6. Populist legal strategies and enforcement discretion in Italy in the COVID-19 emergency

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Introduction

The actual impact of the severe restrictions to the rights of individuals introduced by the Italian government to deal with the Covid-19 emergency cannot be understood through the simple reading of the different legal provisions enacted in the last month, and neither is sufficient the review of the several scholarly articles that have been published on the subject over a short time, mostly to assess the compatibility of such provisions with the guarantees enshrined in the constitution[1].

The choice of the government guided by Giuseppe Conte – a professor of private law without any previous political profile – when Italy found itself in the uncomfortable situation of first European country to be touched by the Covid-19 pandemic was to introduce a "lockdown" that, besides the stop to all economic activities not deemed essential, implied the prohibition for individuals to leave home without a specific justification based on one of the grounds identified in the relevant decrees enacted by the executive.

[1] Among the most relevant articles see AZZARITI, Gaetano, *I limiti costituzionali della situazione d'emergenza provocata dal Covid-19, Questione giustizia online*, March 27, 2020; MASSA PINTO, Ilenia, *La tremendissima lezione del Covid-19 (anche) ai giuristi, Questione giustizia online* March 18, 2020; CIVININI, Maria Giuliana e SCARSELLI, Giuliano, *Emergenza sanitaria. Dubbi di costituzionalità di un giudice e di un avvocato, Questione giustizia online, April 14, 2020.*

This exceptional legal regime, without precedents in Italy after WW II, was adopted and implemented with the support of a public awareness campaign based on the slogan "I stay at home" (*Io resto a casa*), which identified the simple fact of "staying at home" as the ultimate contribution that an individual can give to the fight against the pandemic. Citizens are under a constant communication flow pressuring for compliance with the lockdown rules, where pure mediatic products are mixed with statements from political actors, all conveying their own reading of the content of the "positive law".

The reading that dominates in the media is, however, sometimes partly different from the actual content of the relevant legal instruments, at least according to their text as constructed according to ordinary rules of interpretation. Discrepancies are often due also to unclear communication by public institutions (and by the prime minister himself), and the overall confusion is increased by a variety of acts by local authorities (at region and municipality level) that try to include even harsher restrictions, sometimes disregarding the statutory allocation of rule-making power between different levels of government.

This normative and communicative chaos created a situation where citizens have objective difficulties in understanding the actual scope of their residual freedom of movement[2], but at the same time also one where the different police forces involved in the enforcement of the lockdown enjoy an extreme degree of discretion on whether to authorize or not individuals to move in the public space. A discretion that was often used to serve priorities selected by the media, mostly by providing "visual evidence" of situations that at first sight appeared to violate the lockdown.

The enforcement patterns and the underlying legislative style that in Italy dominate the Covid-19 emergency are, however, not completely new in the recent development of the legal system, since they are fully in line with the policies designed, for different purposes of social control, by the self-labeled "populist" governments that ruled Italy following the last political elections. Within these policies frequently the formal validity of the legal provisions, and the possibility of the sanctions to stand if challenged in court, were not the object of a special attention

[2] This point has been raised by PAPA, Michele, *Decreti e norme vaghe tradotti sui media: la comunicazione che inquina il diritto, Il Dubbio,* April 21, 2020.

by the policymakers, that were more interested in obtaining deterrence through the perception by individuals of a risk – actual or not – of being sanctioned.

While these legal strategies were previously used only against marginal groups, for instance beggars that administrations wanted to eject from the city centers, under the Covid-19 emergency they appear to be the default solution, apparently yet without reaction by the public, that feels them as an unavoidable tool to pursue the protection of public health.

The hardline policy chosen by the Conte government, that not only curtails economic activity but also strongly limits basic individual freedoms is not only perceived (out of a limited circle of liberal legal scholars and journalists) by most of the Italian population as a wise choice, at least for the time being. It became also a matter of national pride, with all the major newspapers unanimously labelling as "irresponsible" foreign governments that allegedly did not follow the Italian lockdown model, considered as the only effective solution. In this respect as well, nothing must be easily taken at face value. Even a cursory analysis of the coverage by the Italian media of the legal solutions introduced elsewhere is sufficient to highlight that, while legal nationalism can maybe be of some comfort for the public in an extreme situation, before proudly affirming that the restrictions of rights and freedoms imposed on Italian society are crucial in fighting the pandemic it will be wise to humbly look around a little bit more.

