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The State health emergency under Covid-19

The health emergency¹ that has been affecting our planet for several months has already 6,663,304 confirmed cases of COVID-19, including 392,802 deaths, reported to World Health Organization². These results were unavoidable even though the measures and actions taken by different countries, aimed to lower the infection flow and also to prevent any possible overburdening of the hospital centers, based on their capacities. The need to guarantee the monitoring of the flows of circulation and the spread of contagion at various levels, brought drastic

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¹ Among the first commentators of recent government measures, see V. BALDINI, Health emergency and state of prevention, in fundamental rights. it, n. 1/2020; C. BUZZACCHI, Coronavirus and territories: the differentiated regionalism coincides with the yellow zone, in the constitution.info, 2 March 2020; G. AZZARITI, The mono-constitutional measures provided that they are for a fixed term, in the Republic, 8 March 2020.

² The data is of 06.06.2020,

https://covid19.who.int/?gclid=Cj0KCCQjw_ez2BRCyARIsAJfg_ktRrOOQ37glNTYY4NsW5TxkmuBrGuI0i5q56b8Nf2IslJZiF1DtE18aAiAIEALw_wcB

restrictions on people and the economy of entire territories, would seem *prima facie* attributable to the state of undisputed emergency.

It is important to mention that the reaction was immediate, as it was responding to a real and serious risk. States found themselves unprepared due to the lack of information on COVID-19 and were forced to keep the issue of the measures taken always on focus, to change them according to the degree of risk³.

It has therefore been asked whether the choice made by certain Governments ensures the respectful observance of the provisions dictated by Constitutions, by way as an example the Italian one, or if the conflict, which occurred in an exceptional emergency context, manifests the first symptoms of a latent return to various autonomous and independent power centers also regarding the limitation of personal freedoms on the *sensu side*⁴ guaranteed by the fundamental Card.

It cannot be denied that in Europe, Italy constituted the leading country in the fight against pandemic COVID 19 and that the restrictive measures adopted by the country were the reference point for containment policies, followed by numerous European and overseas countries.

Although the interest of the various doctrinal currents of thought has focused more on the legal instruments through which the various Governments have come to the choice of significantly limiting the

³ V.PELLIGRA, *Covid, the crisis that we could have imagined and the importance of risk*, on www.ilsole24ore.com, 31 May 2020

⁴ F.M.STORELLI, *The gradual limitation of fundamental rights and freedoms in the coronavirus season*, , on www.iusinitinere.it. 28 March 2020.

aforementioned fundamental freedoms⁵, the focus of this paper is the delicate relationship between personal freedoms and the need to protect primarily the health of an entire state community.

The declaration of the state of emergency by the World Health Organization has prompted governments to take clear and unequivocal positions aimed at giving significant importance to public health, to the detriment of the rights attributed to the individual, but it has left to the States the freedom to establish *quid and quomodo*⁶ of containment of the virus.

States are faced with two main dilemmas related to the public interest: *in primis*, to provide immediate and careful health care for infected people and maximum restriction of their liberty, *in secundis* to restrict the freedom and other rights associated with it, to protect the population, reducing as much as possible the number of infected.

Between them, the states chose to apply both measures, in order to have a *modus Vivendi* between the real situation of COVID-19 and the consequences that could bring in the future. In any case, declaring a state of emergency, or emergency, would allow states to act with these measures, considering them legal. But has that been the response of states to COVID-19, constitutional and in line with the European Convention on Human Rights?

⁵ L.CUOCOLO, *Constitutional rights in the face of the Covid-19 emergency: a comparative perspective*, Covid-19 Emergency Observatory, , on www.federalismi.it, 05 May 2020.

⁶ M.OLIVETTI, *So the rules against the virus can recall the "dictator"*, on www.avvenire.it, 11 March 2020.

In Albania like in other countries, the freedom rights that were limited are divided in: the freedoms and rights related to work; to movement; to health; to personal and private life; to education.

In terms of international law⁷, the pandemic shows how important a global government would be. It would seem that, from a still limping idea of global constitutionalism⁸, there is the intention of a political and cultural initiative for a new international order⁹.

In terms of supranational law¹⁰, all the mediocrities of a European integration process not yet concluded emerge without a shadow of a doubt. Furthermore, the economic-financial system¹¹, with a single currency and multiple sovereign debts, is more evident than ever, in its maximum expression, as the virus of inequalities within the Union¹², where terms such as inclusive citizenship¹³ are increasingly moving away

⁷ C.CARUSO, G.LATTANZI, G.LUCCIOLI and M.LUCIANI, *The pandemic also attacks the law? Interview with by Franco De Stefano* on www.giustiziainsime.it, 2 April 2020.

⁸ F.SPERANZA, interview with L.FERRAJOLI, *A stronger global Constitution of the markets* on www.osservatoreromano.va 17 April 2020.

⁹ A.MINUTO RIZZO, *A hypothetical international order after Covid-19* on www.affariinternazionali.it, 7 April 2020.

