the possibility to confine people «for the prevention of the spreading

[1] ICCPR, art.12, par.3, see above Chapter 5, note 10
[2] ECHR, Protocol n.4, art.2, par.3, see above Chapter 5, note 11. The protocol is in force for all member States of the CoE with the exception of Greece, Switzerland and the UK (https://tinyurl.com/4s4dp3p9)
[3] Italian Constitution, art.16, see above Chapter 7, note 2
[4] Spanish Constitution, art.19, see above Chapter 7, note 19
[5] BIGNAMI, M., *op.cit*., 45
[6] ICCPR, art.9, par.1

of infectious diseases».[7] It seems to us that this should be considered a viable justification for the house confinement of people who have either tested positive for COVID-19 or have been in contact with confirmed cases.[8] However, this measure almost fully corresponds to an house arrest, with people prevented from leaving their residence for any reason, and subject to criminal indictment in all three countries if they do so.[9] As such, some commentators point at the problematic nature of giving sanitary authorities the power to mandate confinement also for close contacts without any intervention from a judge.[10] A similar view was shared by the French Constitutional Council in its decision of May 11, 2020 on the law proroguing the state of emergency. The Court found that if measures of quarantine and isolation impose the total prohibition to leave one's residence, they violate personal freedom. However, they do so in a manner proportional with the need to ensure public health, provided that a series of procedural requirements are met, such as the necessary authorization of the judge of freedoms if they the person is prevented to go out for more than twelve hours per day.[11]

This ruling reveals a striking difference between French and Italian tradition: in the latter case, in fact, personal freedom is considered a reinforced right, which cannot be limited in any way beyond what is normally permitted by article 13 of the Constitution.[12] As such, when judges found that lockdown measures were a violation of this very provision, they declared them

[7] ECHR, art.1, par.5e

[8] As also shared, among others, by BELLETTI, M., *op.cit.*, 190

[9] VON BOGDANDY, A. - VILLAREAL, P., *Derecho internacional público y la respuesta frente a la pandemia de Covid-19*, in GONZÁLEZ MARTÍN, N. - VALADÉS, D. (eds.), *op.cit.*, 13 ff.

[10] LALLI, A., *op.cit*., 222

[11] Conseil Constitutionnel, Décision n° 2020-800 DC du 11 mai 2020, see above Chapter 3, note 35

[12] By the text of the article, «personal liberty is inviolable. No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void» (parr.1-3).

illegitimate.[13] On the contrary, the French Constitution simply states, at article 66, that «nobody can be arbitrarily detained».[14] As such, as long as there is a lawful reason, personal freedom can be compressed. Finally, Spain places somewhat in the middle between the two extremes: its article 17 has a formulation which reminds the Italian article 13, but the suspension of the right is explicitly allowed by article 55 when the state of exceptions or siege are in effect.[15]

Debates in the Iberic country, however, have also revolved around another aspect: as we know from Part II, even if the affected right were freedom of circulation, its suspension is only allowed under a state of exception. During the regime of alarm, instead, only a limitation is possible. The difference between the two is crucial: we have already seen it briefly in Chapter 5. Likewise, the Italian Constitution allows no suspension of fundamental freedoms whatsoever: they can only be restricted, and under rigid criteria.[16]

As such, the rest of the chapter will be dedicated to the analysis of the difference between personal freedom and freedom of circulation, to try and understand whether or not imposing all the population to «stay at home» was admissible under the rule of law. In the last Chapter, instead, we will try to assess whether a proper balancing was carried out when limiting the right, regardless

[13] Giudice di Pace di Frosinone, Sentenza n.516/2020, 29 luglio, par. A; Tribunale di Reggio Emilia, sentenza n.54/2021, 27 gennaio

[14] French Constitution of October 4, 1958, art.66

[15] By the text of article 17, «every person has a right to freedom and security. No one may be deprived of his or her freedom except in accordance with the provisions of this article and in the cases and in the manner provided by the law. Preventive detention may last no longer than the time strictly required in order to carry out the necessary investigations aimed at establishing the facts; in any case the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours. Any person arrested must be informed immediately, and in a manner understandable to him or her, of his or her rights and of the grounds for his or her arrest, and may not be compelled to make a statement. The arrested person shall be guaranteed the assistance of a lawyer during police and judicial proceedings, under the terms established by the law. A *habeas corpus* procedure shall be regulated by law in order to ensure the immediate handing over to the judicial authorities of any person arrested illegally. Likewise, the maximum period of provisional imprisonment shall be stipulated by law». Article 55 precises that the right of information outlined in paragraph 3 can only be suspended under the state of siege.

[16] *Contra*, see DE MARCO, E., *Situazioni di emergenza sanitaria e sospensioni di diritti costituzionali. Considerazioni in tema di legittimità al tempo della pandemia da coronavirus*, in *Consulta Online*, 2020, 2, 369 ff.

of its nature: if it was restricted in such a way as to be thoroughly suspended, then lockdown measures will be untenable independently from the infringed liberty being personal freedom or freedom of circulation.

Firstly, we will dispel any doubts about the possibility of distinguishing between the two on the basis of a clear definition. On the one hand, all liberties descend, in a sense, from personal freedom, meaning that their interconnection is difficult to dissolve.[17] On the other hand, freedom of movement in particular is usually considered a mere aspect of personal liberty: jeopardizing the former for arbitrary or political reasons will lead almost inevitably to a damaging of the latter.[18]

In spite of this, however, the Italian judges who have annulled anti-COVID sanctions, as we have recalled earlier on, have drawn a clear distinction between the two hypotheses, stating that freedom of movement should be intended as the right to access a specific location. Thus, if the prohibition is placed not on a given place, but directly on the person, preventing them to go out except for specific reasons allowed by the Government, then this is an undue violation of personal freedom. Such a line of reasoning was first employed in the ruling of the Justice of the Peace of Frosinone which we have already quoted in Chapter 11.[19] His sentence later inspired heavily the GIP (a magistrate tasked with preliminary investigations) of Reggio Emilia, who quoted some passages almost word by word in a ruling about a couple who, during the first lockdown, had given the police a false reason for justifying their displacement. The judge excluded that they may have committed a crime. In his view, confining the Italian population at home is illegitimate because, as an infringement of personal freedom, it would

[17] PERNA, A., *La liberté individuelle face au Covid-19 : l'adaptation des garanties de l'article 66 de la Constitution aux circonstances d'urgence sanitaire (1re partie)*, https://tinyurl.com/9rsh9zue

[18] see for instance MCADAM, J., *An Intellectual History Of Freedom Of Movement In International Law: The Right To Leave As A Personal Liberty*, https://law.unimelb.edu.au/__data/assets/pdf_file/0011/1686926/McAdam.pdf, who also quotes a 1988 report by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities noting that «freedom of movement is a constituent element of personal liberty … and it is a part of the right of "personal" self-determination».

[19] see above note 12

have required the validation of a judge, as prescribed by article 13.[20] A third sentence using these very arguments was issued by another Justice of the Peace in Camerino, Marche, as he annulled a fine imposed for violation of the curfew.[21]

All rulings, as one may imagine, sparked huge criticism by commentators who support the constitutionality of the lockdown measures. The most widespread lines of reasoning are two.

First, they maintain that article 13 is meant to prevent all the arbitrary actions of the authority which entail a juridical degradation of the person. As such, it cannot be invoked in a case where the entirety of the population is subject to the same measures for a perfectly legitimate motive like containing an epidemic. [22] This is even truer when one considers that citizens are not completely prevented from going out as are, for instance, people subject to house arrest, a measure compared by the judges to the anti-COVID lockdown. Going out is still permitted, for instance, for physical activity, work and necessity reasons.[23] Indeed, the presence of these exceptions is also employed by some Spanish authors to defend their idea that freedom of movement has not been suspended, but only severely limited.[24]

Secondly, commentators affirm that the violations of personal freedom which article 13 is meant to protect are coercive in nature, meaning that public authority will outright use physical constriction to ensure compliance with them.[25] This is not the case in Italy, where violating «stay-at-home» orders will, at most, result in an administrative sanctions. And even when they lead to criminal indictment, if the person was confined for having been found positive

[20] ibidem. Both rulings also attacked the measures on formal grounds, stating that even if the infringed liberty were freedom of movement, it could not have been limited by an administrative act like the DPCM, referencing the debate we have reviewed in detail in Chapters 11 and 12.
[21] COSENZA, A., *Coprifuoco "incostituzionale": multa cancellata, ecco perché*, https://tinyurl.com/3surhmry
[22] ESPOSITO, V., *op.cit.*
[23] GIGLIOTTI, A., *op.cit.*
[24] CUTANDA, B.L., *op.cit.*
[25] MORANA, D., *Le libertà costituzionali in emergenza*, in MARINI, F.S. – SCACCIA, G., *op.cit.,* 143.

to COVID-19, deprivation of freedom will only happen after a ruling from a judge, as it must always be.

Both arguments, however, seem to present a number of flaws, which are even more detectable when one compares the anti-COVID legislations of the three countries. The view that a juridical degradation can only be entailed by a limitation which is not «general» seems to forget that, in principle, any law bears this feature, meaning that it does not affect a specific subject, but any person who finds themselves into the regulated case.[26] As such, for instance, the norms imposing quarantine and isolation to confirmed or suspect COVID-19 cases have been found to impact personal freedom by a number of commentators and by the French Constitutional Council itself.[27] However, one cannot say that they are not «general», since they may apply to any indefinite person. As such, it is certainly not possible to say that the «stay-at-home» orders respect personal freedom only because they are addressed to the whole population. After all, the concept of this right is not merely operational, but works as a principle meant to, for instance, limit the hypotheses of provisional imprisonment.[28] As such, a law too severe on this point would clearly violate article 13 despite being potentially addressed to everyone. Indeed, as also recalled by the judges, a number of hypotheses, from coercive blood sampling to forcefully accompanying an alien to the border, have been found by constitutional jurisprudence to infringe personal freedom, showing that it does not operate simply in the cases of arbitrary detention.