1. From law "in the books" to "law in the press": the "physical activity" issue under the Covid lockdown rules

The legal tools introduced in the context of the Covid pandemic stretched to their outer limits the rule-making powers that can be used by the executive branch according to the Italian constitution. The 1948 Constitution indeed does not foresee a "state of emergency", but only provisions applicable in the state of war. The government therefore issued in a first stage a line of decrees based on the declaration of statutory state of emergency that was issued at the end of January[3]. In different steps

[3] Delibera del consiglio dei ministri 31 gennaio 2020, *Dichiarazione dello stato di emergenza in conseguenza del rischio sanitario connesso all'insorgenza di patologie derivanti da agenti virali trasmissibili.*

undertaken in swift succession, the government introduced thereafter a severe "lockdown" of the whole country, that eventually brought inter alia to the prohibition of movement between different municipalities, of any travel abroad, the interruption of all "productive, industrial and commercial" activities (when these cannot performed remotely), out of those specifically foreseen in a list of essential ones, and the imposition of leaving one's home only for certain purposes enumerated by the government. The lockdown regime in its current form is in force until May 4, and will be most probably be renewed, probably in a slightly less strict version.

Let's focus on the section of this legal regime that is most intrusive on individual freedoms. Eventually the government issued on March 25 a "decree law"[4], to provide a more proper legislative basis to the measures adopted. The decree states inter alia that the government is empowered to introduce "limitations of the circulation of persons, even establishing limitations to the possibility to move from one's residence, domicile or abode out of individual movements limited in time and space or motivated by work needs, situations of necessity or urgency, health or other specific reasons"[5].

This legislative basis serves as foundation of the more detailed final rule introduced in a further government decree, reconnecting with previous ones, according to which individuals are allowed to move from their homes only for "proven work reasons or situations of necessity or work reasons, and that – in any case – it is forbidden to move in a municipality different from the one where they are currently located, with private or public means of transport, out of proven work reasons, absolute urgency, or health reasons", while a further sub-section establishes that any "outdoor game or recreational activity is forbidden; it is permitted to individually practice physical activity in the proximity of one's home,

[4] In the Italian system "decree laws" (*decreti legge*) are legislative acts that according to the constitution can be enacted by the government in "extraordinary cases of necessity and urgency" and that, in order to keep their validity, must be converted by the parliament within sixty days (see art. 77 Constitution).

[5] *Decreto-legge 25 marzo 2020, n. 19, Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19, art. 2 a).*

assuming, however, the respect of the distance of one meter from any other person"[6].

The decree law of March 25 specifies also that the municipalities cannot adopt transitional decrees "in conflict with the state measures", that would be otherwise devoid of any validity[7]. The same applies to those of the regions, with some differences.

These words, passed through a long chain of decrees, do not have a significant political history behind them, but certainly a majestic mediatic one. The sub-section addressed to the municipalities represents indeed a reaction against the flood of ordinances issued by a number of mayors across Italy that aimed at applying locally an even stricter "stay at home" policy. Usually these local ordinances were widely advertised in national newspapers, even if their application was a matter of relatively small towns. While their legal validity, even before the law decree of March 25, could have been objected, such acts were part of broader visibility campaigns that sometimes brought to the attention of an international public local administrators of minor Italian centers[8].

It would be naïve to think that the "fault line" between municipalities and the State concerned mighty health risk management issues, like those that all over Europe were discussed on a daily basis. This was not

[6] *Decreto del presidente del consiglio dei ministri 10 aprile 2020 , Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, recante misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale*, artt. 1 a) and 1 f). Our translation, in the original version 1 a) sounds *"sono consentiti solo gli spostamenti motivati da comprovate esigenze lavorative o situazioni di necessità ovvero per motivi di salute e, in ogni caso, è fatto di- vieto a tutte le persone fisiche di trasferirsi o spostarsi, con mezzi di trasporto pubblici o privati, in un comune diverso rispetto a quello in cui attualmente si trovano, salvo che per comprovate esigenze lavorative, di asso- luta urgenza ovvero per motivi di salute e resta anche vietato ogni spostamento verso abitazioni diverse da quella principale comprese le seconde case utilizzate per vacanza"*, while 1 f) sounds *"non è consentito svolgere attività ludica o ricre- ativa all'aperto; è consentito svolgere individualmente attività motoria in prossimità della propria abitazione, purché comunque nel rispetto della distanza di almeno un metro da ogni altra persona"*.

