Is form substance? Some considerations on the management of the COVID-19 emergency in Italy

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Abstract: In this short contribution we recall and analyze the administrative and legislative actions enacted in Italy to contain the spread of COVID-19, up to the country’s lockdown, under the light of the constitutional guarantees.

1. Introduction and context

Samuel Pepys told of London in the plague of 1665. In his diaries, he wrote: “But, ‘Lord!’ how sad a sight it is to see streets empty of people, and very few upon the Change – jealous of every door that one sees shut up, lest it should be the plague, and about us two shops in three, if not more, generally shut up.” (S. Pepys, The Illustrated Pepys: Extracts from the Diary, R. Latham, ed., Berkeley, 1983, 88).

We felt such a bewilderment when COVID-19 spread from the Far East up to the threshold of our homes in Italy. This is a new, highly contagious virus against which the human body has no natural defenses (Na Zhu et al., A Novel Coronavirus from Patients with Pneumonia in China, 2019, N Engl J Med 2020; 382:727). In January, the Chinese authorities imposed the forced lockdown of any human activity in Wuhan and in the province of Hubei, forbidding about sixty million people to leave home (M. Chinazzi et al., The effect of travel restrictions on the spread of the 2019 novel coronavirus (2019-nCoV) outbreak, Science 10.1126/science.aba9757 (2020)). Such measures were enacted in “aggressive” ways, supported by army intervention (K. Kupferschmidt et. al., Can China’s COVID-19 strategy work elsewhere?, Science 06 Mar 2020: 1061-1062). When we were watching on our screens the images of what was happening there, while the contagion was spreading into our lives unbeknown to us, we all said that “here it would be almost impossible to do that - they are a dictatorship, we are a democracy”.

Some reject the possibility of comparing Italy to China, but they forget that the common element across all epidemies is the human longing for survival, which cannot be completely stifled even by opposite cultural superstructures. Primum vivere, wrote Thomas Hobbes, a contemporary of Pepys that is remembered for theorizing the exchange of individual freedom

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1 This article, completed on 14 March 2020, only considers events up to 13 March 2020.
for collective security. On the other hand, viruses do not hold passports and do not care about cultures or juridical models when propagating. They root and grow according to an exponential mathematical model that envisages a doubling of the infected people every few days, without any resemblance to the linear logic that we commonly use to deal with ordinary everyday phenomena.

In Italy, there was the need to translate the Chinese infection containment model into a juridical scenario deriving from Illuminism and belonging to the Western Legal Tradition, to the rule of law and to the principle of constitutional protection of individual freedoms. Henceforth, any limitations of such rights are hard to accept, both legally and socially, and especially a limitation of the freedom of movement, which however constitutes the only effective solution to counter the spreading of the epidemy. On this point, Article 16 of the Italian Constitution actually foresees the possibility of limits to that freedom to uphold public health and security.

Which instruments can be used to contrast a mostly unknown pathogen, for which there is no herd immunity or vaccine? The ultimate danger is that everybody could potentially get ill, exhausting the available healthcare resources (hospital beds, medical personnel, life-saving medical devices) in a very short timeframe, and grinding society to a halt: this would bring us back to the primordial condition of homo homini lupus. As a consequence, the first and foremost objective to be pursued is to preserve the healthcare system: by slowing down the infection over time, a higher number of patients will be able to receive care and survive (Zunyou Wu, Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China, JAMA, February 24, 2020. doi:10.1001/jama.2020.2648).

