

RULE OF LAW AND PANDEMIC THE ITALIAN STRATEGY FOR MANAGING COVID-19 EPIDEMIOLOGICAL EMERGENCY

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“... public fear might produce unjustified intrusions on civil liberties...”

(SUNSTEIN, C.R. *Laws of Fear. Beyond the Precautionary Principle*.
Cambridge: Cambridge University Press, 2009, p. 204)

Abstract: *The contribution examines the most significant stages of the Italian strategy for managing the Covid-19 epidemiological emergency, through the analysis of the main legislative and administrative acts issued by the Government and by Regional and Local Authorities to face the crisis. The analysis aims to demonstrate that the powers of the competent Authorities have not been exercised in compliance with the principle of loyal collaboration, which inspires the relations between center and periphery. On a practical level, the ordinances issued by the Regional and Local Authorities have imposed more restrictive mitigation measures in their respective territories, overlapping the provisions of the Central Government and compromising the unitary strategy for managing the crisis.*

Keywords: *Covid-19 epidemiological emergency, Italian strategy, national, regional and local powers, Covid-19 and fundamental rights, mitigation and response measures*

1. THE SUBJECT AND THE METHOD OF THE STUDY

Karl Popper in this work *The open society and its enemies* wrote: “For those who have tasted the fruit of the tree of knowledge, paradise is lost. [...] We cannot return to a feral condition. But if we want to stay human, there is only one possible way: the road which leads to open society. We need to proceed towards the unknown, the uncertainty and insecurity, using that little wisdom we have to achieve these goals in the best possible way: security and freedom.”¹

Without exploring the complexity of his mindset, the words of this distinguished epistemologist can only raise a certain interest in the present times, marked by a – more intense – progression of events that have very little ordinary about them, followed by different actions which all aim to reduce the negative effects. There is a certain awareness of the inevitability of the unknown, uncertain and insecure² situations which are typical

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¹ POPPER, K. *La società aperta e i suoi nemici* [*The Open Society and its Enemies*]. Roma: Armando, ed. 1973, II, p. 279. The passage was selected and commented by CUOMO, F. *L'etica della libertà e la critica al totalitarismo in Karl Popper* [*The ethics of freedom and the critique of totalitarianism in Karl Popper*]. Gagnano: Longobardi, 2000, pp. 37–38.

² For concepts of uncertainty and insecurity one must refer to BAUMANN, Z. *La società dell'incertezza* [*The society on uncertainty*]. Bologna: il Mulino, 1999; BAUMANN, Z. *La società individualizzata* [*The individualized society*]. Bologna: il Mulino, 2002.

of human nature and, at the same time, the resilience of an open society needs to be somehow tested in these situations, specifically measuring the ability of the institutions to guarantee, even in extraordinary conditions, security³ and freedom of citizens.

The state of the health emergency caused by the spread of the Covid-19,⁴ initially, in some areas and, then, throughout the entire national territory, has included, in different ways, the social, economical and institutional fabric,⁵ and represents a privileged analysis point of view to test the value of Popper's statements and, as a consequence, to test if and to what extent the Italian Government strategy to manage the crisis has been able to also guarantee security and freedom of its citizens.

The study will try to retrace the complex exceptional legislative and administrative framework set up to contrast and contain the spread of the disease, which developed initially and more powerfully in Italy than in other European and non-European Countries, causing a high death rate and setting up the conditions for a collapse of the National Health System. The framework consists of a variety of different acts (Deliberations, Decrees-Law, Conversion Law, Ministerial Circular, Ministerial Decrees, Decrees of President of the Council of Ministers, Ordinances, etc.) released by Government institutions in rapid sequence, which add to the ordinances and Decrees released by Regional and Local relevant Authorities to react promptly to the contamination risk in the areas affected. Specifically, the analysis will focus on Lombardia, Veneto and Campania Regions in order to picture, through a careful study of the acts released in different moments, three different management strategies of the disease carried out by the Authorities, taking advantage of the spaces left open by the National exceptional regulations.

The target of the study will consist in measuring adequacy and effectiveness of the strategy set up by the Government to contrast and contain the spread of the disease, and also to focus on possible problems which arose during the various phases.

³ For security as a “superprimary value” of the legal system, FERONI, C., MORBIDELLI, G. La sicurezza: un valore superprimario [Security: super-primary value]. *Percorsi costituzionali*. 2008, No. 1, p. 31 ss.; in a similar sense, FROSINI, E. Il diritto costituzionale alla sicurezza [The constitutional right to safety]. In: *Forum di Quaderni Costituzionali Rassegna* [online]. [2021-03-09]. Available at: <www.forumcostituzionale.it>.

⁴ As indicated in the Health Ministry's Circular of 22 February 2020, No. 5443, the illness is defined “COVID-19” (where “CO” stands for corona, “VI” for virus, “D” for disease and “19” indicates the year in which it appeared), while the virus, which had been provisionally named “new Coronavirus”, has officially and definitively been named, by the International Committee on Taxonomy of Viruses (ICTV), on 11 February 2020, “severe acute respiratory syndrome coronavirus 2” abbreviated to “SARS-CoV-2”. In addition, Directive 2020/739/EU, amending Annex III of Directive 2000/54/EC of the European Parliament and of the Council, has included SARS-CoV-2 in the list of biological agents that can cause infectious diseases in humans.

⁵ The representation provided by LEONE, G. Coronavirus, sorte del paese e... appalti a sorte [Coronavirus, fate of the country and... contracts by lot]. In: *Federalismi.it* [online]. [2021-03-09]. Available at: <www.federalismi.it>, Osservatorio Emergenza Covid-19, paper – 5 May 2020, p. 4, has proved emblematic, in which he remarked that “the Covid pandemic (...), like a tornado, has caused immense damage to the national economy”. For a reflection on the long term effects of the pandemic on an economic, social and institutional level, which demolishes consolidated assets and imposes a reconsideration of all traditional regulating instruments, one must read CHITI, E. Questi sono i nodi. Pandemia e strumenti di regolazione: spunti per un dibattito [These are the knots. Pandemic and regulatory tools: points for a debate]. In: *laCostituzione* [online]. 20. 4. 2020 [2021-03-09]. Available at: <www.lacostituzione.info>.

2. PRIOR EVENTS: THE HEALTHCARE EMERGENCY IN CHINA AND THE FIRST PREVENTION MEASURES TAKEN IN ITALY

On 22 January 2020, a Health Ministry's Circular with the object "*Pneumonia caused by new coronavirus (2019-nCoV) in China*" refers that the City Health Commission of Wuhan, capital of the Chinese province of Hubei, on the 31 December 2019, informed the World Health Organization (WHO) of a cluster of pneumonia cases of unknown etiology in the city of Wuhan, mostly epidemiologically related with the Huanan Seafood market, in the South of China, well known for wholesale of sea food and livestock.

After having identified the most common symptoms of the disease – which consist of temperature, dry cough, sore throat, breathing difficulties – that can appear from a mild flu like case, up to a much more serious form (especially in patients with chronic underlying diseases, such as hypertension, diabetes, etc., and the elderly), it followed with the clarification that on the 9 January 2020, the Chinese Center for Disease Control and Prevention (CDC) had identified a new coronavirus (2019-nCoV), closely related to the Severe Acute Respiratory Syndrome (SARS), publically revealing the genome sequence. It also stated that, up to 21 January 2020, cases of patients affected by the disease after travel to Wuhan, had been identified in other areas of China (such as Beijing, Guangdong and Shanghai), in Thailand, in Japan and in South Korea, and that the Chinese Authorities had issued public health actions in order to contain the spread of the virus.

Specifically: identification and follow up of close contacts, included health care staff, a retrospective review of the cluster of patients and the active research of cases made by the Municipal Health Commission of Wuhan, the closure, environmental sanitation and disinfection of the Huanan Seafood market, the provision of information on the virus, the risk of infection and the adoption of biosecurity measures.

On the basis of the information produced by the European Centre for Disease Prevention and Control (ECDC), which had identified as moderate the risk of introduction of the infection in Europe though cases imported from infected areas, the document includes some indications on safety measures to carry out in airports and on the management of potential and actual patients in the medical facilities and households (so-called quarantine).

The Ministerial Circular of 22 January 2020 can be considered the first national action which considers the existence of a new diffusive disease, with an unknown aetiology and abnormal development, as well as a risk of infection, still considered moderate, caused by a stay in an infected area, and this starts the first forms of preventive care. This was followed by non-binding acts of almost the same standard, containing some practical measures to monitor passengers' health conditions on flights from China (for example, the filling of the so-called *passenger locator cards*),⁶ the definition of a case in order to be reported, discerning between suspicious cases, likely or confirmed

⁶ Health Ministry's Circular of 24 January 2020, No. 2265, named "*2019-nCov – operative recommendations for monitoring the health of passengers on board flights arriving from China*".

cases,⁷ the limitation⁸ and ban on flights from China,⁹ the management of potential coronavirus cases on board of ships and on land and of those who have had contact

⁷ Health Ministry's Circular of 27 January 2020, No. 2302, named "*Pneumonia from new coronavirus (2019-nCoV) in China*". The definition of "case" or of "suspected case" is a prime question for the management of an epidemiological emergency, considering that the swab tests, at least during *Phase I* of the emergency, were only carried out on "suspected cases", recognised as such by the Health Ministry following recommendations from the World Health Organization and the European Centre for Disease Prevention and Control. Indeed, in the Health Ministry's Circular No. 1997/2020 three types of cases were identified to carry out swab tests: 1) person with severe acute respiratory infection – SARI associated with travel to Wuhan in the 14 days preceding the onset of symptoms or a health worker from an environment with patients having severe acute respiratory infections; 2) person with unusual or unexpected clinical course with sudden deterioration; and 3) person with acute respiratory distress syndrome – ARDS of any degree of severity, in the previous 14 days, in "close contact" with a confirmed case of symptomatic nCov infection (as Covid-19 was defined), or working in a health institution treating patients with nCov infections. Following this, with the Health Ministry's Circular No. 2302/2020 a distinction was made between "suspected case", "probable case" and "confirmed case" (this last, defined as such only by the laboratory of the Higher Institute of Health) and new means for laboratory diagnostics were identified. In particular, the idea of "suspected case" was refined, and did not include any more persons with an unusual or unexpected clinical course, but still including health workers. This distinction, even though minimal, was confirmed in the Health Ministry's Circular No. 5443/2020. With the following Circular of 27 February 2020, No. 6337, named "*Documents relative to the criteria in order to carry out nasopharyngeal swab and diagnostic tests on asymptomatic individuals in the research for SARS-CoV-2 infections*", the document was sent to the permanent working group of the Higher Institute of Health, which, on the basis of indications from the ECDC on 25 February 2020, considering the (supposedly) low risk of transmission in asymptomatic individuals, recommends carrying out swab tests only in the cases of symptomatic cases of influenza like illnesses not attributable to other causes and with epidemiological links to areas of secondary transmission, cases of ARDS, cases of SARI and suspected cases of Covid-19 (defined according to the previous indications). With Circular No. 6360, published on the same day, named "*COVID-19. Updates*", the "suspected case" which requires carrying out a diagnostic test is limited only to persons with acute respiratory infections which satisfy at least one of the epidemiological criteria (in the previous 14 days before the onset of the symptoms), or close contact with a confirmed or probable case of Covid-19, or have been in an area of alleged community transmission. Health workers are no longer taken into consideration. The definition of "suspected case" which requires diagnostic testing is again modified in the Health Ministry's Circular of 9 March 2020, No. 7922, named "*COVID-19. Update on the definition of the case*", where three ideas are put forward, regarding persons with acute respiratory infections who have been to transmission areas, or who have been in close contact with a confirmed case, or who need hospital admission and there are no other etiology which explains the clinical case (therefore reintroducing the situation foreseen in Circular No. 1997/2020 and eliminated by Circular No. 2303/2020). In the Health Ministry's Circular of 20 March 2020, No. 9774, named "*Annulment and Replacement of the Ministry of Health Circular no. 0009480 of 19th March 2020 COVID-19: tracing of contacts for health surveillance and updating of recommendations regarding laboratory diagnosis in the case of SARS-CoV-2 infections*", provides tracing of all those who could have been in contact with a confirmed or probable case in the previous 48 hours preceding onset of symptoms, without providing for the diagnostic test in itself (other than in the case that it is part of the defined "suspected case", or if the symptoms of the illness have developed). Lastly, the Health Ministry's Circular of 3 April 2020, No. 11715, named "*COVID-19 Pandemic – update on the recommendations on the diagnostic tests and on the criteria to adopt in deciding on priorities. Update on the recommendations regarding laboratory diagnosis*", foresees that priority for diagnostic tests must be given to: patients recovered in hospital with SARI; all cases of acute respiratory infections either recovered in hospitals or in nursing homes or in other long term care facilities; high risk health workers; workers, even if asymptomatic, in nursing homes and care homes for the elderly, persons at risk of developing severe forms of the illness and frail persons, including vulnerable individuals, individuals who are the first to show symptoms of the illness within a closed community in order to rapidly identify clusters and guarantee containment measures. Also, where there are the resources available, all patients with respiratory infections. Asymptomatic individuals remain excluded.

⁸ Health Ministry's Provision of 27 January 2020, named "*Chinese coronavirus nCoV epidemic: Urgent measures to safeguard public health. Ban of all flights arriving from China in the Airports of Ciampino, Roma Urbe, Perugia Ancona*".

⁹ Decree issued by the Health Ministry on 30 January 2020, named "*Prevention measures against the new Coronavirus (2019-nCoV)*".

with a patient,¹⁰ the biosecurity measures for university students (or equivalent courses) returning from the infected areas of China¹¹ and for service and business operators, who for working reasons, have been in contact with the public.¹²

At the same time, with the Ordinance of 25 January 2020,¹³ it was also ordered under art. 32, of the Law of 23 December 1978, No. 833,¹⁴ the Health Ministry orders the enforcement of medical surveillance for passengers flying directly from the areas affected by the medical emergency and the recruitment of staff designated to control activity and provide a health response.

Meanwhile, on 30 January 2020, the World Health Organization (WHO) declares the Covid-19 epidemic, initially a “Public Health Emergency of International Concern” (PHEIC)¹⁵ and then, considering the level of seriousness and its spread, a pandemic.¹⁶

¹⁰ The Health Ministry’s Circular of 31 January 2020, No. 2993, named “*Potential cases of coronavirus (nCoV) and management of the same*”, where if available, for example, isolation in hospital aboard a ship or, where not available, in a single cabin, of the patient with a temperature, classified as a “contact with risk of infection” according to the criteria shown in Annex No. 1 (amongst which: exposure associated with health care, including caring directly for nCoV patients or having been in the same environment with nCoV confirmed patients, have travelled with a nCoV patient in any form of transport, having shared accommodation with a nCoV patient; specifying that the epidemiological contact must have occurred within a 14 day period) and, should the test result positive, the disembarkation and recovery as quickly as possible, in relation to the state of health, in a hospital for infective diseases.

¹¹ Health Ministry’s Circular of 1 February 2020, named “*Recommendations for the management of students and teachers returning from or leaving for affected areas in China*”. These measures were then extended to educational services for children and students including upper secondary school, of every nationality from the following Health Ministry’s Circular of 8 February 2020, No. 4001, named “*Update of the Ministerial Circular Prot. dated 1. 2.2020 with reference to the recommendations for management of the education system for students on their return from high risk cities in China*”.