[7] See *Decreto-legge 25 marzo 2020, n. 19, Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19, art. 3.1* (regions), *3.2* (municipalities). In the original version art. 3.2 sounds *"I Sindaci non possono adottare, a pena di ineffica- cia, ordinanze contingibili e urgenti dirette a fronteggiare l'emergenza in contrasto con le misure statali, né ecce- dendo i limiti di oggetto cui al comma 1"*.

[8] See for instance GIUFFRIDA, Angela, *This is not a film': Italian mayors rage at virus lockdown dodgers, The Guardian, March 23, 2020.*

the case, while the most frequent "legal pluralism clashes" concerned "runners" or – in the further term used in this kind of acts – those who practice "jogging". A huge number of mayors, and at least one governor of region (*Campania*)[9] issued indeed ordinances or "clarifications" stating that even individual sport activity (usually identified primarily with running) was completely forbidden.

Any google search would give an impressing number of entries, providing ample evidence that banning runners was perceived as a priority by a substantial share of mayors. Once again, such local acts, particularly after the March 25 decree law, were definitely illegal, and could have been conceived at most as transitional emergency measures in case of a sudden increase in local risk levels, which is never mentioned. In at least one very recent case concerning the town of Pescara, the local *Prefetto* invited the mayor to withdraw one such ordinance that was considered as a clear violation of the duty of loyal cooperation[10], as well as a possible source of confusion among law enforcers due to its absence of adequate legal ground.

As mentioned in the note of the *Prefetto* of Pescara, if taken seriously and actually enforced, the ordinance of the mayor could have implied legal consequences of some magnitude. Any fine issued by the local police would have for instance possibly implied a liability of the administration with an obligation to refund and pay damages. These legal consequences were likely to be mostly theoretical, since the overall impression that one gets from the news is that actual enforcement against "runners" was not a priority of the mayors. The practical functions of the ordinances were to serve as fake legal basis to the local police to pressure runners to minimize their presence in public spaces, and to obtain the headlines on the local and national media. In other words, the hunt was far more important than the prey...

This approach was per se rational, if one thinks about the mayors in terms of what they are, i.e. political actors. Mayors did not have any serious indicator that runners implied any specific risk of contagion, but were anyhow under a massive and constant pressure coming from the

[9] *Giunta Regionale della Campania, chiarimento n.6 del 14 marzo 2020.*

[10] Ansa, April 15, 2020, *Coronavirus: prefetto Pescara, ordinanza sindaco inefficace*; VERCESI, Paolo, *Coronavirus, Pescara finisce sulla stampa cinese, il Messaggero (edizione Abruzzo)*, April 21, 2020.

media, that "targeted" runners with arguments maybe not so sound but very powerful in terms of creation of "moral panic". Among the hundreds one can find on line, one is especially interesting, since it comes from a quasi-official site, that of the Campania section of the Italian Association of Municipalities (*Associazione Nazionale Comuni d'Italia- ANCI*), which says "These behaviors [the fact of running] are legal but profoundly wrong. [...] . It is otherwise difficult to imagine that in the towns martyrized by wars, like Sarajevo or Aleppo, people run around under the bombs. With an invisible enemy, like this virus, one must apply even more caution"[11]. The text of the "clarification" openly stresses that the administration issued it after "TV programmes" revealed the frequent presence of persons making some sort of physical activity. The mayors reacted thus to a clear input of the media that raised the alarm against the alleged violation of the lockdown, while they were clearly aware that in most of Italy "runners" are, however, a minority of the voting population.

The endless number of ordinances and news reports conceal the simplicity of the situation from the perspective of a traditional lawyer. Since the early versions of the lockdown ordinances, their text constantly allowed to go out of home for "physical activity" (*attività motoria*), and a circular letter of the Minister of Interior specified that the concept of physical activity does not imply only "sporting activity ("jogging")[12], but also simply walking, something that appears as reasonable considering the benefit of physical exercise also for persons who are less fit. But the official text was captured in a mediatic game that made it rapidly irrelevant, absorbed by the rhetoric of the "Stay at home" campaign. As recognized by the Minister of Health, the inclusion in the lockdown regulation of the possibility of "physical activity" was due to scientific advice, that considered it necessary in order to minimize the negative health consequences of a longer lockdown, clearly balancing costs and benefits. The Minister of Health, under a fire of criticisms, eventually accepted to mediate introducing the unclear limit of the "proximity"

[11] ANCI Campania, March 14, 2020, *Chiarimento della Regione mette fine al paradosso: non si può fare jogging*.

