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## CONCORSO PER L'ASSEGNAZIONE DI

### BORSE DI STUDIO DI DOTTORATO DI RICERCA

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Tematica vincolata: Prevention and management of health emergencies

ALLEGRA DOMINICI

TITOLO DEL PROGETTO: REGULATORY MANAGEMENT OF HEALTH EMERGENCIES: BETWEEN TERRITORIAL LEVELS (SUPRANATIONAL AND NATIONAL) AND LEVELS OF COMPETENCE

#### RICERCA PROPOSTA

##### 1. *State of the art*

The emergency that came about as the result of the Covid-19 pandemic affected not only the purely medical management of hospitals and Covid patients, but also brought to light several latent critical issues, such as the division of competencies between State and Regions following the 2001 reform, and the Government's management of legislative power through the (ab)use of emergency decrees even in non-emergency situations.

Emergency management begins with the state of national emergency declaration, which occurred through Decree-Law No. 26/2020. Through this declaration, the power of ordinance was attributed to the Head of the Civil Protection Department, who therefore becomes competent to issue ordinances extra ordinem in derogation of any existing provision, but in compliance with the general principles of the legal system.

The first measures were taken by the Head of the Civil Defense Department in accordance with the code, however, as soon as the level of criticality of the situation became clear, the government used a regulatory-administrative system mirroring that prepared by the Civil Defense Code.

Decree-Law No. 6 intervenes alongside the regulations provided for in the Civil Protection Code, giving rise to a system of parallel sources, based on the biunivocal relationship between decrees-law that delimited the perimeter within which, different instruments – such as decrees of Prime Minister – were able to establish restrictive measures following appreciations about the epidemiological situation.

The President of the Council of Ministers has been identified as the person responsible for managing the health emergency; in fact, he has the power to adopt urgent measures, to be issued “at the proposal of the Minister of Health, after consulting the Minister of Interior, the Minister of Defense, the Minister of Economy and Finance and the other ministers with jurisdiction over the matter, as well as the Presidents of competent Regions, in the case where they concern only a single Region or a specific Region, or the President of the Conference of Regional Presidents, in the case where they concern the national territory.

This initial legislation brought out critical issues in two main aspects: the constitutional legitimacy of this decree, which provides a blank delegation to the Prime Minister, designated as the holder of the power to adopt further measures to counter the pandemic, and that means, further measures affecting fundamental rights and freedoms provided by the Constitution – such as the freedom of movement, the right to education, free private economic initiative, the right to work – through a legislative source such as the DPCMs, without providing for the participation of the legislative body. Further critical aspect concerns compliance with the principle of loyal cooperation, which, as elaborated by constitutional jurisprudence imposes a collaborative governance model between the central Government and local authorities, crisis management has been entirely centralized, leaving only the possibility for the Presidents of Regions to issue contingent and urgent ordinances to introduce measures in addition to those established at the central level, to respond to situations related to specific territories.

Attempts were made to correct these discrepancies through the issuance of a new decree No. 19/2020, which confirms the power to adopt DPCMs concentrated in the hands of the Prime Minister, after hearing the Minister of Health and any relevant ministers, and indicates that the impetus for adopting DPCMs can also come from the Presidents of the Regions and the President of the Conference of Regions and Autonomous Provinces.

The new discipline introduced provides forms of parliamentary involvement such as the obligation to report to the Parliament on the measures adopted, which, following the instances of the Parliament, turned into the government's

commitment to report to the Parliament itself before adopting a new DPCM the measures that were to be introduced. Although some aspects have been changed, the critical issues emerging from the first decree-law: the marginalization of the Parliament in favor of the Government, and respect for the principle of loyal cooperation, although mitigate continue to persist.

The management strategy changed with the inauguration of the Draghi government, with which the instrument of the decree-law was used more, which on the one hand typified the contents of the previous DPCMs and, on the other hand, returned the management of the emergency to the hands of Parliament.

## 2. *Research objectives*

The research aims to identify ways to achieve a proper balance between fundamental rights under the Constitution in emergency situations requiring prompt and rapid responses.

The freedom provided by the Constitution can be limited in the face of reasons that requires a balancing of different rights. In this case in the balancing act was the right to health, understood both as an individual right and as a community interest, and the whole range of freedom provided for in the Constitution, which, however, had to be necessarily restricted to enable and slow down the course of a highly contagious and potentially lethal disease that was bringing the entire national health care system to its knees.

The Constitutional Italian Court has admitted the possibility of negatively affecting constitutional freedoms and rights to cope with emergencies, establishing a series of prerogatives that the measures limiting fundamental rights must possess to be said to be legitimate: it is required to be effective for a limited period, it must be proportionate to the dictates of necessity and urgency, it must be adequately motivated, it must be subject to publication if it has a general scope, and finally, it is required that such a measure be respectful of the general principles of the legal system (Const. C. No. 8 of 1956).

The most frequently used instrument during the emergency period was the Prime Ministerial Decree; which on several occasions provided for more or less extensive limitations of constitutional rights.

