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### The Italian Model to Fight COVID-19: Regional Cooperation, Regulatory Inflation, and the Cost of One-Size-Fits-All Lockdown Measures

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# THE ITALIAN MODEL TO FIGHT COVID-19: REGIONAL COOPERATION, REGULATORY INFLATION, AND THE COST OF ONE-SIZE- FITS-ALL LOCKDOWN MEASURES

FERNANDA NICOLA\* & GINO SCACCIA\*\*

*What has come to be known worldwide as the Italian model to fight COVID-19 was a series of governmental measures undertaken in early 2020 to reduce the contagion of a deadly virus ravaging the northern regions of Italy—especially Lombardy, Veneto, and Piedmont. These measures included quarantine or lockdown throughout the Italian territory, together with the revamping of hospitals, followed by economic recovery packages to address the standstill of the national economy. This Article focuses on the strengths and weaknesses of the Italian model. By highlighting the initial missteps, we can understand how this turned into a productive national and regional coordination model through a learning-by-monitoring process. However, the Italian model was implemented at a high cost, due to the overextension of executive action and the lack of territorial differentiation. After the President of the Italian Republic suggested stronger parliamentary involvement in the executive lockdown measures, the legislative branch began to give full legal force to the governmental provisional regulations. Rather than tailoring the regulatory measures according to the impacted regions, the government imposed a long and widespread lockdown throughout the country by means of an overregulation and bureaucratization of social life, which produced high human and economic costs for the country. In hindsight, the Italian government did not narrowly tailor the lockdown measures or lift them in those regions with limited infections. As a result, this widespread and micromanaged governmental action has created new and effective administrative processes of regional–national cooperation in public health, but it has also triggered distrust toward the way in which public authorities managed the pandemic during the different phases of the COVID-19 pandemic.*

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INTRODUCTION

What experts have called the “Italian model to fight COVID-19” can be summarized in three steps: diminish viral contagions through quarantine and widespread, generalized, integral lockdown; increase the capacity of medical facilities; and adopt social and financial recovery packages to address the pandemic-induced economic crisis.<sup>1</sup> Even if other nations initially viewed the Italian model with suspicion, it has since become an effective model—especially in subnational cooperation between regions, cities, and the central government. However, this model also came at a high cost for the Italian economy and was very much criticized by legal scholars due to the restriction of civil liberties, which created tensions in the Italian constitutional framework. This Article fills the gap in the literature in assessing the institutional strengths and the pitfalls of this model.

In Part I, after depicting the constitutional framework of emergency powers, we focus on what has been heralded as Italy’s decentralized or institutional cooperation<sup>2</sup> across its different levels of government, regions, provinces, and cities in fighting COVID-19. Despite early missteps and conflicts between the national government and the regions in coordinating public health, both institutions have learned how to make decentralization more effective.

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1. See Mauro Pasquini, *Mismanagement of the Coronavirus Emergency and the Italian Model*, IMPAKTER (Mar. 19, 2020), <https://impakter.com/mismanagement-of-the-coronavirus-emergency-and-the-italian-model/>.

2. See DANIELLE ALLEN ET AL., ROADMAP TO PANDEMIC RESILIENCE: MASSIVE SCALE TESTING, TRACING, AND SUPPORTED ISOLATION (TTSI) AS THE PATH TO PANDEMIC RESILIENCE FOR A FREE SOCIETY 50 (2020), [https://ethics.harvard.edu/files/center-for-ethics/files/roadmap-topandemicresilience\\_final\\_0.pdf](https://ethics.harvard.edu/files/center-for-ethics/files/roadmap-topandemicresilience_final_0.pdf).

In Part II we address the cost of the lockdown in terms of the overregulation and bureaucratization in fighting the spreading of COVID-19. In particular, we show how the management of the health emergency has contributed to the concentration of powers in the executive branch. Such concentration also spurred competence conflicts among different levels of government often resolved by adjudication, rather than through institutional collaboration. Finally, the extensive and nonselective lockdown through the Italian territory, including the less affected southern regions with little contagion, halted the country's economy with long-term implications for the country's public debt. In the long term, the inadequacy of "one-size-fits-all" measures adopted by the government not only created different distributive outcomes by heightening the inequality among Italian regions but also diminished Italian citizens' level of trust in the government.

### I. CONSTITUTIONAL FRAMEWORK, EMERGENCY POWERS, AND REGIONAL COOPERATION

The Italian Constitution, unlike the famous models of Article 48 in the Weimar Constitution of 1919,<sup>3</sup> Article 16 of the French Constitution,<sup>4</sup> Article 116 of the Spanish Constitution,<sup>5</sup> and Article 48 of the Hungarian Constitution,<sup>6</sup> does not include a specific provision regulating a state of emergency. Except for a declaration of war, when Parliament can vest in the Executive all necessary powers with no constraints, the Italian Constitution does not provide for extraordinary emergency powers; it does not allow either the suspension of fundamental rights or the delegation of powers unmoored from parliamentary control to the Executive. This constitutional omission is not by chance. In fact, Article 77 provides a general legislative measure for facing "extraordinary cases of necessity and urgency."<sup>7</sup> This law decree—

3. DIE VERFASSUNG DES DEUTSCHEN REICHS [WEIMAR CONSTITUTION] Aug. 11, 1919, art. 48 (Ger.).

4. 1958 CONST., art. 16 (Fr.).

5. C.E., B.O.E. n. 116, Dec. 29, 1978 (Spain).

6. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, Apr. 25, 2011, art. 48.

7. Art. 77 COSTITUZIONE [COST.] [CONSTITUTION] (It.), *translated in* SENATO DELLA REPUBBLICA, CONSTITUTION OF THE ITALIAN REPUBLIC 20–21, [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) ("The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of such introduction. Such a measure shall lose effect from

which must be adopted by the Council of Ministers and signed by the President of the Republic—is immediately effective. However, it needs to be transposed into law by Parliament within sixty days from its publication otherwise it expires and becomes void with retroactive effect.<sup>8</sup> As a result, the Italian constitutional framework ensures that no infringement upon fundamental rights is allowed by the executive branch without parliamentary oversight and the prior scrutiny of the President of the Republic. The President can also refuse to sign patently unconstitutional decrees. In a nutshell, during the spread of the COVID-19 pandemic, the Italian constitutional framework, as we will describe below, has been pushed to its very limit.

### A. *The Spread of the COVID-19 Pandemic as a National Emergency*

The first case of COVID-19 in Italy appeared in late January when Chinese tourists from Wuhan were hospitalized in Rome after passing through Milan. The same day they were hospitalized, the Italian Minister of Health Roberto Speranza announced the suspension of flights to and from China, Hong Kong, Macau, and Taiwan to prevent the spread of the virus.<sup>9</sup> Italy was the first European Union (EU) country to ban flights to and from China.<sup>10</sup> In hindsight, this ban occurred too late and gave the pandemic enough time to spread in northern Italy.<sup>11</sup>

Before the first COVID-19 case appeared, an unusually high number of pneumonia cases emerged in Codogno, a small town in the Lombardy region.<sup>12</sup> Soon afterward, a researcher at the company Unilever was the first Italian patient diagnosed with COVID-19.<sup>13</sup> Authorities quickly confirmed the outbreak in Codogno—the “Wuhan of Italy” as it has been called—and social life came to a halt.<sup>14</sup> Codogno’s mayor adopted several ordinances

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the beginning if it is not transposed into law by Parliament within sixty days of its publication. Parliament may regulate the legal relations arisen from the rejected measure.”).

8. *Id.*

9. See *Italy’s Hopes for Closer China Ties Hit by Coronavirus Flight Ban Rift*, STRAITS TIME (Feb. 10, 2020, 10:11 PM), <https://www.straitstimes.com/world/europe/italys-hopes-for-closer-china-ties-hit-by-coronavirus-flight-ban-rift>.

10. See Decreto ministeriale 30 gennaio 2020, n.203, G.U. Feb. 1, 2020, n.26 (It.).

11. See Mélissa Godin, *Why Is Italy’s Coronavirus Outbreak So Bad?*, TIME (Mar. 10, 2020, 2:18 PM), <https://time.com/5799586/italy-coronavirus-outbreak/>.