¹² The Health Ministry’s Circular of 3 February 2020, No. 3190, named “*Recommendations for service/shop workers having contact with the public*”, in which it was considered sufficient to adopt and respect the common prevention measures for the spreading of respiratory illnesses, and in particular: frequent handwashing, attention to the cleanliness of surfaces, avoiding close and prolonged contact with individuals having flu-like symptoms, etc. Should a worker, whilst at work, come into contact with an individual who could be defined as a “suspected case” referred to in Annex No. 1 of the Health Ministry’s Circular No. 2302/2020, they must immediately contact the health services and, whilst awaiting their arrival, they must avoid close contact with the person concerned; if available, supply them with a surgical mask, carefully wash their hands, paying particular attention to any surface that may have had contact with any bodily fluid (respiratory secretions, urine, faeces) of the individual; dispose of any handkerchiefs used by the individual in waterproof bags (which must be disposed of in the infected material waste bags carried by emergency health workers).

¹³ Named “*Prevention measures against the new Coronavirus (2019-nCoV)*”.

¹⁴ Named “*Institution of the National Health Service*”.

¹⁵ WHO. Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), Geneva, Switzerland, In: *World Health Organization* [online]. 30. 1. 2020 [2021-03-07]. Available at: <[https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-healthregulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-ovel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-healthregulations-(2005)-emergency-committee-regarding-the-outbreak-of-ovel-coronavirus-(2019-ncov))>. The Public Health Emergency of International Concern (PHEIC) has been defined in the International Health Regulations (IHR) of 2005 as an extraordinary event which can: *i*) constitute a public health risk to other states through the international spread of disease; *ii*) potentially require a coordinated international response. Furthermore, this definition implies a situation that is: *i*) serious, unusual or unexpected; *ii*) carries implications for public health beyond the affected state’s national border; *iii*) and may require immediate international action.

¹⁶ Reference WHO. Director-General’s opening remarks at the media briefing on COVID-19. In: *World Health Organization* [online]. 11. 3. 2020 [2020-03-07]. Available at: <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-11-march-2020>>.

The following day, on 31 January, the Government, acting on a proposal made by the Health Ministry, “considering the need to support the Health Ministry’s and National Health Service action, also increasing the medical structures and controls at air and land borders”, declares, for six months, “the state of emergency as a consequence of the health hazard linked to the outbreak of the diseases arising from transmissible viral agents”, ordered under the legislation of Civil Defense, conferring to the Head of the Civil Defense Department the power to issue orders notwithstanding any current regulations and in accordance with the principles of legal order.¹⁷ Starting from the 3rd February, ordinances are issued by the Head of the Civil Defence Department in order to coordinate the actions to manage the emergency.

3. THE INSTRUMENTS PROVIDED BY THE ITALIAN LEGAL SYSTEM TO FACE HEALTHCARE EMERGENCIES: THE STATE OF THE ART

Before analyzing the way the Italian institutions have managed the Covid-19 epidemic emergency, it is necessary to step back and briefly consider the instruments provided by the national legal system to face health emergencies.

There is not, at the present time, one unique definition of emergency, nor does the Constitution identify a specific regulation, only generically and marginally considering it in artt. 77, 78, 120 and 126, corresponding to the emergency Decrees, to the declaration of the state of war, to the power of the Government towards the Regions and Local Authorities in order to protect legal and economic unity and, lastly, the dismissing of the Regional Council.

The interpretation of the subject has described it as a sudden difficulty, an unforeseen circumstance or a situation which requires fast action and that, not being clearly regulated by current laws, needs to be faced as an exception to the recognized legal system.¹⁸ The

¹⁷ Cfr. art. 7, par. 1, lett. c), and art. 24, par. 1, Legislative Decree 2 January 2018, No. 1, named “*Civil Defence Regulations*”. The announcement of a state of emergency represents, within the civil defence system, a particular power that the law confers to the Government for the management of extraordinary events, such as natural calamities, catastrophes and disasters, deciding upon duration and territorial extension of the said state of emergency. For the coordination of the interventions considered necessary to resolve the situation the Civil Defence participates in the decisions “to be adopted in the absence of current provisions, within the limits and means indicated in the resolution of the state of emergency and in respect of all the general principles of the legal system and the law of the European Union”. These regulations are issued subject to agreements with the Regions and the Provinces affected by the emergency and, in the case that they should waive existing laws, they must specify which laws they intend to waive and they must specifically motivate this decision (art. 25, Legislative Decree No. 1/2018). For a general overview of the subject, CERULLI IRELLI, G. *Principio di legalità e poteri straordinari dell’amministrazione* [Principle of legality and extraordinary powers of the administration]. *Dir. pubbl.* 2007, No. 2, p. 345 ss.; GNES, M. *I limiti del potere d’urgenza* [The limits of the urgency power]. *Riv. trim. dir. pubbl.* 2005, No. 3, p. 641 ss.; RAFFIOTTA, E. *Norme d’ordinanza. Contributo a una teoria delle ordinanze emergenziali come fonti normative* [Ordinance rules. Contribution to a theory of emergency ordinances as normative sources]. Bologna: Bonomia University Press, 2019.

¹⁸ FIORITTO, A. *L’amministrazione dell’emergenza tra autorità e garanzie* [The administration of the emergency between authority and guarantees]. Bologna: il Mulino, 2008, p. 12, who specifies further that, “in (...) the lexical meaning, the emergency is defined as a sudden difficulty, an unexpected circumstance or as a situation which imposes a rapid intervention (...)”. On the theme of the emergency, ANGIOLINI, V. *Necessità ed emergenza nel diritto pubblico* [Necessity and emergency in public law]. Padova: CEDAM, 1986; PINNA, P. *L’emergenza nell’ordinamento costituzionale italiano* [The emergency in the Italian constitutional order] Milano: Giuffrè, 1988;

definition clearly transpires both the need for fast action, and also the unsuitability of the ordinary legal instruments in facing crisis situations, which inevitably shifts attention to the waiver of ordinary law which often occurs in a regime of exception.

The main instrument provided by the Constitution to face emergencies is the provisional exercise of the legislative function by the Government when “extraordinary cases of necessity and urgency” occur. They are the Decrees-Law, defined by art. 77, par. 2 of the Constitution as “temporary measures with force of law”, responsibility of the executive branch, which need to be presented to both chambers of Parliament “the same day” “even if dissolved, are then specifically called and will meet within 5 days” but that lose effectiveness *ex tunc* if not converted into law within sixty days after being published on the Official Journal (par. 3). Despite the always more frequent use of emergency Decrees (which sometimes might lead to an actual abuse), the instrument has proved to be very useful during the course of the years to react, with directness and effectiveness, to events (like earthquakes and in general natural disasters) which by their very own nature would not have “withstood” the time needed to issue an ordinary law, because of the necessity and urgency to act to protect rights, goods and interests, constitutionally guaranteed and threatened by the unforeseen event. The use of Decree-Law is also protected by serious constitutional guarantees, specifically, the supervision of Parliament during the process of creation and conversion, in the temporary nature of their effects (the possible limitation of Constitutional rights and freedom would be limited to sixty days) and in the judgment of the Constitutional Court.

Also, there is the national service of the Civil Defence whose aim is to protect life, physical integrity, goods, settlements, animals and environment from the damages or risk of damages caused by natural disasters or human activities, and therefore to manage emergencies.¹⁹

The legal system also consider the administrative ordinances of necessity and urgency, expression of a power of ancient historical derivation, which some administrative Authorities may use by virtue of a law, if exceptional circumstances which cannot be managed in an ordinary way require a fast response to avoid damage to assets and public interest of particular relevance.²⁰ It refers to acts characterized by their content (or object), whether

MARAZZITA, G. *L'emergenza costituzionale. Definizioni e modelli* [The emergency in the Italian constitutional order. Notions and models]. Milano: Giuffrè, 2003; RAZZANO, G. *L'amministrazione dell'emergenza. Profili costituzionali* [The emergency administration. Constitutional profiles]. Bari: Cacucci, 2010; CABIDDU, M. A. *Necessità ed emergenza ai confini dell'ordinamento* [Necessity and emergency at the borders of the legal system]. *Amministrare*, 2010, p. 167 ss.; CARDONE, A. *La “normalizzazione” dell'emergenza. Contributo allo studio del potere extra ordinem del governo* [The “normalization” of the emergency. Contribution to the study of the Government's extra-ordinary power]. Torino: Giappichelli, 2011; GIGLIONI, F. *Amministrazione dell'emergenza* (Administration of the emergency). *Enc. dir., Ann.*, Milano: Giuffrè, 2013, Vol. IV, p. 48 ss.

¹⁹ Disciplined by Legislative Decree No. 1/2018, named “Civil Defence Regulations”.

²⁰ In the grammar of Italian administrative law, the term “ordinance” includes multiple legal deeds, not attributable to any one particular category RESCIGNO, G. U. *Ordinanza e provvedimenti di necessità e di urgenza. Diritto costituzionale e amministrativo* [Ordinance and measures of necessity and urgency. Constitutional and administrative law]. *Noviss. Dig. it.* 1976, Vol. XII, p. 89 ss., in part. p. 90; BARTOLOMEI, F. *Potere di ordinanza e ordinanze di necessità* [Power of ordinance and ordinances of necessity]. Milano: Giuffrè, 1979, p. 3 ss. Generally, the expression includes authoritative measures which impose or forbid or regulate, expressing however a more complex paragraph than a simple order. In fact whilst an order acts as though it were a binding deed or result of technical discretion, the ordinance follows an evaluative process: it is permeated with discretion; MORBIDELLI, G. *Delle ordinanze libere a natura normativa* [Free ordinance of normative nature]. *Dir. Amm.* 2016,

partial or total, not predetermined,²¹ “so defined by necessity and urgency, because these are the requirements which legalises their issue”,²² and specifically of the necessary and urgent ordinances “which highlight a particular relationship with competences of Local Bodies or Authorities”.²³

The rules that provide for them stop at the indication of the assumption, made by the urgent necessity to act, of the target they must pursue, but never state what the Authority can order, instead limiting itself to provide authorization to execute, order and forbid anything that at the time seems necessary and essential to achieve the goal.²⁴

These instruments act like a “valve”²⁵ for the legal system, necessary to face unforeseen situations which risk threatening the actual system or its goals.²⁶

The atypical nature of the content, particular feature of these measures, due to the fact that the Law allows the Administrations to decide which are the right actions, depending on the nature and strength of the events to be faced, is even clearer considering that they

No. 1-2, p. 33 ss., p. 33. For a precise analysis of the power of an ordinance, anticipating some bibliographic references which will be referred to further along, read GIANNINI, M. S. *Potere di ordinanza e atti necessitati* (commento a Cons. Stato, sez. V, 31 gennaio 1948, n. 76) [*Power of ordinance and necessary acts* (comment on Cons. State, sez. V, 31 January 1948, No. 76)]. *Giur. compl. Cass. civ.* 1948, pt. I, p. 388 ss.; CAVALLO PERIN, R. *Potere di ordinanza e principio di legalità. Le ordinanze amministrative di necessità e di urgenza* [*Power of ordinance and principle of legality. Administrative orders of necessity and urgency*]. Milano: Giuffrè, 1990; CAVALLO PERIN, R. *Il diritto amministrativo e l'emergenza derivante da cause e fattori esterni all'amministrazione* [Administrative law and emergency arising from causes and factors external to the administration]. In: AIPDA, *Annuario 2005. Il diritto amministrativo dell'emergenza* [2005 Yearbook. *The administrative law of the emergency*]. Milano: Giuffrè, 2006, p. 31 ss.; CERULLI IRELLI, V. *Principio di legalità e poteri straordinari dell'amministrazione* [*Principle of legality and extraordinary powers of the administration*].

²¹ CAVALLO PERIN, R. *Potere di ordinanza e principio di legalità. Le ordinanze amministrative di necessità e di urgenza* [*Power of ordinance and principle of legality. Administrative orders of necessity and urgency*], pp. 5–6.

²² *Ibid.*, p. 7, where it was shown that “this duo contributes in the modelling, for itself or with others, of many elements of Deeds or of Procedures”.

²³ CAVALLO PERIN, R. *Ordinanze* [Ordinances]. In: S. Cassese (ed). *Dizionario di diritto pubblico* [Dictionary of Public Law]. Milano: Giuffrè, Vol. IV, 2006, p. 3981 ss., p. 3982.

²⁴ RESCIGNO, G. U. *Ordinanza e provvedimenti di necessità e di urgenza. Diritto costituzionale e amministrativo* [*Ordinance and measures of necessity and urgency. Constitutional and administrative law*], p. 91. According CAVALLO PERIN, R. *Potere di ordinanza e principio di legalità. Le ordinanze amministrative di necessità e di urgenza* [*Power of ordinance and principle of legality. Administrative orders of necessity and urgency*], p. 7–8, “this detail is at the same time the most mysterious aspect of the power of the ordinance of necessity and urgency which the Public Administration holds [...], from which many misunderstandings come about regarding the nature and the extension of the derogatory effect of the ordinance of necessity and urgency issued by agencies of the Public Administration”.

²⁵ According to the well-known definition of GIANNINI, M. S. *Potere di ordinanza e atti necessitati* (commento a Cons. Stato, sez. V, 31 gennaio 1948, n. 76) [*Power of ordinance and necessary acts* (comment on Cons. State, sez. V, 31 January 1948, No. 76)], in part. p. 389–380, in which it is stated that the real power of an ordinance “is the function of a valve available in extreme cases, that is, in non-figurative terms, but judicial terms, is a derogation from the statutory reserve principle, predetermined by the same system for exceptional purposes”. Cfr. also by the same Author, *Lezioni di diritto amministrativo* [*Lessons of Administrative Law*]. Milano: Giuffrè, 1950, p. 102, and *Diritto amministrativo* [Administrative Law], Milano: Giuffrè, 1993, p. 237.

²⁶ Fulfilling the function of “protection and maintenance of the system, against critical elements, because unexpected or unforeseeable or in any case unable to be resolved with the current tools available”, as explained by BROCCA, M. *L'altra amministrazione. Profili strutturali e funzionali del potere di ordinanza* [*The other administration. Structural and functional profiles of the power of ordinance*]. Napoli: Editoriale Scientifica, 2012, in part. p. XIII.

are marked as “free” by distinguished interpretations.²⁷ Often facing the need to regulate unforeseen events, emergency measures are often exceptions to ordinary law, determining a contrast to the principle of typicality of administrative acts.²⁸

The Constitutional Court has tried to identify a series of limits to the ordering power, clarifying in many occasions that the exceptional rapport, “far from leaving a gap in the administrative activity, finds actual limits in the way it operates in the normative system.”²⁹ Also, it cannot go in contrast with the general principles of the legal system (stated or implicit) and with “the laws of the Constitution which as they represent the cornerstone of the Legal order, do not allow exceptions not even by ordinary law.”³⁰ On the procedural legality aspect, it needs to be adequate to face the actual situation which needs to be ordered, producing limited effects in time,³¹ justified clearly “in content, duration and method of exercising”.³²

²⁷ MORBIDELLI, G. Delle ordinanze libere a natura normativa [Free ordinances of normative nature]. *Dir. amm.*, 2016, Vol. 1-2, p. 33 ss., p. 35.

