Pandemocracy in Europe

Power, Parliaments and People in Times of COVID-19

Edited by Matthias C Kettemann
and Konrad Lachmayer

PANDEMOCRACY IN EUROPE

This open access book explains why a democratic reckoning will start when European societies win the fight against COVID-19.

Have democracies successfully mastered the challenges of the pandemic? How has the coronavirus impacted democratic principles, processes and values? At the heels of the worst public health crisis in living memory, this book shines a light on the sidelining of parliaments, the ruling by governmental decrees and the disenfranchisement of the people in the name of fighting COVID-19.

Pandemocracy in Europe situates the dramatic impact of COVID-19, and the fight against the virus, on Europe's democracies. Throughout its 17 contributions the book sets the theoretical stage and answers the democratic questions engaged by health emergencies. Seven national case studies – UK, Germany, Italy, Sweden, Hungary, Switzerland and France – show, each time with a pronounced focus on a particular element of democracy, how different states reacted to the pandemic.

Bridging disciplines and uniting a stellar cast of scholars on democracy, rule of law and constitutionalism, the book provides contours and nuances to a year of debates in political science, international relations and law on the impact of the virus on democracies.

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Edited by
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The Marginalisation of Parliament in Facing the Coronavirus Emergency: What about Democracy in Italy?

ARIANNA VEDASCHI*

I. Introduction

The outbreak of the coronavirus (COVID-19), a new disease which quickly turned into a pandemic[1] (still ongoing while this chapter is being written), can be included among the major emergencies of (at least) the last 100 years.[2]

It is widely known that, when an emergency takes place, legal measures to react to the crisis are necessary, and these responses always imply temporary departure from what is usually called 'normalcy'.[3] As a consequence, emergency tools have both an institutional impact – ie on the ordinary relationship and balance between state powers – and an effect on the enjoyment of rights and freedoms – which can be limited during 'times of stress'.[4]

* The author would like to express her gratitude to Chiara Graziani for research assistance.

[1] COVID-19 was labelled a pandemic by the World Health Organization (WHO) on 11 March 2020. WHO Director-General, 'Opening Remarks at the Media Briefing on COVID-19' (11 March 2020) www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-COVID-19---11-march-2020.

[2] If one looks at data about death from COVID-19, it emerges that, up to 26 December 2020, 1,744,235 people passed away from the virus. See World Health Organization, 'WHO Coronavirus Disease (COVID-19) Dashboard (26 December 2020) COVID19.who.int/.

[3] As well known, several theories justify the resort to emergency powers. Carl Schmitt referred to decisionism, meaning that a sovereign body – in Schmitt's view, the President of the Reich within the institutional background of the Weimar Constitution – should be entitled to decide in times of exception, exercising a discretion that could even amount to arbitrariness, if necessary. C Schmitt (1921), *Die Diktatur* (Duncker & Humblot, 2015). Another theory is based on necessity as a source of law, from which emergency measures stem. The latter theory can be traced back to the thought of Santi Romano and, then, of Carlo Esposito. S Romano, 'Sui decreti-legge e lo stato d'assedio in occasione del terremoto di Messina e di Reggio-Calabria' (1909) *Rivista di diritto pubblico* 251; C Esposito, 'Decreto-legge' in *Enciclopedia del diritto* 1 (Giuffrè, 1962).

[4] M Rosenfeld, 'Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror' (2006) 27 *Cardozo Law Review* 2079.

The COVID-19 emergency did not represent an exception in this regard, since almost all countries of the world – although not with the same timings and mechanisms – enacted legal measures trying to prevent the spread of the virus and to protect their citizens.[5]

This chapter focuses on the reactions to COVID-19 in Italy. Italy has been one of the Western countries that have been most and earliest hit by COVID-19, setting itself, during the so-called first wave of coronavirus, as the 'model' to which other states looked in order to put in place their own lockdown strategies. Yet what have been the consequences of legal responses to COVID-19 on the Italian democratic framework? To what extent can some principles at the very core of democracy be put under tension in order to safeguard public health? Could the 'Italian approach' to COVID-19 be improved in terms of compliance with such principles without losing its effectiveness? Ultimately, what about democracy in Italy?

With a view to trying to answer these challenging questions, touching upon the heart of Italian constitutional foundations, this chapter is structured as follows.

Section II shows how Italy handled COVID-19, starting from earliest legal reactions. First, this section explains that, differently from other jurisdictions in the comparative scenario, Italy lacks a fully-fledged 'emergency constitution', ie a set of constitutional provisions specifically settling how to tackle political and non-political emergencies.[6] Second, once the constitutional background is clarified and placed in a comparative context, Italian concrete measures taken from the beginning of the crisis are described, pointing out the main legal issues arising from them.

Section III discusses the implications of Italian anti-COVID-19 measures on democracy. In order to do so, this section takes into account both the representative dimension of democracy and the substantive one. Therefore, the analysis digs into the role of the Houses of the Italian Parliament (ie the Chamber of Deputies and the Senate of the Republic) during the crisis, assessing whether they have been (excessively) marginalised and what could be the resulting effects on representativeness and, more in general, on the balance among powers. Afterwards, this section examines substantive aspects of democracy, studying how restrictions imposed during the pandemic may clash with fundamental principles that give shape to the Italian democracy; and actually that are at the roots of Western liberal democracies. Among them, one can list the protection of rights and freedoms, and the possibility to have measures restricting rights reviewed by a judicial body, transparency and (consequent) accountability of public powers, not to mention certainty of law.

[5] For a comparative overview of legal reactions to COVID-19, A Vedaschi, 'Il COVID-19, l'ultimo stress test per gli ordinamenti democratici: uno sguardo comparato' (2020) 2 *DPCE Online* 1453.