12. See Emilio Parodi & Angelo Amante, *As Coronavirus Slams Italy, Paralysis and Anxiety Spread*, REUTERS, <https://www.reuters.com/article/us-china-health-italy-paralysis-insight/as-coronavirus-slams-italy-paralysis-and-anxiety-spread-idUSKCN20M2WB> (Feb. 28, 2020, 1:44 PM).

13. See Godin, *supra* note 11.

14. See Sean Coughlan, *Lessons from the Lockdown: What Happens When Everyday Life Suddenly Changes?*, BBC (Mar. 20, 2020), <https://www.bbc.co.uk/news/extra/dj3jonuhil/coronavirus-year-of-the-mask>.

requesting citizens to stay home and wear masks when going out.<sup>15</sup> A few days later, other small municipalities started to implement similar measures.<sup>16</sup> Although Codogno had thirty-five new cases per day at the beginning of the outbreak, by the second week of March, the city registered only few infections.<sup>17</sup> In this first phase of the outbreak, the command-and-control chain was totally centralized in the government.

On January 31, 2020, the Italian government declared a state of national emergency,<sup>18</sup> on the premise that ordinary measures would have been unfit to cope with such a pervasive and severe crisis.<sup>19</sup> A state of national emergency enables various institutions—including the National Department of Civil Protection (Protezione Civile),<sup>20</sup> the Ministry of Health,<sup>21</sup> and regional and municipal governments<sup>22</sup>—to take extraordinary measures to respond to the pandemic. In early February, the Ministry of Health adopted a series of ordinances.<sup>23</sup> Some of these ordinances restricted civil liberties to preserve public health, such as the lockdown where the government implemented active surveillance over those citizens who had close contact with COVID-19

15. See *Explained: How Italy Is Handling Coronavirus Outbreak*, LOCAL (Feb. 22, 2020, 10:00 AM), <https://www.thelocal.it/20200222/explained-how-italy-is-handling-co>.

16. See Greata Privitera, *Italy Looks at Life After Lockdown—with Fear and Reluctance*, POLITICO (Apr. 8, 2020, 10:04 PM), <https://www.politico.com/news/2020/04/08/italy-looks-at-life-after-lockdown-with-fear-and-reluctance-176490>.

17. See Colleen Barry, *Italy's Coronavirus Ground Zero Sets Virtuous Example*, U.S. NEWS (Mar. 13, 2020, 10:33 AM), <https://www.usnews.com/news/world/articles/2020-03-13/italys-coronavirus-ground-zero-sets-virtuous-example>.

18. See Decreto legislativo 2 gennaio 2018 n.1, G.U. Jan. 22, 2018, n.17 (It.); *Italy Govt Agrees State of Emergency after Confirmed Coronavirus Cases – Govt Source*, REUTERS (Jan. 31, 2020), <https://www.reuters.com/article/china-health-italy/italy-govt-agrees-state-of-emergency-after-confirmed-coronavirus-cases-govt-source-idUSR1N282044>.

19. See *Italy Declares State of Emergency Over Coronavirus*, FRANCE 24 (Jan. 31, 2020, 2:10 PM), <https://www.france24.com/en/20200131-italy-declares-state-of-emergency-over-coronavirus>.

20. For emergency powers, see arts. 7, 24 D.Lgs. n.1/2018 (It.). See generally *Emergenza Coronavirus*, PROTEZIONE CIVILE, <http://www.protezionecivile.gov.it/home> (last visited Mar. 4, 2021) (providing general information regarding the Protezione Civile and its role).

21. See *Novel Coronavirus*, MINISTERO DELLA SALUTE, <http://www.salute.gov.it/portale/nuovocoronavirus/homeNuovoCoronavirus.jsp?lingua=english> (last visited Mar. 4, 2021). The Ministry of Health's powers are found in Art. 32 Legge 23 dicembre 1978 n.833, G.U. n.360 (It.).

22. See Art. 117 Decreto legislativo 31 marzo 1998, n.112, G.U. Apr. 21, 1998, n.92 (enabling the president of the region to adopt provisional emergency ordinances); Art. 50 Decreto legislativo 18 agosto 2000, n.267, G.U. Sept. 28, 2000, n.227 (enabling mayors to adopt provisional emergency measures).

23. See generally Decreto legge 23 febbraio 2020, n.6, G.U. Feb. 23, 2020, n.45 (codifying a range of health ordinances previously adopted by the health minister).

patients and over those who arrived in Italy after being in the areas ravaged by the pandemic in China.

When the World Health Organization declared COVID-19 a global pandemic,<sup>24</sup> Italian Prime Minister Giuseppe Conte enacted various decrees (DPCMs) that are not subject to parliamentary control or signed by the President of the Republic.<sup>25</sup> In his effort to fight the spread of the virus, the Prime Minister adopted DPCMs that limit fundamental rights enshrined in the Italian Constitution, such as personal liberty, freedom of movement, and freedom of assembly.<sup>26</sup> Although constitutional rights are not absolute, only Parliament has the authority to limit them.<sup>27</sup> Both scholars and political commentators have criticized the adoption of these initial DPCMs, objecting that they were devoid of the force of law and displayed a fragile legislative basis.<sup>28</sup> However, the Council of Ministers adopted the first decree with the full force of law to contain the health crisis on February 23, 2020 (D.L. n. 6/2020).<sup>29</sup> That decree set the regulatory framework for the government to act during the first phase of the emergency.

Between February 23 and April 10, the Prime Minister adopted nine decrees and the President signed four law decrees to implement lockdown measures, demonstrating the Italian government's quick response to a pandemic that disproportionately affected Italy's northern and central regions.<sup>30</sup> The legal and

24. See *WHO Announces COVID-19 Outbreak a Pandemic*, WHO (Mar. 12, 2020), <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic>.

25. See arts. 5, 17 Legge 23 agosto 1988, n.400, G.U. Sept. 12, 1988, n.214 (determining the powers of the President of the Council of Minister and the regulatory powers of the government).

26. See Arianna Vidaschi & Chiara Graziani, *Coronavirus Emergency and Public Law Issues: An Update on the Italian Situation*, VERFASSUNGSBLOG (Mar. 12, 2020), <https://verfassungsblog.de/coronavirus-emergency-and-public-law-issues-an-update-on-the-italian-situation/>.

27. *Id.*

28. See Francesca Rescigno, *La Gestione del Coronavirus e L'impianto Costituzionale. Il fine Non giustifica Ogni Mezzo*, 2020 OSSERVATORIO COSTITUZIONALE 253 (It.); Gaetano Azzariti, *I Limiti Costituzionali Della Situazione D'emergenza Provocati dal Covid-19*, QUESTIONE GIUSTIZIA (Mar. 27, 2020), [https://www.questionegiustizia.it/articolo/i-limiti-costituzionali-della-situazione-d-emergenza-provocata-dal-covid-19\\_27-03-2020.php](https://www.questionegiustizia.it/articolo/i-limiti-costituzionali-della-situazione-d-emergenza-provocata-dal-covid-19_27-03-2020.php).

29. See generally D.L. n. 6/2020 (It.).

30. See *id.* (providing authorities, in all municipalities in which at least one person was positive, power to promote containment measures proportionate to the evolution of the epidemiological situation); Decreto Presidente del Consiglio dei Ministri 23 febbraio 2020, n.294, G.U. Feb. 23, 2020, n.45 (implementing D.L. n. 6/2020, establishing containment measures in Lombardy and Veneto, and providing for additional tax benefits and reliefs); Decreto ministeriale 24 febbraio 2020, n.20A01299, G.U. Feb. 26, 2020, n.48 (implementing

political framework did not change since the adoption of Law Decree no. 19 of March 25, 2020. This decree was adopted to overcome the constitutional challenges that commentators had raised on D.L. n. 6/2020; specifically, that it left the powers of Prime Minister Giuseppe Conte unrestrained, thus causing an eclipse of civil liberties.<sup>31</sup>