Every guarantee defined as fundamental by the Constitutional Charter itself is susceptible to a limitation to deal with circumstances that require a balancing of rights, however, the limitation is covered by the guarantee of the reservation of law. Indeed, the respect for the reservation of law requires that such a limitation may result exclusively from a measure issued by the Parliament, it being the only body elected directly by the citizens that provides for the establishment of dialogue even with the minority forces. Hence, this would exclude the legitimacy of limitations intervened through instruments other than the law.

However, restrictions introduced by decree-laws are also assumed to be legitimate, since they are acts having the force of the law and are therefore equated with ordinary law since the intervention of the Chambers of the Parliament is still guaranteed. However, the possibility that a restriction on fundamental rights can intervene by a legislative source such as the DPCM acts adopted by the Prime Minister alone, on the proposal of the Minister of Health and after consulting the Minister of Interior and Presidents of Regions, without contemplating any intervention by either the President of the Republic or Parliament, remains excluded.

The project, therefore, aims to analyze the compatibility of this regulatory arrangement in light of the respect for the statutory reservation provided for the protection of fundamental rights.

Although the use of DPCMs has allowed for prompt and effective management to respond to the urgencies arising from the development of the pandemic situation, all this cannot be said to be in accordance with a constitutional dictate that provides serious guarantees to regulate the limitation of certain fundamental rights.

The Constitutional Court intervened on the legal nature and constitutional legitimacy of DPCMs, as the instruments most commonly used to introduce measures restricting fundamental freedoms, in Judgment No. 198 of 2021. The Justices of the Court divided the acts used in emergency management into two categories: necessitated ordinances, which include both civil protection orders and contingent and urgent ones, and necessitated administrative acts, which include the DPCMs, as acts with the limited task of adapting to the pandemic what was established by the primary source. Following Judgment No. 37 of 2020, by which the management of the pandemic was returned to the exclusive jurisdiction of the state, with Judgment No. 198 of 2021, the Constitutional Court reaffirmed that it is up to the state to identify the most appropriate regulatory measures to deal with the health crisis.

The purpose of the research is therefore to provide a comprehensive analysis of the critical issues that have emerged in the management of the pandemic regarding the protection and the respect of the citizens' fundamental rights: the reservation of law, the balancing of rights, and the principle of loyal cooperation.

Attempting to identify possible solutions aimed at ensuring the respect and protection of constitutional rights and freedoms, balancing this need with the celerity necessary to respond to crises such as the one brought by Covid-19.

## 3. *Research design*

The project's development is proposed under a threefold analysis. First, the analysis will focus, through a systematic approach, on the developments in domestic legislation - and the specular development of both ordinary and administrative jurisprudence - aimed at responding to the conflicting needs brought by the development of the pandemic, as well as of the critical aspects of the measures taken to this end, in particular: the protection of fundamental rights and the distribution of competencies between levels of government. At the expense of what the principle of loyal cooperation requires, the management of the pandemic seems to have shown a lack of dialogue between different levels of government.

The lack of clarity about the space of intervention left to the regions in the management of the pandemic, led in the first phase, to a large proliferation of regional ordinances, often opposite to the measures adopted at the national level.

Emblematic in this regard is the event in the Marche Region immediately following the issuance of the decree. The President of the Region Luca Ceriscioli with Order No. 1 of 2020, considering the State measures adopted at the national level to be insufficient, ordered measures to counter the spread of Covid, such as blocking all school activities in all of his territory. The Ordinance in question was challenged before the Marche Regional Administrative Court by the Presidency of the Council of Ministers, which requested its suspension and annulment because it was adopted in the absence of the legitimizing prerequisite referred to in Article 1 of the decree, namely the presence of a positive person in the area of reference. The Marche Regional Administrative Court, in Decree No. 56 of 2020, granted the request for suspension, holding that given the regional epidemiological situation in the region, the “additional measures” granted to the Presidents of the Regions by Article 2 of the Decree No. 6 could not be as invasive as those justified by the presence of outbreaks of infection.

To obviate the phenomenon of abuse of the power to issue regional ordinances, Decree No. 19 attempts to curb this possibility by making it subject to limits, providing for greater forms of cooperation with the presidents of the regions in forecasting the measures.

Although during this phase there was greater caution in adopting regional ordinances that conflicted with national measures, a case point, however, is the issue that arose following the enactment of Law No. 11 of 2020 by Valle d’Aosta, which provided for lighter measures than those of the State to enable the progressive recovery of the economy. This law is being challenged by the State before the Constitutional Court, which by Order No. 4 of 2020, for the first time since its enactment, uses the measure of the so-called precautionary suspension, suspending the effectiveness of the challenged law until the ruling. The conflict of attributions was settled with Judgment No. 37 of 2021, in which the Judges of the Court, in upholding the State’s appeal, brought the management of the pandemic back to the area of exclusive competence of international prophylaxis, thus excluding any possible margin of collaboration between the central Government and local authorities; in fact, legitimizing the full centralization of the management of the crisis at the expense of the principle of loyal cooperation.