[6] In the present chapter, the word 'political' is used to define emergencies that are triggered by some political factors (eg, international or domestic terrorism), while 'non-political' ('neutral' or again 'technical') emergencies are those that are caused by non-political events (eg, public health emergencies such as COVID-19, natural disasters etc). A Vedaschi, *À la guerre comme à la guerre? La disciplina della guerra nel diritto costituzionale comparato* (Giappichelli, 2007) 266.

Some concluding remarks take into consideration the resulting background and draw up some guidelines that might be helpful to ensure, in the future, effective responses to global and long-lasting emergencies (as COVID-19 is) without sacrificing values and principles that are crucial in a democratic context.

II. Early Legal Reactions to the COVID-19 Crisis in Italy

The Italian legal reaction to COVID-19 can be traced back to 31 January 2020, ie the day after the World Health Organization (WHO) declared a public emergency of international concern under the International Health Regulations of 2005.[7] From that day onward, a number of legal measures were adopted, amended, repealed and replaced to face this unprecedented health crisis.

Before examining in detail the legal tools employed by the Italian Government to address this new disease, it is useful to analyse the Italian constitutional framework regarding regulation and use of emergency powers.

A. Emergency Powers in the Italian Constitution and in the Comparative Scenario

Looking at the comparative scenario and focusing only on the constitutions of Western liberal democracies, two main 'macro-models' of emergency can be identified.[8]

The first macro-model consists of all those constitutions that do regulate the resort to emergency powers, either in general terms, the so-called general clause model, or more in detail, the so-called rationalised model. An example of the general clause model is the French Constitution of 1958. Its Article 16 gives very undefined (and, so, highly discretionary) powers to the President of the Republic, who, in case of (especially) political distress, is entitled to 'take measures required by these circumstances',[9] meaning any action the President deems appropriate to restore the *status quo ante*.

[7] World Health Organization, 'Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)' (30 January 2020) www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

[8] Vedaschi (n 6).

[9] Official translation by the French Conseil Constitutionnel, www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf. Art 16 French Const is modelled on Art 48 of the 1919 Weimar Constitution. According to Art 48, para 2 of the Weimar Constitution, 'the President of the Reich can, if public safety and peace of the Reich are seriously endangered or threatened,

Constitutions belonging to the rationalised model, instead, regulate emergency more in-depth. For example, the 1949 German *Grundgesetz*, after a constitutional amendment of 1968,[10] provides for several emergency regimes. The choice among them is determined by the intensity of a threat arising from a same source of danger; therefore, the German paradigm can be defined as a 'growing intensity model'. Other constitutional texts designed different emergency patterns that do not depend on the intensity of a threat stemming from a same cause, but on what circumstances triggered the emergency itself. For instance, Article 116 of the 1978 Spanish Constitution envisages the 'state of alarm', the 'state of exception' and the 'state of siege', which can be applied in the case of neutral emergencies (such as an epidemic), political emergencies and state of war, respectively.[11] Thereby, Spanish emergency powers can be qualified as a model based on 'parallel levels', since the intensity of the threat does not affect the choice of the emergency regime to be invoked, which hinges on the very nature of the crisis.

The second macro-model might be more appropriately defined as a 'non-model', as it includes all those constitutions that do not provide an explicit and systematic regulation of emergency.[12] This model is inspired by European constitutions of the Liberal age.[13]

The current Italian Constitution, which entered into force in 1948, falls within this second macro-model. The reason why the Italian Constituent Assembly decided not to embody any extensive and precise regulation of emergency situations in the new constitutional text can be traced back in its history. The Italian Constitution was drafted in the aftermath of World War II, when awful memories of the Fascist regime, which oppressed Italy for 20 years, were still fresh. Consequently, the Constituent Assembly opposed the centralisation of power in the hands of a single body, especially of the executive, fearing resurgence of past authoritarian drifts.

Therefore, the only emergency to be explicitly (though vaguely) addressed by the Italian Constitution is war (in its conventional meaning). Article 78 Italian Constitution states that 'Parliament has the authority to declare a state of war and

take the necessary measures to restore public safety and peace, and, when necessary, he can resort to armed forces' (translated by the author). On the Weimar Constitution, T Ginsburg and A Huq, *How to Save a Constitutional Democracy* (The University of Chicago Press, 2018) 80.

[10] Act (No 17) to amend the Basic Law of the Federal Republic of Germany, DEU-1968-L-18187), 24 June 1968.

[11] The Spanish constitutional regime of emergency is complemented by *Ley Orgánica* no 4 of 1 June 1981.

[12] For the sake of completeness, it is necessary to mention – without going into its details, given the focus of this chapter – an 'ambiguous' model, which can be referred to the United States (US) and can be considered as a 'halfway' paradigm between the two analysed macro-models. Art 1, para 9, cl 2, US Const only enables the suspension of habeas corpus 'when in Cases of Rebellion or Invasion the public Safety may require it'. Thus, there is no procedural rule on emergency, nor is the body vested with emergency powers explicitly spelled out, albeit, according to some theories, these powers are entrusted to the US President. For more information on this model, see Vedaschi (n 6) 327.

[13] For example, the Belgian Constitution of 1831 or the Italian Statuto Albertino of 1848. They both did not provide any systematic regulation of emergency, and such choice depended on the historical-political backdrop, based on a compromise between the Monarch and the representative Assembly.

vest the necessary powers into the Government'.[14] In other and clearer terms, the Italian Government[15] has substantive powers in time of war, following the decision to resort to *bellum* taken by the Houses of the Italian Parliament and, pursuant to Article 87 Italian Constitution, proclaimed by the President of the Republic.