The idea of the justification of the prohibition of going out via exceptions also appears untenable. First, the hypotheses contemplated by the anti-COVID regulations, such as work or necessity reasons, may well be foreseen also during the application of detention measures like house arrest. And indeed, while one may be legitimately prohibited from working if found positive to COVID-19, it seems difficult to admit that they are also prevented from leaving their residence

[26] MARCONI, I., *La norma giuridica*, https://www.altalex.com/guide/norma-giuridica
[27] see BELLETTI, M., *op.cit;* LALLI, A*., op.cit.*; French Constitutional Council, see above note 10
[28] CARETTI, P. – DE SIERVO, U., *op.cit*., 501; but the Spanish Constitution itself includes in the last paragraph of the article about personal freedom the provision that «the maximum period of personal imprisonment shall be stipulated by law».

if a very serious necessity arises. As such, the exceptions allowed by all three legislations seem to be relatively modest. This is even truer when one also takes into consideration, as the commentators do, the hypotheses of doing physical exercise. Such an argument, indeed, not only implicitly admits, for instance, that the Spanish people were deprived of their freedom, as fitness was not consented to them, but it also seems to paradoxically reduce personal liberty to the mere possibility of jogging.[29]

Finally, the issue of the absence of coercion also seems problematic. First, such a reasoning seem to reduce constriction only to physical restraining. However, force can also be exercised on the psychological level,[30] whose integrity is safeguarded by personal freedom as much as bodily one.[31] As such, being compelled to remain at home with the impossibility of going out, if not for specified reasons, may well represent a violation of personal freedom if it is found to have no basis.[32] Nor, in our view, is it relevant that the coercion is not automatic, as it will only possibly happen in a secondary moment and after a judge has found the person guilty of a crime.[33] On the one hand, the intervention of a magistrate is always required to deprive someone of their liberty: even when

[29] Apart from GIGLIOTTI, A., *op.cit*., this very reasoning is used in an even more puzzling way by ZARRA, G. as he maintains that the Italian measures respected rule of law. The problem, however, is that, in the very same work, he argues that the more restrictive norms enacted by the Campania Region did not. However, the only difference was the prohibition, by the latter, to perform outdoor physical activity. He thus seems to do exactly what we have expressed in the main text: justifying «stay-at-home» orders because they consented limited open-air exercise! Among Spanish authors, AMOEUDO-SOUTO, C. A., explicitly speaks of limitation of personal freedom (*op.cit*., 67)

[30] In private law, the first hypothesis is called *vis absoluta*, «absolute force», while the second *vis compulsiva*, «compelling force». The author would like to thank his dear friend Gennaro for sharing this idea.

[31] For instance, article 3 of the Charter of Nice, titled «right to integrity of the person», reads «everyone has the right to respect for his or her physical and mental integrity».

[32] And indeed, the mental consequences of the lockdowns have been found by illustrious scientists, including the WHO itself, to be so dangerous as to represent a literal second pandemic (CHOI, K. R. et al*, A Second Pandemic: Mental Health Spillover From the Novel Coronavirus (COVID-19)*, in *Journal of the American Psychiatric Nurses Association*, 2020, XXVI.4, 340 ff.)

[33] These are the very arguments used by MORANA, D., *op.cit.*, 144. Of course, in Italy, this debate only revolves around people quarantined or isolated for being confirmed or suspect COVID-19 cases. In France and Spain, on the other hand, it concerns the entirety of population, as also the general «stay-at-home» order may lead, if violated, to criminal indictment.

it happens *ex post*, the delay is usually very short.[34] On the other hand, the fact that the coercion happens later than the imposition of the behavior seems, again, to reduce undue violations of personal freedom to the mere cases of arbitrary detention by the police without the validation of a magistrate. As we just said, however, this right has a much broader scope, and it would be far too narrow to see it only as a mere procedural principle. Most importantly, the idea that ordering everyone not to leave their home, except for a few reasons, is a restriction of freedom of movement because it is not enforced through immediate coercion poses, in our opinion, a question: if this is true, what would a violation of personal freedom look like? It appears clear that not even a totalitarian state could have the force to physically prevent the entirety of its population to exit their residence in the same way as, for instance, someone in jail is stopped from leaving. It thus seems evident that the only way to enforce such a measure is to use sanctions, either administrative or criminal. Physical coercion is absent simply because it would not be possible to apply it to everyone. Indeed, the European Parliament, in its resolution of November 13 «on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights», explicitly stated that criminalizing the violation of the lockdown as France and Spain have done must be considered a disproportionally repressive measure.[35]

The best supporters of our thesis are, in a sense, all the French commentators and jurists who staunchly opposed Ordinance n.2020-303 of March 25 on the adaptation of norms of criminal procedure. As we have recalled in Chapter 3, article 16 of the act prolonged every preventive detention or house arrest which would have expired during the state of health emergency: the amount of the postponement varied on the basis of the seriousness of the crime the person was charged with.[36] Seized by the Union of French Lawyers, the Council of State validated the provision on April 3, 2020, with the usual

[34] In Italy, as we know, the police can detain someone for up to forty-eight hours before the validation of a magistrate is required. In Spain, the deadline is extended to seventy-two hours.
[35] European Parliament resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights (2020/2790(RSP), Recital Y.
[36] Ordonnance du Président de la République n.2020-303 du 25 mars 2020, see above Chapter 3, note 24

justifications that the government had not employed powers it had not received by the Parliament and that, in spite of the prorogation of the detentions, the possibility of the intervention of a judge was preserved.[37] In a note, the Union of Young Paris Lawyers regretted the verdict, pointing out that the Council – which did not even allowed a public audience before issuing it – failed to explain how the sanitary crisis justified the extension of the imprisonments.[38] Louis Boré, president of the Order of the Lawyers at the Council of State and the Cassation Court, even compared the decision to the infamous Law of Suspects,[39] a provision enacted during the Revolutionary Terror which mandated the immediate arrest of people belonging to categories considered suspected.[40]

In spite of this, the Constitutional Council, seized via a QPC, on July 3 reached conclusions very similar to those of the Council of State: since the ordinance does not exclude the intervention of a judge, it cannot be considered contrary to article 66 of the Constitution.[41] And even when, in January 2021, it found the disposition unconstitutional, the Court still declared that the measures taken under its application could not be contested, as they would call into questions the provisions taken to safeguard the public order.[42] Also in this case, the decision was regretted by the commentators.[43]

In conclusion, we have tried to show that, on the one hand, in a rule of law country, it seems perfectly admissible to prevent people from leaving their home if they are susceptible to propagate contagious diseases, as the European

[37] Conseil d'État, arrêt 3 avril 2020, n. 439894, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000041808380/

[38] Union des Jeunes Avocats de Paris, *Rejet par le Conseil d'Etat du recours de l'UJA contre la circulaire relative au prolongement des délais de détention provisoire*, 3 avril 2020, https://tinyurl.com/s32kwpr2

[39] JACQUIN, J.-B., *Coronavirus : le Conseil d'Etat valide la prolongation de la détention provisoire sans juge, https://tinyurl.com/4v3y5vdj*

[40] Décret de la Convention Nationale du 17 septembre 1793 relatif aux gens suspects, https://mafr.fr/fr/article/decret-du-17-septembre-1793-relatif-aux-gens-suspe/

[41] Conseil Constitutionnel, Décision n° 2020-851/852 QPC du 3 juillet 2020, https://tinyurl.com/4842fy9b

[42] Conseil Constitutionnel, Décision n° 2020-878/879 QPC du 29 janvier 2021, https://www.conseil-constitutionnel.fr/decision/2021/2020878_879QPC.htm

[43] ENGEL, F., *Inconstitutionnalité de la prolongation de la détention provisoire sans juge*, https://tinyurl.com/2hr29ef5

Convention on Human Rights itself allows. On the other hand, however, ordering the same thing to the entirety of the population, with only a few exceptions, appears utterly problematic. As Emilio Manganiello, the Justice of the Peace of Frosinone we have repeatedly mentioned, pointed out in his ruling, the general «stay-at-home» order seems to have been «borrowed» by Italy - and, in a cascade effect, by a number of other Western countries - from the successful experience of Wuhan. However, the radical difference between the authoritarian Chinese legal system and a rule of law State is something that does not even need to be explained.[44] And even if the measures were to be considered a restriction of freedom of movement, their extent is such as to create a huge doubt about whether they are indeed limitations or undue suspensions. As we know, this has been the core debate in Spain, and we will review it in the last Chapter.

Finally, of course, problems become even worse when one considers that, in many cases, the measures seem to not even have been based on strict scientific grounds. The postponement of the deadlines for preventive incarcerations by the French State is one clear example. However, as we are going to discover in next Chapter, it is actually the whole validity of lockdown measures which may be challenged.

[44]«Indeed, such illegitimate measures of public health have been adopted by the DPCM after the model of non-democratic States, like China, which have an authoritarian constitutional system, legally incompatible with ours» (Sentenza del Giudice di Pace di Frosinone n.516/2020, 29 luglio, par. B, see above Chapter 11, note 2).

## Chapter 16 – Proper purpose and necessity test

Even though we have not yet defined the concept of proper purpose, we have already encountered it a number of time. Whenever we analyzed either general or specific limitation clauses of human rights, we read that the restrictions can only applied under given exigencies. For instance, article 52 of the Charter or Nice clearly says that «limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others», as we have seen in Chapter 6.[1] The same goes for both article 15 of the ECHR and article 4 of the ICCPR: as we know, in order to justify restrictions on human rights, they require that a war or another similarly dangerous emergency threatens the life of the nation.[2] The same goes for all the reasons authorizing the restrictions of specific rights which we have just seen in Chapter 15. As such, we can now match all of this to Barak's specific definition of the concept of «proper purpose»: not every aim can justify a limitation on a constitutional right, but only some central values recognized by a society.[3]

Since the safeguard of public health is one of them, as we have extensively seen throughout this work, we can easily conclude that all the measures enacted by the Italy and Spain meet this important requirement. All of them, in fact, precise that the derogations of human rights they entail have the only purpose to fight against COVID-19: it is the case of both Italian decree-laws and of the Spanish Royal Decrees establishing both states of alarm.[4] Instead, in France the situation is rather different: even though the measures were clearly directed against the current pandemic, the phrase «covid-19 epidemic» [sic] only appears in the title of the Law of March 23, 2020.[5] Instead, the Decree of October 16,

[1] see above Chapter 5, note 25
[2] ICCPR, art.4 and ECHR, art.15, see above Chapter 5, notes 10 and 11
[3] BARAK, A., *op.cit*., 245
[4] According to the acts, measures are applied «to avoid the spread of COVID-19» (DL 23 febbraio 2020, n.6, art.1) and «to contain and contrast the sanitary risks arising from the diffusion of the COVID-19 virus [sic]» (DL 25 marzo 2020, n.19) in Italy; to «face the situation of sanitary emergency created by the coronavirus COVID-19» (Real Decreto 463/2020, art.1) and «to contain the propagation of infection caused by the SARS-CoV-2» (Real Decreto 926/2020, art.1) in Spain.
[5] Loi n.2020-290 du 23 mars 2020, see above Chapter 3, note 22

establishing the second state of alarm, mentions the emergency in its preamble.[6] This, however, may seem a very small issue when compared to the bigger problem: as we have already seen in Chapters 11 and 12, the main question with the state of health emergency is that it has been created as a permanent regime which will remain in the French legal system after the pandemic is over. As such, its only required purpose is to fight, as we know, a «sanitary catastrophe endangering, by its nature and seriousness, the health of the population», according to the new article L.3131-12 of the Code of Public Health.[7] The vagueness of this wording, and the opportunity itself to create a brand new legal tool, have already been a central point of our debate in Part III. Therefore, there is no need to repeat ourselves.