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the tax benefits established by D.P.C.M. 23 Feb., 2020); Decreto Presidente del Consiglio dei Ministri 25 febbraio 2020, n.306, G.U. Feb. 25, 2020, n.47 (introducing new measures for all northern regions, such as the cancellation of sporting events and the establishment of online classes for all educational infrastructures); Decreto Presidente del Consiglio dei Ministri 1 marzo 2020, n.346, G.U. Mar. 1, 2020, n.52 (rationalizing the set of interventions made throughout the Italian national territory); Decreto legge 2 marzo 2020, n.9, G.U. Mar. 2, 2020, n.53 (addressing the negative effects the virus produces on the national socio-economic framework by financially supporting citizens and firms); Decreto Presidente del Consiglio dei Ministri 4 marzo 2020, n.394, G.U. Mar. 4, 2020, n.55 (containing new measures to limit the COVID-19 spread throughout the entire country); Decreto Presidente del Consiglio dei Ministri 8 marzo 2020, n.417, G.U. Mar. 8, 2020, n.59 (declaring Lombardy and the municipalities from different northern regions of Modena, Parma, Piacenza, Reggio Emilia, Rimini, Pesaro e Urbino, Venezia, Padova, Treviso, Novara, Asti, Alessandria, Verbanico-Cusio-Ossola, and Vercelli were in the “red zone,” limiting the freedom of movement); Decreto Presidente del Consiglio dei Ministri 9 marzo 2020, n.421, G.U. Mar. 9, 2020, n.62 (so-called “I am staying home decree,” expanding the measures adopted on March 8 to the entire Italian territory, making the entirety of Italy red zone); Decreto Presidente del Consiglio dei Ministri 11 marzo 2020, n.429, G.U. Mar. 11, 2020, n.64 (closing all commercial and retail activities except for grocery stores, basic need stores, and services including pharmacies and parapharmacies); Decreto Legge 17 marzo 2020, n.18, G.U. Mar. 17, 2020, n.70 (so-called “Cure Italy Decree,” containing multiple financial provisions aimed at enhancing the national health system and funding the Protezione Civile and other institutions involved in the emergency; also, suspending the payment of taxes and other financial obligations while creating financial measures that supported furloughed workers, giving credit to families and micro, small, and medium firms); Decreto Presidente del Consiglio dei Ministri 22 marzo 2020, n.521, G.U. Mar. 22, 2020, n.76 (stopping all industrial and commercial production activities (with some exceptions) and prohibiting all citizens from moving to a municipality different from the one in which the person was residing, except for work needs, absolute emergencies, or health reasons); Decreto Legge 25 marzo 2020, n.19, G.U. Mar. 25, 2020, n.79 (providing the possibility of adopting measures for only specific parts of the national territory in order to contain health risks and the spread of the contagion). Each measure listed in the March 25 decree, once adopted, is not supposed to last for more than thirty days; however, the measures are repeatable and can be changed multiple times till the end of the state of emergency. D.L. n. 19/2020. The decree increases penalties and fines for those who do not respect the restrictions imposed. *Id.*

31. See Michele Ainis, *Il bisticcio del potere*, LA REPUBBLICA (Mar. 3, 2020), [https://rep.repubblica.it/pwa/commento/2020/03/03/news/coronavirus\\_parlamento\\_leggi-250153929/](https://rep.repubblica.it/pwa/commento/2020/03/03/news/coronavirus_parlamento_leggi-250153929/) (explaining the necessity of the restrictions to supersede the “freedom of movement” envisaged in Article 16 of the Constitution); see also Ilenia Massa Pinto, *La tremendissima lezione del Covid-19*



Although the Prime Minister's Decrees introduced meaningful measures, the government adopted the most powerful set of policies with two law decrees: the "Cure Italy Decree"<sup>32</sup> and the "Liquidity Decree."<sup>33</sup> Together, these law decrees offered a stimulus package of 425 billion euros (around \$500 billion) to revamp the economy and to help support families, workers, and enterprises.<sup>34</sup> The government adopted these financial measures in consultation with the European Commission.<sup>35</sup>

When public health experts noticed on April 26 that the pandemic curve was going down, another DPCM started the so-called Phase 2.<sup>36</sup> From May 4 onward, the government lightened the stay-at-home measures, allowing businesses to reopen and social life to awaken.<sup>37</sup>

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(anche) ai giuristi, QUESTIONE GIUSTIZIA (Mar. 18, 2020), [https://www.questionegiustizia.it/articolo/la-tremendissima-lezione-del-covid-19-anche-ai-giuristi\\_18-03-2020.php](https://www.questionegiustizia.it/articolo/la-tremendissima-lezione-del-covid-19-anche-ai-giuristi_18-03-2020.php) (arguing from a constitutional perspective that the central government's response to the pandemic at that point had done nothing but exacerbate the situation); Marco Olivetti, *Coronavirus. Così le norme contro il virus possono rievocare il "dictator,"* AVVENIRE (Mar. 11, 2020), <https://www.avvenire.it/opinioni/pagine/cos-le-norme-contro-il-virus-possono-rievoicare-il-dictator> (declaring it is necessary for the public to be critical of the government's response, because to do otherwise would be "tantamount to putting the Constitution in quarantine"); Francesco Clementi, *Coronavirus, quando l'emergenza restringe le libertà meglio un decreto legge che un Dpcm,* IL SOLE 24 ORE, <https://24plus.ilssole24ore.com/art/coronavirus-quando-l-emergenza-restringe-liberta-meglio-decreto-legge-che-dpcm-ADfpIxC> (June 24, 2020) (expressing concern that the use of DPCMs, which are easily challenged in any regional administrative court, renders the legal response by the government legally fragile, creating great uncertainty about the stability of the new legal processes structuring the day-to-day lives of Italians during the pandemic); Marco Plutino, *I Decreti di Conte sul Coronavirus sono sconosciuti alla Costituzione,* IL RIFORMISTA (Mar. 14, 2020), <https://www.ilriformista.it/i-decreti-di-conte-sul-coronavirus-sono-sconosciuti-alla-costituzione-62221/> (asserting while the norms furthered by the government's response to coronavirus are important, they are secondary to the norm enshrined in the Italian Constitution).

32. D.L. n. 18/2020 (It.).

33. Decreto Legge 8 aprile 2020, n.23, G.U. aprile 8, 2020, n.94.

34. See Diletta Tega & Michele Massa, *Fighting COVID 19 – Legal Powers and Risks: Italy*, VERFASSUNGSBLOG (Mar. 23, 2020), <https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-italy/> (discussing purpose of "Cure Italy" decree and how the allocated 25 billion euros may be used for managing COVID-19); *Italy Enacts "Liquidity Decree" to Further Manage COVID-19*, EY TAX NEWS UPDATE: GLOB. EDITION (Ernst & Young Glob. Ltd., London, U.K.), Apr. 10, 2020, at 1 (summarizing "liquidity" decree as injecting 400 billion euros into the Italian market).

35. D.L. n. 18/2020 (It.); D.L. n. 23/2020 (It.)

36. *Coronavirus: Italy's PM Outlines Lockdown Easing Measures*, BBC (Apr. 27, 2020), <https://www.bbc.com/news/world-europe-52435273>.

37. *Id.*

### B. *Conflicts Between Central and Regional Governments*

The central and regional governments share legislative and administrative powers.<sup>38</sup> This means that it is up to the central government to design principles that regions must apply and implement. The regional governments conduct the administrative management of health services, like hospitals, and they are bound to follow and implement the guidelines of the Ministry of Health, a branch of the central government.<sup>39</sup>

The emergency created by the COVID-19 pandemic has highlighted the limits of the Italian model of distribution of competencies among the different levels of government. Indeed, in the management of the health crises, besides state and regional authorities, there are other institutional subjects, such as municipalities, provinces, prefects, and civil protection, with overlapping public health competencies. The need for more coordination among the different institutional levels was underlined in the National Plan for Preparedness and Response to an Influenza Pandemic, drafted in 2006 and never updated since then.<sup>40</sup> However, as soon as the COVID-19 crisis exploded, and the public institutions were forced to move from theory to practice, missteps and administrative inefficiencies emerged. Regional measures misaligned with national ones, delays and overlapping competencies in the implementation of state and regional acts on the municipal level, and administrative gridlocks all caused distrust and disorientation among citizens.

After the COVID-19 outbreak in Codogno, several governors of Italy's northern regions claimed that the virus was just a seasonal flu and did not take immediate quarantine measures. In downplaying the situation, on February 25, Attilio Fontana, Governor of Lombardy<sup>41</sup> and a member of the right-wing populist party Lega, declared that it was undoubtedly a difficult situation, but not dangerous.<sup>42</sup> Indeed, at the beginning of the outbreak, the central

38. As for public health, it is listed among the twenty-three shared legislative competencies between state and regions. Art. 117 COSTITUZIONE [COST.].