²⁸ As such, as illustrated by GIANNINI, M.S. *Diritto amministrativo* [Administrative Law], p. 270, “the emergency ordinances are administrative procedures which, as they are foreseen by legislation, are legal, but constitute an exception regarding the principles of typicality”. He observes however “a tendential escape from the principles of legality” with a consequential compromise “the overall stability of the Rule of Law”, FERRARA, R. *Emergenza e protezione dell’ambiente nella “società del rischio”* [Emergency and environmental protection in the “risk society”], p. 3362.

²⁹ CAVALLO PERIN, R. *Potere di ordinanza e principio di legalità. Le ordinanze amministrative di necessità e di urgenza* [Power of ordinance and principle of legality. Administrative orders of necessity and urgency], p. 147, with reference to the sentence of the Constitutional Court of 27 May 1961, No. 26. In judicial law, Constitutional Court. 4 January 1977, No. 4 (par. 3.1), In: *Consulta Online Rivista di diritto e giustizia costituzionale* [online]. [2021-03-07]. Available at: <www.giurcost.org>. Constitutional Court. 30 December 1987, No. 617. *Riv. giur. amb.* 1988, p. 113 ss.; Constitutional Court. 28 November 1991, No. 32. *Giur. cost.* 1991, p. 198; Constitutional Court. 9 November 1992, No. 418. *Foro it.* 1993, I, p. 2139; Constitutional Court. 14 April 1995, No. 127. *Riv. giur. amb.* 1997, No. 2, p. 258 ss., with comment of MORRONE, A. *I poteri di ordinanza contingibili e urgenti: l’integrazione del diritto “eccezionale” nel sistema delle fonti e dei livelli di governo territoriale* [Contingent and urgent ordinance powers: the integration of “exceptional” law into the system of sources and levels of territorial government]; lastly, Constitutional Court. 7 April 2011, n. 115. *Giur. cost.*, 2011, 2, p. 1581, with comment of CERULLI IRELLI, V. *Sindaco legislatore? [Legislator Mayor?]* e di MORANA, D. *La rivincita dell’art. 23 Cost. sulle ordinanze di sicurezza urbana (senza bisogno di invocare un principio supremo dello Stato di diritto)* [The revenge of art. 23 of the Constitution on urban security ordinances (without the need to invoke a supreme principle of the Rule of Law)].

³⁰ Constitutional Court. No. 26/1961, par. 3.1. as a matter of law. In the subject matters covered by statutory reserve, the admissibility of ordinances with an operative part of the sentence different from the legislative deed issued according to the Constitution, while those covered by conditional reserve, the ordinances are legitimate only if (and in as much as) the ordinary Law defines punctually (and preliminarily) “the suitable criteria to define the discretion of the body to whom power is given”, and therefore, if they remain within these legal boundaries. On the limits of power of urgent extraordinary ordinances one should consult the extensive examination carried out by CAVALLO PERIN, R. *Il diritto amministrativo e l’emergenza derivante da cause e fattori esterni all’amministrazione* [Administrative law and emergency arising from causes and factors external to the administration]. In: AIPDA, *Annuario 2005. Il diritto amministrativo dell’emergenza* [2005 Yearbook. The administrative law of the emergency], in part. p. 40 ss.

³¹ Constitutional Court. 2 July 1956, n. 8. *Giur. cost.* 1956, I, 683 ss., with the comments of CRISAFULLI, V. *Ordinanze di necessità, interpretazione della Corte e sindacato del giudice comune* [Ordinances of necessity, interpretation of the Court and review of the common judge] and TREVES, G. *La costituzionalità dei provvedimenti amministrativi di necessità e di urgenza* [The constitutionality of administrative measures of necessity and urgency]. In a similar sense, Constitutional Court. 22 May 1987, No. 201, In: *Consulta Online Rivista di diritto e giustizia costituzionale* [online]. 22. 5. 1987 [2021-03-07]. Available at: <www.giurcost.org>.

³² Constitutional Court. No. 127/1995.

As part of the power of ordinance, a relevant position is occupied by measures on health matters, currently provided for by art. 32 of Law No. 833 of 1978, by art. 117 of the Legislative Decree No. 112 of 1998³³ and art. 50 of the Legislative Decree No. 267 of 2000: these acts attribute to the Health Ministry, the President of the Region and the Mayor the power to issue necessary and urgent measures, respectively, with regard to hygiene, public health and animal health, and in the cases of health emergencies, depending on the territorial extent (national, regional or local) of the event. These provisions tend to be similar in content, even if they refer to a different regulatory field,³⁴ as it is clear from the titles of the laws of which they are part (one is about the creation of the National Health System while the other is about the appointment of national administrative functions and tasks to Regions and Local Authorities).

The health topic, linked to the public hygiene one,³⁵ has always represented “one of the fields with a traditional and more widely spread application” of “the administrative emergency law, considered as all the legal instruments issued by the Public Administration in emergency, extraordinary or urgent situations”.³⁶

During the course of years, the transition from the management of the emergencies to the management of the risks, largely depending on the introduction of the precautionary principle in the national legal system, has determined a profound change of the features of the power of ordinance of the Health Authorities.

The first phase, which spans from the administrative unification to the Constitution, is marked by the strong belief in scientific progress and in the possibility of effectively pre-determining the health and hygiene politics through the Law, typical of a Centralised State.

³³ Named “*Conferral of the administrative functions and tasks of the State to the Regions and other Local Bodies, in implementation of Art. 1 of the Law of 15 March 1997, No. 59*”.

³⁴ And, for this reason, susceptible to causing the risk of unfortunate overlapping of regulations and procedures of the relative Authorities RAFFIOTTA, E. *Le ordinanze emergenziali nel diritto comparato [Emergency ordinances in comparative law]*. *Rivista AIC*. 2017, No. 3, in part. p. 22.

³⁵ The regulations of public health and hygiene present diversified subjects, regarding firstly the activities, functions and means of managing public health, and secondly the safeguarding of the healthiness of the community, in the home and at work, as well as concerning food and drink, control of infectious illnesses and in the police veterinary and mortuary contexts. On the evolution of health legislation, AICARDI, N. *La sanità [The Health Care]*. In S. Cassese (ed.). *Trattato di diritto amministrativo. Diritto amministrativo speciale [Administrative Law Treaty. Special Administrative Law]*. Milano: Giuffrè, 2003, Vol. I, p. 633 ss.; ZANOBINI, G. *Corso di diritto amministrativo [Administrative Law Course]*. Milano: Giuffrè, Vol. V, 1959, p. 151 ss.; RABAGLIETTI, G. *Sanità pubblica [Public Health]*. In: *Noviss. Dig. it.* 1969, Vol. XVI, p. 3488 ss.; SANTINELLO, P. *Sanità pubblica [Public Health]*. *Dig. disc. pubbl.* 1997, XIII, p. 546 ss. For an analysis of the National Health System in a current historical context, PIOGGIA, A. *Diritto sanitario e dei servizi sociali [Health and social services law]*. Torino: Giappichelli, II ed., 2017. On the public hygiene sector, IANNOTTA, R. *Igiene pubblica [Public Hygiene]*. *Enc. giur.* 1989, Vol. XV; FONDERICO, F. *L'igiene pubblica [The Public Hygiene]*. In: S. Cassese (ed.). *Trattato di diritto amministrativo. Diritto amministrativo speciale [Administrative Law Treaty. Special Administrative Law]*, p. 711 ss.

³⁶ CHITI, M. P. *Il rischio sanitario e l'evoluzione dall'amministrazione dell'emergenza all'amministrazione precauzionale [The health risk and the evolution from the emergency administration to the precautionary administration]*. In: AIPDA, *Annuario 2005. Il diritto amministrativo dell'emergenza [2005 Yearbook. The administrative law of the emergency]*. Milano: Giuffrè, 2006, p. 140 ss., in part. p. 140, where he comments that “epidemics, pandemics and health catastrophes are in actual fact recurrent and widespread, such as to as the Public Administration for special measures to protect human health and the conditions of the health of the community”.

In this case “the emergency proves to be as a real exception, manageable by the administration of Law”.³⁷

The second phase, marked by the interest of the Constitutional jurisprudence in the identification of a series of limits to the powers of ordinance in order to ensure compatibility with the Constitution, meanwhile entered in force. Despite many organisational innovations – institution of the Regions, of the National Health System and the transferral of health functions which followed – the traditional emergency concept has not changed.

The third and last phase corresponds to the statement, both at an International and a European level, of the precautionary principle which forces Public Authorities to also assess, prior to a possible action, the potential and irreversible risks of serious damages to particularly relevant goods and interest.³⁸ The entrance of the principle in addition to the administrative activity, by effect of the open referral contained in art. 1, par. 1, of the Law No. 241 of 1990,³⁹ has deeply changed the characteristics of the emergency and the related management function entrusted to the relevant Public Authority. Among the changes detected are: the loss of any possible legislative reference for the management of precautionary power, which as a result becomes undetermined and generic in premises and content, the measures’ precautionary nature, which makes it necessary for them to be modified as the initial circumstances change; a full and detailed preliminary activity, a cost/benefit analysis as a consequence of the decision to not act or to act and, in this case, the measure’s adequateness and proportionality.

The most evident consequences are related to the legitimacy aspects of the administrative action and the intensity of the jurisdictional control: while in fact for the ordinances of necessity and urgency the Administrative Judge can only make sure the limits set by the constitutional and administrative jurisprudence are followed, on the contrary, in the precautionary measures when required, the judicial review touches the proportionality and adequateness of the measure, developing round the cost/benefit parameter in relation to the consequences;⁴⁰ in other words, it extends to administrative discretion.⁴¹

³⁷ CHITI, M. P. Il rischio sanitario e l’evoluzione dall’amministrazione dell’emergenza all’amministrazione precauzionale [The health risk and the evolution from the emergency administration to the precautionary administration]. In: AIPDA, *Annuario 2005. Il diritto amministrativo dell’emergenza [2005 Yearbook. The administrative law of the emergency]*, p. 144.

³⁸ The scientific literature on the principle of precaution is vast. Reference must be made to the studies of SUNSTEIN, C. R. *Laws of Fear. Beyond the Precautionary Principle*. Cambridge: Cambridge University Press, 2009, p. 204; SUNSTEIN, C. R. *Beyond the Precautionary Principle*. *U Penn L Rev.* 2003, Vol. 151, p. 1003 ss.; VERMEULE, A. *Precautionary Principles in Constitutional Law*. *Journal of Legal Analysis*. 2012, Vol. 4, No. 1, p. 181 ss.; VERMEULE, A. Introduction: Political Risk and Public Law. *Journal of Legal Analysis*. 2012, Vol. 4, No. 1, p. 1 ss.; DE LEONARDIS, F. *Il principio di precauzione nell’amministrazione del rischio [The precautionary principle in the risk management]*. Milano: Giuffrè, 2006.

³⁹ “*New regulations of administrative procedures*”. The Law contains the general regulations of administrative procedures.

⁴⁰ The profiles have been clearly illustrated by CHITI, M. P. Il rischio sanitario e l’evoluzione dall’amministrazione dell’emergenza all’amministrazione precauzionale [The health risk and the evolution from the emergency administration to the precautionary administration]. In: AIPDA, *Annuario 2005. Il diritto amministrativo dell’emergenza [2005 Yearbook. The administrative law of the emergency]*, p. 152.

⁴¹ On the topic, see PIRAS, A. Discrezionalità amministrativa [Administrative Discretion]. *Enc. Dir.* 1964, Vol. XIII, p. 66 ss.

The consequences on the model of administration are also relevant, in the first place this was completely dominated by the (State) law, but on the other hand, nowadays, it is, instead, put first and given the complicated role of making the decisions appropriate to the dynamism of technical-scientific progress.⁴²

Art. 32 of the Law No. 833 of 1978, art. 117 of the Legislative Decree No. 112 of 1998 and art. 50 of the Legislative Decree No. 267 of 2000 are expressions of the second phase, as it appears evident from the extreme general nature of the assumptions to exercise power (hygiene, public health, animal health or medical emergencies) and for the relative “splitting up” amongst the many Authorities with competences over these matters (Health Ministry, President of the Region and Mayor); the necessary and urgent character of the measures legitimates exceptions.⁴³ Even if this is an expression of the second phase, the actual exercise of the power of ordinance in order to manage a health risk or emergency, is guided by the precautionary approach, which implies a full preliminary, accurate and detailed, activity with identification and measurement of the risk levels, a cost/benefit analysis of acting or not acting, and taken proportional and adequate measures in its content.

4. THE BEGINNING: THE COVID-19 PANDEMIC AND THE PREPARATION OF A SUI GENERIS NATIONAL MANAGEMENT SYSTEM

During the night between 20 and 21 February, the Welfare Councilor of Lombardia Region informed, through a press release, that a 38 year old and fit manager had been found positive for Covid-19. Up to that moment the most influent Italian virologist considered the prevention measures applied sufficient to avoid the spread of the disease on the national territory.⁴⁴ The identification of “patient one”, the first Italian officially infected by the SARS-CoV-2 virus, was possible thanks to the intuition of the anesthetist on duty at the hospital of Codogno (Lodi district), who requested a nasopharyngeal swab or relevant diagnosis test, in order to identify the causes of a suspicious pneumonia.⁴⁵ Despite epidemiological investigations, consisting of investigative activity aiming to trace the map of contacts of the infected patient, the link between “patient one” and China was never

⁴² Again CHITI, M. P. Il rischio sanitario e l'evoluzione dall'amministrazione dell'emergenza all'amministrazione precauzionale [The health risk and the evolution from the emergency administration to the precautionary administration]. In: AIPDA, *Annuario 2005. Il diritto amministrativo dell'emergenza [2005 Yearbook. The administrative law of the emergency]*, p. 153, warns however that, in this last model, the Administration “has lost a its true “centre” following the statement of pluralism and of the administrative system; and where there is the tendency for technical and independant bodies to prevail both within the community and on a national scale, in the logic of “rising” subsidiarity and integration.”

⁴³ RAFFIOTTA, E. *Le ordinanze emergenziali nel diritto comparato [Emergency ordinances in comparative law]*, p. 22.

⁴⁴ Refer to, for example, the interview with the Director of the Sacco Hospital in Milan, a reference point for infective illnesses in Northern Italy, Massimo Galli and TPI: “I was also wrong about the night of patient number one.” In: *TPI* [online]. 11. 5. 2020 [2021-03-10]. Available at: <www.tpi.it>.

⁴⁵ Consult the interview of G. Visetti with Dr. Annalisa Malara, duty anaesthetist at the Hospital of Codogno, Coronavirus, the anaesthetist of Codogno who intuitively diagnosed Mattia's case: “I thought of the impossible.” In: *la Repubblica* [online]. 6. 3. 2020 [2021-03-09]. Available at: <www.repubblica.it>.

found (a Chinese colleague he had dined with a few nights before tested negative to a nasopharyngeal swab) and therefore “patient zero” was never identified.

During the evening of the same day, in Lombardia, other 14 cases were identified. The first 5 deaths were recorded in the following two days, while the cases recorded in Lombardia Region rapidly rose to 167, plus 18 in Veneto Region, 18 in Emilia Romagna Region, 4 in Piemonte Region and 3 in Lazio Region (in this last case, they were two Chinese spouses and an Italian researcher repatriated from Wuhan with special health security measures).⁴⁶

Having identified an infection cluster on national territory, a rapid series of measures was released to contain the spread of the infection.

On 21 February, the Health Ministry, along with the President of Lombardia Region, ordered, with an ordinance issued in accordance with art. 32 of the Law No. 833 of 1978 to manage health emergencies, the first measure intended to stop the outbreak of infection which had spread to ten towns in the Lodi district, where “patient one” had been identified.⁴⁷ The institution of a “red zone” of the epidemic, with the suspension (to be assessed daily) of all public events, whether religious, business, commercial, recreational, sport, educational activities and public transport. The only exception was essential public utility services.