This means that we can immediately shift our attention towards the second part of this Chapter, and perform the «necessity test» or, as Barak also calls it, the «less restrictive means».[8] It requires, as we had anticipated in Chapter 14, that the intervention of the legislator be as less intrusive as possible when limiting human rights. This means that, if there exists a less invasive alternative to the measure enacted, it must be preferred. Thus, we should be asking ourselves whether there would have been a lighter way to combat the COVID-19 than nationwide «stay-at-home» orders. Of course, the problem is that this requires an evaluation pertaining to a completely different field than law, that is to say medicine. As such, a number of commentators validated the measures by simply recalling how they seemed the most effective to curb the pandemic, having been employed by a huge number of countries.[9] In contrast, however, one may point out not only that many others never resorted to this strategy, but also that the top places in the ranking of the results against COVID-19 are coherently occupied by States which famously adopted other measures than any form of lockdown, including for instance Iceland, South Korea, and Taiwan.[10] Among EU

[6] Décret du Premier Ministre n-2020-1257 du 14 octobre 2020, see above Chapter 3, note 49
[7] Code de la Santé Publique, art. L.3131-12, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041747761/
[8] BARAK, A., *op.cit.,* 317
[9] ZARRA, G., *op.cit*., 600
[10] Our World in Data, Excess mortality during the Coronavirus pandemic (COVID-19), https://ourworldindata.org/excess-mortality-covid

countries, the ones with the highest excess mortality, especially during the first wave, were consistently those which employed the toughest measures.[11] Finally, the world is full of examples of countries or territories who lifted all restrictions to zero consequences, such as the US State of Florida.[12]

However, in such a crisis, the most antiscientific thing one could do is inferring causation from correlation. Mortality data, indeed, are hardly comparable, as scientists themselves point out, due to differences among countries and the diverging ways they are collected.[13] Instead, what we can try to do is conducting a general discussion. What does science tell us about the effectiveness of the lockdown?

In principle, a number of studies published by illustrious journals confirm its high capacity to bring down infection rates and, thus, deaths and hospitalizations. Due to the fact that the transmissibility of SARS-CoV-2 is not only high, but can also stem from asymptomatic cases,[14] quarantines and isolations of affected individuals are not enough to curb its spread.[15] This is also due to the wide diffusion of the virus: to make a comparison, the pathogens of the first SARS and the MERS had higher fatality ratios, but they were contained locally.[16] Thus, the only weapon against SARS-CoV-2 seems to be the lockdown: its high effectiveness is confirmed by a research published on "Nature" by Flaxman et al., who calculated a 81% reduction of the indicator R0 as a result of the measure.[17] Similarly, another study by Alfano and Ercolano on

[11] Office for National Statistics, Comparisons of all-cause mortality between European countries and regions: 2020, https://tinyurl.com/y2hkvm29
EUROSTAT, Excess Mortality – Statistics, https://tinyurl.com/54dm44nt
[12] see ALLEN, G. – WESTERVELT, E., *Pandemic Approaches: The Differences Between Florida, California,* https://tinyurl.com/yzmhhcfc, showing how Florida did much better than California even though the latter enacted severe anti-Covid restrictions.
[13] KELLY, G. et al., *Covid-19 And Excess Mortality Rates Not Comparable Across Countries*, in *Cold Spring Harbor Laboratory*, 2021.
[14] LAVINE, J. S. et al, *Immunological Characteristics Govern The Transition Of COVID-19 To Endemicity*, in *Science*, 2021, CCCLXXI.6530, 2021, 741.
[15] ALVES DOS SANTOS SIQUEIRA, C. et al, *The Effect Of Lockdown On The Outcomes Of COVID-19 In Spain: An Ecological Study*, in *PLOS ONE*, 2020, XV.7
[16] LAVINE, J. S. et al, ibidem
[17] FLAXMAN, S. et al., *Estimating the effects of non-pharmaceutical interventions on COVID-19 in Europe*, in *Nature*, 2020, 584, 258.

"Applied Health Economics And Health Policy" points out that the beneficial effects of the restrictions persist until up to 20 days after their removal.[18] This is proven by a number of concrete cases: in China, the lockdown of Wuhan was able to reduce the transmission of the virus by nearly 60%;[19] in Spain, it contributed to a significant decrease in «incidence, hospital admissions, ICU admissions and mortality rates»;[20] and in Île-de-France, i.e. the region of Paris, it reduced the R0 by 79%, from 3.18 to 0.68, that is to say beyond the level of dangerousness of an epidemic.[21] Writing for "Nature", Hsiang et al. estimated that, had the measure not been enacted, Italy would have counted seventeen times as many confirmed cases by April 6, 2020, with 49 out of its 60 million inhabitants infected, and France would similarly have registered 60 million total infections.[22] This means that, by May 4, the former would have ended up with 670 000 victims against the actual 31 000, and the latter would similarly have lost 720 000 peoples, rather than 23 000.[23] Needless to say, both figures are beyond tragic, comparable to the losses of a World War. All of this may make us easily understand why a research published on "The Lancet" at the end of April 2021 by Oliu-Barton et al. concluded that «countries that consistently aim for elimination—i.e., maximum action to control SARS-CoV-2 and stop community transmission as quickly as possible—have generally fared better

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The indicator R0 is the base reproduction number, a mathematical term indicating how contagious an infectious disease is (BATES REMIREZ, V., *What is R*, https://www.healthline.com/health/r-nought-reproduction-number)

[18] ALFANO, V. – ERCOLANO, S., *The Efficacy Of Lockdown Against COVID-19: A Cross-Country Panel Analysis*, in *Applied Health Economics And Health Policy*, 2020, XVIII.4, 509 ff

[19] ANDERSON R.M. et al., *How will country-based mitigation measures influence the course of the COVID-19 epidemic?*, in *The Lancet*, 2020, CCCXCV.10228, 934. A significant decrease in the growth rates thanks to the measure is similarly registered by LAU, H. et al., *The positive impact of lockdown in Wuhan on containing the COVID-19 outbreak in China*, in *Journal of Travel Medicine*, 2020, XXVII.3.

[20] ALVES DOS SANTOS SIQUEIRA, C. et al, *op.cit.*

[21] DI DOMENICO, L. et al, *Impact Of Lockdown On COVID-19 Epidemic In Île-De-France And Possible Exit Strategies*, in *BMC Medicine*, 2020, XVIII.1

[22] HSIANG, S.et al., *The Effect Of Large-Scale Anti-Contagion Policies On The COVID-19 Pandemic*, in *Nature*, 2020, DLXXXIV. 7820, 265.

[23] FLAXMAN, S. et al., *op.cit*., 260

than countries that opt for mitigation—i.e., action increased in a stepwise, targeted way to reduce cases so as not to overwhelm health-care systems».[24]

This very study, however, allows us to identify the major problem surrounding all of these assessments of the lockdown. Its object of analysis, indeed, are the 37 OECD member countries. The five which obtained the best results in the fight against the pandemic are, according to the authors, Australia, Iceland, Japan, New Zealand and South Korea. The problem is that, out of them, only New Zealand employed a two-months nationwide lockdown comparable to the ones witnessed elsewhere in the world.[25] Australia resorted to «a few brief snap lockdowns in certain States»[26], while Japan joined South Korea and Iceland in not using this measure at all.[27] Despite the cautiousness we have just predicated in comparing very different experiences, it then appears clear that there exist effective ways of combatting COVID-19 other than lockdowns.

Indeed, the most attentive readers will certainly have long asked themselves a question: why have we consistently used the word "lockdown" throughout this whole Chapter in spite of the differentiation we had carried out in the Introduction between a generic lockdown and the «stay-at-home» orders? The answer is pretty simple: across the researches we have considered, the term is used interchangeably to mean both things. Thus, if Alves dos Santos Siqueira et al. define lockdown as the prevention of all public movement except essential services and Flaxman et al. very similarly consider the «banning of all but essential travel»,[28] Alfano and Ercolano use the word in a much more general way.[29] This clearly suggests that, when singling out the effect of the «stay-at-

[24] OLIU-BARTON, M. et al., *SARS-CoV-2 elimination, not mitigation, creates best outcomes for health, the economy, and civil liberties*, https://tinyurl.com/9a7b7m4x

[25] STRONGMAN, S. et al., *Timeline: The year of Covid-19 in New Zealand*, https://www.rnz.co.nz/news/national/437359/timeline-the-year-of-covid-19-in-new-zealand
[26] HASELTINE, W.A., *What Can We Learn From Australia's Covid-19 Response?,* https://tinyurl.com/etb3nkbm
[27] BEN-AMI, D., *Briefing: Japan emerging from its invisible lockdown*, https://tinyurl.com/yfzfex6m
[28] ALVES DOS SANTOS SIQUEIRA, C. et al, *op.cit.;* FLAXMAN, S., et al., *op.cit*., 257.
[29] ALFANO, V. – ERCOLANO, S., *op.cit*.

home» order, results may be rather different than the ones we have reported until now.