39. Andrea Poscia et al., *Italy*, in ORGANIZATION AND FINANCING OF PUBLIC HEALTH SERVICES IN EUROPE 49, 54 (Bernd Rechel et al. eds., 2018), [https://www.ncbi.nlm.nih.gov/books/NBK507325/pdf/Bookshelf\\_NBK507325.pdf](https://www.ncbi.nlm.nih.gov/books/NBK507325/pdf/Bookshelf_NBK507325.pdf) ("The National Prevention Plan is drafted by the Ministry of Health and signed in agreement with the State-Regions Conference. Each region has to then transpose the national plan in its own regional prevention plan.").

40. MINISTRY OF HEALTH, NATIONAL PLAN FOR PREPAREDNESS AND RESPONSE TO AN INFLUENZA PANDEMIC (2006), [http://www.salute.gov.it/imgs/C\\_17\\_publicazioni\\_501\\_ulterioriallegati\\_ulterioreallegato\\_0\\_alleg.pdf](http://www.salute.gov.it/imgs/C_17_publicazioni_501_ulterioriallegati_ulterioreallegato_0_alleg.pdf).

41. Presidents of the regions are usually called 'Governors' of the regions.

42. Mattia Ferraresi, *Italy's Politicians Are Making the Coronavirus Crisis Worse*, FOREIGN POLY (Mar. 9, 2020, 3:12 PM), <https://foreignpolicy.com/2020/03/09/italy-covid19-coronavirus-conte-salvini-epidemic-politicians-are-making-crisis-worse/>.

government supported the idea that COVID-19 was not as dangerous as it had been described and stated that everything was “under control.”<sup>43</sup> Authorities not only underestimated the economic impact of the pandemic but also delayed Rome’s response to COVID-19 until early March.

When the Italian government finally enacted its decrees to manage COVID-19, it did so with little guidance for the regions. The best example of this lack of coordination was the DPCM—adopted on March 8—requiring the lockdown of the entire Lombardy region and some municipalities.<sup>44</sup> Before the Prime Minister issued the decree, one of Italy’s most prestigious newspapers published its draft text.<sup>45</sup> As a result, thousands of people left Milan to avoid being stuck in the so-called “red zone,” where the government would begin enforcing the lockdown the next day.<sup>46</sup> All who left the red zone before the government enacted the decree contributed to spread the virus to the rest of the country—especially to its southern regions.<sup>47</sup> Some regional governors prohibited citizens to return to their home regions to avoid further contamination. It is plainly evident that better coordination between national measures and their regional implementation would have reduced the spread of COVID-19.

By the end of February 2020, the Italian central government enacted numerous provisions to fight the virus in limited parts of Italy—namely Lombardy and other small municipalities.<sup>48</sup> With the increasing spread of

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43. See Jamie Dettmer, *Italy’s Moment of Viral Madness*, VOA (Feb. 27, 2020, 9:12 AM), <https://www.voanews.com/science-health/coronavirus-outbreak/italys-moment-viral-madness> (noting in late February how many Italians did not trust the assurances and were taking their own measures).

44. Decreto Presidente del Consiglio dei Ministri 8 marzo 2020, n.417, G.U. Mar. 8, 2020, n.59.

45. See Angela Giuffrida & Lorenzo Tondo, *Leaked Coronavirus Plan to Quarantine 16m Sparks Chaos in Italy*, GUARDIAN (Mar. 8, 2020, 11:54 AM), <https://www.theguardian.com/world/2020/mar/08/leaked-coronavirus-plan-to-quarantine-16m-sparks-chaos-in-italy> (explaining how the quarantine plan was leaked to the newspapers creating a panic).

46. See Elizabeth Schumacher, *Italy Fumbles Coronavirus Lockdown Orders*, DW (Mar. 8, 2020), <https://www.dw.com/en/italy-fumbles-coronavirus-lockdown-orders/a-52685263> (discussing how many people fled after learning of the decree); Marzio Toniolo, *Inside Italy’s Coronavirus ‘Red Zone’ – Video Diary*, GUARDIAN (Feb. 25, 2020, 6:13 AM), <https://www.theguardian.com/world/video/2020/feb/25/inside-italys-coronavirus-red-zone-video-diary> (showing the life in the red zone during lockdowns).

47. See Holly Ellyatt, *‘People Are Very Scared’: Southern Italians Brace Themselves as the Coronavirus Spreads Across the Country*, CNBC (Mar. 31, 2020, 2:18 AM), <https://www.cnbc.com/2020/03/31/southern-italians-brace-themselves-for-coronavirus-outbreak.html>.

48. See Marco Cecili & Andrea Chiappetta, *Diritti fondamentali ed emergenza: come la pandemia covid-19 ha influenzato l’ordinamento giuridico e il bilanciamento dei diritti*, in Francesco Saverio Marini

COVID-19, however, regional governors and city mayors began implementing their own lockdown measures to address the pandemic. Two main examples come from regions that the central government had not declared red zones. On February 22, the President of the Friuli Venezia Giulia region and a member of the Lega party, Massimiliano Fedriga, requested that the central government close the region's territorial borders, but the central government denied his request.<sup>49</sup> Before receiving subsequent authorization by the central government on March 21, the 'governor' adopted additional limitations and restricted the movements of the region's residents.<sup>50</sup>

Similarly, on February 26, Luca Ceriscioli, the President of the Marche region in central Italy and a member of the center-left party in the majority coalition, opposed the Italian government's decision to declare the state of emergency only in the northern regions. He unilaterally decided to close schools and suspend all public activities in the entire Marche region.<sup>51</sup> The region acted without approval from the central government.<sup>52</sup> The government responded by appealing the decision to the Regional Administrative Court, which suspended the President's order.<sup>53</sup> The Presidents of the Basilicata and Calabria regions hinted toward the adoption of "rebellious" regional ordinances aiming to limit the free movement to their regions. These ordinances—intended for avoiding contagion from the "return" of students or workers in northern Italy returning to the southern regions—would have been in striking violation of Article 120 of the Italian Constitution.<sup>54</sup>

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& Gino Scaccia, *Emergenza Covid e Ordinamento Costituzionale* 23–38 (G. Giappichelli ed., 2020) (containing the complete list of provisions passed by the Italian government).

49. *Coronavirus: Fedriga, Governo esclude controlli confini*, ANSA, (Feb. 22, 2020, 6:56 PM), [https://www.ansa.it/friuliveneziagiulia/notizie/2020/02/22/coronavirus-fedrigagoverno-esclude-controlli-confini\\_3ee5d5a5-9b2b-4765-8175-66e7325e5401.html](https://www.ansa.it/friuliveneziagiulia/notizie/2020/02/22/coronavirus-fedrigagoverno-esclude-controlli-confini_3ee5d5a5-9b2b-4765-8175-66e7325e5401.html).

50. Friuli Venezia Giulia, *Ordinanza contingibile e urgente n. 4/PC* (Mar. 21, 2020), [https://www.regione.fvg.it/rafvig/export/sites/default/RAFVG/salute-sociale/COVID19/allegati/Ordinanza\\_4\\_PC\\_FVG\\_dd\\_21\\_03\\_2020.pdf](https://www.regione.fvg.it/rafvig/export/sites/default/RAFVG/salute-sociale/COVID19/allegati/Ordinanza_4_PC_FVG_dd_21_03_2020.pdf).

51. *Coronavirus: Marche Asks to be Put on Contagion List*, LA GAZZETTA DEL MEZZOGIORNO (Feb. 26, 2020), <https://www.lagazzettadelmezzogiorno.it/news/english/1208015/coronavirus-marche-asks-to-be-put-on-contagion-list.html>.

52. *See id.* (discussing Giuseppe Conte's criticism of Marche's decree and noting the legal challenge to it).

53. *TAR Reopens Marche Schools, Museums*, ANSA (Feb. 27, 2020, 5:24 PM), [https://www.ansa.it/english/news/general\\_news/2020/02/27/tar-reopens-marche-schools-museums\\_d579228f-8825-4737-baa0-8e11d9d035ed.html](https://www.ansa.it/english/news/general_news/2020/02/27/tar-reopens-marche-schools-museums_d579228f-8825-4737-baa0-8e11d9d035ed.html).