The following 23 February, having identified two clusters in the Veneto Region (Vò and Mira), the Health Ministry issued an ordinance in agreement (this time) with the President of the Veneto Region, suspending in all the regional territory until 1 May, all events, nursery schools, schools and Universities, museums and all other cultural locations’ activities and school trips.⁴⁸

The identification of “patient one” marks the beginning of the pandemic on the national territory, providing the necessary conditions to plan a specific managing strategy,⁴⁹ which, not having an actual plan to apply, will eventually prove to be easier from a communication point of view.⁵⁰ The definition *Phase I* was chosen to cover the period between the declaration of the emergency state on 31 January 2020, marked by the adoption of measures which would greatly limit fundamental rights and liberties, with the aim to contain

⁴⁶ Refer to the press statement issued by the Civil Defence Department on 24 February 2020.

⁴⁷ Health Ministry Decree in agreement with the President of the Lombardia Region of 21 February 2020, No. 2230, named “*Urgent measures regarding the containment and management of the COVID-19 epidemiological emergency. Lombardia Region*”.

⁴⁸ Health Ministry Decree in agreement with the President of the Veneto Region of 23 February 2020, named “*Urgent measures regarding the containment and management of the COVID-19 epidemiological emergency. Veneto Region*”.

⁴⁹ It is necessary to draw attention to the existence of a National plan for the preparation and answer to a flu pandemic, drawn up on the basis of recommendations issued by the World Health Organization in 2005 and used to counteract the spread of swine flu from the virus A/H1N1 in 2009. The document has apparently not been updated since 2006. In actual fact, even if sufficient to counteract epidemics characterised by limited and circumscribed clusters, was not apparently sufficient to counteract a serious and virulent epidemic like that of Covid-19, to such an extent that, as can be seen, there was no mention of it either in the early states or in the Health Ministry’s Decrees.

⁵⁰ In these terms, GNES, M. Le misure nazionali di contenimento dell’epidemia da Covid-19 [National containment measures from the Covid-19 epidemic]. *Giorn. dir. amm.* 2020, 3, p. 282 ss., in part. 289.

the outbreak of infection among the population and the beginning of *Phase II*, on 4 May 2020, marked by a progressive reduction of these measures together with a slow recovery of trading activities, prior to the adoption of specific hygiene measures.

This strategy was actually set half way through *Phase I*, regulated effectively in Annex No. 10 of the Decree of President of the Council of Ministers of 26 May (the so-called *#IKeepmyDistance*).

4.1 The Legislative and Administrative Instruments to Contain the Infection (and of Rights and Fundamental Freedoms) During “Phase I” of the Emergency

The war against an invisible and mean enemy has put a strain on the ability of the institutions to organize, in a short time, a regulatory and administrative system able to contrast and limit the outbreak of the disease among the population through the obligation of social distancing and relative limitation of fundamentals rights and freedoms protected by constitutional guarantees. The speed of the infection reduced the response time and negatively affected the coherence and cohesion of the whole regulatory system.

It has been seen that the Italian set of rules considers many different instruments, powers and Authorities in order to react to medical emergencies. The initial goal of the Government was to set up, through the Decree-Law instrument, a regulatory system which slotted very specific roles regarding the exercise of powers and the jurisdiction of the Regional Authorities within tight boundaries, anticipating the content of possible measures to be applied in each specific situation.

At the same time, through the declaration of the state of emergency, a wide range of powers were given to the Civil Defence in order to coordinate monitoring activities and to enforce the already suffering health department to be applied at a national level. The exercise of powers and tasks which the temporary Law assigns to the Regional and Local Authorities during medical emergencies, was not carried out following the principles of loyal cooperation, generating a chaotic mess of measures which in most cases reduced even more the fundamental rights and freedoms. These, overlapping national measures, generated further chaos, confusion and uncertainty over permitted and prohibited behavior.

4.1.1 The Decree-Law 23 February 2020 No. 6 and the Legal Basis of The National and Local Measures of Containment. The Consequences of Attributing a “Blank Proxy” to the Competent Authorities.

The first pillar of the regulatory system of management of the emergency is the Decree-Law of 23 February 2020, No. 6, on “*Urgent measures to contain and manage the emergency*,”⁵¹ converted, with updates, in Law on 5 March 2020, No. 13, which assigns to the “competent Authorities” the power to issue direct measures to contrast and contain the spread of the infection, relieving pressure on the National Health System, in difficulty fol-

⁵¹ At a later date converted, with amendments, in Law 5 March 2020, No. 13.

lowing the high number of infected patients and the complex and long therapies needed to cure the disease. The Decree-Law lays the regulatory foundations for the construction of two parallel systems of provisions differentiated on a territorial basis: on one hand the Decrees of President of the Council Ministers (hereafter DPCM) and a long sequence of various type of acts (Ordinances, Decrees, Directives, Guidelines, etc.), and on the other, a variety of ordinances, clarifications and Decrees of Regional and Local Authorities, issued specifically to face the difficulties arising in the specific territories.⁵²

Art. 1 assigns wide powers to the “competent Authorities” to solve the emergency situation, foreseeing that in the municipalities or areas considered “infected”⁵³ “any kind of containing and managing measure proportional to the evolution of the epidemic situation can be applied” (par. 1). This is followed by a rather long list (not exhaustive) of typical measures.⁵⁴

Again to the “competent Authorities” is given the power to adopt “further measures” in the towns and areas not yet affected by the infection,⁵⁵ without, however, any clarification regarding the content (art. 2, par. 1).

The adoption process is similar for both measures: art. 3, par. 1, orders they need to be provided for with a DPCM on a proposal from the Health Minister, in accordance with the Minister of the Interior, the Economy and Finance Minister and other relative Ministers. Whether the measure is to be applied to the territory of one Region or several Regions, a confrontation is foreseen with the Presidents of the Regions involved; if it concerns the whole country, a consultation with the Chairman of the Conference of Presidents of the Regions.

The provision in question represents the legal basis for the adoption of a series of DPCM which have allowed progressively stronger measures, having an effect on different constitutional rights and freedoms, originally with a limited territorial application and later,

⁵² The situation described accurately by MORELLI, A. *Il Re del Piccolo Principe ai tempi del coronavirus. Qualche riflessione su ordine istituzionale e principio di ragionevolezza nello stato di emergenza* [The King of the Little Prince in the time of the coronavirus. Some reflections on the institutional order and the principle of reasonableness in the state of emergency]. *Diritti regionali*. 2020, No. 1, p. 518 ss., p. 518, as a “bulimic production of regulations to which all institutional and government levels contribute to daily”.

⁵³ In which, that is, “is testing positive at least one person where the origin of transmission is unknown or at least where the case is not traceable to a person coming from an area already affected by the viral infection (par. 1)”.

⁵⁴ Amongst which: the ban of entering or leaving a municipality or affected area (lett. *a*) and *b*)); the cancellation of rallies, initiatives, events and any form of meetings, either in public or private, regardless of whether they are cultural, recreational, sporting or religious (lett. *c*)); cancellation of educational services for children and of all schools of every order and grade, as well as scholastic activities for higher education, including universities (lett. *d*)); closure to the public of museums and other cultural institutions (lett. *e*)); cancellation of school trips (lett. *f*)); cancellation of competitive tenders for the hiring of personnel (lett. *h*)); application of quarantine with active surveillance of individuals who have had close contact with confirmed cases of the infectious illness in circulation (lett. *h*)); obligation of all individuals entering Italy from high risk epidemiological areas, as identified by the World Health Organization, to communicate their entry to the Local Health Authority which will then communicate this information to the Health Authorities responsible for adoption of fiduciary home isolation (lett. *i*)); closure of all commercial activities, with the exclusion of those which sell essential goods (lett. *j*)); closure or restrictions of public offices, and public service offices (lett. *l*)); restrictions of access to and cancellation of services regarding the transport of goods or people (lett. *m*)), adoption of smart working measures (lett. *n*) e *o*)).

⁵⁵ The system used is rather vague (“apart from cases provided for in art. 1, paragraph 1”).

on the whole national territory.⁵⁶ The management of the emergency has required the Legislator to balance the right to healthcare (laid down in art. 32 of the Constitution) with other guaranteed constitutional rights and freedom, including: freedom of movement and residence (art. 16 of the Constitution), personal freedom (art. 13 of the Constitution), freedom of assembly (art. 17 of the Constitution), religious freedom (art. 19 of the Constitution), right to education and culture (art. 34 of the Constitution), freedom of individual economic initiative (art. 41 of the Constitution) and the right to work (articles 4 and 35 of the Constitution). If there was ever a contrast between rights or interests at the same constitutional level, the Constitutional Court's jurisprudence has always clarified that the Legislator, guided by sensitivity, can choose which one to sacrifice at the end of a balancing process.⁵⁷ The balance point among the interests at stake cannot be predetermined in an abstract way, nor can it be the result of a formal (and aseptic) application of the Constitution.⁵⁸

During the Covid-19 emergency, the result of the balancing process carried out by the Government was to consider the health right more important because of the unsuitability of the National Health system to guarantee the best support possible to the patients, identifying the solution in the limitation of the right to enjoy certain constitutional rights and freedoms particularly those which were not compatible with social distancing which had been imposed by the high degree of infectiousness of the disease, even for those individuals without symptoms or with very few symptoms, from isolation of those infected and individuals at risk. This last solution has been considered effective to contrast and contain the spread of the virus by the World Health Organization (WHO).

The balancing has therefore been guided, as well as by reasonableness, also by precaution, principle which, as seen, forces public policy-makers to issue proportional, necessary and adequate measures when legally relevant assets and/or interests might only be potentially at risk and on which there is no scientific certainty.

Although the governance of the uncertainty that the management of a risk presupposes involves a necessary use of technical-scientific knowledge to establish the probability of its occurrence, the extent of the consequent damage and the most effective measures to prevent it, nevertheless falls within the responsibility of the public decision maker to

⁵⁶ It can be seen in the DPCM 23 February 2020, in which prevention measures were set out with a limited validity for some municipalities of the Lombardia and Veneto Regions; the DPCM of 25 February 2020, which extended the validity of the measures adopted in the preceding Decree to all the municipalities in the Emilia-Romagna, Friuli-Venezia Giulia, Lombardia, Veneto, Liguria and Piemonte Regions; the DPCM 1 March 2020; the DPCM 4 March 2020, which extended the measures laid out in the previous Decree to the entire National territory, the DPCM 8 March 2020, in which a ban was placed on entrance, exit and circulation of any individual person with the Lombardia Region and the Provinces of Modena, Parma, Piacenza, Reggio-Emilia, Rimini, Pesaro e Urbino, Alessandria, Asti, Novara, Verbano-Cusio-Ossola, Vercelli, Padova, Treviso and Venice, allowing only "movement due to proved working necessities or other situations of necessity such as for health reasons", as well as cases of "return to one's domicile, home or residence".

⁵⁷ Defines the balance in the following publication, MORRONE, A. Bilanciamento (giustizia costituzionale) [Balancing (Constitutional justice)]. *Enc. dir. Ann.* 2008, Vol. II, p. 185 ss.

⁵⁸ The logic of the legislative choices, in the presence of a conflict between constitutional rights or interests which are susceptible to comparative evaluation, depends essentially on the positive outcome of judgement of necessity, sufficiency and proportionality.

define the risk containment thresholds, i.e. its legal acceptability, conventional data deriving from the comparison and balancing with the other values involved.⁵⁹

However, it is debated whether the flexibility of the choice of the delimitation threshold (made by the Legislator or by the administration) is attributable to a political activity,⁶⁰ or of a political-administrative orientation,⁶¹ or still purely administrative in nature,⁶² with important consequences in terms of protection jurisdiction and the powers of the Judge. In any case, the role of science and technology remains limited to the construction of the premise necessary for defining the concrete management method, through the choice of measures inspired by the canons of proportionality, necessity, adequacy and consistency; the main purpose of the precaution is in fact to provide judgment parameters in contexts dominated by uncertainty, given the need to reach a decision in any case.⁶³

With Decree-Law No. 6 of 2020, and in consideration of the increase of the epidemic, which became dramatic in the Lodi district at the beginning of March because of the hundreds of people admitted to intensive care with many deaths, on 8 March 2020 a DPCM was issued which established a so-called “red zone” which included the whole Lombardia Region and the districts of Modena, Parma, Piacenza, Reggio in Emilia, Rimini, Pesaro and Urbino, Alessandria, Asti, Novara, Verbano-Cusio-Ossola, Vercelli, Padova, Treviso and Venezia. The DPCM imposes, between 8 March and 3 April, even more restrictive measures: ban of any kind of travel whether inbound, outbound or within the territories, allowing only that justified by proven work needs or health reasons; a “strong recommendation” to stay at home for anyone with a temperature higher than 37.5°C; cancellation of any kind of event, the closure of museums, schools and universities; the closure of swimming pools, gyms and sports centres (except for the training of professional athletes), the imposition of many limitations to the commercial activities which had not been suspended.⁶⁴

On the whole national territory some containing measures are issued, including the suspension of all kinds of events, the confirmed closure of schools and universities (until 15 March), the closure of museums, the promotion of smart-working, the total ban on movement for individuals in quarantine.

⁵⁹ COGNETTI, S. Precauzione nell'applicazione del principio di precauzione [Precaution in applying the precautionary principle]. In: G. Leone (ed.). *Scritti in memoria di Giuseppe Abbamonte* [Written in memory of Giuseppe Abbamonte]. Napoli: ESI, 2019, p. 387 ss., pp. 391–392.

⁶⁰ MARCHETTI, B. Il principio di precauzione [The precautionary principle]. In: M. A. Sandulli (ed.). *Codice dell'azione amministrativa* [Administrative Action Code]. Milano, Giuffrè, 2017, p. 194 ss., p. 199.

⁶¹ COGNETTI, S. *Precauzione nell'applicazione del principio di precauzione* [Precaution in applying the precautionary principle]. pp. 391–392.

⁶² CHITI, M. P. Il rischio sanitario e l'evoluzione dall'amministrazione dell'emergenza all'amministrazione precauzionale [The health risk and the evolution from the emergency administration to the precautionary administration]. In: AIPDA, *Annuario 2005. Il diritto amministrativo dell'emergenza* [2005 Yearbook. The administrative law of the emergency], p. 152, shows that “the principle of precaution encroaches directly on the administrative discretionary powers, making various public interests relevant as in the past”.

⁶³ In these terms, FIORITTO, A. *L'amministrazione dell'emergenza tra autorità e garanzie* [The administration of the emergency between authority and guarantees]. p. 196.

⁶⁴ It should also be noted that the Ordinance of the Head of the Civil Defence Department of 8 March 2020, No. 646, clarifies that transit, transport of goods and the activity of public offices are excluded from the ban, notwithstanding the preference for smart working.