2. The Italian scenario

Italy realized that the contagion was spreading across her own territory all of a sudden, when the news broke that an adult (labelled “Patient 1”) showed up twice at the emergency room of the hospital in Codogno, a small town near Lodi: the first time with flu-like symptoms, the second with high fever and a respiratory crisis. In both cases, doctors and other staff in the emergency room did not wear any protection against the infection, thus unwillingly also becoming its agents. After the recent social contacts of Patient 1 were identified, the local health authorities certified that an outbreak had happened in Codogno and nearby, without being able to find the “Patient 0”, thus concluding that the virus was already out in the wild.
In a very short timeframe, the situation became very hard to handle: the contagion spread much more quickly than expected, flowing out of the Codogno area and involving the whole of Lombardy and other Northern Italian regions; hospitals fell into overload. Furthermore, disagreements (also political) about administrative competences arose between the regional healthcare authorities and the national government, straining relationships in the management of the emergency (F. Carinci, Covid-19: preparedness, decentralisation, and the hunt for patient zero, BMJ 2020;368).

From then on, it is possible to analyze how the fragmentation of the administrative and legal regulation of the emergency frustrated the attempts to apply strong, effective and “draconian” measures to contrast the exponential diffusion of the virus.

Article 16 of the Costitution, paragraph 1, allows for the law to introduce general limitations to freedom of movement for reasons of health or security. In this case, such reasons are proven by the progression of the epidemic and by the strong infectiousness of COVID-19, which make contrast and containment measures entirely necessary. It is particularly interesting to look at the fundamental role of DL 6/2020, a law-decree enacted on 23 February 2020 and converted into law no. 13, 5 March 2020.

The first article imposes limits upon several constitutionally granted rights, such as the freedom of movement, of entering and leaving specific geographical areas, of gathering, of meeting, of exercising entrepreneurial activity, in any place affected by an outbreak.

The second article is especially significant for our analysis. Through it, the President of the Council of Ministers takes upon himself an unlimited amount of power, exerted in a self-referential way, through the use of merely administrative acts, as it then happened later during the epidemic. This articles stipulates that “The competent authorities, in the ways defined in article 3 commas 1 and 2, can adopt further measures for the containment and management of the emergency, with the purpose of preventing the spread of the COVID-19 epidemic, even outside of the cases listed in article 1 comma 1.”.

Such a norm is extremely relevant, as it formed the juridical foundation for the adoption of any following measure to counter the expansion of the contagion. It is quite a broad clause, almost vague, that apparently can be easily and solidly used for any purpose instrumental to the authority that devised it.

In the meantime, on 30 January 2020 the World Health Organization declared the COVID-19 epidemic “a public health emergency of international relevance”, while the government
enacted three further law-decrees (no. 9, 11 and 14/2020), six acts of the President of the Council of Ministers (either deliberations or president’s decrees), twenty-two decrees and ordinances by individual Ministers, and then the three DPCMs (Decrees of the President of the Council of Ministers) of 8 March, 9 March and 11 March 2020, that combined together established a partial but extensive blockade of economic activities and freedom of movement across the whole of Italy: the so-called *lockdown*, the halt of the entire country. However, this last part of regulatory activities was enacted in a very peculiar way, which, according to the author, cannot be fully accepted.

3. The consequences of an untimely leak

During the night of Sunday 8 March 2020, the President of the Council of Ministers signed a DPCM labelled “*Additional provisions for effecting the law-decree of 23 February 2020, containing urgent measures for the containment and management of the COVID-19 epidemiologic emergency*”. Even if this was not the first act on the matter, its creation and the untimely release of a non-final draft in the late afternoon of the same day prompted thousands of panicked people to flee Milan towards the South of Italy. This collective behaviour, which spread the contagion, was opposite to the purpose of the act, which was about to declare Lombardy and 14 more provinces in the North a “red zone” (*Coronavirus, la pazza fuga da Milano di migliaia di persone in preda al panico per la Lombardia ‘chiusa’,* TPI, 8.3.2020).

The scoop, even if imprecise, was relaunched by all media under the right to report and to freedom of expression. However, the exercise of both rights should have been balanced against public healthcare needs, as the necessity to prevent further contagion was known and generally agreed upon. The following day, the government extended the restrictions to the whole of Italy, under pressure by the regional governors of the South, which saw a sudden increase in the likelihood of a massive outbreak in their territories, without having adequate healthcare structures at their disposal.