War is for sure the most traditional, but not the sole form of emergency. Other situations of crisis – terrorist attacks, financial turmoil, epidemics, etc – are not governed by any explicit and specific norm of the Italian Constitution. Nonetheless, emergencies different from war can be dealt with through Article 77 Const, a clause that can be applied to cases 'of necessity and urgency'.[16] For this reason, it can be said that the Italian Constitution is 'silent', but not 'mute' as far as emergency is concerned.[17]

According to Article 77 Italian Constitution, the Council of Ministers, under its own responsibility, can adopt decrees with the same legal force as ordinary law (for this reason they are called 'decree laws') to address extraordinary and pressing situations. These acts are then issued by the President of the Republic, who orders their publication in the Official Journal of the Italian Republic.

Although decree laws enter into force the same day of their publication, they have to be immediately submitted to the Houses of Parliament to be converted into a law called 'conversion law'. If the Houses do not pass a law converting the decree within 60 days of the latter's publication, the decree retroactively loses its effects (ie, from the time of its adoption, as if it had never existed). Otherwise, in case the decree is converted into law by the Houses, the 'conversion law' replaces the decree as if the latter had never come to light.[18]

Some scholars argue that decree laws can indeed be considered as a fully-fledged emergency constitution.[19]

Actually, the Constituent Assembly had conceived Article 77 Italian Constitution as a provision to deal with natural catastrophes (for example, floods, earthquakes etc). However, praxis in Italy shows that these decrees are frequently used by the Government (and, often, converted by the Houses of Parliament) in a much wider range of circumstances, some of them falling outside of the very definition of 'emergency'.[20] Of course, they were also resorted to during actual emergencies, eg to address international terrorism in the aftermath of 9/11, when

[14] English translation of the Italian Constitution by the Italian Senate, www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[15] ie, the body called 'Council of Ministers', made up of a President of the Council of Ministers and of all the Ministers of the Italian Republic. Art 92 It Const.

[16] English translation of the Italian Constitution (n 14).

[17] As highlighted by M Luciani, 'Il sistema delle fonti del diritto alla prova dell'emergenza' (2020) *Rivista AIC* 1.

[18] A phenomenon called '*novazione della fonte*' in Italian constitutional law.

[19] Luciani (n 17).

[20] Decree laws were and are used, inter alia, to regulate the price of oil and other fuels, to amend rules on housebuilding and to introduce new taxes, to the point that many Italian scholars talked about 'abuse' of decree laws. See, among others, F Modugno and A Celotto, 'Rimedi all'abuso del decreto-legge' (2002) 39 *Giurisprudenza costituzionale* 3232.

a decree law amended the Criminal Code's provisions on terrorism,[21] and after subsequent attacks that hit Europe.[22] In these cases, due to the very fact that they were converted into law, they contributed to a worrisome phenomenon of 'normalisation of emergency'.[23] From this perspective, there is no doubt that decrees adopted pursuant to Article 77 Italian Constitution differ, to some extent, from temporary emergency regimes, since, at least potentially, they can be turned into permanent law (in case of conversion).

At the same time, specific legislation was approved in Italy to tackle natural disasters. In particular, Legislative Decree no 1/2018,[24] (so-called Civil Protection Code) was enacted to deal with these situations. Pursuant to Article 76 Italian Constitution, legislative decrees are, like decree laws, acts with the same force of law adopted by the Council of Ministers. Differently from decree laws, they are not converted into law *ex post* by the Houses of Parliament, but the latter play an *ex ante* role, delegating the Government, through a 'delegation law', to adopt the legislative decree.

B. Legal Reactions to COVID-19: The (Head of the) Executive as the 'Dominus' of the Pandemic Emergency

Against this constitutional and legislative background, the Italian Government has addressed the COVID-19 crisis.

Despite not being an act precisely conceived to cope with health emergencies, Legislative Decree no 1/2018 was the first legal tool to be triggered when Italy was faced with COVID-19.

On 31 January 2020, the Council of Ministers, pursuant to Articles 7 and 24 of Legislative Decree no 1/2018, declared a 'national state of emergency'. Originally,

[21] Decree Law no 374 of 18 October 2001, converted into Law no 438 of 15 December 2001.

[22] After attacks perpetrated in Paris in 2015, Decree Law no 7 of 18 February 2015, converted into Law no 43 of 17 April 2015, was adopted. Further measures against international terrorism enacted through decree laws and the ones that partially conflate counter-terrorism strategy with immigration policies. See Decree Law no 144 of 27 July 2005, converted into Law no 155 of 31 July 2005 (introducing a new ground of expulsion from the Italian territory, on a decision of the Minister of Interior or of the Prefect, based on alleged links to international terrorism). See also Decree Law no 113 of 4 October 2018, converted into Law no 132 of 1 December 2018 (providing for the revocation of Italian citizenship in case a naturalised citizen is convicted on a terrorist offence). On legal issues arising from citizenship stripping as a counter-terrorism strategy, A Vedaschi and C Graziani, 'Citizenship Revocation in Italy as a Counter-Terrorism Measure' (*Verfassungsblog*, 29 January 2019) verfassungsblog.de/citizenship-revocation-in-italy-as-a-counter-terrorism-measure/.

[23] On this topic in Italy, G de Vergottini, *Guerra e costituzione. Nuovi conflitti e sfide alla democrazia* (il Mulino, 2004) 212.

[24] Legislative Decree no 1 of 2 January 2018. This legislative decree replaces an older piece of legislation, dating back to 1992.

this state of emergency was set to last up to 31 July 2020, then it was extended several times.[25]

The mentioned provisions of Legislative Decree no 1/2018, empowering the Council of Ministers to declare a state of emergency, do not vest the Italian Government with well-defined powers. For instance, they do not list a number of rights and freedoms that can be limited during the emergency, nor explain which acts have to be passed to set out concrete measures.