The so-called *#IStayHome* Decree next day was issued the next day, the DPCM of 9 March 2020 which extends the freedom to travel restrictions in the whole national territory, following both the growth of the epidemic curve and the “mass escape” on the night between 7 and 8 March from the “red zones” to other Italian Regions due to an unofficial leak of the draft of the previous Decree, with the specification that “any form of gathering of persons in public places or open to the public is prohibited.”⁶⁵

Many scholars have strongly criticized the way the Government decided to manage the emergency, expressing doubts on the legitimacy (formal and substantial) of the implementing Decree. First of all, the adoption procedure did not follow either the procedural framework or the procedures prescribed by art. 17 of Law No. 400 of 1988, and therefore lacking the opinion of the State Council.⁶⁶ Secondly, a violation of the absolute legal reserve that art. 16 of the Constitution places as a guarantee for freedom of movement, as the limitations are established by a sub-legislative source.⁶⁷ Thirdly, the measures issued (limitation of the freedom of movement initially in some “areas”, then extended to the entire national territory) are not supported by the Decree-Law No. 6 of 2020 which, on the contrary, limits placing a ban (inbound and outbound) from the town or from the area concerned.⁶⁸ The adoption procedure was not based on the principles of transparency, participation, communication and information which, on the contrary, should guide the formation of decisions in the presence of risk.⁶⁹ In addition, the motivations of the Decrees lack any reference to the scientific risk assessment that should support the adoption of such restrictive and until then unknown measures for the entire Italian population. Finally, despite dealing with a matter that in the constitutional system is attributed to the concurrent competence of the Regions, these are adopted only by the President of the Council of Ministers following a mere consultation with the Presidents of the Regions concerned, without however reaching an agreement as the procedure of so-called “subsidiary call” of the related legislative function.⁷⁰

⁶⁵ Cfr. art. 1, par. 2.

⁶⁶ The contribution of A. Cardone at the online webinar on “*The rights of the emergency in the coronavirus crisis*”, 8-9 April 2020, In: *Radio Radicale* [online]. [2021-03-09]. Available at: <www.radioradicale.it>, in which he adds that the terms of prevention control of the Court of Auditors in which at art. 27, par. 1, of Law No. 340 of 2000 are halved and that, in the interim, the Decrees are provisionally effective, executors and executives according to artt. 21-*bis*, 21-*ter* e 21-*quater*, of Law No. 241 of 1990 (cfr. art. 3, par. 6, of Decree-Law No. 6 of 2020).

⁶⁷ CARAVITA, B. L'Italia ai tempi del coronavirus: rileggendo la Costituzione italiana [Italy at the time of the coronavirus: re-reading the Italian Constitution]. 6, p. III. In: *Federalismi.it* [online]. 2020 [2021-03-09]. Available at: <www.federalismi.it>.

⁶⁸ BARTOLINI, A. #Torna il coprifuoco?# Alcune riflessioni sul #DPCM (Decreto Presidente Consiglio dei Ministri)# #coronavirus# dell'8 marzo 2020 [#Is curfew back? # Some reflections on the #DPCM (Presidential Council of Ministers Decree) # # coronavirus # of 8 March 2020]. In: *Riflessioni sul Diritto Amministrativo* [online]. 8. 3. 2020 [2021-03-09]. Available at: <www.ridiam.it>, p. 3.

⁶⁹ Detects the dark character CARAVITA, B. L'Italia ai tempi del coronavirus: rileggendo la Costituzione italiana [Italy in the time of the coronavirus: re-reading the Italian Constitution], p. IV.

⁷⁰ The so-called “subsidiary call” is an institution of jurisprudential creation which allows the Government to claim for itself, due to the national relevance of the underlying interests, the administrative functions of the assigned subjects, in the ordinary way, to the exclusive or shared authority of the Regions, respecting the principles of loyal cooperation (cfr. Constitutional Court. 1 October 2003, No. 303) This is a “mechanism for which in some cases the State can “occupy” the discipline of the subject triggering a rise in subsidiarity” (see, BIN, R. La leale cooperazione nella giurisprudenza costituzionale più recente [Loyal cooperation in the most recent constitu-

Beyond the perplexities reported, the most problematic provision of Decree-Law No. 6 of 2020 is contained in art. 3, par. 2, pursuant to which “pending the adoption of the Decrees of the President of the Council of Ministers referred to in par. 1, in cases of extreme necessity and urgency”, the measures referred to in artt. 1 and 2 (both typical and atypical ones) can be adopted pursuant to art. 32 of the Law n. 833 of 1978, of art. 117 of the Legislative Decree n. 112 of 1998 and art. 50 of the Legislative Decree n. 267 of 2000, and therefore, respectively, by the Health Ministry, the President of the Region and the Mayor. The regulation of the requirements and methods of intervention of Regional and Local Authorities aims to combine the national dimension of the emergency with the different territorial concentrations of the infection in order to ensure a prompt reaction⁷¹ to critical issues in limited areas. However, the generality of the regulatory provision (the Decree refers to the “competent Authorities” that can adopt “further measures” with respect to those typified by art. 1 for the already infected towns and “areas”) ends up conferring a sort of “unlimited delegation” to a broad spectrum of public powers,⁷² which, as we will see, will result in an overflow of regional

tional jurisprudence] speech at the Seminar “The principle of loyal collaboration between the State and the Regions”, Roma, Conference of the Regions and of the autonomous Provinces, 6 April 2017). The principle of subsidiarity is foreseen in art. 118 Constitution and “regulates the administrative functions, which may be attracted to the centre if that would seem to be the most convenient location” (see ZUPPETTA, M. La sentenza n. 232/2011: inammissibilità della chiamata in sussidiarietà per mancanza di motivazione della legge? [Judgment No. 232/2011: inadmissibility of the call to subsidiarity for lack of motivation of the law?] In: *Gazzetta Amministrativa* [online]. [2021-03-09]. Available at: <http://ww2.gazzettaamministrativa.it/opencms/export/sites/default/_gazzetta_amministrativa/_aree_tematiche/sett_i_proamm_tuel_rqpist/_redazionali/_numero_2012_1/LA_SENTENZA_N._232_2011__INAMISSIBILITAx_DELLA_CHIAMATA_IN_SUSSIDIARIETAx_PER_MANCANZA_DI_MOTIVAZIONE_DELLA_LEGGE_DI_ZUPPETTA.pdf>. The requirements to trigger the procedure are: the need for a uniform management of the administrative function in view of the principles of proportionality and reason; the verification of the inadequacy of the lower territorial level (regional) and the participation of levels of government involved (cfr. Constitutional Court. 22 July 2011, No. 232). As the exercise of this function must be carried out in compliance with the principle of loyal cooperation, which regulates the relationship between the State and the autonomous territories, the constitutional legal system, despite some fluctuations, considered it necessary to draw up an agreement between Government and the Regions in question (see, among many, Constitutional Court. 12 July 2017, No. 170; Constitutional Court. 21 January 2016, No. 7; Constitutional Court. 12 May 2011, No. 165; Constitutional Court. 28 July 2010, No. 278; Constitutional Court. 14 October 2005, No. 383; Constitutional Court. No. 303/2003).

⁷¹ This is illustrated by DE SIANO, A. Ordinanze sindacali e annullamento prefettizio ai tempi del Covid-19 [Union ordinances and prefectorial cancellation at the time of Covid-19]. In: *Federalismi.it* [online]. [2021-03-09]. Available at: <www.federalismi.it>, Osservatorio Emergenza Covid-19, paper - 15 April 2020, p. 5.

⁷² The critical situations are highlighted by S. Cassese in the interview on “Coronavirus emergency: cancellation of rights”, granted to Radio Radicale on 6 March 2020. In: *Radio Radicale* [online]. 6. 3. 2020 [2021-03-09]. Available at: <www.radioradicale.it>; as well as the interview granted to P. Armadori and published on *Il Dubbio*, 14 April 2020; MAZZAROLLI, L. A. “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 [“Reservation of law” and “principle of legality” in times of national emergency. About a parliamentarism that does not hold up and gives way to a sort of extra-ordinary presidentialism, with the obvious consequent excessive power of the pp.aa. The repeated and prolonged violation of articles 16, 70 ss., 77 of the Constitution, to keep silent about others]. Insert: In: *Federalismi.it* [online]. 23. 3. 2020 [2021-03-09]. Available at: <www.federalismi.it>, Osservatorio Emergenza Covid-19, paper - 23 March 2020, p. 13; DE GIORGI CEZZI, G. Libertà dalla paura. Verso nuove forme di libertà per la collettività? (Freedom from fear. Towards new forms of freedom for the community?). In: *Federalismi.it* [online]. 18. 3. 2020 [2021-03-09]. Available at: <www.federalismi.it>. p. 221.

and local ordinances, often containing more restrictive prescriptions than in national measures.⁷³

4.1.2 The Decree-Law 25 March 2020, No. 19 and The Creation of Controls Over The Power of Ordinance of Regional and Local Authorities

With the following Decree-Law 25 March 2020, No. 19, the executive intervened to correct the critical issues generated by the first, particularly in the regional and local areas.⁷⁴ The Decree established that the measures taken to contain the infection must be taken, in ordinary proceedings, by the President of the Council of Ministers, with one or more Decree, upon proposal by the Health Ministry, having heard the Ministries of the Interior, Defence, Economy and Finance, other experts and, whether they concern regional or national territory, also the President of the Region involved or the President of the Conference of the Regions and the autonomous Provinces, which also has the power of initiative (art. 2). The constant control of the Government on the work of the executive is reinstated, with publication of the DPCM on the Official Journal and a “means for discussions”⁷⁵ between these and the Government (art. 2, par. 5).

The Regions can however make use of a space for urgent interventions under certain conditions: the exercise of the power of a regional ordinance, limited to the adoption of measures more restrictive than those already in force, can be applied only “pending” the issue of Decrees by the President of the Council of Ministers with limited effectiveness until that moment, as well as resorting to “specific unexpected situations of an aggravation of health risk that has occurred in the [...] [regional] territory or in a part of it” and exclusively as a part of the activities of their respective competences, without affecting any further productive activities and other factors strategically relevant to the national economy. These limitations are also applied to the powers of ordinance attributed to the Regions in the public health sector by any provision of the previous law (par. 1), provision, from which can be seen the will of the Legislator to close any possible opening for the Regions to exercise powers regarding regulatory provisions not expressly referred to in the Decree.⁷⁶

⁷³ Concept explained by CARLONI, E. La crisi coronavirus come problema di geografia amministrativa [The coronavirus crisis as a problem of administrative geography]. In: *laCostituzione* [online]. [2021-03-09]. Available at: <www.lacostituzione.info>. For an analysis of the measures issued by the Lombardy, Veneto and Campania Regions during the emergency legislation in force, see Paragraph 5 below.

⁷⁴ The corrective action of the Decree-Law No. 19 of 2020 is remarked upon by, STAIANO, S. Né modello né sistema. La produzione del diritto al cospetto della pandemia [Neither model nor system. The production of law in the face of the pandemic]. *Rivista AIC*. 2020, No. 2, p. 531 ss.; CINTIOLI, F. Sul regime del lockdown in Italia (note sul decreto legge n. 19 del 25 marzo 2020) [On the lockdown regime in Italy (notes on Decree-Law No. 19 of 25 March 2020)]. In: *Federalismi.it* [online]. [2021-03-09]. Available at: <www.federalismi.it>, Osservatorio Emergenza Covid-19, paper – 6 April 2020; G. SILVESTRI. Covid e Costituzione [Covid and Constitution]. In: *Unità per la Costituzione* [online]. 10. 4. 2020 [2021-03-09]. Available at: <www.unicost.eu>.

⁷⁵ CINTIOLI, F. Sul regime del lockdown in Italia (note sul decreto legge n. 19 del 25 marzo 2020) [On the lockdown regime in Italy (notes on Decree-Law No. 19 of 25 March 2020)], p. 4. The regulations establish that, in fact, the Decree must be communicated to Parliament within the day following their issue and that “the President of the Council of Ministers, or a Minister who he has delegated, reports every 15 days to Parliament on the measures adopted according to the present Decree”.

⁷⁶ BARTOLINI, A. Sull’uso (e abuso) delle ordinanze emergenziali regionali [On the use (and abuse) of regional emergency ordinances], interview by F. Ruggiero published in *Giustizia Insieme*. In: *Giustizia Insieme* [online]. 23. 4. 2020 [2021-03-09]. Available at: <www.giustiziainsieme.it>.

Acknowledging the regulations of art. 35, of the Decree-Law 2 March 2020, No. 9,⁷⁷ currently repealed, it confirms that the Mayor's are forbidden to adopt “contingent and urgent ordinances aimed at addressing the emergency in contrast with state and regional measures”⁷⁸ or exceeding the limits mentioned in paragraph 1, valid for the regional ordinances (art. 3, par. 2).

Which, then, are the legitimate Mayor's ordinances in that they are not “in contrast” with state and regional measures? The answer forces one to examine what is intended with the expression “in contrast”, in order to establish when the space of intervention of the Mayor's authority remains within the boundaries of legality. An interpretation adhering to the “centripetal orientation” underlying the regulatory design, “determined by the belief that the management of the containment of the viral epidemic must be uniform and homogeneous throughout the national territory,”⁷⁹ leads one to believe that the Mayor's ordinances:

- a) cannot waive national and regional regulations, tightening or loosening the relative prescriptions;⁸⁰
- b) they may take on an implementary or supplementary content (in which case, either without or with a minimum exercise of discretion);⁸¹
- c) they may go so far as to regulate areas not already regulated by the superordinate acts, as long as they are limited to the introduction of regulations with exclusively local effect;⁸²

⁷⁷ Named “*Urgent support measures for families, workers and businesses connected to the Covid-19*”, not converted into Law.

⁷⁸ The words “and regional” were added to Law No. 35 of 2020 during conversion.

⁷⁹ CHERCHI, R., DEFFENU, A. Fonti e provvedimenti dell'emergenza sanitaria Covid-19: prime riflessioni [Normative sources and measures of the Covid-19 health emergency: initial reflections]. *Diritti regionali*. 2020, No. 1, p. 648 ss., in part. p. 670, who point out again that “if it's true, as it is, that the damaging potentiality of the virus are the same from North to South, then the measures necessary to suffocate its spreading must be basically identical – except for some exceptional needs of some territories”.

⁸⁰ LUCIANI, M. Il sistema delle fonti del diritto alla prova dell'emergenza [The system of sources of law to emergency proof]. *Rivista AIC*. 2020, 2, p. 109 ss., p. 136, according to which “the Mayor's ordinance must respect all the State regulations adopted during the emergency”. In a different sense, however, RUGGIERI, A. Il coronavirus contagia anche le categorie costituzionali e ne mette a dura prova la capacità di tenuta [The coronavirus also infects constitutional categories and puts a strain on their resilience]. *Diritti regionali*. 2020, No. 1, p. 368 ss., in part. 376-377, which does not exclude a tightening up of the measures adopted on a local level, as opposed to an eventual relaxation of the measures, considering it “covered” by art. 32 of the Constitution.

⁸¹ One considers the ordinances with which the Mayors, carrying out regional regulations, have issued, in the various municipalities, regulations regarding biosecurity in covered markets, during *Phase I* of the emergency (see, for example, the Ordinance of the Mayor of Milan No. 19 of 7 April 2020, which establishes rules for the safe opening of covered markets in accordance with that regulated by the Lombardia Region Ordinance No. 522 of 6 April 2020). The execution of discretion by the Local Authority is, in this case, minimal, limiting itself within the specification of guidelines already defined by a regional ordinance.