¹⁰ Ibidem C.CARUSO, G.LATTANZI, G.LUCCIOLI and M.LUCIANI, *The pandemic also attacks the law? Interview with by Franco De Stefano* on www.giustiziainsime.it, 2 April 2020.

¹¹ Annex 1 - Fiscal sovereignty of individual Member States within the framework of European federal integration: elimination of "Tax Havens" in the Union and transition to a European federal tax system, Accademia dei Lincei, Covid-19 Commission document on www.lincci.it, 9 May 2020.

¹² A.STOCCHIERO, *Inequalities in the time of the coronavirus*, on www.focsiv.it, 30 March 2020.

¹³ E.SANTORO, *From inclusive citizenship to excluding citizenship: the role of prison in the management of migration*, on www.dirittoquestionipubbliche.org, Dossier n.6/2006.

from pro-European dream. In terms of domestic law, in Italy the fundamental issues, concern rights and the structure of powers¹⁴.

The Constitution of the Republic of Albania provides in Article 17¹⁵ that: Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it. This provision requires the fulfillment of certain conditions to realize the restriction of fundamental rights and freedoms, where the most important of them is related to the fact that the restriction should be done only by law. To justify from a constitutional point of view, touching on the fundamental rights and freedoms of the individual, it is necessary the intervention of the state, depending on the nature of the law, the character of the public interest to be protected, the concrete circumstances that dictate the intervention to a minimum and as less harmful as possible from the point of view of human rights¹⁶.

It is interesting to note that in this case, the formula used was not that of a law passed in the assembly, but initially the state of pandemic in Albania, was declared by order of the Ministry of Health and Social

¹⁴ F.GATTA, *COVID-19: the framework of the emergency system*, on www.iusinitinere.it, 27 March 2020.

¹⁵ Constitution of the Republic of Albania, Article 17 1. Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it. 2. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

¹⁶ Decision 39 dated 16.10.2007 of the Constitutional Court of the Republic of Albania.

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Inclusion¹⁷. Through this act it was declared the state of pandemic in Albania due to COVID-19. This act was enough to start closing the education institutions in Albania, to take measures regarding the health institutions dedicated to infected patient. Other acts followed this Order and it was finalized with the Decision of the Council of Ministers, nr. 243 dated 24.03.2020 “On the declaration of the state of natural disaster”¹⁸.

The European governments have adopted measures to combat the virus, activating systems which derogate from the ordinary rules of action and intervention, given the extraordinary nature of the emergency moment faced.

This event has demonstrated the incompleteness¹⁹ of the European constitutional path, unable to face the emergency in a uniform way, providing the Member States with common lines of action, although considering the territorial, political and sociological differences present in the European Union.

¹⁷ Order nr. 15 dated 10.03.2020 of Minister of Health and Social Inclusion.

¹⁸ The normative act it is based on article 101 of the Constitution of Albania, provided that the Council of Ministers, in case of necessity and emergency, may take temporary measures through normative acts, having the force of law. These acts must be immediately submitted to the Assembly which is convened within 5 days if it is not in session and it is does not approve them within 45 days these acts lose force retroactively.

¹⁹ G.MICHELINI, *EU and pandemic, health shock and integration*, on www.questionegiustizia.it, 20 March 2020.

It is interesting to highlight the rigidity of the containment measures adopted by China²⁰ which through a decision, defined by the WHO itself "unprecedented", has drastically reduced fundamental freedoms, aggravating the position of any violators with the threat of the death penalty, as well as with an unacceptable limitation of freedom of expression, certainly not shared by democratic states.

However, the parallel confrontation with Western democracies has raised concerns about the opportunity to review the extent of the powers of intervention recognized to the various democratic governments faced with the need to protect public health in a prevalent way.

The question that arises is whether the pandemic has also attacked²¹ the law.

No social or natural phenomenon is in itself indifferent to the law, which can always make it an object of regulation where this is logically possible. On the contrary, there is no social and natural phenomenon that is not potentially capable of affecting the law. In the case of a pandemic, the reflection deserves a comparison on a multilevel plane that sees

²⁰ February 18 2020 :Intentionally hiding or incorrectly reporting symptoms related to coronavirus is an offense that could result in the death penalty, according to a notice issued on February 15, 2020 by a Chinese court. Hiding a travel trip could also be a crime, the warning adds. Any resident responsible for further spreading the COVID-19 virus may be accused of the crime of endangering public safety by dangerous means, the Beijing Daily newspaper wrote. "In extreme cases," added the Beijing Daily, violators "could be sentenced to 10 years in prison, life imprisonment or death." The Chinese National Health Commission also introduced bans on February 15 against anyone with a cough, fever or any other disease of traveling by road, rail or air. On www.nessunotocchicaino.it.

²¹ Ibidem C.CARUSO, G.LATTANZI, G.LUCCIOLI and M.LUCIANI, The pandemic also attacks the law? Interview with by Franco De Stefano on www.giustiziainsime.it, 2 April 2020.

international law, supranational law and, finally, internal law as protagonist.