In this context, and also in the light of the quick increase in the number of COVID-19 cases, on 23 February 2020 the Italian Government adopted Decree Law no 6/2020.[26] This Decree Law, recognising the seriousness of the threat posed by the virus and acknowledging the need to limit some everyday activities in order to try to contain its quick spread, was still very vague. It deferred the adoption of further measures aimed at curtailing individuals' rights and freedoms, enshrined in the Constitution, to 'one or more decrees of the President of the Council of Ministers'.[27] And this is exactly what happened in Italy. All provisions enacting very severe lockdown measures and curbing a wide number of rights and freedoms, such as personal freedom,[28] freedom of movement,[29] freedom of assembly,[30] freedom of worship,[31] freedom to conduct businesses,[32] and many others were taken by decrees of the President of the Council of Ministers (DPCMs). Albeit Decree Law no 6/2020 was repealed and replaced by other decree laws,[33] as the factual situation evolved and new measures were required, the scheme is always the same: a decree law is enacted, it gives further DPCMs the power to limit basic rights and personal freedoms, then DPCMs are adopted.[34]

At this point, it is essential to shed light on the legal tool called decree of the President of the Council of Ministers and on its position within the hierarchy of Italian sources of law. First of all, DPCMs are decrees adopted by the sole President of the Council of Ministers (PCM, ie the Head of the Italian executive), and not by the whole Council of Ministers (as it happens, according to Article 77 Italian Constitution, with decree laws). Moreover, while decree laws are issued by the

[25] The state of emergency was extended, on the decision of the Council of Ministers, on 29 July 2020 up to 15 October 2020; on 7 October 2020 up to 31 January 2021; on 13 January 2021 up to 30 April 2021; on 21 April 2021 up to 31 July 2021; on 23 July 2021 up to 31 December 2021.

[26] Decree Law no 6 of 23 February 2020, converted into Law no 13 of 5 March 2020.

[27] Decree Law no 6/2020, Art 3. Translated by the author.

[28] Art 13 It Const.

[29] Art 16 It Const.

[30] Art 17 It Const.

[31] Art 19 It Const.

[32] Art 41 It Const.

[33] Decree Law no 19 of 25 March 2020, converted into Law no 35 of 22 May 2020, repealed and replaced this Decree Law.

[34] It should be noticed that, due to the troubles it raised, the use of DPCMs has been considerably reduced starting from February 2021, when a new executive was sworn in. Nevertheless, this chapter was written between December 2020 and January 2021, so it takes into account the approach to the pandemic from February 2020 to January 2021.

President of the Republic[35] – who, in doing so, ensures a *lato sensu* check on the constitutionality of decrees – DPCMs are issued by the PCM, without any check by the President of the Republic. Additionally, DPCMs are not submitted to the Houses of Parliament to ask for their conversion into law as is the case for decree laws. All these features mean that no parliamentary nor presidential[36] oversight is carried out on DPCMs.

Looking at the Italian hierarchy of legal sources, DPCMs have a lower rank than laws, while decree laws are equated to them. As a consequence, the constitutionality of DPCMs cannot be reviewed by the Italian Constitutional Court, which is only entitled to rule on the compliance of statutory laws and acts having the same legal force (ie, decree laws and legislative decrees) with the Constitution.[37]

The use of DPCMs to face a major emergency such as COVID-19 is an unprecedented approach in Italy. Wide resort to DPCMs is a blatant sign of concentration of powers in the hands not of the whole executive, but of his Head alone, which is very uncommon in the Italian parliamentary form of government. The described setting is unquestionably a peculiar and challenging one and it has significant implications on democracy in Italy. This is the object of analysis developed in section III.

III. The Impact of Reactions to COVID-19 on Democracy in Italy

In order to examine the impact of the backdrop presented in the previous section on Italian democracy in a thorough and comprehensive way, two sides of the Italian concept of democracy (which can be extended to most of Western legal systems) have to be taken into account.

First, Italian democracy is a so-called representative (or indirect) democracy. In other words, sovereignty, belonging to the people according to the Constitution,[38] is exercised by the Houses of Parliament. The latter are made up of representatives of the Nation,[39] expressing the will of people. Consequently, Parliament plays a pivotal role in the Italian democratic context.

Second, the Italian democracy has a substantive side, meaning that at its very core there are some crucial principles that have to be respected. Among them, one can list the protection of rights and freedoms, judicial review, transparency and accountability and certainty of law.

[35] Pursuant to Art 87 It Const.

[36] In the Italian legal system, the President of the Republic is considered to be a 'neutral' body, not directly involved in politics and tasked with ensuring the respect of constitutional legality.

[37] Art 134 It Const.

[38] Art 1 It Const.

[39] Art 67 It Const.

The Italian legal response to COVID-19 impacts on both these limbs, which deserve separate analysis.

A. The Marginalisation of Parliament: The Italian Case in the Comparative Context

The Italian approach to the COVID-19 pandemic, revealing a key role of the Head of the executive, resulted, at least at first, in the blatant marginalisation of Parliament.

In emergency circumstances, a certain degree of prevalence of executive bodies to the detriment of Legislatures is a common factor, since Executives, by their very nature, are better placed to deal with 'exceptional' times.[40] Nevertheless, the risk of thwarting the role of the parliamentary institution was made even worse by the peculiar traits of the COVID-19 emergency. With social distancing being the main way to contain the effects of the disease (and consequent banning of major gatherings and minimisation of people meeting), convening the Houses of Parliament to carry out their activities entailed many risks, especially at the beginning of the pandemic.

Yet at the same time – particularly in a parliamentary form of government, as Italy is – hindering the activity of Parliament might seriously endanger the relationship among powers as well as political accountability. In a parliamentary system, there is a confidence relationship between the political majority sitting in Parliament and its Government, so that the Legislative should be able to continuously check the activity of the executive (through tools that the Constitution and the standing orders of each House provide), holding it politically accountable if necessary.