54. Art. 120 COSTITUZIONE [COST.] ("Regions may not levy import or export or transit duties between Regions or adopt measures that in any way obstruct the freedom of movement

C. *Learning by Monitoring: Turning Conflicts into Cooperation*

The conflicts that emerged between the national and regional governments underscored the need for more coordination. In some cases, the Department for Civil Protection worked as a negotiator between regions and the central government, coordinating public health efforts by creating new hospitals and providing medical equipment.<sup>55</sup> Although most regional governors, especially in the north, did not initially take the situation as seriously as they should have, they strictly implemented the national measures once the pandemic spread.

On February 21, the Governor of Lombardy created an emergency task force, in collaboration with the Ministry of Health and Civil Protection, to manage the emergency intensive care unit (ICU).<sup>56</sup> Before the outbreak, the total ICU capacity in Lombardy was approximately 720 beds.<sup>57</sup> The COVID-19 task force was responsible for responding to the demand for increased ICU capacity and for implementing containment measures.<sup>58</sup> The task force identified the most important public hospitals in the territory and asked them to implement targeted health measures.<sup>59</sup> The regional governments participating in the task force allocated extra emergency funding, more health care workers, and additional equipment to ensure that patients who needed an ICU bed had one.<sup>60</sup> One month later, the Italian government formed a new task force of 300 experts to help Lombardy cope with the health crisis.<sup>61</sup> Following these efforts, the total ICU capacity in Lombardy rose to about 1,600 beds by late March.<sup>62</sup>

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of persons or goods between Regions. Regions may not limit the right of citizens to work in any part whatsoever of the national territory.”).

55. See *De Nora Supports Italian Civil Protection Agencies in the Fight Against the Coronavirus – COVID-19 Pandemic*, MED. DEVICE NEWS MAG. (Mar. 16, 2020), <https://infomeddnews.com/de-nora-supports-italian-civil-protection-agencies-in-the-fight-against-the-coronavirus-covid-19-pandemic/>.

56. Giacomo Grasselli et al., *Critical Care Utilization for the COVID-19 Outbreak in Lombardy, Italy: Early Experience and Forecast During an Emergency Response*, 323 J. AM. MED. ASS’N 1545, 1545–46 (2020).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. See Giada Zampano, *Doctors Respond En Masse to Italy’s Call to Arms*, ANADOLU AGENCY (Mar. 22, 2020), <https://www.aa.com.tr/en/europe/doctors-respond-en-masse-to-italys-call-to-arms/1774991#> (stating that the Italian government has opened bids for 300 additional doctors).

62. See *Galleria: in Lombardia superati i 1600 posti in terapia intensiva*, ASKANNEWS (Mar. 29, 2020, 6:19 PM), <http://www.askanews.it/cronaca/2020/03/29/galleria-in-lombardia-suprati-i-1600>

Another example of collaboration comes from Veneto, the second most-affected region after Lombardy. When cases of COVID-19 appeared in Veneto and the local businesses protested the negative impacts of the restrictive measures on the local economy, Governor Luca Zaia described the virus outbreak as a “media pandemic” or “wrong psychosis” and claimed the press had amplified the seriousness of the situation.<sup>63</sup> But when the contagion spread, Zaia changed his position.<sup>64</sup> He immediately established strict measures to isolate the positive cases in small municipalities, such as in Vò Euganeo, which offered most citizens coronavirus testing.<sup>65</sup> Loyal to cooperating with the central government, Governor Zaia quickly aligned his policies with directives coming from Rome and requested emergency powers to adopt more stringent measures than his neighbors.<sup>66</sup>

A more collaborative approach can be found in the Piedmont region *vis-à-vis* the containment of COVID-19’s spread inside the public retirement home, Residenze Sanitarie Assistenziali. The Regional government, together with the Prefectures, the Provincial, and metropolitan city government of Turin, undersigned a Memorandum of Understanding on March 31, 2020, through which a set of operational guidelines from the Health Ministry were uniformly adopted throughout the region.<sup>67</sup>

Even in the so-called Phase 2—which started May 4, 2020, ended the integral lockdown, and restarted commercial and industrial businesses—numerous regional measures were introduced in patent violation of the

-posti-in-terapia-intensiva-pn\_20200329\_00121/ (discussing the increase from 724 beds to 1,600 added for intensive care).

63. *Veneto. Coronavirus. Zaia: “Conseguenze economiche disastrose. Psicosi sbagliata, pandemia mediatica,”* AGENPRESS (Feb. 27, 2020), <https://www.agenpress.it/2020/02/27/veneto-coronavirus-zaia-conseguenze-economiche-disastrose-psicosi-sbagliata-pandemia-mediatica/>.

64. *See Coronavirus, Zaia avanti per la sua strada: «Non ritiro l’ordinanza: il limite è a 200 metri. Alimentari chiusi domenica»*, IL GAZZETTINO (Mar. 21, 2020) [hereinafter *Coronavirus, Zaia avanti per la sua strada*], [https://www.ilgazzettino.it/nordest/primopiano/coronavirus\\_zaia\\_cosa\\_ha\\_detto\\_oggi\\_21\\_marzo\\_2020-5124408.html](https://www.ilgazzettino.it/nordest/primopiano/coronavirus_zaia_cosa_ha_detto_oggi_21_marzo_2020-5124408.html) (discussing how the February 20 order will continue and citizens are required to respect the law).

65. *See* Sabina Castelfranco, *Italy’s Veneto Region to Test Everyone for Coronavirus*, VOA (Mar. 24, 2020, 2:51 PM), <https://www.voanews.com/science-health/coronavirus-outbreak/italys-veneto-region-test-everyone-coronavirus> (explaining the large-scale testing that was put into action).

66. *See Coronavirus, Zaia avanti per la sua strada, supra* note 64 (explaining Zaia’s response to the restrictive order and maintaining its enforcement).

67. *See* Protocollo d’intesa fra unità di crisi- Regione Piemonte, Prefettura di Torino (anche per le altre prefetture del Piemonte), Città metropolitana e Province del Piemonte (Mar. 31, 2020), [https://www.regione.piemonte.it/web/sites/default/files/media/documenti/2020-04/protocollo\\_rsa.pdf](https://www.regione.piemonte.it/web/sites/default/files/media/documenti/2020-04/protocollo_rsa.pdf) (containing the relevant guidelines).

governmental directives.<sup>68</sup> Veneto and Lombardy, for example, enacted more severe restrictions than the ones provided for by the central government.<sup>69</sup> On the contrary, Emilia-Romagna, Liguria, Tuscany, and Calabria regions lifted the lockdown measures before they were allowed to do so by the central government.<sup>70</sup> Let us take, for example, the ordinance of the President of Calabria—later challenged by the central government and declared void by Administrative Regional Tribunal (TAR)—allowed food outlets based in the region to provide carryout catering, which seemingly anticipated “Phase 2.”<sup>71</sup>

In essence, Italy’s intergovernmental cooperation was an exercise of learning by monitoring or, as stated in Charles Sabel’s well-known essay,<sup>72</sup> an attempt to overcome the conflict between learning and monitoring through a continuous feedback loop among regional, local, and national administration that happened in both a vertical and horizontal manner. Over the first phase of prompt reaction to COVID-19, regions were entitled to take part in the decisionmaking process to draft the measures aimed at tackling the pandemic.<sup>73</sup> However, they had neither a veto power nor a power of proposal. As a result, the central government was free to unilaterally adopt any measure, without co-deciding it with the regions. Moreover, the boundaries between the state emergency powers, the power of all of the 8,000 Italian mayors to enact contingent and urgent ordinances for health reasons, and the power of the regional governors to set ordinances safeguarding the public health were far from clearly defined.

After the regions began to rebel against state regulations, thus demonstrating that coordination among institutions did not work well, Art. 2 of Law Decree no. 19/2020<sup>74</sup> vested the regions with the power to propose

68. *Phase Two: What Changes in Italy from May 4th?*, LOCAL (May 4, 2020, 8:25 AM), <https://www.thelocal.it/20200504/phase-two-what-changes-in-italy-from-may-4th>.

69. Chiara Berardi et al., *The COVID-19 Pandemic in Italy: Policy and Technology Impact on Health and Non-health Outcomes*, 9 HEALTH POL’Y TECH. 454, 461 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7467905/pdf/main.pdf>.

70. Valentina Di Donato, *Italian Region of Calabria to Begin Relaxation of Lockdown Measures*, CNN, [https://www.cnn.com/world/live-news/coronavirus-pandemic-04-30-20-intl/h\\_36455217d614dd89e21904c3a8df6098](https://www.cnn.com/world/live-news/coronavirus-pandemic-04-30-20-intl/h_36455217d614dd89e21904c3a8df6098) (Apr. 30, 2020, 10:56 PM).

