

Covid-19 Italian emergency legislation and infection of the rule of law

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“Viruses can have more powerful consequences than any terrorist action”,

Tedros Adhanom Ghebreyesus, Director General of the World Health Organisation (WHO),

11 February 2020

State of emergency: Legal framework in Italy

States of emergency pose the most significant challenges to the safeguarding of fundamental rights and civil liberties.¹ The strengthening of executive power to the detriment of judicial authority and parliamentary oversight, absent effective domestic mechanisms of supervision of that executive power and the replacement of the judicial role with police operations represent a symptom of how prolonged emergencies lead to the eclipse of legal certainty and may cause the rapid and irreversible degradation of the rule of law.²

The outbreak of the Covid-19 – first detected in China at the end of 2019 – triggered an epidemic (which evolved into a pandemic³); the World Health Organization, on 30 January 2020, declared an international public health emergency.

Soon after that, the governments of many countries in the world issued a declaration of emergency, among them Italy: on 31 January 2020, the Italian Government formally declared the state of emergency pursuant to Legislative Decree 1/2018 (Civil Protection Code⁴) recognizing that Covid-19 disease had to be considered as an

1. See Triestino Mariniello, ‘Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise Its Immunity System’ (February, 2019) 20 Ger L J 46–71, Cambridge University Press: 13 March 2019.
2. The abuse of applicable provisions allowing governments to limit and derogate from certain rights contained in international treaties has challenged many scholars in a closer examination of the conditions and grounds for permissible limitations and derogations in order to achieve an effective implementation of the rule of law: see, eg the so-called ‘Siracusa Principles’ on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights in <<https://www.icj.org/siracusa-principles-on-the-limitation-and-derogation-provisions-in-the-international-covenant-on-civil-and-political-rights/>>. For concerns regarding Human Rights Dimensions of Covid-19 Response, see <<https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>> accessed 19 March 2020.
3. On 11 March 2020, the WHO declared that the outbreak of the viral disease Covid-19 had reached the level of a global pandemic.
4. English version here <http://www.protezionecivile.gov.it/en/transparent-administration/legal-measures/detail/-/asset_publisher/default/content/decreto-legislativo-n-1-del-2-gennaio-2018-codice-della-protezione-civi-1> accessed 19 March 2020. It should be noted that the code in its previous version of 1992 has been used often, and especially in case of

“emergency of national importance connected with natural origin or man-made disasters 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.”

Article 24 of Italian Civil Protection Code (‘Resolution on the state of emergency of national importance’) rules that the Council of Ministers, id est the Government, can declare a state of national emergency, which has to be limited in duration (12 + 12 months maximum) and determine its territorial scope, with reference to the nature and character of events. The declaration of emergency authorises the issue of civil protection orders, which can be adopted ‘in derogation to any current provision, within the limits and with the methods indicated in the resolution on the state of emergency and in compliance with the general principles of the legal system and the European Union rules’.

Italian Civil Protection Code legislation does not explicitly empower the Government to limit rights and freedoms.

Since the Italian Constitutional rules that restrictions to (some of the) fundamental freedoms cannot be enacted nor regulated by means other than laws and acts having the force of law, on 23 February 2020, Decree Law n. 6⁵ was issued, containing emergency provisions⁶ in order to limit infection due to the Covid-19 Virus, granting the ‘competent authorities’ with the power to order ‘any appropriate restrictive measure’ on those living in affected areas (‘red areas’).

Initially, only 10 municipalities in Lombardy and 1 in Veneto were declared red areas; rapidly, measures were extended to the whole Lombardy and 14 provinces of other Regions, and finally on 9 March 2020, restrictive measures applying to ‘red areas’ have been extended to the entire Italian territory until 3 April 2020 by the head of the Italian Government, the President of the Council of Ministers, through an administrative order called ‘Decree of the President of the Council of Ministers’ (DPCM).

Essentially, as a result of the emergency legislation, the whole country has been put in lockdown: citizens were prevented from leaving their homes, except for ‘well grounded work-related reasons or situations of need or movements for health reasons’. At the same time, school and

natural calamities such as storms and earthquakes; drought in the north of Italy; the presence of Roma population in Campania, Lazio and Lombardia; the high number of immigrants in the south of Italy; saving the archaeological site of Pompei; the Iraqi war: in order to face any terroristic attack or immigrant flows; managing of garbage disposal in Campania, Sicily and Calabria; and traffic in Rome, Naples, Reggio Calabria, Vicenza and Treviso.