In principle, however, such an operation is anything but easy. As Haug et al. point out, the diverse measures (called scientifically «nonpharmaceutical interventions» or NPIs) are so interconnected with one another as to render almost impossible evaluating the impact of one of them in isolation.[30] This, however, also implies something very important to our analysis: since a national lockdown is likely to come after the adoption of a number of other measures, its additional effects are likely very small. Thus, «a suitable combination of a smaller package of such measures can substitute for a full lockdown in terms of effectiveness, while reducing adverse impacts on society, the economy, the humanitarian response system and the environment».[31] This is also confirmed by a study published on "Science" by Brauner et al. The research analyzed the effectiveness of single NPIs across 41 countries and concluded that, in the vast majority of cases, «issuing a stay-at-home order had a small effect when a country had already closed educational institutions and nonessential businesses and had banned gatherings».[32] The very same measures are also quoted by Haug et al. as having the largest impacts in curbing the transmission rates.[33] A third research by Bendavid et al, published on the "European Journal of Clinical Investigation", bore even more striking results: not only «there is no evidence that more restrictive nonpharmaceutical interventions ('lockdowns') contributed substantially to bending the curve of new cases in England, France, Germany, Iran, Italy, the Netherlands, Spain or the United States in early 2020», but «it is even possible that stay-at-home orders may facilitate transmission if they increase person-to-person contact where transmission is efficient such as closed spaces».[34] Indeed, the study even finds that, in Spain, lockdown may actually

[30] HAUG, N. et al., *Ranking the effectiveness of worldwide COVID-19 government interventions*, in *Nature Human Behavior*, 2020, 4, 1307.
[31] ibidem, 1309
[32] BRAUNER, J. M. et al., *Inferring the effectiveness of government interventions against COVID-19,* in *Science*, 2021, CCCLXXI.6531
[33] HAUG, N. et al*., op.cit*., 1304.
[34] BENDAVID, E. et al., *Assessing mandatory stay-at-home and business closure effects on the spread of COVID-19*, in *European Journal of Clinical Investigation*, LI.4

have contributed to an increase in daily growth rates. Therefore, its benefits «may not match the numerous harms», including «hunger, opioid-related overdoses, missed vaccinations, increase in non-COVID diseases from missed health services, domestic abuse, mental health and suicidality, and a host of economic consequences with health implications».[35]

Indeed, the greatest problem among Western policymakers seems to be their absolute faith in the effectiveness of drastic measures, regardless of the human costs associated with them. In a study published on the "Journal of Clinical Investigation" by Chin et al., the researchers analyzed the "Nature" work by Flaxman et al. we have previously quoted. As we have seen, this last report attributed a huge effectiveness to lockdown measures, able to bring down the R0 by 81% and to save 3 million lives over 11 countries.[36] In the opinion of Chin et al., similar studies had a major impact on the choice by policymakers to resort to the same strategy during the second wave. The problem is, however, that another model, developed by the very same team, suggested little or no benefits from lockdowns in most of the same States.[37] This means that the effectiveness of the measure is «non-robust and highly sensitive to model specification, assumption and data employed to fit models».[38] Ignoring such an uncertainty on the policymaker's part is «ill-advised»: ««if exposures can be reduced with less aggressive measures and fewer or no harms, this would be optimal».[39] This last sentence is basically equivalent to the essence of the necessity principle as we have presented it at the beginning of the Chapter. Haug et al. arrived to a very similar conclusion: lockdown should be seen as «the "nuclear option" of NPIs».[40] It is highly effective, but it also bears a huge impact

[35] ibidem
[36] FLAXMAN, S., et al., *op.cit*., 269. Apart from the three which form the object of our dissertation, the nations included in the study are Switzerland, the UK, Germany, Austria, Belgium, Denmark, Norway and Sweden.
[37] CHIN, V. et al., *Effect estimates of COVID-19 non-pharmaceutical interventions are non-robust and highly model-dependent*, in *Journal of Clinical Epidemiology*, 2021, 136, 102. The study, also authored by the leading epidemiologist professor John Ioannidis, was the subject of a huge debate in Italy (see LA7*, L'intervista integrale al prof. Ioannidis che risponde a Borghi sui lockdown*, https://tinyurl.com/ndvxp3af)
[38] CHIN, V. et al, *op.cit*., ibidem
[39] ibidem, 103
[40] HAUG, N. et al., *op.cit*., 1309

on both the socio-economic fabric and the civil liberties of a country. Thus, less intrusive NPIs should take precedence, especially as they «foster better compliance from the population».[41] Anderson et al. expressed a very similar idea: despite commending the effectiveness of the Wuhan lockdown, as we have seen, they concluded that «personal, rather than government action, in western democracies might be the most important issue. Early self-isolation, seeking medical advice remotely unless symptoms are severe, and social distancing are key».[42]

Indeed, the theme of the possible existence of alternative strategies has been central all throughout the pandemic. A number of proposals focused on allowing the entirety of the population to resume its normal activities while protecting the elders and the fragile, the categories more endangered by COVID-19. For instance, this was the conclusion of the report by the IDHBP and the Institute for Human Rights of European Lawyers we have constantly been referencing,[43] as well as of the infamous "Great Barrington Declaration".[44] However, such theses were constantly attacked by the other scientists, who pointed at the still unclear features of COVID-19, the difficulty of identifying «vulnerable people», and the proven effectiveness of lockdown, among others.[45]

In spite of this, one cannot avoid to notice how policy-makers seem generally to have favored the most drastic option even in the face of opposing scientific evidence. For instance, by mid-April 2021, extensive attention was given in the media to a monitoring by the Health Protection Surveillance Center of Ireland, reported by "The Irish Times". Professor Mike Weed, of the University of Canterbury, studied 27 000 Covid-19 cases and found that the number of them associated with outdoor transmission was «so small to be

[41] ibidem, 1310
[42] ANDERSON, R.M. et al., *op.cit.*, 934
[43] CERF, E., et al., op.cit.
[44] KULLDORFF, M. et al., *Great Barrington Declaration*, 4 October 2020, https://gbdeclaration.org/
[45] See ALEXANDERSON, K. et al., *The John Snow Memorandum*, 14 October 2020, https://www.johnsnowmemo.com/ (originally on *The Lancet*, CCCXCVI.10260, E71-E72), a direct response to the Great Barrington Declaration.

insignificant».[46] Similar conclusions, however, were anything but new: already in the summer of 2020, a study conducted over 318 outbreaks in China involving three or more people (for a total of 7324 confirmed COVID-19 cases), evidenced that all of them had happened indoors. This led the authors to conclude that «the transmission of SARS-CoV-2 from infected individuals to susceptible individuals is mainly an indoor phenomenon».[47] The statement also matches the evidence we have reported earlier on about the dangerousness of confining people in closed spaces during a pandemic caused by an airborne disease. In spite of this, policymakers in Italy, France and Spain preserved their faith in lockdowns: as we are going to see in the conclusion, the first two even maintained the curfew until long after April 2021.

The issues revolving around this measure, if we want, are exactly a re-edition on a smaller scale of the ones surrounding the larger lockdown. While a research published on "Eurosurveillance" by Di Domenico et al.[48] pointed out that the French curfew was able to stabilize hospitalizations (though being unable to prevent the spread of the B.1.1.7 strain, the infamous «Alpha variant»),[49] another study, available on the "Journal of Infection", evidenced that, in the Toulouse area, it may have helped the spread of the virus since «the more restrictive evening curfew results in larger groups of people in shops and supermarkets before they all hurried to get home».[50]

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[46] McGreevy, R., *Outdoor transmission accounts for 0.1% of State's Covid-19 cases,* https://tinyurl.com/56kxbj59

[47] Qian, H. et al., *Indoor transmission of SARS-CoV-2,* in *International Journal of Indoor Environment and Health*, XXXI.3, 640

[48] Di Domenico, L. et al., *Impact Of January 2021 Curfew Measures On SARS-Cov-2 B.1.1.7 Circulation In France*, in *Eurosurveillance*,, 2021, XXVI.15.

[49] The «Alpha variant» is the lineage of SARS-CoV-2 previously known as «English variant». However, on May 31, 2021, mere days before the submission of this work, the WHO officially mandated the use of letters of the Greek alphabet to refer to the mutated strains of the virus to avoid placing stigmas on countries. While the phrase «Alpha variant» is certainly less immediately comprehensible for readers than the by now far more common expression «English variant», we cannot but align with this indication due to its commendable purpose (WHO, *Tracking SARS-CoV-2 variants*, https://tinyurl.com/56jbvz82)

[50] Dimeglio, C. et al., *Side effect of a 6 p.m. curfew for preventing the spread of SARS-CoV-2: A modeling study from Toulouse, France,* in *Journal of Infection*, 2021, LXXXII.5, 222.

This whole debate, however, has a significant limitation. The effectiveness of reducing social interactions to combat a disease characterized by human-to-human transmission is something that can easily be understood even without being a specialist. In a democracy, however, it is not enough that a measure be useful: as we have tried to constantly show, it must also be the least invasive alternative. This is due to the fact that, in our Western systems, there exist values which need to be balanced against health. Whether or not this balancing was appropriately conducted will be exactly the object of inquiry of our last Chapter.

## Chapter 17 – A proper balancing?

In Barak's work, the concept of balancing is used in the most practical way. When a judge determines whether or not the limitation of a constitutional right was proportional, she uses a two-pronged procedure. First, she needs to compare the marginal harm inflicted upon the infringed freedom to the marginal benefit resulting to the protected one: if the former exceeds the latter, the limitation is not proportional. If, on the other hand, the two of them have exactly the same weight, then the judge must go to the next step: she needs to verify whether there would have been another alternative, able to create a lower mismatch between the harm and the benefit.[1]

In our work, however, we will employ the concept of balancing in a more abstract way, as our assessment will take place at the constitutional level. Thus, at first we will try to determine whether or not the right to health can be supreme over other freedoms, as it has been throughout the pandemic. Secondly, we will consider whether or not the infringement on fundamental rights has to be considered excessive *per se*. It may well be the case that health is found to be the most important value, but this does not justify that all other ones be outright suspended. Finally, we will take into consideration a number of judiciary ruling to verify how courts themselves have balanced the right to health with other fundamental freedoms over the course of the emergency.

To begin with, let us repeat a concept we had exposed at the very beginning of our work: the COVID-19 pandemic has been a dramatic crisis, unheard of for almost exactly a century. Thus, the early adoption of invasive measures was justified, in the view of many commentators, by the tremendous impact of the disease, which risked overwhelming health systems. This was also a result of the huge scientifical uncertainty surrounding the new threat.[2] The motive behind these actions has a precise name: the principle of precaution. Deriving from environmental law, it is nowadays enshrined in a number of normative instruments, such the Treaty on the Functioning of the European

[1] BARAK, A., *op.cit.*
[2] BENDAVID, E. et al., *op.cit.*

Union.[3] Its central idea is pretty straightforward: when there is the suspicion that a given activity may be harmful, «it is better to act before it is too late rather than wait until full evidence is available».[4] Already in 1998, the Court of Justice of the European Union had given a definition even more responding to health crises like COVID-19: «where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent».[5]

If we combine this concept with the observation that, usually, when reviewing emergency norms, courts are deferential to the Governments,[6] we may understand why, at the beginning of the crisis, pretty much all judiciary decisions were favorable to the anti-contagion measures, as we are going to see in a moment. This also obeyed to a concept relaunched by several authors and commentators: the idea that the right to health must take precedence over all other ones, either because it is naturally more important[7] or, alternatively, because the threat posed upon it by the pandemic is so large as to justify even huge restrictions of all other freedoms.[8] The second thesis is indeed more convincing, given that, in a democracy «no tyrant rights» exist except the absolute ones, as strongly stated, among others, by the Italian Constitutional Court.[9]

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[3] By art.191, par.2 of the Treaty, «Union policy on the environment […] shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay» (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF)

[4] MEßERSCHMIDT, K., *COVID-19 legislation in the light of the precautionary principle*, in *The Theory and Practice of Legislation*, 2020, VIII.3, 272.

