
The Parliament in the time of coronavirus

Italy

The Italian Parliament and the pandemic: its difficulties in maintaining its centrality towards the government and the regions have been confirmed

Ines Ciolli* et Massimo Luciani*

* Lecturer, University of Rome, La Sapienza

* Full Professor of Public Law, Faculty of Law at the University of Rome, La Sapienza

Never, since the end of the World War II, has Italy faced such a dangerous emergency situation. In 2020, the number of deaths was higher than that for any year since 1944 and this is a dramatic statistical evidence. A crisis like this has had - and continues to have – significant impact on individual lives, social relations, economic activities, political initiatives. It is therefore affecting the domain of constitutional law, profoundly changing the balances of power, the practical functioning of the form of government, and the likelihood of fundamental rights continuing to mark the borders of sovereign powers.

As a matter of fact, no fundamental right has escaped serious restrictions during the pandemic. Economic rights, civil rights, social rights, political rights: all have suffered major limitations. This phenomenon, however, does not mean that over these terrible months the rights to health and life have become, “tyrannical rights”, to use the words of our Constitutional Court¹. No constitutional right has a hierarchical supremacy over the others and our Constitution does not recognize the same “*allgemeine Werteordnung*” (“a general hierarchy of values”) conceived by the German Constitutional Tribunal. Every right, even the rights to life and health, can be balanced with the others by the legislator and the reasonableness of the balance can be controlled by the Constitutional Court.

Nevertheless, it is obvious that during the pandemic crisis the rights to life and health have become the true stars on the stage, and in order to protect them all the other rights have been severely limited. The legitimacy of these limitations, however, has been controlled by the judiciary, showing that the mainframe of our system of legal guarantees has remained untouched. In a few words: the rule of law has still been respected even during the crisis.

Although the judiciary has continued to function, other practical difficulties have been

¹ N° 85 /2013.

experienced by the Legislative Branch.

Firstly, Parliamentary debates encountered many practical obstacles posed by the safety measures established due to the virus and it is not a coincidence that some MP's and specialists suggested the creation of a virtual Parliament that could use remote working facilities. Fortunately, these proposals were rejected, due to the clear prescriptive content of the Constitution and the Standing Orders of the Chambers, requiring the physical presence of MPs (with the exception for minor activities, such as audiences of third persons).

Moreover, the usual difficulties of Parliament, frequently marginalized by the Government under ordinary conditions, became even more pronounced during the pandemic, due to the reinforcement of an executive power called upon to address quickly the problems set by this emergency. Recently, a Bill ² to be discussed in the *Camera dei deputati* (the Italian lower Chamber), was proposed the creation of a parliamentary Committee that would enjoy special supervisory control and decision-making powers, aiming to counterbalance the increasing force of the Executive branch of our institutions.

But perhaps we should answer some questions, concerning the role of parliamentary institutions during the pandemic:

- How and to what degree did (and does) the Italian Parliament function?
- Have the constitutional prerogatives of the Parliament been respected?
- Has the role of the Parliament toward the Government significantly changed?
- What kind of relations have the representative assemblies of the Regions (regional Councils) had with Parliament?

1. How and to what degree (and does) the Italian Parliament function?

All statistical data relating to the pandemic period show that the Italian Parliament continued to function, working hard, even during the worst days of the crisis. Nevertheless, its political subordination to the Government clearly has emerged through the absorption of the main part of its energies in the *conversione in legge* (transformation into law) of the countless decree-laws (decrees having the force of the law) adopted by the Government, on which the Parliament has to vote within a very short time span (60 days, according to art. 77 Const.). Almost entirely occupied by an ancillary activity such as this (in which Parliament intervenes following a governmental initiative), the Legislative Branch lost, during the pandemic, all its powers to address parliamentary initiatives, leaving the field almost entirely free to the Executive.