⁸² Again CHERCHI, R., DEFFENU, A. Fonti e provvedimenti dell'emergenza sanitaria Covid-19: prime riflessioni [Normative sources and measures of the Covid-19 health emergency: initial reflections], p. 676. Keen observations are also made by FORGIONE, I. La gestione locale dell'emergenza da Covid-19. Il ruolo delle ordinanze sindacali, tra sussidiarietà e autonomia [Local management of the Covid-19 emergency. The role of trade union ordinances, between subsidiarity and autonomy]. *Il diritto dell'economia*. 2020, No. 2, p. 71 ss., p. 89, who comes to consider admissible, despite the pervasiveness of the executive's actions “an area of integrated and implemented intervention [of the national and regional measures] [...], in a subsidiary function and in loyal cooperation, as well as [...] one of its own, a guide and direction for town life”. This in as much as “the Local Authorities

d) results exclusively to the adoption of one of the measures previously defined by the exceptional legislation.⁸³

To summarise, the Decree-Law No. 19 of 2020, through a rewrite of art. 3, par. 2, of the Decree-Law No. 6 of 2020, aimed at “correcting” the dysfunction resulting from the overlapping of competences of the Regional and Local Authorities which had occurred during the period of the first Decree, has brought about a contraction of the subjective scope of application of power by limiting its exercise to the Regions alone, thus making the intervention of the Mayors even more subsidiary and marginal.⁸⁴

The creation by the executive of well-defined tracks within which lie the Region’s and Mayor’s powers of ordinance, further enforcing the second “correctional” Decree, fulfils the dual purpose of preserving the unified crisis management strategy, which could be compromised by an uncontrolled exercise of the same, and at the same time, leave a margin of intervention to the Regional and Local Authorities, defined in the assumptions and contents, to promptly resolve critical issues related to the respective areas.⁸⁵

Art. 4 of the Decree closes and completes the system, outlining a series of sanctions and controls on respect of the containment measures, marked by a much higher degree of deterrence and complexity than the last one.⁸⁶

don’t only have the job of carrying out decisions taken elsewhere, as the last link in the institutional chain, but the must also be a primary institutional spokesman, with the task of adapting, adjusting, informing and balancing on the basis of factual reality.”

⁸³ The profile is described well by CAVALLO PERIN, R. *Pandemia 2020: decreti e ordinanze d'emergenza* [Pandemic 2020: emergency Decrees and ordinances]. In: *Giustizia Insieme* [online]. 15. 05. 2020 [2021-03-09]. Available at: <www.giustiziainsieme.it>. who highlights that “the definition by the Decree of urgency of a “list” of possible contents of the ordinances (initially incomplete Decree-Law No. 6 of 2020, (...) art. 1, co. 2), which at a legislative level shows abstract types of Civil Defence Decrees or ordinances, which can then be selected by the President of the Council of Ministers and as an alternative by the President of the Regional Council or again by the Mayors, respectively with Decrees (in the case of Civil Defence Ordinances) or with contingent and urgent ordinances, so long as they are all within the limits dictated by the “principles of suitability” (sic!) or the “principle of proportionality”, both by reason of the risk which is actually present on national territory or in parts of it (art. 1, par. 2°, Decree-Law No. 19 of 2020 (...)). In jurisprudence, Regional Administrative Court, Puglia, Bari, sez. III. 22 May 2020, No. 733, which ruled that according to the needs to intervene through a Mayor’s ordinance this must be limited within the area “of a predefined classification of State and Governmental of regulatory laws”.

⁸⁴ It can be seen, in fact, that the art. 3, par. 2, of Decree-Law No. 6 of 2020, established that “pending the adoption of the Decrees of the President of the Council of Ministers mentioned in paragraph 1, in cases of extreme necessity and urgency the measures referred to in art. 1 and 2 can be adopted, according to art. 32 of the Law of 23 December 1978, No. 833, art. 117 of the Decree of 31 March 1998, No. 112, and art. 50 of the Consolidated Law regarding the organization of Local Authorities, pursuant to Legislative Decree of 18 August 2000, No. 267”; therefore, respectively, by the Health Minister, the President of the Region and the Mayor.

⁸⁵ If I may suggest, read DI CAPUA, V., FORGIONE I. *Salus rei publicae e potere d'ordinanza regionale e sindacale nell'emergenza Covid-19 (Salus rei publicae and power of regional and trade union ordinance in the emergency from Covid-19)*. *Giorn. dir. amm.* 2020, No. 3, p. 330 ss. On the topic, CORTESE, F. *Stato e Regioni alla prova del coronavirus (State and Region to the test of the coronavirus)*. *Le Regioni*. 2020, No. 1, p. 3 ss.

⁸⁶ Art. 3, par. 4, of Decree-Law No. 6 of 2020 which was previously in force, establishes punishment for the transgressor in containment measures with the application of art. 650 c. p., unless the incident had constituted a more serious crime. The following paragraph 5 attributed to the Prefect, based upon information from the Ministry of the Interior, the power to ensure the execution of the measures through the police force and, where necessary, the armed forces, after informing the Minister of the Interior, the power to ensure the execution of the measures by making use of the Police Forces and, if necessary, the Armed Forces, having heard the territorial

In implementation of the Decree-Law No. 19 of 2020, the DPCM 10 April 2020 was issued which was inserted in the tracks already traced by the DPCM 8, 9 and 22 March 2020 (expressly repealed) and of the Health Ministry's Ordinances 20 e 22 March, of which some provisions are reiterated.⁸⁷

This provision is aimed at an increased organicity compared to the previous ones, underlining the executive's intention to "group" in one single legal document the implementary measures, or national interest, of the Decree-Law No. 19 of 2020, so resolving at least part of the problem of the plurality of sources created during the period of the previous Decree-Law No. 6 of 2020.

A strong criticality remains however in the provisions of art. 8, par. 2, which excludes "the more restrictive containment measures adopted by the Regions, in agreement with the Health Ministry's, in relation to specific areas of the regional territory." The perplexities are evident when one considers that art. 3, par. 1, of the Decree-Law No. 19 of 2020 foresees a time limit on the adoption (and enforcement) of more restrictive regional measures, in pending the adoption of the DPCM, with a consequential loss of effect of the same following the issue of the same. Art. 8, par. 2, of the DPCM, a secondary source, introduces a sort of "amnesty" *ex post* of the regional ordinances containing more restrictive provisions, placing itself in contrast to the primary legislation and so causing an alteration of the system of sources which, what more, seems to be one of the recurrent traits, together with the tangle of measures, of the emergency management.

Doctrine has correctly outlined the critical situation not involving so much the prescriptive content (the rectifying effect on the tightest regional measures), considering that "a mechanical application of the snare of ineffectiveness would cause unreasonable and incomprehensible effects, which, for example, the weakening of the protection belt adopted to contain a cluster,"⁸⁸ but the alteration of the hierarchy of the sources: the

chiefs in charge. In actual fact, the ineffectiveness of these sanctions was immediately pointed out by BERGAMI, M., LEONE, G. *La sanzione più efficace è quella pecuniaria: basta puntare su una multa da 3mila euro* [The most effective sanction is the pecuniary one: just aim for a 3 thousand euro fine]. *Il Sole 24 Ore*, 21 March 2020, who proposed a different solution, made up of an "introduction of a specific administrative offence, covered by an effective pecuniary sanction which would be an effective deterrent (.), e.g. 3.000 euro". This proposal was adopted in the following Decree-Law No. 19 of 2020 (art. 4, par. 1).

⁸⁷ Amongst which: limitation of the movements of individuals to those "motivated by proven work needs or situations of need that is for health reasons" even towards a municipality different to that in which they find themselves; ban on every movement towards homes other than one's main residence including second homes used for holidays (art. 1, par. 1, lett. a)); advice to all individuals with symptoms of a respiratory illness and a temperature (above 37,5°C) to remain in their own home and to limit as much as possible all contact with other people, to contact their own G.P. doctor (art. 1, par. 1, lett. b)); total ban on leaving one's own home for individuals subjected to quarantine that is testing positive to the virus (art. 1, par. 1, lett. c)); total ban on any form of gathering of people in public places or places open to the public (art. 1, par. 1, lett. e)); ban on open air recreational and leisure activities, with the exception of individual physical exercise only near one's home and always respecting the distance of at least one metre from any other person (art. 1, par. 1, lett. f)).

⁸⁸ BARTOLINI, A. *Sull'uso (e abuso) delle ordinanze emergenziali regionali* [On the use (and abuse) of regional emergency ordinances], who points out that the "orthopedic function" of the DPCM 10 April 2020 which brought back "to reasonableness a provision, that of the Decree-Law, which from the literal point of view is clearly unreasonable". A different solution is, however, put forward TROPEA, G. *Il Covid-19, lo Stato di diritto, la pietas di Enea* [Covid-19, the rule of law, the *pietas* of Aeneas]. In: *Federalismi.it* [online]. [2021-03-09]. Available at: <www.federalismi.it>. Osservatorio Emergenza Covid-19, paper, 18 March 2020, p. 11, according to which the regional and local ordinances adopted after the issuance of the DPCM would be invalidated by "lack of power."

“amnesty” would be determined by a secondary source when, more correctly, it should have been established by a conversion law.

4.2 The Progressive and Controlled Regaining of Rights and Fundamental Liberties and the Slow Recovery of the National Economy in *Phase II*

The DPCM of 26 April 2020⁸⁹ marks the start of *Phase II* of the emergency plan, marked by a progressive slackening of the containment measures adopted previously, as is already clear from the title of the Decree (so-called *#IKeepmyDistance*). This is a phase “which is still within the state of emergency but combines the necessity to control any spread of the virus together with the necessity to return to a normal social life in the community.”⁹⁰ It is not only by chance that its launch was prepared with the constitution of a new Committee, the board of experts in economic and social subjects,⁹¹ assigned the delicate job of elaborating ideas, advice and probable outcomes at the end of *Lock-down*.

With reference to freedom of movement, the situations of need which justified movement were extended to allow meeting with “relatives,”⁹² as long as gatherings were avoided, social distancing was maintained of at least one metre and facemasks were used at all times. Limits regarding physical exercise and sports were lifted, and they were permitted as long as the distance of one metre was respected for physical exercise and two metres for sport. Essentially, the barriers to movement within the territory of each municipality were removed, whilst those between Regions remained. The quarantine measures remained obligatory only for those who returned from abroad and a “total ban”⁹³ was introduced for those affected by any respiratory infection symptoms and temperature (higher than 37,5°C) of movement from home and with limited social contacts. The obligation to wear facemask was only indoors, where it was impossible to guarantee social distancing. Funerals were now permitted although only relations were allowed to attend, always respecting social distancing and, where possible, conducting services outdoors.

Catering businesses, until now only authorised for home delivery, were allowed to sell take-away dishes. The list of businesses permitted was extended, but they are subject to

⁸⁹ See “Further implementing provisions of the Decree-Law of 23 February 2020, No. 6, containing urgent measures regarding the containment and management of the epidemiological emergency from COVID-19, applicable throughout the country”. The title of the Decree does indeed raise some perplexity, having been adopted on the basis of a Decree-Law which is no longer effective.

⁹⁰ GIGLIONI, F. Le misure di contrasto alla diffusione dell’epidemia nella “fase due” [Measures to combat the spread of the epidemic in “phase two”]. *Giorn. dir. amm.* 2020, No. 4, p. 414 ss., in part. p. 414, who points out that it is identified by a “gradual path, adaptive and partially unknown, which probably will not expire even when the virus disappears or is finally contained judging by the long-term effects that seem probable”.

⁹¹ The Committee was constituted with DPCM 10 April 2020, subsequently integrated with DPCM 12 May 2020, and is made of 24 members, with various expertise and professional experience, amongst which two are experts in Law, represented by the Head of Department of the Civil Defence and of the Special Commissioner. The supervision of the Committee has been entrusted to Dott. Vittorio Colao.

⁹² The Ministry of the Interior Circular No. 15350 of 2 May 2020 specifies that the expression “relatives” includes “spouses, relationships of kinship, affinity and civil union”, as well as relationships characterized by “lasting and significant sharing of life and affections” (cfr. Court of Cassation, sez. IV. 10 November 2014, No. 46351).

⁹³ The Ministry of the Interior Circular No. 15350 has clarified that the regulation reinforces the preceding measure, consisting of a strong recommendation, and imposing on these individuals “a true and real duty”.

a series of precautionary measures laid out in the security protocols attached to the Decree.⁹⁴

Of particular interest was the content of art. 2, par. 11, which confers monitoring functions of the epidemiological situation to the Regions in their respective territories, to guarantee the safe performance of productive activities. The eventual worsening of the health risk, identified by using the principles shown in att. 10 and the criteria established in the Health Ministry's Decree of 20 April 2020, enabled the President of each Region to promptly suggest to the Health Ministry any necessary and urgent restrictive measures for productive activities in the regional territory concerned, in order to activate the power of ordinance referred to in art. 2, par. 2, of Decree-Law No. 19 of 2020.

The rule introduced an important limitation of the use of regional powers of ordinance which, regarding businesses, is still tied to the effective risk of contagion, the assessment of which presupposes the application of criteria predetermined by the Decree, and to the obligation to consult the Health Ministry before adopting any more restrictive measures. The aim is that of slowing down the practice followed up until then by some Regions (e.g. Campania) to further depress businesses with premises in that territory, often on the basis of a worsening of the risk of contagion which had not been measured with indisputable unambiguous and uniform parameters.

The DPCM promotes the principle of loyal cooperation, totally absent in *Phase I*, which should guide the regional power of ordinance, even if limiting it to the economic sector.

Another important innovation regards the introduction and the coding of "*Principles for monitoring any health risk*" in Annex No. 10 of the DPCM, useful for maintaining pandemic management or passing from one phase to another. Five phases are foreseen altogether: Phase 1 (Lockdown), Phase 2A (Initial Transition), Phase 2B (Advanced Transition), Phase 3 (Reopening) and Phase 4 (Preparation). The Annex No. 10 identifies a series of criteria of which their existence (partial or total) or absence, ascertained through periodical verification, decides, respectively, the maintenance at one level or passage to the next level or return to the previous level.⁹⁵

Other than the fact that some criteria are characterized by a high level of generality (in the case of activities for *readiness*) and others suggest the use of tools still being experimented (*contact tracing*), the highly commendable efforts of the executive to place the emergency within a strategy of risk management, to introject the damaging event within an ordinary legal system, so allowing "the management of exceptional situations with a tool which is not *extra ordinem*, which unrelated to the traditional guarantee and control

⁹⁴ See the Safety Regulations in the Workplace, signed on 24 April 2020 by the Government and social partner organisations, as well as, for the relative areas of competence, of Safety Regulations in Building Yards, also signed on 24 April 2020, and the Safety Regulations in the Transport and Logistics Sector of 20 March 2020, attached to the Decree.

⁹⁵ For example, the transition to Phase 2B is subject to the occurrence of the following conditions: epidemiological monitoring capacity; stability of transmission; health services not overburdened; *readiness* activities; ability to rapidly test all suspect cases; possibility to guarantee sufficient resources for *contact tracing*, isolation and quarantine. The transition to the following Phase 3 is consequential to the availability of a safe and effective vaccine against the virus. Phase 4 coincides with the end of the pandemic.

circuits certainly leaves room for an instrumental use and in some cases even “improper.”⁹⁶

The predictions of the DPCM 26 April 2020 were partially “absorbed” by Decree-Law 16 May 2020, No. 33,⁹⁷ converted, with some adjustments, by the Law dated 14 July 2020, No. 74. It was therefore preferred to define, with a normative source of primary rank, the legal protocol of the movements of the population and the exercise of business on national territory.⁹⁸

With reference to freedom of movement, it can be foreseen that from 18 May 2020 the limitative measures of inter-regional movement would cease to exist, and from 3 June 2020, even inter-regional movement, subordinating any reiteration or new adoption exclusively in relation to specific areas of the same territory affected by a worsening of the epidemiological situation, in compliance with the principles of adequacy and proportionality (art. 1, par. 1 e 3). Starting from this last date even movement to and from foreign countries is allowed, subordinating to the same conditions of any future limitation (art. 1, par. 4).