Political accountability is not the sole reason why marginalising Parliament might be troublesome. In the Italian system, the Houses of Parliament are tasked with exercising 'collectively'[41] the legislative function. And there are matters (eg, the limitation of some rights and freedoms) that, according to the Constitution, have to be governed by laws of Parliament (or primary sources, meaning acts with the same force as law, like decree laws). This mechanism – called statutory limit (*riserva di legge*) in Italian constitutional law – is aimed at ensuring that some sensitive issues are only addressed by the bodies (the Houses of Parliament) that guarantee the widest possible representation of Italian people, while the executive represents just the temporary political majority.

[40] This is due to the fact that the executive's action is usually quicker than potentially long parliamentary procedures. Moreover, it is easier, for executive bodies, to deal with technical measures and with the involvement of experts in decision-making. On the role of the executive in times of emergency, AV Dicey (1885), *Introduction to the Study of the Law of the Constitution* (McMillan, 1979).

[41] Art 70 It Const.

At first, marginalisation of Parliament is exactly what happened in Italy. On 5 March 2020, the Heads of parliamentary groups of the Chamber of Deputies suspended the work of the lower House of the Italian Parliament, with the exception of undeferrable acts. The Heads of parliamentary groups of the Senate of the Republic did the same on 9 March 2020. This situation could not last long, since it seriously undermined the Italian form of government.

Italy has not been the only jurisdiction to face the problem of how to convene Parliament and ensure that it can carry out its activities in times of COVID-19 without fuelling the spread of the virus. Other countries have had to deal with similar issues while struggling against the pandemic.

In this regard, a comparative overview shows that, in some cases, remote voting has been identified as a possible solution. Not just at the domestic level – for instance, in Spain and in the United Kingdom[42] – but also within the European Union,[43] distance voting procedures have been enacted to keep the functions of representative bodies alive while averting the risks deriving from large gatherings of people.

To make compliance with social distancing rules easier, in Germany, parliamentary standing orders have been amended so as to reduce the *quorum* requirements of members who have to be present in order to validly adopt new laws or take any other decisions.[44]

Another arrangement that has been made is the introduction of reduced formats for parliamentary sittings combined with proxy voting, as happened in France.[45]

In Italy, the possibility to resort to remote voting and, thus, to the use of technology in parliamentary activity[46] has given rise to a lively debate among both

[42] In Spain, the Congreso de los Diputados (ie, the lower House of the Spanish Parliament) opened to the possibility of distance voting as of March 2020, then extended also to the Senado (ie, the upper House). In the United Kingdom, on 21 April 2020, the House of Commons adopted a system called 'hybrid Parliament', meaning that some members of the House are physically present, while others resort to remote voting. On the British approach, see the chapter by R Thomas, 'Virus Governance in the United Kingdom' in this volume.

[43] On 26 March 2020 the European Parliament resorted for the first time to an extraordinary remote voting procedure to approve urgent measures to fight the pandemic.

[44] A temporary amendment of the Bundestag's standing orders provided that valid decisions can be taken when more than one quarter of the members of the German lower House are present (before this change, the quorum was more than one half). *Beschlussempfehlung und Bericht des Ausschusses für Wahlprüfung, Immunität und Geschäftsordnung*, Drucksache 19/18126, 25 March 2020.

[45] In France, a specific working method was adopted: only three members per political group can sit in the Assemblée Nationale, but each member can cast vote (by proxy) for all the members of his/her political group. On the French situation, see S Brunet, 'The Hyper-Executive State of Emergency in France', in this volume.

[46] To the point that someone talked about 'virtual parliaments' in times of COVID-19. D Natzler, 'Building a "virtual parliament". How our democratic institutions can function during the coronavirus' (*The Constitution Unit*, 20 April 2020) constitution-unit.com/2020/04/20/building-a-virtual-parliament-how-our-democratic-institutions-can-function-during-the-coronavirus; A Williamson, 'Virtual Members: Parliaments During the Pandemic' (2020) *Political Insights* 40. See also L Sciannella, 'La crisi pandemica da Covid-19 e la "trasformazione digitale" dei Parlamenti. Un'analisi comparata' (2020) 2 *DPCE Online* 2509.

political parties and scholars. Pros and cons of the use of distance voting and the feasibility of such procedure within the Italian constitutional framework have been widely examined.

On the one side, some are in favour of remote voting during public health crises, maintaining that it would be a feasible option to ensure representativeness without impairing the right to health.[47] They can be divided into those who argue that distance voting should be introduced through a change of the standing orders of the Houses of Parliament[48] and those who hold that the current drafting of the procedural rules would already allow e-voting practices, which could be legitimised by a mere authorisation of the Presidents of the Houses.[49]

On the other side, there are some stances against remote voting. First, in some scholars' opinion, the provisions of the Italian Constitution regarding the activity of members of Parliament unequivocally refer to physical attendance. And, according to this literal reading, even if the Constitution were amended and the requirement of physical presence removed, such a change would seriously jeopardise the very concept of 'political representativeness', since the idea of 'representativeness' exactly means to give voice to those who are absent.[50] Not to mention that distance voting would frustrate debate in the Houses and transparency of parliamentary sessions, which instead are crucial in representative democracies.[51] Second, someone claims that remote voting would be dangerous, since it would end up being used also outside of emergency contexts. In other terms, distance voting during the pandemic might turn out to be a dangerous precedent, and the duty to physically sit in the premises of the Houses of Parliament would be neglected even in ordinary times.[52]

It is worth highlighting that this reluctance towards remote voting has been shared also by the Presidents of the two Houses of the Italian Parliament and by some political forces.[53] As a consequence, no distance voting mechanism has ever

[47] Among others, S Curreri, 'Il Parlamento nell'emergenza' (2020) 3 *Rivista AIC* 214; N Lupo, 'Perché non è l'art. 64 Cost. a impedire il voto "a distanza" dei parlamentari. E perché tale voto richiede una "re-ingegnerizzazione" dei procedimenti parlamentari' (2020) *Osservatorio Costituzionale* 23. Among political parties, Partito Democratico, Movimento 5 Stelle and Liberi e Uguali.