5. The Decree Law 6/2020 can be read in Italian here: <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2020-02-23;6!vig=.4>> accessed 19 March 2020.
6. In the Italian Constitution, there is no explicit provision on the suspension of constitutional rights and guarantees, declaration of the state of war excepted (art 78, Italian Constitution). Despite the lack of a constitutional rule explicitly allowing the limitation of rights, the Italian lawmaker several times limited fundamental rights in order to face security threats and those laws were also submitted to the review of the Constitutional Court, using Decree Laws thought to face any situation of extraordinary need and urgency and regulated by the Constitution (art 77). The Decree Law is a source of law passed by the Government and issued by the President of the Republic that has the same status of a statute law of Parliament in the hierarchy of law sources. The executive can pass a Decree Law only in case of extraordinary necessity and urgency (art 77.2, Italian Constitution). Moreover, the Decree Law has to be confirmed by Parliament statute law within 60 days after the publication. The Houses are allowed to amend the confirming bill, whose original content is the same of the Decree Law. If the latter is not passed by the Parliament, it loses its effect also in the past so it is like it had never been in force, though the Parliament may rule (by statute law) on the legal relations produced by the non-confirmed Decree Law (art 77.3, Italian Constitution). Therefore, it is an extraordinary instrument as the Constitutional Court held. Quoted from Gabriella Angiulli, ‘States of emergency and fundamental rights Italy. The state of emergency in Italy’, Comparing Constitutional Adjudication, 2009, Università di Trento.

university activities as well as public events and sport competitions were suspended nationwide; the closure of museums, cultural centres and sport facilities have been ordered, as well as any non-essential commercial activity⁷; stores different from pharmacies and supermarkets have been closed; trains and public transport have been shut down or limited; and religious ceremonies, including funeral ceremonies, have been suspended.

More and more restrictions were applied on a day-by-day basis: the roll-out of the new restrictions has been chaotic, as they came from many different sources, including decrees or orders of different Ministers (Minister of Economics and Finance, Minister of Health, Minister of Interior), Head of Government, Presidents of Regions or Autonomous provinces, City Mayors and Civil Protection Department.

These measures were described as the largest lockdown in the history of Europe⁸: in fact, they establish unprecedented limitations to individual freedom and rights for a non-authoritarian regime.

Lockdown affected, *inter alia*, fundamental principles of the Italian democracy, such as personal liberty, freedom of movement, freedom of assembly and freedom to profess one's religious belief; free enterprise is strongly impacted as well; the right to education may also be impaired; and the right to privacy may be affected by (announced) use of surveillance technologies (such as cell-phone location tracking, advanced video analytics and biometric surveillance).⁹

Criminal justice and Covid-19 disease: Emergency rules and fair trial rights

The coronavirus pandemic has upended the day-by-day operations of the Italian justice system, raising significant questions regarding the limits of derogatory regulations in emergency situations.¹⁰

7. As per DPCM 22 March 2020.

8. Jason Horowitz and Emma Bubola, 'On Day 1 of Lockdown, Italian Officials Urge Citizens to Abide by Rules' (8 March 2020) [NYTimes.com](https://www.nytimes.com).

9. 'Limitations/restrictions to non-absolute rights are allowed when they are prescribed by law, pursuant to a legitimate aim and when such limitation is necessary in a democratic society and proportionate to the identified legitimate aim. Limitations allow for the balancing of individual and collective interests and are built into several provisions of the ICCPR and the ECHR (and its Protocols), to which Italy is a party. While worded in slightly different ways, both the ECHR and the ICCPR identify legitimate aims including national security, public safety, public order, public health or morals, as grounds for limiting – by law and when necessary and proportionate to such identified aims – the following rights: the right to respect for private and family life (Art. 8 ECHR), freedom to manifest one's religion or belief (Art. 9 ECHR and Art. 18 ICCPR), freedom of expression (Article 10 ECHR and Art. 19 ICCPR), freedom of assembly and association (Art. 11 ECHR and Arts 21-22 ICCPR), freedom of movement (Art. 2 ECHR Protocol no. 4 and Art. 12 ICCPR)'. Alessandra Spadaro, 'Do the Containment Measures Taken by Italy in Relation to Covid-19 Comply With Human Rights Law?' (16 March 2020) <<https://www.ejiltalk.org>> accessed 19 March 2020.