It is, however, not to be forgotten that for a long time now the dynamics of our political system have profoundly undermined parliamentary discretion. Among the most important factors: a) an increasing transfer of power in favour of the Government, following the globalization processes; b) the growing phenomenon of power concentrated in the hands of the *Presidente del Consiglio* (Prime

² N°1838 (Pagano).

Minister), due to the shifting of political consensus from political parties to individuals; c) the ever-decreasing quality of the representatives; d) the structural difficulties of the representative mandate, facing an identity-crisis of those represented in a changing society (nobody really knows *for whom* and *what* he or she is fighting) e) the rhetoric of speed and efficiency, clearly unfavourable to institutions that - like a Parliament - need time to discuss, deliberate, decide.

Today's difficulties are therefore not surprising at all and the pandemic has only deepened the crisis experienced by the representative assemblies across the world.

2. Have the constitutional prerogatives of Parliament been respected?

During the exercise of emergency power, it is clear that ordinary power is "surpassed". We generally witness a centralization of power and rapid decisions, not necessarily agreed by the representative bodies. As we have already said, the Italian constitution provides that in extraordinary cases of necessity and urgency the government can adopt decree laws. With regard to the specific health emergency situation, the Constitution contains a series of provisions and restrictions (with a Bill) for health reasons and for public safety as regards the inviolability of the home (art. 14); limitations on freedom of movement and residence (art. 16), freedom of association (17). Art. 24 of the legislative decree n°1/2018 also established that the declaration of the state of emergency must be adopted by the Government (which was done on January 31, 2020).

This picture shows us how the Parliament plays a marginal role in emergency situations, but we have already seen that even under ordinary conditions its constitutional position has been weakening for a long time. The pandemic, on the one hand, has exacerbated the weakness of the parliamentary body and also the centrality of the Executive (indeed no less weak because it is subject to internal divisions) but, on the other hand, it has also acted as a reminder of the importance of knowing the collegial institutional body, namely the composition of the different opinions and the different political perspectives. In fact, it is becoming clearer that after the pandemic the political decision cannot be replaced by decisions of scientists and technocrats: those decisions are in themselves formally neutral and cannot take responsibility for carrying out choices that affect rights and freedoms, protection of life and health, or economic choices that can restore businesses that have remained closed during the quarantine period, which have been imposed in almost all European countries. Therefore, although constitutional prerogatives have not been violated during the pandemic, they had already been weakened prior to it starting

The functioning of Parliament during the pandemic has changed because the coronavirus has affected people's lives and therefore also those of the MPs'. Some MPs contracted the Covid-19 virus, so even the majorities required for the approval of the measures were distorted by such absences. Twice, the quorum in the Chamber of Deputies was not reached during voting because the majority of parliamentarians were not present. During the vote on the measures allowing a change in the budget for emergency cases, the majority and the minority groups of Parliament reached an agreement to send only a number of parliamentarians that was just sufficient to achieve an absolute majority required to vote in favour of budget variances. In other countries such as Germany, the

assembly modified internal rules a few times to allow lower majorities during the pandemic and to accept electronic voting (only for the work of parliamentary Committees) even though this broke the dogma of physical coexistence in parliamentary assemblies, advocated by J. J. Rousseau³.

As for the e-vote, this led to a great debate in Italy, but it did not lead to change, which many specialists oppose⁴, because above all, in the parliamentary assembly debate and co-presence continue to be irreplaceable. It is true, however, that the question can be considered in a different way for the vote in the assembly debate or in the Committees, and in some other countries only the latter was accepted. Furthermore, since virtual presence is already allowed for hearings during the work of the parliamentary committee, extending the e-vote to other parliamentary competences would mean acknowledging the fact that the activities of the parliamentarians would be crushed by voting rather than by debate and political mediation. The latter mostly requires physical co-presence, as required by the Constitution and Standing Orders. However, some specialists believe that the question could easily be resolved by a parliamentary committee since the regulations governing Italian parliamentary assemblies already provide for the replacement of absent committee members by parliamentarians of the same party on account of sickness or mission; so, a replacement would not be that much a revolution within Committees on disease or quarantine⁵.