[48] S Ceccanti, 'Verso una regolamentazione degli stati di emergenza per il Parlamento: proposte a regime e possibili anticipazioni immediate' (2020) 2 *BioLaw Journal* 1. See also the proposal for a reform of the standing orders of the Chamber of Deputies, submitted by Stefano Ceccanti, stefanoceccanti.it/lo-stampato-della-proposta-di-riforma-regolamentare-per-il-parlamento-a-distanza-con-le-104-firme.

[49] S Curreri, 'Voto a distanza in Parlamento: i precedenti non lo impediscono affatto' (*La Costituzione. info*, 16 March 2020) www.lacostituzione.info/index.php/2020/03/16/voto-a-distanza-in-parlamento-i-precedenti-non-lo-impediscono-affatto/.

[50] R Calvano, 'Brevi note su emergenza Covid e voto dei parlamentari a distanza. Rappresentanza politica, tra effettività e realtà virtuale' (2020) 21 *Federalismi* 45.

[51] V Lippolis, 'Parlamento a distanza? Meglio di no' (*Il Foglio*, 1 April 2020).

[52] M Luciani, at the debate: 'Parlamento aperto: a distanza o in presenza? (II appuntamento)', organised on Facebook on 3 Aprile 2020 by the President of "Commissione Affari Costituzionali" of the Italian Chamber of Deputies, www.radioradicale.it/scheda/602453/parlamento-aperto-a-distanza-o-in-presenza-ii-appuntamento.

[53] Among these political forces, Fratelli d'Italia, Italia Viva, Lega.

been introduced in Italy. Rather, to lower the risk of spreading the virus, as of the end of March 2020, parliamentary sittings started to be held using all spaces available (including those usually reserved for journalists) to allow as many members of the Houses as possible to attend without breaching social distancing rules. In some cases – for example, when the increase of budget deficit to tackle the emergency needed to be voted on – Heads of parliamentary groups even made agreements to ensure that no more than half of the members of each Houses sat in Parliament.

Hence, after a first moment – coinciding with the very beginning of the pandemic – of real marginalisation of Parliament, it cannot be said that the Italian Houses have been completely excluded from decisions regarding the COVID-19 pandemic.[54] However – and this is the most questionable aspect – even when they played a role in the handling of the pandemic, not always did they do so in an effective way. Some examples can be made.

First, thanks to described ploys enabling voting without violating anti-COVID-19 safeguards, the Houses have converted into law many decree laws dealing with the emergency, but without fixing main problems arising from them. Among others, excessive discretion left to the PCM.[55]

Second, an improvement in the relationship between the Parliament and the (Head of) Government is due to a provision of Decree Law no 19/2020,[56] according to which, before adopting DPCMs aimed at managing the pandemic, the PCM (or a Minister delegated by him) has to inform both Houses of forthcoming measures on which the Houses can pass a resolution.[57] This mechanism was applied also when the state of emergency, declared pursuant to Legislative Decree no 1/2018 and originally set to expire on 31 July 2020, was extended up to 15 October 2020 and then up to 31 January 2021, as both Houses passed their own resolutions. However, Decree Law no 19/2020 does not ensure full participation of the Houses. As a matter of fact, in some cases, the PCM resorted to a clause – contained in the same Decree Law – permitting him to adopt measures and, after doing so, merely inform the Houses *ex post*; as a result, the Houses cannot vote a resolution, but only engage in an *ex post* debate.

In sum, available tools were not always appropriately used by the Houses themselves to fully exercise their role (reference is to failure to amend decree laws during the conversion procedure). And even newly established procedures aimed at reintroducing Parliament (at least to some extent) in the decision-making process do not ensure a significant voice of the Houses on actions to be taken. Actually, they can simply pass resolutions and, furthermore, the PCM can choose

[54] On whether the marginalisation of Parliament was 'real', see also G Zagrebelsky, 'Chi dice Costituzione violata non sa di cosa sta parlando' interview published by *Il Fatto Quotidiano*, 1 May 2020, www.vasroma.it/zagrebelsky-chi-dice-costituzione-violata-non-sa-di-cosa-sta-parlando/.

[55] The Houses could have done so because, when they convert a decree law into law, they have the possibility to make amendments to the substantive content of the act.

[56] Decree Law no 19 of 25 March 2020, Art 2, para 5.

[57] In the Italian parliamentary system, a resolution is a tool that each House can pass – usually after a debate – in order to direct governmental action (although not being legally binding).

to trigger the *ex post* clause embodied in Decree Law no 19/2020, depriving them of this possibility. It might be argued that these improvements in the relationship between the Legislature and the executive in times of emergency are just apparent or, at least, their outcome highly depends on the two branches' will to engage in a cooperative behaviour.

B. The Pandemic's Effect on Human Rights and Personal Freedoms

Moving to the effects of anti-COVID-19 measures on 'substantive' aspects of democracy, it is worth considering that, albeit abovementioned tools have been introduced to ensure involvement of Parliament, acts concretely used to face the health emergency have still been taken by the executive (rather, by its Head).

Consequences on basic principles of democracy are manifold and they touch upon at least four main areas.