[5] ECJ, Case 157/96*, National Farmers' Union and others,* par.63, https://curia.europa.eu/juris/liste.jsf?language=en,T,F&num=157/96

[6] PETROV, J., *op.cit*., 81

[7] For instance, TAMBURRINI, V., notices how, in the Italian Constitution, the right to health is the only one qualified as «fundamental» (*La limitazione dei diritti costituzionali in tempo di pandemia*: *alcune osservazioni sul carattere fondamentale dell'interesse della collettività alla salute*, in MARINI, F.S. – SCACCIA, G., *op.cit.*, Torino, Giappichelli, 2020, 130);

[8] MORELLI, A., *op.cit*., 532

[9] The phrase «tyrant rights» was formulated by the Court in a landmark sentence, the n.85/2013 (*Considerato in diritto*, par. 9) and was reprised by its current President to comment the actions of the Government (CORAGGIO, G. (interview), *Giovanni Floris intervista il neo presidente della Corte Costituzionale Giancarlo Coraggio*, https://tinyurl.com/4fj9s5bb, min. 9)

Whatever the precise position, the safeguard of health inspired judges by all three countries to validate the anti-COVID dispositions in a number of cases. This was especially true in France where, already on March 22, 2020, the Council of State issued an ordinance imposing the Prime Minister to better clarify – in a restrictive sense – some aspects of the lockdown measures. It had been seized by the Union of Young Doctors under a procedure normally employed to preserve fundamental freedoms: in this case, however, the ruling went in the direction of toughening the restrictions.[10] Several commentators pointed at the profound paradox laying behind this, with the judge of liberties becoming an auxiliary of the administrative police.[11] As we know, it then continued to validate each and every single disposition issued by the Government, including the most controversial ones like article 16 of the Ordinance n.2020-303 of March 25, effectively becoming «an organ of juridical labelling of the decisions taken by the Prime Minister».[12] During the first wave, only in three cases did it rule against the executive: on May 18, 2020, it ordered the State to stop using drones to monitor compliance with anti-COVID rules;[13] on the same day, it imposed the Prime Minister to take less restrictive measures vis-à-vis places of worship;[14] and on June 13, it partially suspended the prohibition of gatherings of more than 10 people in public places.[15]

The argumentations used by the Council in the last two cases shed an important light on the principle of precaution: contrarily to what it may seem, it is not opposed either to the rule of law or to the principle of proportionality.[16] Indeed, «it does not provide authority for whatever intervention politicians deem

[10] Conseil d'Etat, ordonnance 22 mars 2020, n.439674

[11] DUPRE DE BOULOIS, X., *On nous change notre…. référé-liberté » (obs. sous ce ord., 22 mars 2020, n°439674)*, https://tinyurl.com/4tssku33; *contra*, see ARIF, A., *Ordonnance du 22 mars 2020 du conseil d'etat : quelques précisions juridiques*, https://tinyurl.com/v2kffn3v («The Council of States thus reaffirms its role of guarantor or fundamental freedoms and asks that guidelines be issued in order to clarify the public about the practices which must be adopted»)

[12] CASSIA, P., *Le Conseil d'Etat et l'état d'urgence sanitaire: bas les masques*, https://tinyurl.com/2nx3pc5b

[13] Conseil d'État, ordonnances 18 mai 2020, n.440442-440445

[14] Conseil d'État, decision 18 mai 2020, n.440366

[15] Conseil d'État, ordonnances 13 juin 2020, n.440846, 440856, 441015

[16] MEßERSCHMIDT, K, *op.cit*., 282

necessary»[17]. Though initially authorities may take measures which restrict fundamental rights even if they have no certainty about their effectiveness,[18] as time passes by such dispositions need to be constantly revised and updated to the newest scientific evidence.[19]

This means that the more time has elapsed since the start of an emergency, the more stringent the justifications for invasive measures need be. It is also confirmed by the fact that judicial scrutiny tends to become ever more severe,[20] especially considering that restrictions of long duration are particularly likely to be disproportionate.[21] This means, as Kalogeropoulos puts it, that «limitations to liberty must be discontinued as soon as permitted» since «the fact that they last for a long period of time indicates their disproportionality».[22] This, in our opinion, reveals the first, huge problem of «stay-at-home» orders: their renewal over the course of several months, which must thus be considered disproportional. As Nicotra says, «the "time" factor serves to confine the exceptional emergency law into very precise duration limits, putting normal law within "parentheses" only for a given period».[23] This is even clearer when one considers that new scientific evidence confirmed that they were unnecessary, as we have extensively pointed out in Chapter 16. If this were not enough, suffice it to consider that focusing on «health» as mere protection from COVID-19 is contrary to the very definition of the term given by the WHO, where health is exactly «a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity».[24] The huge impacts of being unable to leave one's home on both the body and the mind are widely known to medical

[17] ibidem, 288
[18] LALLI, A., *op.cit.,* 224
[19] MEßERSCHMIDT, K, *op.cit,* 291
[20] PETROV, J., *op.cit*., 281
[21] ECtHr, *Kuimov v. Russia*, n.32147/04, 2009, par. 96, https://tinyurl.com/y56xjumf
[22] KALOGEROPOULOS, S., *Human rights v. Covid.19,* https://www.internetjustsociety.org/human-rights-vs-covid-19
[23] NICOTRA, I. A., *op.cit*., 70.
[24] Preamble to the Constitution of WHO as adopted by the International Health Conference, New York, 19 June - 22 July 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of WHO, no. 2, p. 100) and entered into force on 7 April 1948.

literature, as we have previously seen.[25] As such, «stay-at-home» measures should, definitely, be discarded, if not for a brief initial period where the uncertainty surrounding the new threat may authorize invasive interventions.

If we want, this is exactly the idea followed by judges in all three countries, as we have pointed out. In Italy, for example, the Administrative Regional Tribunal of Campania had validated, in March 2020, an ordinance by the local Governor imposing a more stringent regime than the national one, as it prevented citizens from performing outdoor physical activity.[26] Seized on the act, the Court basically repeated its very motivations and added that, in that turbulent first period, preeminence should be given to measures adopted to safeguard public health.[27] Then, ten months later, the very same organ had to rule on another ordinance, which prolonged the closure of schools in the Region. This time, it struck the provision down by arguing that, since the contagion had kept spreading during Christmas festivities, when educational institutions are notoriously closed, one could doubt of the usefulness of shutting them to curb the epidemic. The ruling appears indeed rather questionable: it would be like inferring no correlation between lung cancer and tobacco, against all scientific evidence, simply because the disease also befalls people who do not smoke. However, the sentence also states something very important to our dissertation: «it would be necessary to prove that the measure [school closure] is indispensable to reach the aim, after all other ones have been excluded».[28] Thus, whilst at the beginning of the emergency the Tribunal conferred an absolute supremacy to the right of health, after nearly one year it had returned to demand a most stringent justification for the measures enacted. Our central thesis is exactly this: «stay-at-home» orders, acceptable for a short time in the initial

[25] Apart from the literature we have already quoted in Chapter 16, see PHIRI, P. et al., *An Evaluation Of The Mental Health Impact Of SARS-Cov-2 On Patients, General Public And Healthcare Professionals: A Systematic Review And Meta-Analysis*, in *EClinicalMedicine*, 2021, XXXIV.
[26] Ordinanza del Presidente della Regione Campania n.15 del 13/3/2020, http://regione.campania.it/assets/documents/ord-n-15-13-03-2020-1.pdf
[27] TAR Regione Campania, Sezione V, Decreto 18 marzo 2020, n.416, http://www.issirfa.cnr.it/tar-campania-napoli-sez-v-decreto-18-marzo-2020-n-416.html
[28] TAR Regione Campania, Sezione V, Decreto 20 gennaio 2021, n.142, https://arsg.it/?p=2598

phases of the crisis (in spite of their questionable admissibility under democratic legal systems),[29] do not survive the more rigid criteria one should employ after several months have passed. This is especially truer if the Government continues to employ instruments, such as the self-declaration, which create numerous juridical problems, as noted by more than one Court.[30] The Venice Commission expressed this idea very clearly in a 2016 Opinion about Turkey: «the longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature with the consequence that it cannot be addressed by application of normal legal tools».[31]

If all of this were not enough, there is the second worrisome issue about the «stay-at-home» order: the fact that they are definitely too similar to a suspension of fundamental rights rather than to a limitation. In Chapter 15, we have seen that this measure is probably far closer to personal freedom than to freedom of movement. However, even if we shared the opinion of the commentators who argue that the debate must be centered around the latter, this does not mean that its suspension is legitimate. We had already seen the difference between «suspending» and «derogating» in Chapter 5: there, we had concluded that the first term refers to the cancelation of the essential nucleus of a freedom, while the second indicates limitation which are consented by ordinary norms.

As we know, this debate was particularly heated in Spain, where the difference between suspension and limitation defines the exceptional regime

[29] MONE, D., for instance, excludes *in toto* their legitimacy (*op.cit*., 7)
[30] In Italy, in November 2020, the GIP of Milan cleared a truck driver accused of perjury, stating that one can only self-declare past events, not intentions such as the place where they plan to go (GIP Milano, sent. 16 novembre 2020, giud. Crepaldi); another magistrate, the GUP, exculpated a youngster who had willingly lied, declaring that there is no law imposing the obligation to tell the truth on anti-COVID self-declarations and, even if such a law existed, it would violate the prohibition of self-incrimination (GUP Milano, sentenza 12 marzo 2021, giud. Del Corvo). In France, polemics about the complexity of the self-attestation were so vibrant as to induce the executive to remove it for movements within 10 km from one's domicile in March 2021 (BERDAH, A., *L'exécutif renonce finalement à l'attestation de sortie en journée,* https://tinyurl.com/ykdprcu5*)*
[31] Venice Commission, *Turkey Opinion on Emergency Decree Laws Nos. 667-676 adopted following the failed coup of 15 July 2016*, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), par. 41

which can be activated. As in the other two countries, scholars divided: supporters of the legitimacy of the actions of the Government argued that the freedom of circulation was not suspended because, if it had been, citizens would have had no right to invoke before the Courts, and the State could have used force to confine them at home.[32] Similar arguments have already been disproven in Chapter 15, especially the ones on the coercion. Instead, we agree with the numerous other authors opining that the «stay-at-home» orders corresponded to a suspension of the right. The reason is, if we want, conceptual: since it is prohibited to go out, *except* for a few motives allowed by the Government, it appears clear that the relation between exception and norm is inverted.[33] This is especially true when one makes a counterargument: if this is not a suspension, what would a suspension look like? Is it imaginable that a Government prevents people from leaving their residence even in the face of basic necessities?[34] Since the answer is most certainly in the negative, it appears clear that the «stay-at-home» order is effectively a suspension of the freedom of movement.[35] Thus, Spain should have declared the state of exception.