A new problem that arose as a result of the pandemic crisis is that parliamentary control which cannot be properly exercised because the committees worked little, even though they focused precisely on pandemic issues. In the Chamber of deputies, parliamentary control should be addressed both to the health emergency and to its most direct consequence, the economic emergency. For this purpose, there is a Bill n°1834 (Pagano) which proposes to reintroduce the Parliament in the decision-making circuits and in the control of the measures adopted by the government or better still to be adopted.

The bill aims to establish a bicameral parliamentary committee comprising ten senators and ten deputies to ensure respect the share of groups elected in the chambers; the Committee Chair should be entrusted to a member of the minority to guarantee its participation. The Committee's tasks would be those of exercising control over executive power and of expressing binding (or not binding as many specialists prefer) advice⁶ on Government proceedings (including the Prime Ministerial decrees) regarding the measures to contain and combat the spread of COVID-19 within a set term. The Committee may request the hearing of the Prime Minister or of a Minister delegated by him.

³ Bundestag Resolution, on 15th March 2020.

⁴ F. Clementi, *Proteggere la democrazia rappresentativa tramite il voto elettronico: problemi, esperienze e prospettive (anche nel tempo del coronavirus). Una prima introduzione*, *Federalismi.it*, 6/2020, 216 ss: This author is not completely adverse to the e-vote but in this sense see: G. Scaccia, A. Carboni, *Funzionalità del Parlamento e modalità di voto nell'emergenza*, *Forum di Quaderni costituzionali*, 3/2020, 121 ss. F. Biondi, P. Villaschi, *Il funzionamento delle Camere durante l'emergenza sanitaria. Riflessioni sulla difficile praticabilità di un Parlamento "telematico"*, *Federalismi.it*, 18/2020; R. Calvano, *Brevi note su emergenza Covid e voto dei parlamentari a distanza. Rappresentanza politica, tra effettività e realtà virtuale*, *Federalismi.it*, 21/2020.

⁵ N. Lupo, *L'attività parlamentare in tempi di coronavirus*, *Forum di Quaderni costituzionali*, 2/2020, 134 ss.

⁶ See the hearing of Massimo Luciani and Guido Rivosecchi - Constitutional affairs Committee - Senate, 12 November 2020

3. Has the role of Parliament towards the Government significantly changed?

During the pandemic, relations between Parliament and Government, as is always the case during emergencies, were reversed, so the executive power prevailed since the legal system required rapid decisions and a clear direction, as Carl Schmitt has explained in different contexts⁷. This was proven by the use of certain specific sources such as the Prime Ministerial decrees or Ministerial ordinances (*ordinanze*) which were the most prevalent sources during the pandemic and which caused major problems, because they were unrelated to the decisions made not only by Parliament, but also the Government, seen as a collegial body; this implied on the one hand a guarantee of even greater speed than that required by negotiations within the government coalition, and on the other, they also highlight a phenomenon of verticalization within the Executive power and the personalization of the Government with its Prime Minister, who does not have an autonomous political responsibility in terms of the adoption of measures.

At the very beginning of the pandemic especially, the government's role was central and almost exclusive: neither Parliament nor the Regions actively participated in the decision-making process and the parliamentary assemblies found themselves exercising mild control by converting the decree into law. The first decree law, no.6/2020, which was the link in a long "regulatory chain", contained the first and founding decisions regarding the pandemic, including the quarantine period, and this was quickly converted into law by Parliament with hardly any changes being made; this is the one that legitimized the subsequent acts of the Government. The difficult situation prevented and indeed blocked any opposition to government decisions⁸. The role of minorities and other institutions that would have been entitled to decide on health matters was almost eliminated in this first phase. It is also true that the opposition, in such a tragic moment, avoided any form of obstruction.