10. It has been especially questioned whether the source of the regulation is compliant with the Constitution (see, eg Marco Plutino, 'I decreti di Conte sul Coronavirus sono sconosciuti alla Costituzione' (14 March 2020) <<https://www.ilriformista.it/i-decreti-di-conte-sul-coronavirus-sono-sconosciuti-alla-costituzione-62221/>> accessed 19 March 2020; see also Arianna Vedaschi and Chiara Graziani 'Coronavirus Emergency and Public Law Issues: An Update on the Italian Situation' (12 March 2020) [Verfassungsblog.de](https://www.verfassungsblog.de), and Arianna Vedaschi and Chiara Graziani, 'Coronavirus, Health Emergencies and Public Law Issues', [Verfassungsblog.de](https://www.verfassungsblog.de), 6 March 2020: the scholars point out that 'Compliance with the rule of law implies that openness towards citizens is a primary duty of public authorities, even during emergency, as long as information is verified and correct, and its disclosure is necessary in the light of public interest. Lack of information may impair people's confidence towards public institutions, resulting in the erosion of democracy').

Limiting the present analysis on the impact of the lockdown on procedural criminal justice, it has to be said that, so far, two Decree Laws and three DPCM have been enacted.¹¹

Focusing on the most recent provision, that is, Decree Law No. 18 of 17 March 2020, it contains – among other provisions – specific rules about criminal justice in the Covid-19 emergency¹²: there are mandatory rules, which applied by law until 11 May 2020 (extending the first deadline of 15 April 2020), and rules that could be enacted by Courts on a discretionary basis in the period between 12 May 2020 and 31 July 2020.

For the emergency period until 11 May 2020, such legislation rules:

- ✓ automatic rescheduling of every hearing and postponement of deadlines in criminal proceedings,¹³ except specific hearings – which will be held in closed court – such as
 - juvenile criminal justice hearings,
 - habeas corpus hearings in case of arrest by police forces or
 - hearings with defendants in pretrial detention if the accused or the defence lawyer file a specific request to hold the hearing,
 - urgent evidentiary hearings;
- ✓ *suspension of the limitation period in criminal proceedings* (noting that limitation periods are a part of substantive criminal law in the Italian system);
- ✓ *suspension of all procedural time limits*, including deadlines for the notification of proceedings before the Court, enforcement and appeal procedures;
- ✓ *derogation of personal notification to the defendant* of rescheduled hearing;
- ✓ *limitation of public access* to court offices and courtrooms;
- ✓ limitations for inmates regarding family (visits and contact to external world, including parole benefits)¹⁴;
- ✓ *limitation to access to the lawyer for inmates*¹⁵;
- ✓ improving *home detention for inmates* with less than 18 months to serve in order to relief the overcrowded Italian prisons.¹⁶

11. Decree Law n. 11/2020 and DPCM 4 March 2020, 8 March 2020 and 12 March 2020; lastly, the Decree Law 18 of March 17 contains specific provisions regarding criminal justice (art 83 regarding criminal proceedings and art 123 regarding home detention for inmates who met the conditions set out in the Decree Law).

12. See arts 83 and 123 Decree Law 18/2020 available here (ITA) <<https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg>> accessed 19 March 2020.

13. Hearings have to be mandatory rescheduled after a given date (currently May 11 due to Decree law 23/2019 enacted on April 8); from May 12 to June 30, it is up to the courts to reschedule trials or to adopt adequate containing measures (closed court, face masks, etc.). Videoconference has to be used whenever possible; the topic cannot be covered in the present article, referring to Penelope Gibbs, 'Defendants on Video – Conveyor Belt Justice or a Revolution in Access?' (October 2017) <<http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>> accessed 19 March 2020.

14. 'As least six inmates have died, and at least 50 others have escaped from an Italian prison in the southern region of Puglia on Monday amid extensive rioting in 27 prisons across the country after visitation rights were curtailed due to the rapid spread of the novel coronavirus', Barbie Natza Nadeau, 'Italy Prison in Flames in Coronavirus Lockdown Riot Among Cut-Off Inmates' (9 March 2020) <<https://www.thedailybeast.com>> accessed 19 March 2020.

15. The Decree Law refers to a provision in the prison code which does not make any distinction between family members and defence counsel: as a result, it could be argued that any contact with the inmate has to take place via videoconference (if available, which means in very few cases) or telephone call, having the law increased the number of calls the inmate is allowed to make.