Some observations are needed.

First of all, it is evident that the relations of permanent dialogue between the Government and Parliament have failed, so much so that one wonders, precisely, if the government operators themselves, one hundred people, had certain immunity at Covid-19 respect to certain Members of Parliament. On this point, Legislative Decree 19 was certainly not helpful.

Secondly, the tension between the various levels of government cannot fail to be noticed. This refers to the relationship between the State and the Regions²². The d.l. n. 19 of 25 March made the picture even more cumbersome. At first, it was quite clear that according to the legislative decree n. 6, the regional ordinances could have intervened only pending the d.P.C.M. Subsequently, those entered into force were reserved, admitting a regional derogatory intervention of excessively undetermined scope.

Well, already in 2003 the Constitutional Court, with the sentence n.307²³, had already ruled how the most rigorous regional health protection

²² Ex multis F. FABRIZZI, *A de constitutionalized conflict or a politicized conflict? Reading the sent. 259/2019 on a conflict between entities that resembles a conflict between powers*, in the Forum of Constitutional Notebooks, 1, 2020, on www.forumcostituzionale.it, Dossier 1/2020.

²³ Q.CAMERLENGO, *The new constitutional structure of the legislative functions between intangible balances and substantial legality (Note to the Court of the Constitution 307/2003)*, on the Regions, Dossier n. 1/2004.

measures interfere with essential national interests and that these should be balanced²⁴ by the state legislature. *Historia non est magistra vitae*.

Finally, the question arose as to what the relationship between collective interests and individual rights was.

Considering, for example, the right to personal liberty, codified in article 5 of the European Convention on Human Rights (ECHR), the provision provides that no one can be imprisoned, subject to a number of exceptions, including regular detention of a person likely to spread a contagious disease²⁵. The European Court of Human Rights, an independent body charged with supervising the application of the ECHR, has had the opportunity to provide an authentic interpretation of the norm²⁵.

In making their assessment, the judges took into account factors such as the length of the period of detention, the danger of the disease, both in relation to the ease of the contagion, and the symptoms that it can give, and the availability of other measures less harmful to individual freedom, useful to face the situation. Given the rate of contagion, the number of deaths caused by Covid-19, and the serious difficulties of many States in curbing the epidemic, the hospitalization or quarantine measures

²⁴ V.LOPILATO and G.CORSO, *Il Diritto Amministrativo dopo le riforme costituzionali*, Parte Speciale, Volume II, Giuffrè Editore, Milano,pg.21.

²⁵ See The European Court of Human rights, Case Enhorn v.Sweden ,judgment of 25 January 2005.

adopted by different States would seem not to differ with the requirements set by the article 5 of the ECHR²⁶.

To influence the complexity of the analysis, the interpretative criteria developed by the ECHR cooperate in the exegetical development of the Convention. One of them wants each limitation clause²⁷ to be interpreted restrictively and so that the introduced measure does not affect the “essence” of the law itself²⁸.

In addition, some of the provisions require that the limitations are necessary “in a democratic society.” This implies for national authorities to prove that the individual measures do not go to affect the underlying principles of the democratic functioning of the state.

The exceptionality that characterized the government systems has not been considered in the same way by all the Community institutions. On the one hand, in fact, both the European Central Bank and the European Commission²⁹ have put in place economic aid capable of allowing a slow recovery of the productive activities of the states, severely compromised by the forced lockdown imposed by the pandemic³⁰.

²⁶ E.SOMMARIO, *Coronavirus contrast measures and respect for human rights*, , on www.affariinternazionali.it, 29 March 2020.

²⁷ E.SOMMARIO, *Measures to contrast the epidemic and human rights, between ordinary limitations and derogations*, 27 March 2020, on www.sidiblog.org, 27 March 2020.

²⁸ S.VAN DROOGHENBROECK and C.RIZCALLAH, *The ECHR and the essence of fundamental rights: the search for sugar in hot milk?*, on www.cambridge.org, Dossier 20, 04 September 2019.

²⁹ To see Monetary policy decisions, , on www.ecb.europa.eu, 4 June 2020

³⁰ M.CASTELLANETA, *Bundesverfassungsgericht against the EU Court or against Europe?*, on www.giustiziainsieme.it, 9 May 2020.

On the other hand, however, the European Court of Justice has continued to operate in an ordinary regime, failing to recognize the difficulties that emerged from managing an unusual situation dictated by the emergency, thus also imposing convictions against countries infringing Union rules.

This attitude, of course, runs counter to the well-known solidarity clause which, by imposing support behavior towards member countries in difficulty, also weighs on the institutions, which must make up for the deficiencies found at national level³¹, in accordance with the principles of subsidiarity and proportionality that have always animated relations between the European Union and its members³².

³¹ M.BELLOCCI and P.PASSAGLIA, *The protection of weak subjects as an explanation in the constitutional law*, on www.cortecostituzionale.it.

³² See on Thematic notes on the European Union, The subsidiarity principle on www.europarl.europa.eu