The subsequent decree no.19 /2020 to art. 2, on the other hand, imposed a particular procedure in the drafting process of the Prime Ministerial decrees providing that the containment measures of the pandemic be adopted by the Prime Minister, on the proposal of the Minister of Health, after consulting the Home Minister, the Minister of Defence, the Minister of Economy and Finance and the other ministers competent for the matter, and also the Regions. Regarding the technical-scientific measures which have to include the assessments of adequacy and proportionality, the Technical-Scientific Committee must be heard, as required by the ordinances issued by the Head of the Civil Protection Department (3 February 2020, n°63).

In this way, the decree law n. 19 of 2020, is a particular type of Prime Ministerial decree, since the classic source does not provide that other bodies also be heard prior to deliberation and resolution. This means two things: that the Chambers thus exercise control over the Executive, and that this act can restrict freedoms and rights because the principle of legality is respected. Of course, this does not

⁷ C. Schmitt C., *Teologia politica. Quattro capitoli sulla dottrina della sovranità*, pp. 35 ss., in ID., *Le categorie del politico: saggi di teoria politica*, trad. a cura di G. Miglio e P. Schiera, Bologna, Il Mulino, 2001; M. TUSHNET, *The constitutional politics of emergency powers: parliamentary and separation-of-powers regulation*, *International journal of law*, 3/2007, 275 ss.

⁸ M. Luciani speaks about "regulatory chain", see ID., *Il sistema delle fonti del diritto alla prova dell'emergenza*, *Rivista AIC*, www.rivistaaic.it, 2/2020, 1 et ss.

invalidate the fact that this decree which is the source of executive power authorized a series of Prime Ministerial decrees without giving them precise indications on the restrictions of rights, that is, *how* and *when* it shall be possible to impose the same. However, this is justified by the characteristics of this pandemic's unforeseeable trend that has to be governed on a day-to-day basis, even if the law decrees have so far always provided for the duration in force of the Prime Ministerial decrees and their limited temporal effectiveness (generally 2 or 3 weeks).

The sources of law that government can use during the emergency have also been delimited in terms of content. As one Italian specialist said: "The more the predictive resources of technical discretion are reduced, the more it is inevitable to navigate on sight. This is why the decrees of the Prime Minister have an average duration of two weeks, and why it is now expected, with approximate correspondence, that they will be published in the Official Journal of the Italian Republic and communicated to the Chambers within the day following their publication. Prime Minister or a Minister delegated by him reports every fifteen days to the Chambers on the measures adopted pursuant to this decree" (Article 2, fifth paragraph, Legislative Decree no.19/2020)⁹.

The role of the assembly that represents national sovereignty has been thus more focused on the control of governmental acts rather than on legislative power. However, this had already happened for some time even prior to the emergency situation. Over time, there has been an increase in the Government's regulatory power in parallel with Parliament's power to amend the executive decree-laws at the time of their adoption. The only difference between the recent decades and the latest period of the pandemic is that the Parliament has more rarely exercised its power to amend the decrees that have been presented, perhaps to avoid any delay for their conversion which has always been rapid by very large majorities, and often involving the opposition. This was especially true in the first months of this pandemic.

As regards the relationship between Parliament and the Executive, the difference in terms of importance and permanence of decisions is well established: the Executive's special sources remain in force only for the time necessary to regulate the emergency; there is therefore a specific competence but also a very precise hierarchy: the role of Parliament remains fundamental and its sources are not subject to time; they are permanent and they can only be removed from subsequent primary sources.

Based on these principles, some parliamentarians are asking for a more accurate control of the Government through a Resolution approved by the Senate¹⁰. This resolution states that the Government, which must adopt further measures to deal with the Covid-19 emergency, must ensure a real and timely involvement of Parliament, Regions and other territorial entities; there must be a debate involving all political forces represented in the two chambers, to be held within the Parliament, in compliance with the principles of the Constitution and parliamentary regulations; the use of the decree-law should be preferred when limits to fundamental rights have to be introduced including communication with and involvement of Parliament in any action aimed to protect public health; the Chambers must be informed of the content of the Presidential decrees before the adoption, so as to

⁹ C. Pinelli, *Il precario assetto delle fonti impiegate nell'emergenza sanitaria e gli squilibrati rapporti fra Stato e Regioni*, *Diritti comparati*, 2020, p. 3.