[12] *Circolare Ministero dell'Interno*, March 31, 2020, N. 15350/117(2) Uff.III-Prot.Civ.

from the home of the person, which generated a range of interpretations varying between 150 and 1000 meters[13].

In an ordinary situation, a solution like the one just mentioned would ordinarily introduce a wide discretion in the hands of law enforcers for establishing what means "proximity to home", but with no harm to the possibility to perform moderate outdoor activity not linked to purchasing of food, tobacco (exempted by the lockdown), pharmaceutical items. But under a media coverage constantly and obsessively reporting the local prohibitions to physical activity, the widely shared public perception, the "popular legal culture", was that running and the like was a "legally grey area", rather than an activity clearly authorized *expressis verbis*, and well rooted in the fundamental freedoms temporarily suspended in the lockdown. Many persons therefore abstained from any kind of outdoor exercise.

The Covid pandemic thus gave us the opportunity of a mass experiment of legal sociology after which we learned that what matters is not only the difference between "law in the books" and "law in action", but how the "law in the books" becomes first "law in the press", before – later on – moving to action.

2. The "last meter of the rule of law": populist legal strategies ante and post Covid

The paradoxical battles around the possibility to prohibit physical exercise outdoor, notwithstanding the standard legal sources clearly authorized it, was in our opinion a symbolic battle that some mayors appreciated as an opportunity to get political points with an easy fight, not involving complex decisions like e.g. those concerning economic activity. Moreover, from the fact that the harassment against runners had weak legal ground derived that it seems seldom used to issue actual fines. The stake in terms of social control was, after all, limited and concerned a limited number of persons moving on foot. The life-changing novelty for average Italians was instead the necessity, to simply get out of home, of providing a justification based on vague concepts as "necessity" and

[13] SANGIA, A. *La difficile sorte dell'attività motoria nell'ordinanza del ministro della salute al tempo del coronavirus, Il Sole –24 Ore, March 27, 2020.*

so on, particularly if crossing a border between two municipalities, even more a regional border.

In order to ensure the effectiveness of such restrictions, the first versions of the decrees provided for the application of a criminal sanction, establishing that the violation of the basic lockdown rules violated article 650 of the criminal code, punishing the breach of orders of the public authority. After a while, it became clear that this would have implied a load of several tens of thousands of files in the prosecution offices all over Italy, with a likely collapse of the system and the impossibility to process all of them. In the last decrees, the criminal sanction was thus left only for especially serious violations, like breach of the quarantine by those who are found Covid-19 positive, while ordinary lockdown violations bring only an administrative fine. It is interesting to note, however, that this reduction of the scope of application of criminal law met (notwithstanding the practical problems above mentioned) the opposition of some heads of prosecution offices, one of whom even proposed the introduction of a new ad hoc crime, that would have allowed law enforcement officers *to arrest on the spot anyone* found in violation of all *ordinary lockdown* rules[14].

The perception that criminal law, or at least severe administrative sanctions supported by far-reaching "muscular" police monitoring, is the ultimate solution when behavior modifications are needed is since several years dominant within Italian society, across the whole political spectrum but with a special penchant for the populist political groups, like the Lega Nord and the Five Stars movement. It is therefore not strange that the first lockdown instruments relied on the use of criminal law.

On a closer look, it is – however – important to note that the populist trend does not have the preference for criminal law as sole feature, but it also has a further pillar represented by the frequent use of rules that can give to law enforcers a wide discretion whether to start or not the process (prosecution, but also application of administrative fines) bringing to punishment. A punishment that – even if of an administrative nature – can sometimes bring to serious consequences due to the amount of the fine or to indirect legal effects.

[14] The proposal was of Luigi Patronaggio, public prosecutor in Agrigento, *la Repubblica*, March 27, 2020

This strategy was developed in multiple occasions in pre-Covid times, in the context of situations where there was an interest in "cleaning" towns from beggars and other persons living as marginals. Examples could be the reintroduction of the crime of "intrusive begging" and the introduction of harsher prison sentences for persons occupying pieces of land or buildings, as well as the introduction within local police regulations of provisions sanctioning "nuisance" in the streets[15].