Second, the project aims to adopt a comparative methodology to analyze critical issues emerging from the regulatory management of the health emergency.

The comparative approach aims to analyze legal solutions adopted by different countries to respond to a common issue, such as the 2020 pandemic emergency. The project also aims to analyze pandemic management at the regulatory level following a comparative study with the methodology followed in France, by analyzing the convergent aspects and comparing them with diverging ones. First and foremost, the system of preventive constitutionality control, that ensures conformity with the constitution of law destined to come into force.

The French regulatory system, like the Italian system, provides for the possibility that the Government can regulate certain situations normatively, removing them from the legislation of the Parliament, following a request for authorization from the Government to adopt by ordinance and for a limited time, measures that normally fall within the scope of the law. Both the authorization and the content of ordinances are subject to judicial review by the Conseil Constitutionnel.

What is proposed to be analyzed is both the French pandemic management, comparing common aspects, such as the central management of the emergency and the marginalization of the Parliament, with different aspects, such as the provision of a system of preventive control of constitutionality and how, such a system can ensure respect for fundamental rights, necessarily constrained in the emergency period. It proposes to attempt to identify ways in which to respond to the need for celerity imposed by emergency situations, while maintaining respect for the fundamental principles that the Constitution imposes, such as the principle of reservation of law. The comparative analysis with the French legal system also aims to deal with the comparison between the relations established between the central government and local authorities, taking as its start point the Dec. 4, 2020 Cons. Cost. Ruling Pierre-Chanel vs. others, regarding the distribution of competencies between the State and New Caledonia – which is competent in health matters in contrast to other regions of France – in which it is ruled that temporary and exceptional measures, limited to what is necessary to respond to the health disaster and its consequences, are brought under the guarantees of public freedoms, hence removed from New Caledonia’s competence.

The Italian constitutional judges, in pronouncement No. 37 of 2021, opted for the same French solution: legitimizing the centralization of emergency management, to the detriment of a legal system based on multiple levels of government articulated throughout the territory.

Lastly, the research cannot disregard an empirical study approach, analyzing the critical issues that have emerged as a result of the regulatory approach adopted and followed by Italian institutions, studying how these critical issues have been encountered in the concrete management of the pandemic crisis.

From the point of view of the protection of fundamental rights, the GreenPass affair is particularly relevant, that instrument appears to be at odds with the constitutional provision in at least two respects: the principle of non-discrimination and data privacy protection.

On March 17, 2021, the European Commission presented a proposal for a regulation that aimed at introducing a digital green certificate for the secure free movement of citizens in the EU, as made explicit in the proposal it should not be a prerequisite for free movement or for exercising other fundamental rights. The green certificate is intended to certify vaccination, a negative result of a rapid antigenic swab, or recovery from the illness; to ensure the protection of data, the certificates include a limited set of information that will not be stored in member countries, but only in the one where the issuance took place.

In Italy, with d.l. 105/2021, the Green Pass measure was introduced with some differences concerning the original EU regulations: while in the European system the pass is informative, in the Italian system it becomes an indispensable prerequisite for the exercise of certain fundamental freedoms guaranteed by the Constitution, negatively affecting the principle of non-discrimination; moreover, since it is necessary to display this pass, as far as respect for the confidentiality of personal data is concerned, the digital pass provides a substantial flow of health data that exposes individuals to the risk of illicit use.

In this regard, the Guarantor for the Protection of Personal Data has had the occasion to intervene, drawing the attention

of public operators, considering that the processing of data relating to the vaccination status of citizens for the use of certain services must necessarily be the subject of national law, to ensure a fair balance between the interests that the Legislature intends to pursue and the individual interest in privacy.

This solution has been followed, where the parliamentary law has been chosen to adopt a measure that impacts fundamental rights and freedoms, on a par with that in Italy.

#### 4. *Expected results*

The need to cope with an unprecedented epidemic seems to have led to the centralization of the government and the marginalization of the Parliament and territorial autonomies; the measures to contain the disease, on the other hand, seem to have had an impact on the constitutional provisions, both with regard to the limitations to the fundamental rights enshrined in it, and with regard to the distribution of competencies between the different levels of government and, with that, the respect of the principle of loyal cooperation.

The research, therefore, aims to analyze in detail the legislation adopted in the management of the health emergency, bringing out its main criticalities, following a systematic, comparative study, analyzing the French regulatory management, and, ultimately, analyzing the incidences that this legislation has had in empirical reality.

Through the study of the criticalities found, it is then proposed to identify a possible model of emergency management aimed at balancing the instances of celerity of the regulatory response to emergency situations with the safeguards prepared by the Constitution to protect fundamental rights and freedoms; which is also suitable to guarantee the effective respect of the principle of loyal collaboration, thus ensuring cooperation between the different levels of government in a way that conforms to the model of collaborative regionalism resulting from the constitutional reform of 2001.

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