¹⁰ Resolution n. 6-00146 (by the senator Calderoli), approved 2 November 2020.

take into account any guidelines formulated by the said Chambers; where this is not possible for reasons of urgency connected to the nature of the measures to be adopted, the Chambers must be reported to as pursuant to article 2, paragraph 1, of decree-law no. 19 of 2020.

The role of Parliament cannot be neglected as far as economic issues are concerned: article 81 of the Italian Constitution requires the decision of an absolute majority of the members of each Chamber to carry out budgetary changes and to authorize any further increase in the Nation's debt due to exceptional conditions (disasters, exceptional events, etc.). In this case, all parliamentary groups have agreed to send to each of the two Chambers only the number of parliamentarians sufficient for an absolute majority. In this way, any such decision is made *a priori* by parliamentary assemblies.

The role of Parliament in its relationship with the Government has not really changed but the crisis already in progress has worsened. Fewer parliamentary sessions and fewer sessions of parliamentary committees, whose work is now limited to questions related to the pandemic, highlight the prevailing role of the Government over the Parliament. For a closer dialogue between the Parliament and the Government in times of pandemic, a bill could be approved or a parliamentary committee on the epidemiological emergency caused by Covid-19 might be established. This bicameral committee would be in charge of overcoming the difficulties of parliamentary activities to face health problems (which have been and are also related to logistics and internal organization); rebalancing and strengthening the role of parliamentary legislative production entrusted above all to Prime Ministerial (or individual Ministers) decrees and decree-laws, with a noticeable reduction in ordinary formal laws. The draft bill would aim to entrust the Committee with the power to “express opinions” (some would like them to be binding) on draft Government acts concerning measures to contain and prevent the spread of Covid-19, including the draft Prime Ministerial decrees; and it would intend to impose the short term, useful for the issuance of the opinion in times of emergency.

4. What kind of relations have the representative assemblies of the Regions (regional Councils) had with Parliament?

In Italy, the pandemic has revealed a number of previously existing problems: among these is the absence of the Senate as a representative Chamber of the Regions, which led to bargaining between the State and Regions, resulting in different demands in as regards unitary State interest. The absence of a Senate for the Regions, in which there are such pronounced levels of autonomy as those prescribed in Title V, thus transforming what should have been territorial and institutional pluralism into a long-standing, complex fragmentation.

This pandemic has led to a great number of questions: most of these are linked to the protection of health, and article 117 of the Italian Constitution establishes a concurrent health competence between the State and each Region. The State provides the fundamental principles on the matter and the Regions legislate on everything else. This means that both the national Parliament and all regional Councils are called upon to work towards health protection. But during a period of the use of exceptional powers, Parliament has been called upon to limit rights; Regions, mayors or the Minister of Health can only adopt emergency ordinances that do not impinge on rights. Only central power

can limit rights by a parliamentary bill according to the principle of legality¹¹. Even though many decisions are taken by the Prime Minister through Decrees, which in turn are given the green light by the Government's decree-laws that must in turn be converted by Parliament. The supremacy of Parliament in absolute terms is due also to the temporary nature both of the decree laws and the ordinances (all kinds: those of the Regions, of the Prime Minister, Mayors and so on.)¹². However, from a substantial and concrete point of view, Parliament has constantly ratified the provisions and has never replaced the regional powers as it arguably should have done¹³.