After all, the COVID-19 has effectively led to the suspension of many other rights. On April 28, 2020, for instance, the High Court of Justice of Galicia rejected an appeal against a prohibition by the Government's Delegation to hold a parade by automobiles. However, its reasoning was quite contradictory: while declaring that no suspension of the freedom to assembly and demonstration had taken place, it argued that parading was not included in the reasons why people could circulate in public roads.[36] It is, however, evidently unclear how one could hold a public manifestation while remaining at home. When the plaintiffs

[32] VILLAVERDE, I., *op.cit.*
[33] ÁLVAREZ GARCÍA, F. J., *Estado de alarma o de excepción*, in *Estudios Penales y Criminológicos*, 2020, XL, 9 ff.
[34] DE LA MATA, N. J., *Pandemia, estado de alarma y suspensión de libertad*, https://almacendederecho.org/pandemia-estado-de-alarma-y-suspension-de-libertad
[35] AMOEUDO-SOUTO, C.A., *op.cit*., 67
[36] Tribunal Superior de Justicia de Galicia. Sala de lo Contencioso, Sección Primera, Sentencia 136/2020, de 28 de abril, *Fundamentos Juridicos*, par.4, https://www.poderjudicial.es/search/openDocument/d979470087d23cff

brought the case before the Constitutional Tribunal, it upheld the ruling,[37] but only after a tough division.[38] Romboli correctly considers the sentence too restrictive: since the demonstration was to be held by the use of cars, the right of health was well protected.[39] This is even truer when one considers that, in the very same days, a number of other tribunals issued completely opposite rulings. It was the case, for instance, of the High Court of Justice of Aragon, holding that the prohibition of a manifestation must be found in the concrete case, rather than in a more general situation of sanitary crisis;[40] of the HCJ of Madrid, which demanded a «reinforced motivation»;[41] and of the HCJ of Catalonia, which similarly stated that «the prohibition of a demonstration founded on the necessity to protect the right to life and the right to health of people must be grounded in solid reasons, on the existence and proximity of a certain risk for such rights».[42] The three of them also took into consideration the special nature of the infringed freedom, seen a corollary of the right of expression. The demand of stringent criteria reached the formal aspect when, in October, the Court of Madrid struck down an act by the Autonomous Community imposing tough anti-COVID measures, on the ground that the law used to cover them did not offer adequate legal justification.[43]

Such a shift is also visible in Italy, as we have already anticipated. During the first wave, the right to health had received such a superiority as to

[37] Tribunal Constitucional, Auto 40/2020, de 30 de abril, https://hj.tribunalconstitucional.es/es/Resolucion/Show/26279

[38] BRUNET, J. M., *División en el Constitucional por el derecho de protesta durante la crisis,* https://tinyurl.com/fa2sjh49

[39] ROMBOLI, S., *op.cit*., 848

[40] Tribunal Superior de Justicia de Aragon. Sala del Contencioso, Sección Primera, Sentencia 151/2020, de 30 de abril, https://tinyurl.com/wvc5zuvp

[41] Tribunal Superior de Justicia de Madrid, Sala del Contencioso, Sección Cuarta, Sentencia 214/2020, de 21 de mayo, https://tinyurl.com/pu2zs2k2

[42] Tribunal Superior de Justicia de Cataluña, Sala del Contencioso, Sección Tercera, Sentencia 1391/2020, de 22 de mayo, *Fundamentos jurídicos*, par.5, https://tinyurl.com/24d3vvha

[43] Tribunal Superior de Justicia de Madrid, Sala de lo Contencioso Administrativo, Sección Octava, Sentencia 128/2020, de 8 de octubre, https://www.poderjudicial.es/search/indexAN.jsp?org=ap-tsj&comunidad=13

justify, for instance, the prohibition for a divorced father to see his children,[44] or a municipal ordinance imposing the obligation, for houseowners not residents within the territory of the city, of communicating their arrival at least ten days prior and self-attesting that they did not test positive for COVID.[45] Afterwards, however, just like in France and Spain, courts became more restrictive. in December, the Administrative Regional Tribunal of Lazio found that the Government did not seem to have operated a proper balance between the right to health and the other fundamental freedoms guaranteed by the Constitution.[46] A few days later, the Tribunal of Rome went as far as to scrutinize the minutes of the Scientific Technical Committee, holding that the measures it suggested lacked an adequate motivation. The reason was that, in its advises, the Committee limited to general phrases like «the more stringent are containment measures, the more effectiveness in preventing the spread of the virus one can expect», but it was not specified why, for instance, bars and restaurants could remain open with safe distance while school could not, nor why the same measures were recommended for the whole territory even in the face of very different epidemiological situations.[47]

This last statement is particularly striking when one considers the most troubling point about the «stay-at-home» measures, which we have kept for the very end: in Italy, the Scientific Technical Committee had never advised the Government to resort to a total lockdown, as revealed by its minutes after their declassification.[48] Similarly, in France, the Scientific Council only greenlit the measure on the very same day of its enactment.[49] This clearly reveals that, in both cases, the executives acted without a strict scientific basis. As we have tried

[44] Corte d'Appello di Bari, Sezione Minori e Famiglia, ordinanza 26 marzo 2020, https://tinyurl.com/42vvb2bn
[45] TAR Calabria, Sezione I, decisione 11 luglio 2020, n. 378, https://tinyurl.com/wd3mmwm3
[46] TAR Lazio, Sezione I, ordinanza 4 dicembre 2020, n.7468, https://tinyurl.com/ph8vh5uz

[47] Tribunale Ordinario di Roma, Sezione VI Civile, Ordinanza 16 dicembre 2020, n.25283, https://tinyurl.com/ptaeb3dy
[48] Musco, S., *Coronavirus, il Comitato tecnico scientifico non voleva il lockdown totale*, https://tinyurl.com/4yfrm7aw
[49] CERF, E., et al., *op.cit*., 7

consistently to demonstrate throughout this work, this can be acceptable for an initial, short period, when huge uncertainty surrounds a newly-discovered disease. Still, it does not mean that the administration possesses a blank check: fundamental rights still need to be balanced against the right to health, differently from what has happened many times over the course of the pandemic. As time passes by, however, judges become more rigid, citizens are less respondent,[50] and above all, new evidence unravels. Thus, the greatest error by all three Governments can be considered, in our opinion, the attempt to use the very same measures of the first wave over the course of several months (though with some degree of adaptation), rather than opening the way to more careful balancing with all the other rights defining a democracy. The Venice Commission states this points very clearly: «what is justified after in the immediate aftermath of a major public crisis may not be needed several months later».[51] Because, as René Cassin, Nobel Prize Laureate, Father of the UN Declaration of Human Rights and President of the ECtHR once said, «the right to life» cannot mean «to any life».[52]

[50] In France, a striking 60% of respondents to a survey declared having violated the rules of the second lockdown at least once (Le Figaro, *Deuxième confinement : 60% des Français ont transgressé les règles*, https://tinyurl.com/3tyybkzm); in Italy, in March 2021, when most of the territory was in «red zone», with rules comparable to those of the first lockdown, movements remained twice as frequent than the previous year (SkyTG24, *Covid, lockdown e spostamenti +129% rispetto a marzo 2020*, https://tinyurl.com/9vpc3auu)

[51] Venice Commission, see above note 31, par.62

[52] CHAUVIN, R.*, R.Cassin et la Déclaration Universelle des Droits de l'Homme*, in *Revue Belge de Droit International*, 1998, 2, 335.

# Conclusion

We are writing this conclusion at the end of May 2021. Since February 14, the progression of the epidemiological situation has been rather fluctuating. Worldwide, both daily new cases and deaths registered two peaks before decreasing steadily since the end of April.[1] This was also favored by the diffusion of the vaccines, whose huge effectiveness at preventing the severe form of COVID-19 is a great source of hope for the future.[2] Sadly, this did not prevent the pandemic from continuing to ravage certain areas of the world. This was especially true for India, a country battered so severely as to be labelled «Pandemic Ground Zero» in April.[3] The world death toll thus continued to increase, reaching three and half million deceased in the very days we are writing.[4]

As regards Italy, France and Spain, the trend of the contagion was slightly different for each. Italy experienced the second peak by mid-March, while daily deaths were above 700 still on April 9. France, on the other hand, met the spike later on, at the beginning of April, while the curve of deaths fluctuated steadily, though continuously decreasing. Finally, Spain saw a constant reduction of both new cases and deceased, in spite of occasional peaks.

The strategies employed by the three States to curb the pandemic were also rather different. While Spain simply kept the measures of the state of alarm until their end on May 9, both France and Italy were forced to resort to new restrictions as the contagion progressed. The former imposed a sort of third lockdown to its whole territory on April 3, after having applied the measure to the most severely hit areas in the month of March: between 6 am and 19 pm, the entirety of the citizens could not travel beyond 10 km from their residence, except for essential

[1] Worldometers, see above Chapter 1, note 24
[2] KATELLA, K., *Comparing the COVID-19 Vaccines: How Are They Different?,* in https://tinyurl.com/xare3wbt
[3] KUGELMAN, M., *How India Became Pandemic Ground Zero,* in https://foreignpolicy.com/2021/04/22/india-coronavirus-pandemic-crisis-second-wave/
[4] Worldometers, see above Chapter 1, note 24

reasons. All educational institutions had to close once again.[5] Similarly to the two previous times, also in this case the measures are being lifted gradually since May 2, 2021: their end is foreseen for June 30.[6]

In Italy, the new Draghi Government followed a similar path: on March 13, a new decree-law canceled the «yellow zone», *de facto* sending the country back into a sort of lockdown, officially declared for the Easter weekend.[7] The division only in «red» or «orange zones» was later extended until April 26,[8] date of start of a progressive reopening. The details of its completion, however, as of today are uncertain. Indeed, if there is something we have over these months, is that even the most basic freedoms can be subject to political debate and bargaining. Of course, it is absolutely normal that, in a democracy, decisions are the result of a deliberation among political forces with different ideas. On the other hand, however, this has led, in our opinion, to the point that both the general public and the parliamentary formations have lost sight of what, in a democracy, should represent a fundamental value.