All the tools just mentioned have in common one point: in most cases the individual law enforcement officer will not suffer any consequence if he or she will not take action, by notifying the prosecutor or issuing the ticket. This will be simply his or her choice. He will be in a way the master of the "last meter of the rule of law", of those "face to face" situations where the decision of the officer will make the difference between on the one hand starting a criminal case or the application of a heavy administrative fine, and on the other hand nothing. A decision that is especially important in the Italian system, since the constitution contains (art. 112) a principle of compulsory prosecution, according to which the prosecutor cannot withdraw prosecution on grounds of expediency. In one of the "security decrees" of the former populist government, it was also decided to take away for a number of typical "street crimes" the previously existing possibility to acquit when the fact was of very tiny relevance.

This strategy, together with the intrinsic vagueness of some categories ("nuisance", "necessity", etc.) brings frequently to a situation where the meeting between law enforcement officers and citizens becomes a negotiation, where the power of the officer is counterbalanced by the capacity of the citizen to show himself as a "mainstream" person, and even better as one who has a significant cultural, social and relational capital.

At the same time, this flexibility in choosing whether to set the machine into motion or not, brings to a system where enforcement can be easily steered by political actors, putting police pressure on specific social groups. At the same time, particularly at local level, enforcement can be targeted and directed in line with the media. Very frequent in my experience are e.g. situations where a local newspaper with continuous

[15] PAILLI, Giacomo, *Applicazione selettiva del diritto e strategie di tenuta a distanza dello straniero*, forthcoming in *Diritto, Immigrazione e Cittadinanza, 2020.*

presentation of pictures of a certain group of beggars in a city center gives the impression of an "invasion", thus forcing administrators to intervene.

The Covid-19 emergency extended the possibility to use such strategies beyond even the wildest dream of a populist policy maker. It will be interesting to see whether the end of the emergency will bring back the point of balance of the law enforcement process a little more distant from the "last meter of the rule of law".

3. Blaming the "others": the "comparative law" of populism

Choices like the lockdown decided by the government of Giuseppe Conte are unavoidably accompanied by mediatic efforts to create a cohesion in the whole population and a trust for the policy makers. These can be supported by different lines of arguments, and a typical one is the presentation of other similar contexts in which the approach worked. Since this was not possible in the Italian case, due to our unfortunate priority in receiving the pandemic, the debate has taken a very nationalistic approach, with very little serious information on other countries and a tendency to blame those who do not follow the "Italian style".

A preferred target of Italian newspapers in the last month has been Sweden, where the government decided not adopt any lockdown, simply issuing detailed non-binding recommendations, until now introducing only a ban on public gatherings of more than 50 persons, and providing by law the government with rule making powers (not yet used) to introduce binding restrictions without the previous vote of the parliament[16].

The two Italian leading newspapers, *la Repubblica* and *Corriere della Sera* published a series of articles where the Swedish strategy was presented as a cynical exercise disregarding lives. Articles objectively distorted the meaning of a speech of the Prime Minister, always giving the impression of a forthcoming change of strategy that until now has instead never been on the table. The weaknesses of the way in which the Swedish Covid-19 strategy was reported were such that the Swedish ambassador in Rome published an open letter of protest[17].

[16] *Lag om ändring i smittskyddslagen (2004:168)* of April 17, 2020.

[17] *La Svezia contro I giornali italiani, il Post,* April 16, 2020

An interesting aspect of the Italian criticisms is the frequent reference to an alleged link between the liberal policy adopted by Sweden and its higher number of victims compared to the neighbors, particularly Denmark and Norway, where mortality due to Covid is apparently still low. This is constantly presented as an evidence that a lockdown "Italian style" is an indispensable tool to control the pandemic. Such media debates neglect, however, one relevant point, i.e. that the restrictions introduced in Denmark and Norway have little in common with those introduced in Italy, and what is less in common are indeed the restrictions on individual freedom of movement. Denmark e.g. simply forbids public gatherings outdoor of more than ten persons. If the Nordic countries can suggest something, is thus maybe that very strict limitations on the individual freedom of movement are not per se a "silver bullet" against Covid-19.

Conclusions

The Covid-19 emergency is submitting the Italian legal system to a "stress test", but not in the sense of an immediate risk of democratic backsliding, since there is no sign of anyone willing to exploit the crisis to set aside for good constitutional guarantees. The test is rather in the sense of giving further momentum to a trend reinforced under the previous populist government and not interrupted by the present one, represented by the expansion of a law enforcement sector with broad hidden discretionary powers and accustomed to establish its priorities under the pressure of the media and of political actors.

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