The Mayor’s power of ordinance undergoes a further cutback, shown in the fact that it is limited to the temporary closure of specific public areas or those open to the public in which it has not been possible to respect social distancing (art. 1, par. 9).

Finally, the sanctions and controls framework is clarified and increased: violation of the Decrees and the ordinances issued to implement the Decree, unless it constitutes a crime other than that envisaged in art. 650 of the penal code, will be punished with an administrative fine according to art. 4, par. 1, of the Decree-Law No. 19 of 2020. If the violation is committed in the exercise of a business activity, the business will be closed for a period of between 5 and 30 days (art. 2, par. 1).

To ascertain the violation and reduced payments the Decree refers to art. 4, par. 3, of the Decree-Law No. 19 of 2020. The sanctions will be imposed by the Prefect (chief magistrate) or by the Regional or Local Authorities according to whether the action violated a measure imposed by the State, by the Regional Authorities or by the Local Authorities (art. 2, par. 2).

In implementation of the Decree-Law No. 33 of 2020 the DPCM 17 May 2020⁹⁹ is emanated, which permitted the recovery of further businesses, access to “parks”, permission to carry out recreational and leisure activities, as long as social distancing was respected.

⁹⁶ See GIANI, L. Dalla cultura dell’emergenza alla cultura del rischio: potere pubblico e gestione delle emergenze [From the culture of emergency to the culture of risk: public power and emergency management]. In: L. Giani, M. D’Orsogna, A. Police (eds.). *Dal diritto dell’emergenza al diritto del rischio* [From emergency law to risk law]. Napoli: Editoriale Scientifica, 2018, p. 15 ss., p. 28, who proposes “a sort of normalisation even of unusual cases”, with the idea of a full responsabilisation of public decision makers and, at the same time, satisfaction of the interests of the community.

⁹⁷ Read “*Further urgent measures to face the Covid-19 epidemiological emergency*”.

⁹⁸ On this point GIGLIONI, F. *Le misure di contrasto alla diffusione dell’epidemia nella “fase due”* [Measures to combat the spread of the epidemic in “phase two”], p. 414–415, which justifies recourse to the primary source due to the greater involvement of Parliament demanded by the public debate, encouraging the contribution of all political forces to the reopening of social life.

⁹⁹ See “*Implementational regulations of Decree-Law of 25 March 2020, No. 19, bearing urgent measures to face the Covid-19 epidemiological emergency, and of 16 May 2020, No. 33, bearing further urgent measures to face the Covid-19 epidemiological emergency*”.

The DPCM 11 June 2020¹⁰⁰ marked the end of *Lock-down* and a recovery of movement even outside national boundaries, and of businesses, albeit with continuing exceptions and in compliance with biosecurity rules.

4.3. The Temperamental Evolution of Phase II and the Institutional Response to the Ascent of the Epidemic Curve

It has been seen that the main aim of *Phase II* consisted in guaranteeing the recovery of a normal social life in complete safety; to succeed in gaining this result it has been decided to act on several fronts, setting up a single line of action which would necessitate, in the implementation phase, the coordinated efforts of all the competent Authorities involved in the management of the emergency.

In the first place, it continued to influence the behaviour of individuals, reiterating, with several DPCM which followed one another, that obligations of voluntary isolation and health monitoring for those individuals with positive results of diagnostic testing, precautionary measures for anyone who, even if not positive to testing, has influenza-like symptoms and, for everybody else, the obligation to use facemasks and social distancing. Basically the generalised limitations of *Phase I*, which determined a graduation of intensity between infected and not infected, to a selective limitation of freedom, modulated in proportion to the state of health and risks for the individuals.

Secondly, a series of health measures was put in place, of a purely regulatory nature, with the aim to define indicators, unvarying on national territory, to monitor and evaluate the epidemics evolution and, at the same time, establish the threshold of attention and the alert values.¹⁰¹ These are parameters which not only measure the epidemiological results, but also take into account the capacity, in terms of human and instrumental resources, of the national health system in caring for the sick.

Thirdly, specific measures were adopted to ensure safety in the workplace.¹⁰²

Fourthly, measures have been prepared for the activation and regulation of widespread screening to study circulation of the virus and obtain further data on the evolution that it has taken over time,¹⁰³ filling the gap that so heavily influenced the progress of the preceding phase.

¹⁰⁰ See “Further implementational regulations of Decree-Law of 25 March 2020, No. 19, bearing urgent measures to face the Covid-19 epidemiological emergency, and of Decree-Law of 16 May 2020, No. 33, bearing further urgent measures to face the Covid-19 epidemiological emergency”.

¹⁰¹ See the the Health Ministry’s Decree and Circular of 30 April 2020.

¹⁰² For example, consult: the Health Ministry’s Circular of 29 April 2020, which gave recommendations regarding safety regulations at the workplace to tackle Covid-19, establishing regulations for the specialist doctors; the Health Ministry’s Circular of 28 May 2020, which gave a series of information and recommendations regarding sanitification of workplaces, also foreseeing precise references to the risk of infection due to contact with specific substances. Amongst these measures is also the prediction that imposes upon employers to ensure that measures of biosecurity are respected in their production and commercial areas, as well as supplying all employees with masks, the distribution and use of sanitizing dispensers, the organization of entrances and exits to avoid gatherings, measurement of temperature, etc.

¹⁰³ The Decree-Law 10 May 2020, No. 30, converted with amendments in Law 2 July 2020, No. 70, ordered in particular the serological tests generalized by the Health Ministry, which had cooperated with the Technico-scientific Committee set up at the Civil Defence, ISTAT and the Italian Red Cross.

Finally, following the practice already experimented in South Korea, the activation of a contact tracing system has been prepared, useful in reconstructing the chain of infection in order to block promptly any spread of the illness.¹⁰⁴ With this in mind a single national platform has been prepared supported by an app called “App Immuni”, available to all citizens who own a smartphone.¹⁰⁵

The preparation and activation of these measures has not been able to keep the trend of the epidemic curve stable which, immediately after the end of the summer, with Italians returning from abroad, received an upwards surge particularly in some Regions. The reaction of the Health Authorities was fast and timely, resulting in measures such as obligation to wear facemasks even outdoors during the evening when the risk of gatherings is higher,¹⁰⁶ as well as closure of discos, dancehalls and premises where it is difficult to enforce social distancing¹⁰⁷ and in the control of arrivals on national territory from countries in full epidemic.¹⁰⁸ At the same time, the Government announced an extension of the State of Emergency until 15 October 2020.¹⁰⁹

In comparison to *Phase I* there is evidently a greater awareness by the Authorities regarding possible outcomes during the winter, when the circulation of seasonal influenza, triggered by the reopening of schools and universities, could compromise the functionality and efficiency of the health sector. The Health Ministry’s Circular of 11 August 2020 includes a document “*Elements of preparation and response to COVID-19 during autumn-winter period*”, prepared by the Higher Institute of Health together with the Health Ministry and the Coordination of the Regions and the autonomous Provinces which, on the basis of strong points and critical situations found in the *Phase I* of the epidemic, has the aim of providing indications to face an eventual increase in the number of cases during the winter. With reference to the monitoring of the health risk found in Annex No. 10 of the DPCM 26 April 2020, the document lays down four possible outcomes connected to the epidemical curve and to the capacity of the Health System to manage the sick, which corresponds to the adoption by the competent Authorities of progressively intense containment measures based upon the model followed during the preceding months.

¹⁰⁴ See the Decree-Law 30 April 2020, No. 28, converted with amendments in Law 25 June 2020, No. 125.

¹⁰⁵ Critical regarding the efficiency of the measures, GIGLIONI, F. *Le misure di contrasto alla diffusione dell’epidemia nella “fase due”* [Measures to combat the spread of the epidemic in “phase two”], p. 417, pointed out that “on one hand [...], voluntary participation in a programme does not offer sufficient guarantee on reaching an adequate number of individuals which would allow one to trust the prevention capability of the tools provided, on the other, the randomness of the tracking measurements, which exclude even any real contact with the people involved, and above all, the individual responsibility on which the activation verification of infection depends makes it very difficult to achieve its aim.”

¹⁰⁶ See the Health Ministry’s Ordinance of 16 August 2020, art. 1, par. 1, lett. a).

¹⁰⁷ Cfr. Ordinance of 16 August 2020, art. 1, par. 1, lett. b).

¹⁰⁸ See Health Ministry’s Ordinance of 24 July 2020, which obliges quarantine for all travellers arriving from Romania and Bulgaria, Health Ministry’s Ordinance of 12 August 2020, which obliges all travellers from Croatia, Greece, Malta or Spain to hand in to the airline or other carrier a negative test carried out in the 72 hours before travelling, or to test within the 48 hours following entry into national territory and, in this case, remain in quarantine whilst awaiting the result.

¹⁰⁹ The Cabinet Resolution of 29 July 2020, named “*Extension of the COVID-19 health emergency*”.

Furthermore, the Decree-Law 7 October 2020, No. 125, converted with amendments by Law 27 November 2020, No. 159, modifies the power of ordinance of the Regions in the sector of economic activities, introducing the obligation of a prior agreement with the Health Minister in the event that they decide to adopt additional measures with respect to what is prescribed by national provisions (art. 1, par. 2, let. *a*). The provision has the purpose of preventing the Regions from issuing more restrictive ordinances regarding the economic activities present in the territory, jeopardizing the unitary strategy for managing the crisis.

The exponential increase in infections corresponds to the adoption of mitigation measures of progressively increasing intensity:¹¹⁰ the obligation to always have the mask with you and to wear it indoors and outdoors, if it is not possible to respect the interpersonal safety distance; possibility of closing to the public, after 9 pm, streets or squares in the cities where the risk of gatherings is high; suspension of the activities of dance halls, discos and similar venues, indoors and outdoors; ban on parties in any place; suspension of school trips; limitations to the activities of restaurants, bar, pub, ice cream shops, pastry shops and similar places, which are allowed until 6 pm with table consumption, until midnight with take-away and without time constraints with home delivery; suspension of events, competitions and other sporting events; suspension of contact sports; obligation to carry out the events exclusively in static form; suspension of conferences, congresses and other events; obligation to hold meetings in public administrations electronically; “strong recommendation” to natural persons not to travel, even by public or private means of transport, except for work, study, health reasons, situations of need, or to carry out activities or use unsuspending services.

The increase in pressure on the Health System in some Regions has prompted the Government to partially modify the strategy followed up to that moment and to divide the national territory into three areas characterized by a scenario of medium, high and maximum severity within which to place the Regions or parts of them that present a more or less critical situation.¹¹¹ The identification of the Regions to be included in the areas of high and maximum risk is the responsibility of the Health Minister who, after consulting the Presidents of the Regions concerned, proceeds by order, based on the monitoring of epidemiological data as established by the document “*Elements of preparation and response to COVID-19 in the autumn-winter season*” and on the basis of the data processed by the “control room,”¹¹² subject to the opinion of the Technical-Scientific Committee. The intensity of the mitigation measures is proportional to the severity of the risk in the areas considered: for example, the blocking of intra-municipal mobility in the Regions characterized by a scenario of maximum severity, the closure of non-essential services, the limitation of service activities catering and similar to home delivery and take-away.

¹¹⁰ First with DPCM 13 October 2020 and, subsequently, with DPCM 24 October 2020.

¹¹¹ DPCM 3 December 2020.

¹¹² Established by the Health Ministry's Decree of 30 April 2020 and composed of Higher Institute of Health, Health Ministry and three representatives of the Regions (Lombardy for the North, Umbria for the center and Campania for the South).

5. THE EXTRAORDINARY URGENCY ORDERS AS PREFERENTIAL INSTRUMENTS IN THE MANAGEMENT OF THE COVID-19 PANDEMIC IN THE LOMBARDIA, VENETO AND CAMPANIA REGIONS

The analysis of the management of the emergency in the Lombardia, Veneto e Campania Regions represents an interesting prospective of observation of the ways in which the Regional Authorities exercised the power given to them, firstly from the Decree-Law No. 6 of 2020 and later on with Decree-Law No. 19 of 2020.

It was seen that the ratio of the regulatory provisions which allowed the Regional Authorities to enter in to the strategies of management of the emergency prepared by the executive, is based essentially on the need to integrate the national dimension of the emergency with the differentiated concentration of contagion on a territorial basis. However art. 3, par. 2, of the Decree-Law No. 6 of 2020 opened “an obvious haemorrhage in legislation,”¹¹³ forcing the Government to tighten the tourniquet by issuing the following Decree-Law No. 19 of 2020, in which art. 4 drastically limited the power to intervene on the part of the Regional Authorities.

The Lombardia, Veneto and Campania Regions represent, under this profile, a privileged observation point, as the illness had taken on different infection rates in the respective territories.

During the *Phase I* Lombardia and Veneto were the first Regions to be involved in the health emergency, which reached an unprecedented extension and intensity in both areas, to the contrary Campania never reached such an advanced state. In *Phase II* the situation was partially reversed with Campania amongst the Regions with the highest Rt.¹¹⁴

However, as can be seen, the strategy laid down by this last Region to contain the diffusion of the virus was decidedly more restrictive in both phases than that followed by the first two Regions.

More in particular, at the beginning of *Phase I* of the emergency, Lombardia and Veneto exercised the power of ordinance in agreement with the Health Ministry,¹¹⁵ denoting a correct and effective application of the principle of loyal cooperation. However, from the moment in which the entire national territory was declared “red zone” by the DPCM 9 March 2020, the two Regions acted in full autonomy, adopting measures which were implementing or supplementing the national ones. This can be clearly seen in the ordinances where,

¹¹³ TORRE, F. Il (carattere bidirezionale del) principio di sussidiarietà alla prova dell'emergenza da coronavirus [The (bidirectional character of the) principle of subsidiarity to test the coronavirus emergency]. *Diritti Regionali*. 2020, No. 1, p. 20.

¹¹⁴ The Rt index is one of the parameters on the basis of which the ability of an epidemic to expand is calculated. R0 indicates the potential transmissibility of an infectious disease in its early stage in a susceptible population. Rt instead describes the contagiousness rate after the application of measures to contain the spread of the disease. In summary, R0 represents the number, on average, of secondary cases of an “index case”; Rt is a number indicates how many people are infected by a single person, on average and over a certain period of time: it is therefore a parameter linked to a contingent situation, depending on the effectiveness of the containment measures.