A first point concerns effective protection of rights and freedoms, which is an essential feature of any democratic context. As is widely known, protecting rights and freedoms does not necessarily mean that all of them must be considered as 'absolute' and so subject to no limitations. Rather, in many cases, limitations may be legitimate in a democracy, when they are necessary to safeguard other competing rights or interests and a balancing effort is needed. However, the restriction of rights and freedoms is a very sensitive matter and, thereby, the Italian Constitution prescribes that some of these limitations can only be set by a law or an act having the same legal force.

As said, DPCMs are not laws, nor do they have the same legal force. Although they are not primary sources, they do have impact on rights and freedoms that can exclusively be limited by the law, according to the Constitution.[58] In this regard, some Italian scholars maintain that there has been no violation of the Italian Constitution. They say that, even though concrete measures are established by DPCMs, such acts find their legal basis in previous decree laws, whose legal force is the same as laws. In their view, this would be sufficient to legitimise limitations of personal freedom and freedom of movement.[59] Other stances, instead, argue that this legal basis is too vague and undefined, so, in practice, the powers of the PCM are excessively wide.[60]

[58] eg, Art 13, para 2, It Const (restrictions of personal freedom); Art 16, para 1, It Const (restrictions of freedom of movement).

[59] Luciani (n 17). On the legitimation of emergency measures based on decree laws, see also G Azzariti, 'I limiti costituzionali della situazione di emergenza provocata dal COVID-19' (*Questione Giustizia*, 2020) www.questionegiustizia.it/articolo/i-limiti-costituzionali-della-situazione-d-emergenza-provocata-dal-COVID-19_27-03-2020.php.

[60] S Cassese, 'La pandemia non è una guerra. I pieni poteri al governo non sono legittimi' (*Il Dubbio*, 14 April 2020) www.ildubbio.news/2020/04/14/cassese-la-pandemia-non-e-una-guerrapieni-poteri-al-governo-sono-illegittimi; Vedaschi (n 5).

A second point is strictly related to the first one. Given that the possibility to challenge the constitutionality of acts limiting rights and freedoms before a court is another key element of democracy, the lack of constitutional review of DPCMs is a problem. Pursuant to Article 134 Italian Constitution, the Italian Constitutional Court – ie the sole body in Italy mandated with constitutional adjudication – can review the constitutionality of laws and acts with the same legal force, declaring their invalidity if they violate the constitutional standards. Therefore, DPCMs are excluded from any chance of constitutional review.

There is, indeed, a possibility of judicial (not constitutional) review of these acts in the Italian legal system. DPCMs are considered to be administrative acts and, consequently, administrative courts are in charge with reviewing their legality and, if necessary, declaring them null and void. And there have been cases in which DPCMs dealing with the COVID-19 crisis have been challenged before administrative courts, with the applicants claiming that they left too much discretion to the PCM. Yet, in these circumstances, there have been two main issues, a procedural and a substantive one.

The procedural issue is that, since the coronavirus pandemic situation evolves rapidly, DPCMs are quickly replaced by other following ones. Rules governing the procedure before Italian administrative courts require dismissal of the case, if the administrative act that has been challenged loses its effects. Thus, since the beginning of the pandemic, judges have frequently had to abstain from ruling on the content of the acts, since the DPCM under review was no longer in force.[61] A way to overcome this situation might be conceivable, but would entail a partially innovative attitude of Italian administrative courts. More specifically, a possible solution might be that administrative courts decided to review the DPCM in force, if it shows the same flaws that characterised the expired one. This would recall a well consolidated case law of the Constitutional Court regarding decree laws,[62] but Italian administrative courts have not taken this approach yet.

The substantive point can be explained as follows. Even when administrative courts have assessed the merit of DPCMs (and also of acts issued by lower levels of government in Italy, such as the presidents of regional executives and even mayors) containing anti-COVID-19 measures, they have very often ruled that these acts pursued a legitimate aim, ie the protection of public health, and, therefore, they were fully legitimate. In other words, courts did not engage in an in-depth scrutiny of whether (or not) the limitative measures, in safeguarding public health – which is for sure a legitimate purpose – were appropriate and proportionate.[63] Rather, they have merely made sure that reviewed acts did not lack any rational basis.

[61] See, among others, Regional Administrative Court for Lazio, order no 3453/2020, 4 May 2020.

[62] For more details, see Vedaschi (n 5).

[63] See, inter alia, Regional Administrative Court for Campania, decree no 416, 18 March 2020; Regional Administrative Court for Friuli, order no 61, 10 April 2020; Regional Administrative Court for Veneto, decree no 205, 21 April 2020. In Italian administrative law, this approach is called 'extrinsic scrutiny'.

A third reason of concern regarding the substantive dimension of democracy has to do with the principle of transparency. Transparency is at very roots of any democratic environment and is the precondition for accountability.[64] The executive must be held accountable before Parliament (in parliamentary forms of government, as Italy), but also before public opinion, as citizens have a right to know choices made and actions taken by governmental bodies and rationales behind them.

Transparency issues in the COVID-19 emergency can be addressed under both the perspective of scientific evidence and the viewpoint of the use of mass communication.

As far as scientific knowledge is concerned, DPCMs aimed at tackling the pandemic have often been adopted on the basis of analyses carried out by a 'Comitato Tecnico-Scientifico' (Technical-Scientific Committee), specifically set up at the beginning of the COVID-19 crisis. Reports and other documents of this Committee, on which Italian anti-COVID policies have been grounded, remained confidential for a long time, and just recently they have become public, after judicial litigation and a huge political and media debate.[65]

The problem of transparency of technical and scientific information on which political decisions in times of the coronavirus emergency are based affected other jurisdictions, too. For instance, in France, the Assemblée Nationale created an ad hoc parliamentary enquiry commission to investigate on how executive authorities, supported by a 'Conseil Scientifique' (Scientific Council) with functions that are similar to those of the Italian Committee, are handling the pandemic. This step might be desirable in Italy, too, as it would probably result in further involvement of Parliament in the struggle against the pandemic.