16. The provision is completely inadequate, since it (1) is a copy of an existing regulation (law 199/2019) and (2) needs electronic bracelets to be implemented, but there are no bracelets available. The Italian Union of criminal lawyers made

If the existence of emergency situations may require authorities to take measures that normally diverge from the standard human rights protections afforded under the ‘European system’,¹⁷ it has to be recognised that some of the said provisions do impact on fundamental criminal justice rights as well as on fair trial rights, such as reasonable length of proceeding, access to a lawyer, effective participation in the proceeding, publicity of the hearing, right to be present at the hearing, preparation of the defence and right to have lawfulness of detention decided speedily by a court (being postponed the duty to deliver the reasons in appeals proceedings about pretrial detention).

Criminal justice and Covid-19 disease: Sanctions for not respecting containment measures

The breach of any disease containment measure at the start of the emergency period constituted a criminal offense: Decree Law of 23 February 2020, n. 6 established that failure to comply with any of the containment measures should be punished with detention up to 3 months or with a fine up to EUR 206.00 pursuant to article 650 of the Italian Criminal Code (‘non-compliance with the Authority’s provisions’).¹⁸ Additionally, individuals who have been tested positive to the coronavirus and defy mandatory quarantine could have been prosecuted pursuant to articles 438 or 452 of the Criminal Code, with penalties up to life imprisonment.

The main problem regarding the sanctions was the overlapping of information/overregulation¹⁹ from different sources and the complexity of prescribed measures: among the regulations provided by the Government (decrees of the President of the Council of Ministers, of Ministry of Health and

a press statement CYNIC AND IRRESPONSIBLE CHOICES LINKED TO BRACELETS THAT DO NOT EXIST (18 March 2020) <https://www.camerepenali.it/cat/10388/carcere_scelte_ciniche_e_irresponsabili_legate_a_braccia_letti_che_non_esistono.html> accessed 19 March 2020; scholars and even judges association raised concerns as well.

17. See, eg art 15 European Convention on Human Rights. In the interpretation and application of art 15, European judges have held that their approaches must take into account the ‘need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights’ (ECtHR, *Fox, Campbell and Hartley v. UK*, App Nos 12244/86; 12245/86; 12383/86, para 28, 30 August 1990) <<http://hudoc.echr.coe.int/>>.
18. Crime is a misdemeanour, being its deterrent effect quite low. It had to be added that since leaving home is permitted in specific cases, as proven working needs, cases of need, health reasons, police asks to sign a statement to whoever is questioned; who makes false statements commits a felony, punished with the imprisonment up to 6 years (art 495 Italian Criminal Code). Incredibly, no reference has been made so far to a specific misdemeanour regarding the spread of an infectious human disease as consequence of a not obeying an order of an authority (art 260, Italian Code of health provisions).
19. ‘State power – we see it in Italy at every daily press conference on updates about the evolution of the pandemic – tends to communicate in an increasingly reticent way’, Luca Guglielminetti, ‘Pandemic Risk Communication: The Anticipated Regret’ (18 March 2020) <<https://hommerevolte2.blogspot.com/2020/03/pandemic-risk-communication-anticipated.html>> accessed 19 March 2020. Same author points out that ‘It’s dangerous to handle the Covid-19 emergency like it’s a war’ and Hannah Arendt talks about it in the final section added to the second edition of her book, *The Origins of Totalitarianism*, in 1958, when she highlights how individual isolation and loneliness are preconditions for totalitarian domination. Concept then taken up in her later paper Public Rights and Private Interests (1974), in Coronavirus Outbreak and Rule of Law: Need for Vigilance, 16 March 2020. Finally, Prof Guglielminetti pointed out that ‘it’s dangerous to handle the Covid-19 emergency like it’s a war and Hannah Arendt talks about it in the final section added to the second edition of her book, *The Origins of Totalitarianism*, in 1958, when she highlights how individual isolation and loneliness are preconditions for totalitarian domination’.