¹¹⁵ See the ordinances of 21 February 2020 and 23 February 2020, drawn out, respectively, by the Veneto Region and the Lombardia Region in agreement with the Health Ministry, which gave orders, amongst others, the ban on all public events, isolation at home of all individuals arriving from “infected areas” etc.

even though banning open air leisure and recreational activities, always allowed physical activity and individual sports near one's home and always respecting the interpersonal safety distance;¹¹⁶ where the parks were to be closed;¹¹⁷ those which regulated in detail the way businesses were to be run to avoid gatherings inside their properties¹¹⁸ and to guarantee monitoring of their personnel and clients;¹¹⁹ those which accepted that open air markets would only be allowed to sell food products;¹²⁰ those which suspended all catering services other than home deliveries and take away.¹²¹

The exceptions (widening or restrictive) to the national regulations are in fact limited to sporadic cases: one may consider, for example, provisions which required the obligatory use of facemasks even outside,¹²² in partial discrepancy with the national provisions which limited the obligation to indoors, to the ordinance of the Lombardia Region which allowed the sale through home delivery of some product categories not included in Annex No. 1 of DPCM 10 April 2020;¹²³ to the implementation in the Veneto Region of health *screening* aimed at finding the potentially infected “asymptomatic” individuals (considered one of the principle vehicles of infection of the virus amongst the population).¹²⁴

Even in *Phase II* a strategy of management of the emergency is outlined which is mainly aimed at cooperating with, and supporting, the national one, whilst avoiding any undue and illegitimate overlapping which resulted in the issuing of an ordinance in the areas only partially regulated by the measures of the Executive. The Veneto Region, one thinks of the biosecurity measures taken for those returning from foreign countries still affected by the epidemic.¹²⁵ And by the Sardegna Region as a result of a noticeable increase in the

¹¹⁶ See the Lombardia Region's Ordinances No. 514, 521 and 528, and the Veneto Region's Ordinances No. 33 and 40.

¹¹⁷ Closure of “parks” was ordered, in the Lombardia Region, in Ordinance No. 514 (point 17) and confirmed in Ordinance No. 521, and in the Veneto Region, in Ordinance No. 33, confirmed in Ordinance No. 38, which allowed however their maintenance. These orders were approved in the Health Ministry's Ordinance of 20 March 2020, and issued at a legislative level with Decree-Law, No. 19 of 2020, in implementation of which the DPCM 10 April 2020 made it obligatory on a national scale.

¹¹⁸ For example, through the fixing of quotas for access to shops, limiting the number to only one individual from each family (except in the case of accompanying the elderly, children or the disabled); cfr. Lombardia Region Ordinance No. 514 and Veneto Region Ordinance No. 33.

¹¹⁹ Consider the systematic measurement of temperature of personnel and customers of pharmacies, drugstores and shops (cfr. Lombardia Region Ordinances No. 514 and 521).

¹²⁰ Open air markets alone, limited to those selling food, are permitted subject to the adoption, by the Mayor of the municipality involved, of a specific plan giving behavioural and social distancing regulations (cfr. Lombardia Region's Ordinance No. 522, and Veneto Region's Ordinance No. 45).

¹²¹ Lombardia Region's Ordinance No. 514 suspended all catering services (bar, pub, restaurants, ice-cream and cake shops) with the only exception of home deliveries, observing all the regulations of DPCM 10 April 2020.

¹²² Lombardia Region's Ordinances No. 521 and 520 ordered the use of facemasks “or, alternatively, any other article of clothing which covers nose and mouth [*sic!*], together with constant hand washing”. Similar measures were ordered by Veneto Region's Ordinance No. 40.

¹²³ Ordinance No. 528 however was suspended, as a precautionary measure, by the Regional Administrative Court, Lombardia, Decree of 23 April 2020, No. 634; in a similar way, the Regional Administrative Court TAR Calabria Region, sentence of 9 May 2020, No. 841, which declared the illegitimacy of the Calabria Region's Ordinance No. 37, which authorised catering with waitress services at the tables.

¹²⁴ The plan *Covid 19 Epidemic: Urgent Public Health Action*, result of the agreement between the Region and the University Hospital of Padova, attached to the agreement between the Region and University Hospital of Padova, attached to the Regional Committee Resolution No. 344 of 17 March 2020.

¹²⁵ See Ordinance No. 84 of 13 August 2020.

epidemic curve during the summer;¹²⁶ and in the Lombardia Region, where the regulations specified the cases when it was necessary to wear a facemask,¹²⁷ and how to proceed with the measurement of temperature inside public buildings or those open to the public.¹²⁸

The Veneto Region continues to reinforce the efficiency of the Regional Health System, by means of the document “*COVID-19 Emergency – Emergency Plan for Autumn 2020*”, which aims to adapt the present welfare system for the ongoing pandemic, providing for specific interventions regarding hospital care and access to the Emergency Rooms, development of microbiology labs and the adoption by Emergency Rooms, care homes and General Practitioners of rapid tests which supply a result in a few minutes for the *screening* of Covid-19.

With reference to the Lombardia Region, the initiative aimed experimenting “*Covid-Tested*” flights on the Milano Linate-Roma Fiumicino routes: the airlines must chose two flights per day, defines as “*Covid-Tested*,” reserved for the transportation of passengers testing negative to the SARS-CoV-2 virus following a rapid antigen test carried out before boarding or holding a document certifying a negative result of a PCR test or antigen test carried out within 72 hours before departure.¹²⁹

The Campania Region however communicates with power of ordinance a completely different direction in comparison to the previously mentioned Regions, which was realized in a sequence (chaotic and disorganic) of regulations bearing exceptions to the national rules, which stands out for the progressively intense growth in its forms of containment of the infection, from the particularly invasive and strongly restricting of rights and guaranteed constitutional freedom. For example during *Phase I* the ban imposed upon resident in the Campania Region from leaving their homes, residences, domiciles or abodes,¹³⁰ providing a restrictive interpretation of the “situations of need” which justified any movement;¹³¹ or not only to participate in leisure or recreational activities, but also individual sport and exercise, close to one’s home and respecting all the regulations regarding social distancing (activity, it should be noted, always permitted at a national level).¹³² The breaking of any of these rules brought about the application, as well as the fine set out in art. 650 c.p. (unless the fact constituted a more serious crime), also the measure of voluntary home isolation with an active health surveillance (so-called quarantine), which thus was stripped of its precautionary purpose, and took on a punishment character, as is confirmed in the use of the terms “violation” and “violator.”

¹²⁶ See Ordinance No. 132 of 27 August 2020, which allows the possibility for those who had been to Sardinia to have swab tested within 14 day before returning to the regional territory (molecular biology test or rapid antigen test).

¹²⁷ See point 1.1 of Ordinance No. 604 of 10 September 2020.

¹²⁸ See points 1.3 and 1.4 of Ordinance No. 604.

¹²⁹ See Ordinance n. 609 of 17 September 2020.

¹³⁰ Reference is made to Ordinance no. 15, 23, 27 and 32. It can also be seen that the Regional Administrative Court, TAR Campania, Decree of 18 March 2020, No. 416, which considered illegitimate, as a precautionary measure, Ordinance No. 15 and relative clarification No. 6.

¹³¹ For example, Ordinance No. 23 considered “situations of need” exclusively “those connected with primary needs for people and pets, for a strictly indispensable length of time, and always in close proximity to the home, domicile or residence” (point 3).

¹³² Specifically, to the art. 1, par. 1, lett. b), Health Ministry’s Ordinance 20 March 2020.

The intertwining of regulations continued through the applications, frequently confirmed and reiterated, of the protective belts created to contain clusters of infection flared up within some municipalities.¹³³

A similar situation was seen with the ordinances regarding businesses allowed within the regional territory which, overlapping with national rules, bore exception orders (more restrictive) aimed at limiting some forms of activity: e.g. there was a total ban on all production and sales, even with home delivery, of some goods permitted by Government regulations,¹³⁴ as well as open air markets selling foodstuffs.¹³⁵

A similar line of action continued during *Phase II* despite the gradual reduction of the room for manoeuvre initially granted to the Regions, regarding freedom of movement, the ban on sporting activities remained, only permitted in certain time slots,¹³⁶ even though all limitations had been removed on a national level¹³⁷; constraints that ceased to exist sometime after the entry into force of Government measures. The same limitations affected businesses as well: e.g. catering businesses were allowed, at least in the beginning, only for home delivery and even take away sales were banned,¹³⁸ in stark contrast to that ruled in the DPCM 26 April 2020, which specifically allowed both.

Regulations continue to be issued regarding the “protection belt” of clusters of infection developed in some areas of the regional territory.¹³⁹

The strategy prepared by the Region goes along with the national one only during the summer, when the flattening of the epidemic curve permitted the elimination of any barriers for freedom of circulation and the recovery of all businesses within the territory, as long as the biosafety regulations were maintained (facemasks indoors, temperature control, protocols, etc.). However, the return of higher infection levels caused by the relaxation of containment caused a new misalignment with the national regulations, clearly shown

¹³³ This was about, in particular, the municipalities of Ariano Irpino (AV), Sala Consilina, Caggiano, Polla, Atena Lucana, Auletta (SA), Lauro, Paolisi, Saviano e Letino, “closed” with a series of chaotic ordinances which were conferred and lengthened on several occasions.

¹³⁴ Ordinance No. 13 limited the home delivery of foodstuffs to only prepacked foods. These measures were then widened and extended by the following Ordinance No. 25 which suspended even home delivery catering services, placing itself in clear contrast not only to the regulations of DPCM 11 March 2020, which allowed catering services to operate only for home delivery or take away following the hygiene-sanitary regulations, but also to the art. 3, par. 1, of the Decree-Law No. 19 of 2020, which impeded regional ordinances to further depress the economical activities.

¹³⁵ See Ordinance No. 13.

¹³⁶ See point 1.2 of Ordinance No. 42 of 2 May 2020, which allowed open air sporting activities exclusively in the time slot 6-8.30 a. m.; point 1.2. of Ordinance No. 45 of 8 May 2020, which allowed in the “parks” and along the seafont only in the time slot 5.30-8.30, while without limits in other public areas or areas open to the public, ordering however facemasks must always be carried and activity must be stopped in case of gatherings.

¹³⁷ From DPCM 26 April 2020.

¹³⁸ See Ordinance No. 37 of 22 April 2020.

¹³⁹ See Ordinance No. 57 of 22 June 2020, extended by Ordinance No. 58 of 30 June 2020, which orders isolation at home of all residents of so-called “Palazzi Cirio” (palazzo Drago, palazzo Roma, palazzo A-G, palazzo Nuovo Messico, palazzo California), situated in the municipality of Mondragone (CE); Ordinance No. 67 of 11 August 2020, which orders that, until 25 August 2020, closure of the receptive facilities “La Sonrisa” and “Hotel Villa Palmentello”, situated near Sant’Antonio Abate (NA), with orders to disinfect and sanitize the entire structure before reopening, and obligation of isolation at home, until 14 August 2020, of all residents of the street “Croce di Gragnano” in the same territory.

by the contents of the ordinances which imposed the use of facemasks even in the open air and regardless of any interpersonal distance,¹⁴⁰ limiting catering services including restaurants, bars, wedding and ceremonies with organizational requirements¹⁴¹ or of specific obligations (e.g. identification of at least one client at every table through the collection and storage of personal data from an I.D. Card).¹⁴²

The crackdown over and above the State regulations enforced by the Campania Region shows, at least formally, to be justified only during *Phase II* in as much as it was sustained by a harsh (and somewhat unexpected) rise in the epidemical curve of infection and of the consequential increase in pressure on the National Health System. However, some questions on the suitability of these measures must be made, and in some case, even on the logic and proportion of the measures actually enforced in comparison with the type of risk to be managed: e.g. the use of facemasks in the open air regardless of social distancing, when in reality scientific evidence shows that the purpose of the facemask is to guarantee individual protection when it is not possible to practice social distancing, or to dictate obligatory closing time of restaurants and similar businesses to avoid the “club scene” at the weekends,¹⁴³ ignoring however the public transport sector, where the infection rate is decidedly high.

6. FINAL CONSIDERATIONS

Notwithstanding the fact that the epidemiological data shows that the health emergency is still ongoing, it is possible to formulate some reflections on the suitability and efficiency of the strategy drawn up until now by the Government to contain infection on the national territory.

First of all, in absence of a plan, the only tools available to the Government to manage a situation that found the institutions totally unprepared and that, for the seriousness and the length of time, would not seem to have precedence in history, are to be found in the Decree-Law, in the DPCM, in the national service of Civil Defence and in the ordinances relating to health emergencies, surrounded by a variety of documents of “*soft law*” (Circulars, Guidelines etc.) involving biosecurity measures.

The need to combine the national dimension of the emergency with the different concentration of infection on a territorial basis has required that the management system permits some encroachment by the Regional and Local Authorities which, by taking advantage of the ordinance powers, were able to react promptly to critical situations tied to their respective territories (e. g. some clusters of infection regarding specific areas). It has been seen however that, in spite of the issuing of contingent and urgent measures it was

¹⁴⁰ This can be seen at point 1.2 of Ordinance No. 72 of 24 September 2020, extended by Ordinance No. 76 of 3 October 2020 (especially point 1.6) and, lastly, Ordinance No. 77 of 5 October 2020 (point 3.1).

¹⁴¹ For example, dictating a maximum number of people sat at a table (see Annex No. 1, Ordinance No. 76 and art. 2, Ordinance No. 75 of 2 October 2020, regarding, respectively, the wedding and ceremony sector and catering).

¹⁴² Point 3, Ordinance No. 64 of 31 July 2020, shows that this was confirmed and extended, lastly, by No. 72 (especially point 1.4).

¹⁴³ See, lastly, Ordinance No. 77 and relative clarification No. 35.

necessary to be guided following the principles of loyal cooperation, which governs the relationships between institutions belonging to different territorial levels, Regionals and Local Authorities have often acted in total autonomy, jeopardizing the unitary crisis management strategy prepared by the Central Government.¹⁴⁴ In other words, as clarified by administrative law, the exercise of powers of ordinance regarding health emergencies, to be legitimate, must move within the boundaries of relations between the State and the Regional and Local Autonomies put forward in art. 117 of Constitution, and that is to take into account the territorial dimension of the emergency, as well as contained within the sectors and thematic areas (and always within the competence agreed upon in the Constitution) identified by the emergency regulations (e.g., limitation of movement within the community, closure of roads, intervention in events and cultural, sport, and religious gatherings, rules for businesses, entrepreneurs and professionals, etc.).¹⁴⁵

So if it is true that the constitutional arrangements of the current positive systems are the product of the great health risks of the past (and also of this present time)¹⁴⁶, it cannot be denied that the ongoing health emergency has contributed to redefining the relations between Central Government and Regional and Local Authorities, emphasizing, on one hand, the role of Regional and Local Autonomies in the management of risks connected with the community of reference and, on the other, the indispensability of a central power that maintains the “direction” of the overall strategy.

¹⁴⁴ On this point, VESE, D. Managing the Pandemic. The Italian Strategy for Fighting Covid-19 and the Challenge of Sharing Administrative Powers. *Eur. J. Risk Reg.* 2020, Vol. 11, No. 3, p. 1 ss., p. 7, [2021-03-09]. Available at: <<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/managing-the-pandemic-the-italian-strategy-for-fighting-covid-19-and-the-challenge-of-sharing-administrative-powers/BC9649C9AB8321C3AF807CD5D8F295E2>>, in part. p. 5, shows that “the main problems of the Italian administrative strategy for the Covid-19 pandemic are due to lack of effective “sharing of powers”, and more specifically to the failure to share administrative regulatory powers among the different levels of government with the participation and cooperation of all institutional actors involved in the emergency decision-making process: the Government, Regions and Local Authority”.

¹⁴⁵ See TAR Lazio, Roma, sect. III *quarter*. 2, October 2020, No. 10047 and No. 10048.

¹⁴⁶ Dutiful reference is made to FOUCAULT, M. *Naissance de la biopolitique: Cours au Collège de France (1978–1979)* [*Birth of biopolitics: Course at the Collège de France (1978–1979)*]. Gallimard, 2004.