In the early stages of the emergency, Regions were also cut off from the decision-making process; the first decree, no.6/ 2020 established local “red zones” and restricted personal freedom, movement, and religious practice of people residing in places where the coronavirus was most present. Nevertheless, with decree n°19/2020 the Regions resumed their role and their competences. In fact, as we already said, this decree provided that the Presidents of the Regions be consulted regarding matters involving one or more Regions; the President of the Conference of Regions and the autonomous provinces must be consulted, whereas the Prime Ministerial decree involves the entire national territory. The decrees can also be adopted on the proposal of the Presidents of the Regions if they involve one of the Regions or on the proposal of the President of the Conference of Regions and autonomous provinces, if the measure concerns all Regions. This means that Regions take part in the decision-making process when any such decision involves them directly. Art. 3 of the same decree law provides that if the Regions find there is an increase in the risk to health within their territory or in a part of it, they may introduce further restrictive measures, exclusively within the realm of their competences and without affecting production and sectors of strategic importance for the national economy. Regions however only have the power to issue ordinances, in their areas of competence and exceptional powers only with regard to regional laws¹⁴.

During the pandemic all types of power has been challenged. However, the “emergency” is a classic problem of constitutional law. The Italian Constitution does not directly regulate the emergency (the question of a declaration of state of war, provided for by art. 78 of the Constitution is different). It provides for explicit limits to the amendment of intangible rights on non-negotiable conditions, either in the case of their modification, or in that of the negotiation of international agreements or the introduction of supranational rules that cannot therefore infringe these principles (such as the provision on the indivisibility of the Republic contained in art. 5 and unity regulated by art. 87, the supreme principles of the current constitutional order contained in the articles 7, 10, 11 and 139).

In other words, our Constitution a priori decided to preserve some principles vis-à-vis any act that could question their continuation which also includes amongst others the state of emergency, which is however established and ordered by an ordinary law and not by the Constitution itself. The

¹¹ For this point of view, and in time of pandemic, see F. BILANCIA, *Le conseguenze giuridico-istituzionali della pandemia sul rapporto Stato/Regioni*, *Diritto Pubblico*, 2/2020, p. 333 ss. A. LUCARELLI, *Costituzione, fonti del diritto ed emergenza sanitaria*, *Rivista AIC*, www.rivistaaic.it, 2/2020; Q. CAMERLENGO, *Il governo della pandemia tra Stato e Regioni: ritorno al coordinamento tecnico*, *Le Regioni*, 4/2020, 737 ss.

¹² C. Pinelli, *Il precario assetto delle fonti impiegate nell'emergenza sanitaria e gli squilibrati rapporti fra Stato e Regioni*, cit., 3.

¹³ A. Lucarelli, *Costituzione, fonti del diritto ed emergenza sanitaria*, cit., 3.

¹⁴ F. Bilancia, *Le conseguenze giuridico-istituzionali della pandemia sul rapporto Stato/Regioni*, cit., 337 e ss.

choice of not including emergency powers in the Constitution derives precisely from the fact that necessity never becomes a source of law, and therefore depends on the founding fathers' conception of what an emergency is, since they believed that this should be rooted in the discipline of positive constitutional law, refusing to consider the "dangerous idea that necessity itself should be the source of law", as it happens instead in other legal systems¹⁵.

Therefore, ordinary powers have to act during the emergency, and they have proven, during the management of the pandemic, that a mutual position can be found. But precisely because this involved the management of the emergency with ordinary powers, all their previous difficulties and all the crises that were already in progress were exacerbated.

First of all, the Parliament has confirmed all the difficulties it experiences in maintaining its centrality towards the government and especially towards the Regions¹⁶. The political relation with the Regions has been the most complex because there is no regional Senate for political mediation, between the interests of the individual Regions and those of the State. Constitutional Law n. 3 of 2001, which modified all of title V, established a kind of political assembly in article 11 where the Regions and the Parliament could negotiate, but this particular institution never really worked.

The pandemic, however, raises two sensitive issues: the need for a Parliament that works and participates in governmental decisions, and the essential need for a Senate where the Regions can transform sectorial and partial interests into political guidelines.

¹⁵ M. Luciani, *Il sistema delle fonti del diritto alla prova dell'emergenza*, *Rivista AIC*, www.rivistaaic.it, 2/2020, 113.

¹⁶ N. Lupo, *L'attività parlamentare in tempi di coronavirus*, *Forum di Quaderni costituzionali*, 2/2020, 134 ss.