This hurried sequence of acts showed the government’s hardships in managing a complex situation, unheard of in recent times. Such hardships were amplified by the lack of a solid political majority in support of the government after the political crisis in Summer 2019, which was solved through a significant switch of sides in political alliances, even if the role of President was still held by the same person. Moreover, both the majority and the
opposition are constantly focused on instant political polls, given the frequent and repeated string of elections at multiple administrative levels, giving citizens the feeling of living in a so-called hyperdemocracy (Ortega y Gasset, *La Ribellione delle Masse*, trad. it., 2001, 81; S. Cassese, *Il popolo e i suoi rappresentanti*, Roma, 2019, 33). Such a reciprocal stimulus between political representatives and the electoral body prevents the enactment of stable public policies, pushing the country into a permanent electoral campaign, while the room for political representativeness reduces more and more. In the two years since 4 March 2018, the day of the last national parliamentary elections, there have been 16 different elections: three supplementary parliamentary elections for vacant seats, one for the European Parliament, and 12 administrative votes, six regional (encompassing about half of Italy’s regions) and six local, including the town councils of important cities like Bari, Catanzaro, Cagliari, Bergamo.

4. A single man at the helm?

Under the institutional profile, this weakness affects the relationships among public bodies in the production of norms: apparently, the government is attempting to circumvent the need for confrontation with the Parliament and with the President of the Republic, the institutions that are designed to promote political debate and embody the checks and balances of democracy. Up to now, the emergency has been addressed through decrees of the President of the Council of Ministers (DPCMs), while the most appropriate lawmaking instrument in this case would be the law-decree. According to article 77 of the Constitution, a law-decree can be issued in case of urgent needs, it must be signed by the President of the Republic (that exerts an ex ante check) and it must be confirmed by Parliament no later than sixty days after its issue.

This *iter* was not followed for the acts issued initially to lock down the Lombardy region and 14 other provinces, and later to lock down the whole of Italy. They have been enacted through DPCMs, a secondary source and an administrative type of act, which should define technical norms that, though general, affect a single specific matter and are useful to the implementation of a pre-existing law. This choice sidestepped any political and constitutional check.

The President of the Council of Ministers has thus abnormally used the power attributed to him: it is true that the second article of Law 13/2020 allowed him to issue the

Electronic copy available at: https://ssrn.com/abstract=3554515
implementation measures necessary for the emergency, but that power was limited to the acts foreseen in the law-decree 6/2020 (then converted into Law 13/2020), the original reference source. Extending such administrative power to the DPCMs of 8, 9 and 11 March 2020 - which have in fact a lawmaking nature, affect 60 million citizens, and address situations and conditions objectively very different from those existing in Codogno and nearby on 23 February 2020 - implies a constitutional abuse, as those acts did not take the form which would be appropriate to ensure adequate parliamentary control.

In front of such strong criticism, some claim that, if you consider their actual wording, these DPCMs only constitute a kind of moral suasion to push Italians to adopt the only appropriate behaviour to counter the infection, that is, stay home. However, as a matter of fact, the Parliament has been deprived of its legislative power; and it is very concerning that the Parliament has in practice not been gathered any more, so removing the democratic check that the Constitution provides for.

There is thus no answer to the fundamental question: who is the President of the Council of Ministers accountable to for his administrative acts?

The legal instrument used is important, as it must legitimate practical measures that, to protect the public health, impose very invasive limits to the freedoms of movement and gathering (M. Sirleaf, Responsibility for Epidemics, 97 TEX.L.REV. 285-351 (2018)). These measures must be adopted while respecting the constitutional guarantees that in such a serious condition seem to be lacking. The apparent conclusion that can be reached is that, in spite of the formal existence of constitutional guarantees, in critical conditions it is still not possible to avoid Hobbes’s approach, shattering the delusion that fundamental freedoms cannot be suppressed in a democracy.