Let us give an example to better clarify our point: Italy has, much like France, vowed to keep curfew until nearly the end of June. The measure is currently set to end on the 21 of the month, except for the Regions which will have entered the lowest tier of risk, the «white zone», where it will be abolished beforehand (together with almost all restrictions).[9] This calendar was only

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[5] Décret n° 2021-384 du 2 avril 2021 modifiant les décrets n° 2020-1262 du 16 octobre 2020 et n° 2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire

[6] Décret n° 2021-541 du 1er mai 2021 modifiant le décret n° 2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire
Service-Public.fr, *Les prochaines étapes du déconfinement en detail*, https://www.service-public.fr/particuliers/actualites/A14895

[7] DECRETO-LEGGE 13 marzo 2021, n. 30 - «Misure urgenti per fronteggiare la diffusione del COVID-19 e interventi di sostegno per lavoratori con figli minori in didattica a distanza o in quarantena»,
https://www.gazzettaufficiale.it/eli/id/2021/03/13/21G00040/sg
later converted by the Legge 6 maggio 2021, n.61
https://www.gazzettaufficiale.it/eli/id/2021/05/12/21G00071/sg

[8] DECRETO-LEGGE 1 aprile 2021, n.44 - «Misure urgenti per il contenimento dell'epidemia da COVID-19, in materia di vaccinazioni anti SARS-CoV-2, di giustizia e di concorsi pubblici»

[9] RIZZUTI, S., *Addio al coprifuoco e riaperture anticipate in zona bianca: trovato l'accordo Regioni-Governo*, in https://tinyurl.com/38y32p53

agreed upon on May 17, when the curfew, until then still at 10 pm, was immediately pushed back to 11: it will then start at midnight by June 7. These rules were established through decree-law n.65 of May 18 which, on the other hand, anticipated the lifting of some restrictions, such as the closure of gyms or of indoor restaurants, vis-à-vis what had previously been decided.[10] It thus seems that this was the result of a sort of «compromise» between the area of the Government demanding cautiousness and the one which, on the other hand, pressures for reopening.

If we want, this is the very reason why we have written this dissertation: trying to remember that fundamental democratic freedoms, such as the possibility of leaving one's home without justifying the conduct before the State, should never be the object of a «compromise». Their limitation is well possible, as we have proven, but has to occur under strict scientific data, especially after such a long time has passed since the beginning of the emergency. Thus, the prosecution of a partial lockdown like the curfew against all evidence,[11] as we have thoroughly demonstrated in Chapter 16, must be definitely considered disproportional. This becomes even more serious when it appears clear that the measure has become a political symbol rather than an effective way of keeping the contagion at bay. Suffice it to recall how, on May 19, the curfew was pushed one hour back only to allow the fans who had attended the *Coppa Italia* final between Juventus and Atalanta to return home without being fined…[12]

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[10] DECRETO-LEGGE 18 maggio 2021, n. 65 - « Misure urgenti relative all'emergenza epidemiologica da COVID-19»

[11] Apart from the researches we have quoted, including the Scientific and Technical Committee signaling that the Government had not consulted them before decide to maintain the curfew in April (see above Chapter 13, note 29), several members of the organ confirmed, upon being interviewed, that no precise scientific data exist in favor of the measure except the generic constatation that limiting the circulation of people contains the spread of the virus (see ABRIGNANI, S. (interview), *Abrignani (Cts) sul coprifuoco alle 22 o alle 23: "Non ci sono dati scientifici a supporto di un orario. Ma è ovvio che un'ora in più aumenti chance virus di circolare"*, https://tinyurl.com/3z47euu9; CICILIANO, F. (interview), *Fabio Ciciliano (Cts): "Far slittare il nuovo coprifuoco cambia poco"*, https://tinyurl.com/3h6kr545)

[12] Ordinanza del Ministro della Salute 19 maggio 2021 - « Ulteriori misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19 in relazione alla finale di Coppa Italia «Tim Vision 2020/2021»». The *Coppa Italia* is the most important cup of Italian football: the final of the 2020/21 edition, played in Reggio Emilia, allowed the attendance of 4300 fans, but its starting time of 9 pm put them at risk of being forced to leave the stadium

Such preoccupations are all but theorical. Ever since the COVID-19 crisis began, scientists have warned about the fact that it could be only the first of a long list of pandemics which could befall the humanity if the latter does not change radically its lifestyle and the patterns of globalizations.[13] SARS-CoV-2 itself will likely become endemic.[14] As stated by the Venice Commission, similar threats cannot be dealt with through permanent states of emergencies: these regimes can only apply to exceptional, short-term dangers.[15] Thus, we should never lose sight of what is normal and what is not. It appears clear that the solution cannot consist in continuous lockdowns for an indefinite period of time. After all, as we have tried to demonstrate throughout this entire work, this measure is clearly a violation – yet temporary and necessary – of the constitutional framework of Italy, France and Spain, jeopardizing personal freedom.

Will we be able to find a solution to fight COVID-19 - and all other future pandemics - without resorting to disproportional means? It is undoubtedly a challenge but, if we cherish the notion of what «inalienable rights» means, it is a challenge we cannot avoid to take. The risk we incur is very serious: normalizing such measures due to the «legacy» of this specific crisis.[16] Thus, in a sense, the aim of our dissertation was exactly to remember that, as stated by the European Parliament, «even in a state of public emergency, the fundamental principles of the rule of law, democracy and respect for fundamental rights must prevail».[17]

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without seeing the end of the match should it not have occurred within the 90 minutes. The extension of the curfew ended up being unnecessary, as Juventus won in the ordinary time, but it had already sparked huge criticism.

[13] In July 2020, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), a UN platform, concluded a workshop on the subject of biodiversity and pandemics with a report poignantly titled «Escaping the era of pandemics» (https://www.ipbes.net/pandemics); a similar phrase was used, in May 2021, in the final document issued by the Scientific Expert Panel of the Global Health Summit organized in Rome (https://global-health-summit.europa.eu/panel-scientific-experts_it)

[14] LAVINE, J.S. et al., *op.cit.*

[15] Venice Commission, see above Chapter 5, note 8, par. 20

[16] NICOTRA, I. A., *op.cit*., 15.

[17] European Parliament resolution of 13 November 2020, par.1, see above Chapter 15, note 35

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# SUMMARY

## Introduction

The aim of this work is to determine whether or not the «stay-at-home» orders enacted by Italy, France and Spain to counter the COVID-19 pandemic can be considered compatible with their constitutional frameworks. To do this, we have divided our discussion in four parts. Part I reviews the progression of the pandemic and the measures enacted by the three countries until February 14, 2021 (date chosen as deadline for our work, when the Conte II Government, in Italy, left office). Part II analyses the relevant normative provisions, from the international (Chapter 6) to the national level (Chapters 7 and 8). Part III evaluates the compliance of «stay-at-home» orders with the formal requirements of the rule of law selected in Chapter 9: the principle of legality (Chapter 11), the centrality of Parliaments (Chapter 12) and normative clarity, completed by *nullum crime sine lege* (Chapter 13). Finally, Part IV tries to determine whether or not the measures were proportional: after debating whether they affected personal freedom or freedom of movement (Chapter 14) we proceed to carry out the proportionality test according to Aharon Barak's procedure. This means that we first review the proper purpose and the necessity of the rules (Chapter 16) and, then, consider whether or not the Governments carried out a proper balancing between the right to health and the other fundamental freedoms involved (Chapter 17). Finally, in the Conclusion we give a final assessment whilst recalling briefly the events between February 14 and the end of May.

## Part I – The pandemic and governments' responses

Chapter 1. First detected at the end of December 2019 in the Chinese town of Wuhan, the virus SARS-CoV-2, causing the COVID-19 disease, quickly spread to the whole planet, causing the first serious pandemic event since the 1918 Spanish flu, with more than 3 million total victims. To contain it, Chinese authorities enacted a strict lockdown of Wuhan and surrounding areas, preventing residents from even leaving their houses. This allowed to keep the

contagion at bay in its place of origin while, on the other hand, it WAS flaring worldwide, forcing a huge number of countries to copy China's response model. «Half of humanity» thus experienced some sort of restrictions between March and April 2020. The situation slightly improved in the boreal summer, only to descend into an almost generalized second wave in the last quarter of the year and, then, a third wave in early 2021. Within this general framework, Italy, France and Spain fared particularly bad at containing the virus, placing consistently in the top-ten of world countries as regards excess mortality, total deaths and even total number of cases.

Chapter 2. Engulfed by the pandemic since mid-February, on March 9 Italy was the first major nation to import the Chinese «stay-at-home» model by ordering a national lockdown. Ravaged by the epidemic, it kept the strict measures for two months, until the beginning of May. Its Government, nevertheless, drew criticism for the confusion it engendered among citizens due to the huge number of norms issued. After a brief return to normalcy in summer, the country was directly hit by the second wave. However, it never resorted to a second lockdown, preferring to employ a three-tier system, dividing its territory into areas featuring progressively more restrictive measures. A short national lockdown was only employed during Christmas days. Then, the three-level system returned, continuing to be used until the end of the Conte II Government and, afterwards, by the new executive led by Mario Draghi. In spite of the harshness of the norms, the numbers of the country remain dramatic, with nearly 100 000 lives lost as of February 14, 2021.

Chapter 3. France, on the other hand, tried to be more active since the beginning: even if its legal system already featured a number of exceptional regimes to tackle crises, on March 23, 2020 it created a brand new one, the «state of health emergency», immediately applied to counter the pandemic. The country had already been in lockdown for a week: the restrictions continued until May, after which the de-escalation was more gradual than in Italy. After establishing a transitional regime in July, France reverted to the state of health emergency in October, and re-introduced the national lockdown in November.

Even after its lifting, at the beginning of December, tight rules continued to be applied, such as a 6 pm curfew since mid-January.

Chapter 4. Finally, Spain had a somewhat ambiguous approach. During the first wave, it enacted the toughest restrictions among the three countries we are considering, proclaiming a state of alarm and preventing its citizens to leave their home even to preform outdoor physical activity. In autumn, however, though reestablishing the exceptional regime, it always used locally-determined measures, thus obtaining contradictory results in the fight against the virus. While all data remained much below the dreadful peaks of the first wave, during which the country had witnessed truly apocalyptic scenarios, the third one exploded already in January 2021.

## Part II - The Constitutions, the States of Emergency and the rule of law

Chapter 5. Ever since the time of the Declaration of the Rights of Man and of the Citizen, an inextricable link has existed between constitutions and human rights. However, the latter are hardly absolute: they can be subject both to ordinary limitations, to ensure cohabitation with conflicting freedoms, and to exceptional suspensions to tackle emergency situations. Villareal proposes three ways employed by Constitutions to face crises: the use of already existing norms; the enactment of completely new rules grounded in the exceptional circumstances; and a middle-ground model where the constitutional text foresees extra-ordinary powers, but their scope, duration and criteria are strictly defined in advance. Usually, in modern rule of law countries, the only accepted archetype is either the first or the third, given the supremacy of the law which characterizes them. And since the Constitution is, by definition, the supreme law of the land, we use it as the basis for searching the emergency norms appliable during the COVID-19 crisis. We review both the general limitation clauses and the ones specific to each single right. The difference between the suspension which can be enacted during a crisis and the restriction which can be applied ordinarily are

less intense than one could think, given the fact that even exceptional derogations from a freedom need to abide by the same criteria of proportionality which govern its everyday limitations.