Regarding the perspective of communication from public authorities to the general public (mass communication), it should be noticed that the PCM has taken a peculiar stance, which the history of the Italian Republic had never witnessed before, in the relationship with citizens and the media. As a matter of fact, prior to the entry into force of new anti-COVID-19 measures, the PCM has directly addressed citizens in press conferences, broadcast on TV. Usually, only the President of the Republic, and in very limited circumstances, directly speaks to Italian people. Yet, such a media exposure of the Head of the executive does not automatically result in ensuring transparency in its proper sense, since there is no guarantee that all available and correct information is shared with citizens.

[64] JJ Rousseau (1762), *The Social Contract*, trans M Cranston (Penguin Books Ltd, 2008); J Bentham (1791) in J Bowring (ed), *Panopticon; or The Inspection House* (Russel & Russel, 1962); I Kant (1795) in B Orend (ed), *Perpetual Peace*, trans W Hastie (Broadview Press, 2015); N Bobbio, *La democrazia e il potere invisibile* (1980) 10 *Rivista italiana di scienza politica* 181.

[65] More specifically, some plaintiffs asked the Regional Administrative Court for Lazio to order the Civil Protection Department of the Council of Ministers to disclose reports of the Committee. The Court granted their request (Regional Administrative Court for Lazio, judgment no 8615 of 13 July 2020). Although, on appeal, the Council of State had temporarily suspended the execution of the lower court's ruling (Council of State, decree no 4573 of 31 July 2020), the Civil Protection Department decided to autonomously disclose the documents, perhaps due to the media hype that had been raised.

A fourth and last point needs to be addressed, representing another very peculiar aspect of the handling of the COVID-19 crisis. As the content of DPCMs is sometimes unclear, a new practice was established according to which, a few hours after publication of a new DPCM imposing restrictions on citizens' rights and freedoms, the website of the Presidency of the Council of Ministers published a set of Frequently Asked Questions (FAQs) clarifying the most common doubts. However, even these FAQs raise several questions as to their binding nature. Undoubtedly, leaving the interpretation of tools limiting rights and freedoms to non-binding guidelines seriously undermines the principle of certainty of law, another foundational aspect of democracy.

IV. Concluding Remarks

The analysis carried out throughout this work brought to light some points that have a significant impact on Italian democracy.

First, this chapter proved that there is a close link between effects of emergency on the representative dimension of democracy and effects on its substantive limb. As seen, marginalising Parliament – in a first moment – and endowing it with weak participation tools – during the so-called second wave of COVID-19 – has impacted not just on representativeness and political accountability, but also on key features such as – among others – the protection of rights, constitutional review, transparency and certainty of law. As a matter of fact, DPCMs escape a number of checks: by the whole Council of Ministers, being adopted by its Head alone; by the President of the Republic, not being issued by him; by the Houses of Parliament, not being converted into law; by the Constitutional Court, not falling within its jurisdiction. And although, in theory, they can be scrutinised by administrative courts, this review has not proven effective, due both to procedural issues (timing) and to administrative judges' deferential approach.

Second, the handling of COVID-19 in Italy has shown that, even when mechanisms ensuring a certain degree of participation of Parliament have been arranged in the midst of the pandemic, state powers have not cooperated much. Italian institutions have shown a fragmented and sometimes incoherent attitude, both as regards the relationship between Parliament and the executive and, within Parliament itself, between majority and opposition political forces. On the one side, the executive often labelled anti-COVID-19 measures to be taken as 'urgent', so as to exclude any *ex ante* discussion in the Houses of Parliament and the possibility for them to adopt their own resolutions. On the other side, majority and opposition have frequently disagreed on crucial aspects (among others, whether or not to resort to remote voting), without setting a cohesive response plan. This situation, indeed, mirrors the condition of political fragmentation that Italy was already going through before the beginning of the pandemic emergency. The latter has done nothing but emphasise this framework and its drawbacks, as COVID-19

has been exploited to fuel political antagonism. This situation is undesirable, since, in circumstances of crisis, loyal cooperation among state bodies and political forces would be essential.

A third and particularly important aspect concerns the legal framework to deal with an emergency in Italy. Albeit abovementioned loyal cooperation efforts on the political scene would be helpful in stressful times, they might not be enough, as they might need to be complemented by a new constitutional framework to address emergency. The choice, made by the Italian Constituent Assembly, not to introduce any systematic and detailed regulation of emergency in the Italian Constitution was based on precise historical reasons, and can be considered as a thoughtful and reasonable one in a post-World War II Italy. Nonetheless, the historical and political scenario has changed and, most of all, emergencies have been transformed. Society is now facing emergencies characterised by a global reach and by a considerable amount of time, to the point that the requirement of temporary nature, traditionally considered to be one of the main features of emergency, is increasingly ebbing away. COVID-19 is a blatant example of a global and long-lasting crisis, but the same can be said with regard to pre-existing emergencies, such as the threat posed by international terrorism, which has permanently loomed over democracies since 11 September 2001.[66]

Against this backdrop, it might be necessary to reconsider the decision, made in the aftermath of World War II, to have a 'silent' Constitution on emergency. Whether or not it is time for the Italian Constitution to 'speak up' on emergency is something that needs at least to be discussed, both at the political and academic level, once the coronavirus crisis is over.

[66] A Vedaschi, 'The Dark Side of Counter-Terrorism: *Arcana Imperii* and *Salus Rei Publicae*' (2018) 66 *American Journal of Comparative Law* 877.