71. *Il Tar Calabria si esprime sull’annullamento dell’ordinanza del President della Regione Calabria del 29 aprile 2020*, n. 37., IL DIRITTO AMMINISTRATIVO (May 9, 2020), <https://www.ildirittoammministrativo.it/Tar-Calabria-si-esprime-annullamento-ordinanza-Presidente-della-Regione-Calabria-29-aprile-2020-n-37/ult1329>.

72. Charles Sabel, *Learning by Monitoring: The Institutions of Economic Development*, in HANDBOOK OF ECONOMIC SOCIOLOGY (Columbia L. Sch. Ctr. for L. & Econ. Stud., Working Paper No. 102, 1993), <http://www3.law.columbia.edu/sabel/papers/Learning%20by%20Monitoring.pdf>.

73. D.L. n. 6/2020 art. 3(1) (It.).

74. Decreto legge 25 marzo 2020, n.19, art II, G.U. Mar. 25, 2020, n.79.

and modify emergency COVID measures, even when the central government's measures were intended to be applied uniformly throughout the national territory. Furthermore, Art. 3 of the same Law Decree no. 19/2020<sup>75</sup> authorized the regions to adopt more stringent supplementary measures than national ones in the event of an increase in the contagion index in their territory.

The different measures implemented by municipalities in Italy, and the missteps taken by regional leaders, show how initial conflicts between central and regional governments can eventually be turned into enhanced cooperation.<sup>76</sup> However, to avoid Italy's missteps and learn from its successes, local governments around the world should seek ways to cooperate and learn by monitoring for a common purpose to share, both horizontally and vertically, the most effective measures to respond to the pandemic.<sup>77</sup>

## II. THE COST OF A WIDESPREAD LOCKDOWN

### *A. Legal Inflation, Governmental Paternalism, and the Bureaucratization of Social Norms*

The Italian model as a response to the spreading of COVID-19 differed from the approach that many other EU countries implemented as a response to this pandemic.<sup>78</sup> If almost every country limited fundamental rights by balancing these restrictions against the protection of public health, the Italian government used this balancing to justify a widespread lockdown for sixty-nine days. On top of the long lockdown, the government applied one-size-fits-all regulations that were not tailored to the different regions, producing overregulation that constrained the

75. *Id.* art. III.

76. See Giovanni Di Cosimo & Giacomo Menegus, *L'emergenza Coronavirus tra Stato e Regioni: alla ricerca della leale collaborazione*, BIOLAW J. (SPECIAL ISSUE), May 2020, at 183. For a discussion of similar matters in the U.S. context, see Sheila R. Foster, *As COVID-19 Proliferates Mayors Take Response Lead, Sometimes in Conflicts with Their Governors*, GEO. L., <https://www.law.georgetown.edu/salpal/as-covid-19-proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/> (last visited Mar. 3, 2021).

77. Rebecca Katz et al., *A Mayoral Network for Pandemic Preparedness*, GLOB. POL'Y J. (June 21, 2018), <https://www.globalpolicyjournal.com/blog/21/06/2018/mayoral-network-pandemic-preparedness> (providing an example of horizontal and vertical cooperation in pandemic preparedness of U.S. cities).

78. See generally Arianna Vendaschi, *Il Covid-19, l'ultimo stress test per gli ordinamenti democratici: uno sguardo comparato*, 43 DPCE ONLINE 1453, 1461, 1463–65 (2020), <http://www.dpceonline.it/index.php/dpceonline/article/view/1015/988> (providing a comparative view on how western democracies have reacted to COVID-19).



intimate life of its citizens, ultimately leading to a bureaucratization of social life.<sup>79</sup>

During that time, the regulatory measures adopted by the Italian government were pervasive and very detailed.<sup>80</sup> Rather than releasing a general preventative framework relying on the citizens' self-preservation, the regulations were hyper-detailed and enforced with high penalties. Between January 30 and April 26, the central government and Parliament passed more than twenty measures via laws, decrees, and ordinances; the Civil Protection issued more than twenty ordinances; the Ministry for Health issued more than one hundred ordinances; and the Ministry for Internal Affairs issued thirteen decrees.<sup>81</sup> As early as the end of April, all issued state rules had filled more than 1,100 pages of the Official Journal, where Italian laws are published.<sup>82</sup> Finally, because Law Decree no. 6/2020 enabled regions and municipalities to specify and tighten the governmental orders through local regulations, regional Governors, mayors, and local authorities enacted a wave of new rules.<sup>83</sup>

Consequently, the overregulation of the lockdown orders resulted in a patchwork of ambiguous, sometimes contradictory rules, full of references to national, regional, or European laws and regulations. This complex regulatory web was impossible for civil servants, politicians, and professionals to grasp, let alone citizens who were at a loss in this legislative jungle. The bureaucratization of every aspect of their social life spurred among Italians a Kafkaian critique of an overzealous government that micromanaged, not always very effectively, its response to the spread of the pandemic.<sup>84</sup>

79. See Andrea Chiappetta, *Less Regulation for Better Regulation: ipertrofia normativa e pressapochismo linguistico ai tempi della pandemia da Covid-19*, FORUM DI QUADERNI COSTITUZIONALI, June 15, 2020, at 717, 722–25, <http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2020/06/45-Chiappetta-FQC-2-20.pdf> (noting specific examples of how vaguely worded DPCMs meant to clarify restrictions actually create further confusion and limit freedoms of citizens); Nicoletta Rangone, *Italy's Complex Legislative Framework Impairs Its COVID-19 Response*, REGUL. REV. (June 8, 2020), <https://www.theregreview.org/2020/06/08/rangone-italy-complex-legislative-framework-impairs-covid-19-response/> (discussing the complex and shifting administrative requirements placed on citizens leaving home for authorized activities).

80. See *Italian Government Actions*, INT'L CTR. THEORETICAL PHYSICS, [https://www.ictp.it/ictp\\_covidresponse/italian-government-actions.aspx#close](https://www.ictp.it/ictp_covidresponse/italian-government-actions.aspx#close) (last visited Mar. 3, 2021).

81. See Cecili & Chiappetta, *supra* note 48, at 23–30.

82. Giuliano Armeno, *Covid, in 54 giorni oltre mille pagine di norme: Scaccia e la giungla delle leggi*, ALESSIO PORCU (May 6, 2020), <https://www.alessioporcu.it/articoli/gino-scaccia-giungla-mille-leggi-emergenza-covid/>.

83. D.L. n. 6/2020 (It.).

84. See, e.g., Francesco Orofino, *Kafka, il coronavirus e l'architettura nel Paese del "combinato disposto,"* ONE LISTONE GIORDANO, <https://one.listonegiordano.com/architettura/kafka-il->

One example is the self-certification that every resident had to carry with them when leaving their homes to go to work, to shop, or to the pharmacy. The self-certification's online format changed multiple times, which caused a panic among citizens to ensure they printed the correct form. In the streets, police checked for self-certifications, and the inability to produce proper documentation resulted in the police levying fines or sending citizens back home.<sup>85</sup> Another example is the interpretative dilemma created by the notion of "*congiunti*," or "family members," in the DPCM of April 26, 2020, which considered the movement to meet another family member "necessary and therefore legal."<sup>86</sup> However, the definition of *congiunti* does not appear in the Italian Civil Code. Therefore, the question was whether it included cohabitants or same-sex partners—especially when these relations do not fall under the legal categorization that only includes married couples.

As Antonio Baldassarre, the emeritus President of the Constitutional Court, pointed out, such interpretation would have privileged only family members because it left out those not included in the traditional nuclear family,<sup>87</sup> including same-sex partners or cohabitants. The central government immediately clarified that *congiunti* included "*affetti stabili*,"<sup>88</sup> or "stable relationships"—a definition that, rather than clarifying, created even more confusion. For instance, would a long-term mistress be included within this definition, or a long-term friendship between widows? Due to the vagueness and difficulty to qualify these family ties, it is not surprising that public authorities have generally preferred not to levy fines based on that part of the said DPCM.