Ministry of Interior), many other local authorities had enacted containment measures, such as Presidents of Regions/Autonomous Provinces or even City Mayors.²⁰

The partition of authority between regional and national officials had not only caused political tensions among the authorities themselves, but it resulted in different regulations, which did not allow legal certainty, a general principle of European Union and Conventional law. The international standard in this regard rules that an individual must be able at least to be aware of which acts and/or omissions will make him/her criminally liable and what penalty will be applied for the act committed and/or omission.²¹

This confusion may have been one of the reasons of the impressive result of police monitoring: from 11 March 2020 to 23 March 2020, over 2,000,000 people have been questioned by police about the reason of their presence in public and almost 100,000 of them are investigated.^{22,23}

On March 25, the Decree law 19/2020 abolished the criminal sanctions for not respecting containment measures and introduced a brand-new fine up to EUR 4000: since it is an

20. The Italian Constitution promulgated a complex system of autonomous territories including municipalities, provinces and regions, all operating under the national government. Between 1970 and 2001, regions progressively became fully operational, with powers and resources transferred from the national government under art 117 of the Italian Constitution; since 2001, regions and autonomous provinces gained more regulative power in important issues, such as healthcare. See Chiara De Cuia, 'How Italy Is Handling the Coronavirus' (6 March 2020) <<https://www.lawfareblog.com/how-italy-handling-coronavirus>> accessed 19 March 2020.
21. Administrative regulations that rule sanctions for disobeying seem not to be an issue under art 7 ECHR: in fact, 'when speaking of "law," Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability' (ECHR, II section, *Parmak and Bakr v Turkey* 2019, para 58). It also sets out, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where an individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him or her criminally liable' (ibid); the ECtHR pointed also out that 'the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment' (ibid).
22. Some cases of arbitrary law enforcement have been reported (Pietro de Vivo, 'È colpa di quelli come te se c'è il contagio!'. Abusi in divisa e strategia del capro espiautorio nei giorni del coronavirus <<https://www.wumingfoundation.com/giap/2020/03/vendicatori-in-divisa-coronavirus/>>). Connection between legal uncertainty and arbitrariness is analysed in my interview 'Il diritto argini la paura' *Quali sono i rischi connessi all'emissione di una legislazione d'emergenza?* <<https://www.salto.bz/it/article/23032020/il-diritto-argini-la-paura>> accessed 19 March 2020.
23. In addition, it has to be mentioned that emergency legislation has been used against NGO rescuers, since Italian authorities have subjected non-government sea rescue organisations assisting migrants and asylum seekers – and only them! – to quarantines at dock (despite crew members and passengers testing negative for the virus). In a context in which civilian rescue missions have been consistently undermined, blocked and even criminalised, potentially unnecessary quarantines might be used to deter rescue at sea. As Human Rights Watch argued, The coronavirus pandemic should not be used to criminalise or obstruct the work of civil society organisations (HRW Report, 19 March 2020, quoted above). See also Alessandro Puglia, 'Coronavirus, se l'emergenza impedisce il soccorso in mare' (2 March 2020) <<http://www.vita.it/it/article/2020/03/02/coronavirus-se-lemergenza-impedisce-il-soccorso-in-mare/154234/>> accessed 19 March 2020). Since April 7, the Italian government has declared its own ports unsafe due to the coronavirus epidemic: any boat carrying migrants rescued in the Mediterranean is not permitted to dock any more.

administrative proceeding,²⁴ the burden of proof is put on the alleged trespasser and Beyond-Any-Reasonable-Doubt rule does not apply any more; in this context, the main problem remains the knowledge of which activity is admitted or prohibited outdoor. Even worse, Italian police forces interpret extensively limitations (which should be restrictively applied), and doing so they reduce fundamental rights to authorisations!²⁵

Conclusions

No question about the need for containing emergency measures, since it was crucially urgent to postpone the peak outbreak, in order not to burden healthcare facilities.

However, any emergency legislation always represents a risk for the rule of law, because it has to be kept in mind that once a precedent to any kind of derogation of a fundamental right has been set, who can rule out the possibility that the same restrictions on fundamental rights will be reactivated again in the future in the name of another supposed emergency?²⁶

That is why we must stay vigilant and protect the right to health as well as the rule of law and prevent the virus from infecting the rule of law.

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24. Official data recognise that approximately 200,000 citizen are questioned every day; over 8,500,000 and 3,000,000 shops have been fined! Source: Italian Minister of Interior <<https://www.interno.gov.it/it/coronavirus-i-dati-dei-ser-vizi-controllo>> accessed 19 March 2020.

25. The law admits leaving the house for 'physical activity', but incredibly police forces fine who practices sport exercises outdoor (despite the fact that WHO defines 'exercise' as subcategory of physical activity). For running ban, see <<https://www.outsideonline.com/2411341/coronavirus-running-ban>> accessed 19 March 2020.

26. Quoting René Schlott, *Um jeden Preis?* (17 March 2020) <<https://www.sueddeutsche.de>> accessed 19 March 2020.