Chapter 6. The three most important international instruments of human rights protection for Italy, France and Spain are the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the Charter of Nice. All of them have a general limitation clause which, regardless of the specific wording, sets very similar conditions for derogating from fundamental freedoms: it is necessary that an emergency be underway and that the limitation not be disproportional. Moreover, some rights remain non--derogable, such as freedom from torture or the *ne bis in idem* principle. The limitation clause of the ECHR, art.15, also requires that countries willing to activate the mechanism file an official notice to the Council of Europe. Italy, France and Spain did not do it, amidst vibrant polemics. However, we argue that this was better for human rights protection as, usually, when art.15 has been invoked, the European Court of Human Rights has conceded a large margin of appreciation when reviewing the decisions enacted to quell emergencies. Instead, it is desirable that anti-COVID legislation be judged as strictly as possible.

Chapter 7. At the constitutional level, while Italy has no general emergency provision, France and Spain know several exceptional regimes. The Italian Constitution only establishes the state of war (art.78); then, the disposition more closely appliable to the COVID-19 pandemic is art.77, which regulates the decree-law (*decreto-legge*). This is a piece of primary legislation the Government can issue if extraordinary and urgent cases require so: Parliament must then convert it into an ordinary law. However, during the course of the emergency, the Italian executive mostly used the decree-law to authorize other acts, the decrees of the President of the Council of Ministers (DPCMs). In France, instead, the Constitution knows two emergency regimes: the exceptional powers granted to the President of the Republic (art.16) and the state of siege (art.36). However, the institutions which seemed fittest to tackle the current

crisis before the enactment of the state of health emergency was the "simple" state of emergency, detailed by a law of 1955. Finally, Spanish Constitution features two fundamental articles: n.116, establishing the states of alarm, exception and siege, and n.55, giving a list of rights which can be suspended during such crises, but only under the last two regimes. Whether or not the measures taken to fight COVID-19 were admissible under the state of alarm was, thus, a central point of debate in the country.

Chapter 8. In Italy, the law introducing the state of emergency is the Code of Civil Protection which, however, has mostly to do with bringing relief to populations befallen by disasters. We must also mention the 1978 Law on the National Health Service, allowing the Minister of Health to «issue contingent and urgent ordinances on hygiene, public health and veterinary police». In France, the most relevant provision is the 1955 law on the state of emergency, but a number of other sources were employed as the basis for the administrative powers of public authorities: among them, the Code of Territorial Collectivities and the Code of Public Health. Finally, Spain has a whole organic law, the n.4 of 1981 on the states of alarm, exception and siege. To this, we must add a number of other general Laws allowing the Minister of Health to intervene by ordinance. Whatever the source and regardless of the specific country, however, the conditions for the exercise of exceptional administrative powers are pretty similar: Governments can only act in a proportional manner and cannot disrespect existing legislation. These are exactly the foundations of what we call the rule of law.

Chapter 9. The rule of law is a particularly wide concept. Its core elements are the principle of legality, demanding that any citizen or public authority be responsible before the law; constitutional supremacy, also fundamental to human rights respect; legal certainty, which also comprises the prohibition of retroactive criminal legislation (*nullum crimen sine lege*); and procedural requirements such as access to justice, independence and impartiality of the judiciary, and separation of powers. The last one entails supremacy of the Parliament, which issues the law, expression of general will: if its norms take minority rights into

due consideration, they can be considered inherently just, explaining why all public authorities must be subject to them. Thus, we have returned to the principle of legality, showing that all elements of the rule of law are strictly interrelated with one another.

## Part III – The formal aspects: the principle of legality, the centrality of Parliaments and legal certainty

Chapter 10. While most commentators see the core elements of the rule of law as closely interrelated with one another, for our work we choose to divide them into formal and substantive ones. Part III analyzes the compliance of «stay-at-home» orders with the former: the principle of legality (Chapter 11), the centrality of Parliaments (Chapter 12) and the need for legal certainty (Chapter 13). We have discarded access to justice for two reasons: it was not immediately linked to our specific topic and, most importantly, it does not seem to have been jeopardized in a particularly serious way during the emergency.

Chapter 11. Starting from Italy, we argue that the Declaration of the state of emergency was perfectly legitimate, as it met the requirements set by the Code of Civil Protection. Instead, the DPCMs used to tackle the pandemic cannot be based on said law: they are a totally new act, established *ex novo* by the decree-laws n.6 of February 23 and n.19 of March 25, 2020. The two provisions have different legitimacy. The former includes a fairly too vague delegating norm (art.2), seriously calling into question the validity of the DPCMs adopted under its cover (though they may still be «saved» by considering them *extra ordinem* ordinances). The latter, instead, basically solved the problem, detailing the measures the DPCMs could impose and setting a maximum duration for them. Thus, from a strictly formal point of view, they seem unproblematic. In France, the Decree of the first lockdown was issued by the Prime Minister on the basis of a norm (former art. L-3131-1 of the Code of Public Health) which conferred powers to the Minister of Health. This was validated by commentators and judges through the theory of exceptional circumstances. As regards the new law

on the state of health emergency, even though it meets the requirements of temporariness and clear delegation, we agree with the majority opinion on its unnecessariness, as the Government could simply have activated the "old" law on the state of emergency. Finally, as regards Spain, we maintain that using the state of alarm was formally appropriate to tackle a pandemic, but that its second enactment for six months creates a huge problem of temporariness.

Chapter 12. The use of the DPCM jeopardized the centrality of Italian Parliament both because this act needs not be converted by the Houses and because, as an administrative provision, it seems to disrespect the principle of the *riserva di legge*. The idea that it is legitimate because the Assembly itself had authorized its use by converting the two decree-laws nn. 6 and 19 of 2020 has an important flaw: it does not consider that this kind of primary norm cannot be used by the Government to confer a delegation upon itself. Thus, the Draghi executive did well in abandoning the instrument of the DPCM after March 2, 2021. In France, instead, the state of health emergency poses huge problems for the weak parliamentary control on its enactment and the extension of the powers conceded to the Government. They relate both to the number of domains it can regulate and to the invasiveness of the measures it can take. Similar issues are also present in Spain, even though, here, the yardstick is the more pervasive control the Parliament can exercise during the state of exception: as we know, however, the opportunity of declaring this regime rather than the state of alarm has to do mostly with substantial issues.

Chapter 13. Though uncertainty and lack of stability are a defining characteristics of all norms issued to counter emergencies, anti-COVID legislation had two serious problems in all three countries. First, it tended to refer too much to the content of other acts, thus jeopardizing not only normative clarity, but even basic principles of criminal law such as the non-retroactivity of criminal behavior or the *ne bis in idem* rule. Second, it consistently lacked accuracy, poorly defining concepts like «necessity reason» or «proximity». Moreover, Government authorities consistently made a number of errors, such as always acting in the most rigid way, changing norms within too short notices,

or imposing even huge limitations of freedoms for political reasons rather than scientific evidence.

## Part IV. The substantive aspects: the principle of proportionality

Chapter 14. The components of proportionality we have selected for inquiring the admissibility of «stay-at-home» orders on a substantial basis are the ones proposed by Aaharon Barak in his book "Proportionality": proper purpose, necessity test and balancing, also called proportionality *stricto sensu*. The first one requires that any limitation of fundamental right be enacted only with an acceptable aim; the second demands that said limitation be the least invasive; and the last one, finally, verifies whether or not the measures properly balanced the conflicting rights at stake.

Chapter 15. While the human rights texts allow to limit freedom of movement for a number of reasons, they give a close list of motives which may lay the ground for restrictions of personal freedom. They are the needs to maintain public order, such as the detention of suspected or convicted criminals. However, article 5 of the ECHR also allows to confine people to prevent the spreading of infectious diseases. Thus, total confinement of confirmed or suspected COVID-19 cases must be considered justifiable, but still remains a violation of personal freedom, as also found, among others, by the French Constitutional Council. However, the same can then be said, in our opinion, for the lockdown imposed to the totality of the population. On the one hand, the exceptions allowed – work, necessity reasons, physical activity – seem very modest. On the other hand, the idea that physical coercion is absent does not take into consideration the fact that not even a totalitarian State may have the power to force everyone at home in the same way someone in jail is prevented from leaving. Finally, the thesis that there is no violation of personal freedom because this can only occur with the preventive authorization of a judge forgets that, in a democracy, it must always be thus. Our reasoning is also confirmed by the fact that a number of commentators, and the Constitutional Council itself, considered that the Ordinance of the French President of the Republic n.2020-303 of March

25, which extended automatically preemptive detention periods, violated personal freedom even if it did not exclude the intervention of a judge to mandate the liberation of affected people in advance.

Chapter 16. While the measures enacted by Italy and Spain seem to respect the principle of proper purpose, as they are expressly meant to fight COVID-19, the French state of health emergency is a new law which will permanently remain in the legal system. As regards the necessity test, the results are ambiguous: while a number of studies confirm the effectiveness of lockdown measures, results vary when we single out «stay-at-home» orders. These last provisions, coming after other interventions such as the closure of schools and nonessential businesses and the banning of gatherings, may be not only unnecessary, but even dangerous, as they confine people in closed spaces. Therefore, their beneficial effects are probably unable to match the numerous harms.

Chapter 17. Even though, at the beginning of a sanitary crisis, the principle of precaution may justify the sacrifice of other fundamental freedoms before the right to health, a more proper balancing is expected as time passes by, due to the unraveling of new scientific evidence. Thus, the renewal of «stay-at-home» orders over several months must be considered disproportional. Moreover, they look way more similar to the suspension of a fundamental right (whether it be personal freedom or freedom of movement) rather than a limitation: thus, we can argue that authorities failed to enact a proper balancing among competing freedoms. Our thesis is confirmed by a number of judicial rulings: while, at the beginning of the emergency, courts in all three countries usually validated the actions of the governments in the face of the uncertainty surrounding the new threat, they reverted to demand ever more stringent justifications as months went on.

## Conclusion

From February 14 to the end of May, the pandemic had a fluctuating

progression, both all over the world and in the three countries we have analyzed. Their responses were rather different: while Spain simply kept the measures of the state of alarm until their end on May 9, Italy and France enacted much stricter restrictions, with the latter even recurring to a third lockdown. The deconfinement plans foresee the end of the limitations only in the last decade of June for both countries. It is utterly worrisome that such provisions kept a partial «stay-at-home» order like the curfew in spite of its proven unnecessary and disproportional nature. Given that many scientists warn that humanity could have entered an «age of pandemics», it appears clear that the solution cannot be the continuous application of a measure which, as we have tried to prove, seems severely at odds with democratic Constitutions if not applied for a short time. Thus, it will be our duty to find an effective way to fight COVID-19, and any other future pandemic, without renouncing our fundamental values.