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coronavirus-e-larchitettura-nel-paese-del-combinato-disposto/ (last visited Mar. 3, 2021); Eliana Agata Marchese, *Autocertificazione firmata da Kafka*, L'ADIGE.IT (May 7, 2020, 1:14 PM), <https://www.ladige.it/blogs/diario-mamma-prof/2020/05/07/autocertificazione-firmata-kafka>; *I Meme più divertenti sui Dpcm di Conte e sulle autocertificazioni*, IL FARO (Mar. 25, 2020, 12:00 PM), <https://www.ilfaroonline.it/2020/03/25/i-meme-piu-divertenti-sui-dpcm-di-conte-e-sulle-autocertificazioni/328221/>.

85. Alessandro Di Paola & Gabriel Frasca, *Riflessioni critiche in tema di Covid 19 e autocertificazione*, AVVOCATOANDREANI (Apr. 8, 2020), <https://news.avvocatoandreaani.it/arti-coli/riflessioni-critiche-tema-covid-autocertificazione-105690.html>.

86. Alfonso Celotto, *Chi sono i nostri congiunti in diritto? Lo spiega Celotto*, FORMICHE (Apr. 27, 2020), <https://formiche.net/2020/04/fas-2-congiunti-diritto/>.

87. Roberta Lanzara, *Baldassarre: "Dpcm in tutto incostituzionale"*, ADNKRONOS (Apr. 27, 2020, 5:46 PM), [https://www.adnkronos.com/fatti/politica/2020/04/27/baldassarre-dpcm-tutto-incostituzionale\\_NCKg79J8eVOblBGG6m3byH.html](https://www.adnkronos.com/fatti/politica/2020/04/27/baldassarre-dpcm-tutto-incostituzionale_NCKg79J8eVOblBGG6m3byH.html).

88. See *Coronavirus: Italia verso la Fase 2, ok alle visite ai congiunti, compresi fidanzati e 'affetti stabili'*, ANSA.IT (May 1, 2020, 7:02 PM), [https://www.ansa.it/sito/notizie/politica/2020/04/27/coronavirus-litalia-verso-la-fase-2-fra-cautele-e-polemiche\\_1faa2a81-9e44-4e67-b733-0e0e0dc1177e.html](https://www.ansa.it/sito/notizie/politica/2020/04/27/coronavirus-litalia-verso-la-fase-2-fra-cautele-e-polemiche_1faa2a81-9e44-4e67-b733-0e0e0dc1177e.html).

### B. *The Italian Parliament as Sleeping Beauty*

To face the COVID-19 pandemic, the Italian government relied on two main forms of regulations: law decrees and Presidential Decrees adopted by the Prime Minister. While law decrees are specifically designed in the Italian Constitution to deal with emergencies, Presidential Decrees adopted by the Prime Minister do not have the same legal force as laws. During this emergency situation, the government has used DPCMs broadly to fight the spread of the virus, limiting fundamental rights enshrined in the Italian Constitution protecting personal liberty,<sup>89</sup> freedom of movement,<sup>90</sup> freedom of assembly,<sup>91</sup> freedom to profess religious belief,<sup>92</sup> right to education,<sup>93</sup> and right to economic enterprise initiative.<sup>94</sup> While these constitutional rights are not absolute, the possibility to limit them stems from Parliament's exclusive adoption of laws. Therefore, DPCMs are administrative provisions and are not the correct legislative instrument envisaged by the Constitution to restrain fundamental rights.

The numerous DPCMs adopted by the government to contain the spread of the pandemic cannot be legally grounded on Article 78 of the Italian Constitution, even broadly interpreted. This provision allows the central government to enact decrees having the force of law only in case of war.<sup>95</sup> Such a speculation could hardly be supported here because public health emergencies, although in some scholars' view are "like a war,"<sup>96</sup> are different from wars declared between nation states and approved by parliaments. Additionally, Article 78 allows the entire government, not the Prime Minister alone, to enact such decrees. Finally, the government can act under Article 78 only if explicitly authorized by the Parliament. Currently, the Italian government's justification for using DPCMs rather than law decrees is grounded in the need to speed up the adoption of emergency measures. However, marginalizing the role of the Parliament is dangerous to democracy.

While many measures were introduced through DPCMs, the most powerful set of norms was enacted with the Cure Italy Decree. This

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89. Art. 13 COSTITUZIONE [COST.].

90. Art. 16 COSTITUZIONE [COST.].

91. Art. 17 COSTITUZIONE [COST.].

92. Art. 19 COSTITUZIONE [COST.].

93. Art. 33 COSTITUZIONE [COST.].

94. Art. 41 COSTITUZIONE [COST.].

95. "Parliament has the authority to declare a state of war and vest the necessary powers into the Government." Art. 78 COSTITUZIONE [COST.].

96. Angela Giuffrida, *'This Is Like a War': View from Italy's Coronavirus Frontline*, GUARDIAN (Mar. 17, 2020, 1:00 AM), <https://www.theguardian.com/world/2020/mar/17/this-is-like-a-war-view-from-italy-coronavirus-frontline>.

provision included a massive package of financial measures by the Italian government in support of families, workers, and enterprises.<sup>97</sup> An extensive political debate should have ensued in Parliament over the scope and value of these financial measures. For this reason, it was extremely important for the Italian Parliament to meet and have the main legislative body initiate proceedings for the transposition of the provisional law decrees into law. However, just like *Sleeping Beauty*, the Parliament was slow to get in motion and was awakened by the President of the Republic, Sergio Mattarella, who recalled the relevance of democratic deliberations and that the government should work on a bipartisan platform before Parliament to transparently debate how to reasonably balance respect for fundamental freedoms and the need to protect public health.<sup>98</sup>

Despite the presidential wishes, the government continued to adopt the most powerful set of policies with no meaningful consultation of parliamentary minorities. On the contrary, the government limited the parliamentary debate through a special approval procedure called “vote of confidence,” which is frequently used by the Executive to make all the proposed parliamentary amendments fall with a single vote and thus restricts the parliamentary bargaining. The most important governmental acts, namely the already mentioned Cure Italy Decree and Liquidity Decree, followed this procedure. The Parliament did not meet as a full body since the number of members that could attend each session was limited. Therefore, a robust discussion of the legislation did not happen in person nor electronically. In fact, Article 64 of the Constitution and dozens of internal regulations of the Parliament remain vague as to the possibility of an “online” deliberation.<sup>99</sup> Although initially absent and through a slow adaptation, the Parliament finally amended some of the governmental decrees and managed to speed up the democratic legislative process.

### C. A Targeted and Decentralized Regulatory Approach

The regional “rebel” measures highlighted above show two flaws in the government’s emergency policies: the weak institutional cooperation and the

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97. See Tega & Massa, *supra* note 34.

98. Barbara Tedalddi, *Mattarella chiama governo e opposizione e chiede unita*, AGENZIA ITALIA (March 19, 2020), <https://www.agi.it/politica/news/2020-03-19/coronavirus-mattarella-conte-salvini-meloni-berlusconi-7685147/>.

99. See Gino Scaccia & Andrea Carboni, *Funzionalità del Parlamento e modalità di voto nell'emergenza*, FORUM DI QUADERNI COSTITUZIONALI, Aug. 4, 2020, at 122–25, <http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2020/08/12-Scaccia-Carboni-FQC-3-20.pdf> (discussing the different interpretations on meaning and scope of Article 64’s definition of “presence” and its effect on parliamentary procedure during COVID-19).

lack of targeted, differentiated, and decentralized regulations. The principle of regulatory differentiation is expressed in Article 118 of the Constitution, along with the subsidiarity principle of enabling by default local authorities to exercise administrative powers unless they are unable to do so and a national measure is needed. Because the virus spread in the Italian territory with elevated contagions in the north, very limited contagions in the center, and almost nonexistent contagions in large parts of southern Italy, the one-size-fits-all regulatory approach of the government inevitably clashed with the principle of differentiation. It also clashed with the principle of proportionality because the government applied regulations in a uniform manner, even when the contagion was decreasing.<sup>100</sup> The lockdown measures not only targeted the northern regions but also territories where the pandemic was almost absent. This limited the fundamental rights of the residents in those non-infected regions and possibly violated the principle of proportionality, as it is recognized in Italian and EU constitutional law.<sup>101</sup>

In a second regulatory phase, however, the Italian government turned to a more tailored and decentralized approach, giving more regulatory space to the regions. For instance, in approaching the economic reopening, the government delegated to the regional presidents the responsibility to differentiate the anti-COVID-19 measures on the territory. In particular, Article 1, paragraph 14 of Law Decree no. 33/2020 tasked the regions to adopt a regulatory framework to prevent or reduce the risks of contagion for

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100. See Gino Scaccia & Christian D'Orazi, *La concorrenza fra Stato e autonomie territoriali nella gestione della crisi sanitaria fra unitarietà e differenziazione*, FORUM DI QUADERNI COSTITUZIONALI, Aug 4, 2020, at 117, <http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2020/08/11-Scaccia-DORAZI-FQC-3-20.pdf>.

101. Proportionality is a key concept in global constitutionalism. For a deep analysis of the principle, see PETER LERCHE, *ÜBERMASS UND VERFASSUNGSRECHT: ZUR BINDUNG DES GESETZGEBERS AN DIE GRUNDSÄTZE DER VERHÄLTNISSMÄßIGKEIT UND DER ERFORDERLICHKEIT* (1961); see also AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (Doron Kalir trans., Cambridge Univ. Press 2012) (2010). The Italian Constitutional Court has stated that “reasonableness and proportionality...are general constraints of the legislative action intended to limit individual rights.” Corte Cost. [Constitutional Court], 9 gennaio 1997, n.1, G.U. (spec. ser.), Jan. 15, 1997, n.3 (It.) (translation by the Authors). The proportionality test is widespread in the case law of the Court of Justice of the European Union, the European Court of Human Rights, and of many constitutional courts all over the world. See generally Gino Scaccia, *Proportionality and the Balancing of Rights in the Case-law of EU Courts*, FEDERALISMI.IT (Feb. 20, 2019), <https://www.federalismi.it/ApiOpenFilePDF.cfm?artid=38092&dpath=document&dfile=18022019195153.pdf&content=Proportionality%2Band%2Bthe%2BBalancing%2Bof%2BRights%2Bin%2Bthe%2BCase%2Dlaw%2Bof%2BEU%2BCourts%2B%2B%2D%2Bstato%2B%2D%2Bdottrina%2B%2D%2B>.

the return to economic and social activities.<sup>102</sup> This decentralized approach undertaken by the Italian government did not happen without conflicts with the regions or ambiguities in its implementation; although, at the declaratory level, the government embraced the regional framework in its DPCM of May 17, 2020.<sup>103</sup> Some regions, however, almost in protest against the government because of the lack of guidelines for security measures, postponed the reopening of their economic activities.

Decentralization and differentiation in the economic reopening of Italy should not undermine the effectiveness of such regulatory measures. However, this is what happened with the smart monitoring and tracing systems of the contagion that the government attempted to establish through downloadable applications on the citizens' smartphones. The government set up an app called "*Immuni*," or "Immune," that was sent to all residents to download on their cell phones. Even though there are sixty million people in Italy owning about eighty million smartphones—demonstrating how many Italians own multiple devices—the app was downloaded by only nine million inhabitants.<sup>104</sup> Since the Immuni App did not achieve the critical mass of downloads to realize the tracing goal for which it was created, this was a huge setback for the Italian government. Part of this debacle was driven by the Italians' lack of trust in the government and, in particular, lack of trust in a tracing system perceived as too invasive of their privacy.<sup>105</sup> In addition, the competition with similar apps created by the regions led to a duplication and confusion in the implementation of monitoring regimes.<sup>106</sup> This lack of coordination triggered even more misperception in the general public and undermined the regulatory strategy of contact tracing of COVID-19.

102. Decreto legge 16 maggio 2020, n.33, G.U. May 16, 2020, n.125.

103. Decreto Presidente del Consiglio dei Ministri 17 maggio 2020, n.1058, G.U. May 17, 2020, n.126.

104. Roberta Zanon, *Report Digital 2020: lo scenario nel mondo e in Italia*, DIGIT. DICTIONARY: BLOG (Feb. 20, 2020), <https://www.digitaldictionary.it/blog/report-digital-2020-scenario-digitale-mondo-e-italia> (reporting 2020 Internet and social media trends and statistics in Italy); *Immuni: Here's What You Need to Know About Using Italy's Contact-tracing App*, LOCAL (Oct. 6, 2020, 9:13 AM), <https://www.thelocal.it/20201006/immuni-heres-what-you-need-to-know-about-using-italys-contact-tracing-app>.

105. See Martina Cardone & Marco Cecili, *Osservazioni sulla disciplina in materia di tutela dei dati personali in tempi di Covid-19. L'Italia e i modelli sudcoreano, israeliano e cinese: opzioni a confronto*, NOMOS-LE ATTUALITÀ DEL DIRITTO (2020), <http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2020/05/Cardone-Cecili-1-2020-REV-1.pdf>.

106. See Michele Paolo, *Why Italy's Contact Tracing Is Not Working*, ITALICS MAG. (Nov. 11, 2020), <https://italicsmag.com/2020/11/11/why-italys-contact-tracing-is-not-working/>.

### CONCLUSION: BETWEEN PUBLIC HEALTH COOPERATION AND GOVERNMENTAL DISTRUST

In March 2020, the European Central Bank issued a new asset purchase plan worth €750 billion, the Pandemic Emergency Purchase Programme (PEPP), lasting until the end of 2020 to support the liquidity and the financial condition of all sectors of the Eurozone economy.<sup>107</sup> This measure has greatly benefited the Italian government, whose economy was halted due to a granularly implemented lockdown throughout the Italian territory that came at a high cost. The stress test for Italian institutions included an empowered executive branch, that only after a late fine-tuning through learning by monitoring adjustment, overcame conflicts with the regions to become an effective model of regional-national cooperation for public health policies. In a second phase, both the regions and the Parliament had to learn how to adapt to the new mode of governance established by the government. During this phase, the role of President Sergio Mattarella was central in reestablishing the institutional balance in governing the country by insisting on the need for greater involvement of the legislative branch and the regions in executive decisionmaking.

The COVID-19 pandemic has highlighted the weaknesses of the Italian constitutional and administrative system, especially on how to manage a national emergency in exceptional circumstances. In order to be effective and timely, during the first phase of the pandemic, the government centralized its decisionmaking while marginalizing both regions and the Parliament. The dialectic between the different levels of governments through regionalism, as well as between the executive and the legislative branches, are an integral part of the pluralist constitutional Italian style.<sup>108</sup> However, after some initial central-regional conflicts, the Italian system reached a new equilibrium that has allowed the institutions to cooperate democratically. This learning by monitoring process in national-regional cooperation entailed the sharing of information and the monitoring of public health policies that succeeded in containing the spread of the pandemic and eventually enabled the reopening of the Italian economy.

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107. The Pandemic Emergency Purchase Programme (PEPP) was announced by the European Central Bank (ECB) in the press release on March 18, 2020. *ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)*, EUR. CTR. BANK (Mar. 18, 2020), [https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318\\_1~3949d6f266.en.html](https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html). See generally *Pandemic Emergency Purchase Programme (PEPP)*, EUR. CTR. BANK, <https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html> (last visited Mar. 3, 2021).

108. See Vittoria BARSOTTI ET AL., ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT 231 (2016).

The lesson learned during the COVID-19 pandemic was that during a public health emergency, it was necessary to shorten the chain of command and practice stricter coordination between national and regional public health administrations. Part of the reason why this tighter practice did not happen earlier was the lack of constitutional and administrative frameworks defining the roles and responsibilities of each actor involved in the crisis.

Finally, the government's response to the pandemic also exposed traditional weaknesses of the Italian system, which include: overregulation; overlapping of state, regional, and municipal regulatory competencies on the same territory; and finally, excessive bureaucratization that paralyzed economic and social life throughout the country. In fact, during the spread of the pandemic, Italians were micromanaged by an overzealous government that transformed them into vulnerable citizens who had to expose even their most intimate relations to public authorities in order to leave their homes. In hindsight, rather than adopting a wave of regulations in a frantic and paternalistic effort to protect its citizens, restricting individual liberties, and educating citizens on how to behave, the government could have empowered citizens by asking them to take more responsibilities and duties and forgone imposing high fines and criminal sanctions for those who did not comply with the lockdown measures. While this governmental approach has eroded some of the public trust that citizens had in the current administration, making it difficult to implement similar measures in the future, the model of regional cooperation in public health and the renewed effort to establish democratic parliamentary cooperation with the executive branch will stay in place.