

HEALTH EMERGENCY MANAGEMENT. A LEGAL ANALYSIS OF THE ITALIAN EXPERIENCE

Vincenzo Baldini¹

Abstract

The state of emergency that is being experienced has generated a sort of dynamic disorder of complex systematic re-elaboration within the framework of the legal system of the state. We appreciate a permanent tension between the rule of law and the discipline of emergency which manages to find a problematic landing point in the prefiguration of the existence of an emergency legal system, based on a different Grundnorm and parallel to the one that sustains the whole establishment of the legal system of the sources of the state legal order.

Keywords

State of exception. Rule of law. Constitutional state. Covid-19 health emergency. Health emergency management. Italian experience.

Summary

1. Some premises. The "state of exception" as a category of the Political. That is, the epiphany of the Sovereign without a Law ... 2. The state of exception as a theoretical-legal perspective in the context of rule of the constitutional state. 3. The constitutional sources of emergency regulation in the legal order. 4. The Covid-19 health emergency in Italy: problematic aspects of an (alleged) administrative "normalization". 5. The legal problems of emergency management: in search of the Basicnorm (Grundnorm) of recognition. 6. Conclusions: the health emergency between the limits of a "parallel" legal order and symptomatic elements of involution of the model of democracy.

¹ Full Professor. Cassino University (Italy).

1. SOME PREMISES. THE "STATE OF EXCEPTION" AS A CATEGORY OF THE POLITICAL. THAT IS, THE EPIPHANY OF THE SOVEREIGN WITHOUT A LAW ...

“Sovereign is he who decides on the exception”². This well-known assertion of Carl Schmitt's Political Theology is evoked, at the beginning of these reflections, with a critical and, at the same time, problematic tone since the State of exception (*Ausnahmezustand*), according to Carl Schmitt, is the condition of absolute domination of the Political, which, as such, remains external and extraneous to the sphere of the legal order, “accessible to legal knowledge”³ because it pertains to the legal horizon (see below). As has been said authoritatively, the State of exception is located in an “uncertain ... fringe, at the intersection between the legal and the political”⁴. It is in this condition that the figure of the sovereign-decision-maker stands out, prevailing over the legislative force of every legal order. The problematic reference to Carl Schmitt lies, instead, in the perennial uncertainty of the outcomes and consequences of the logical and teleological conflict between the State of exception and the rule of law and constitutional State⁵, between the reign of the Political⁶ and the

² SCHMITT 2004, 13; SCHMITT 2005, 5.

³ Norm and Decision (this is an element of Judicial) are in the frame of Judicial: SCHMITT 2004, 19.

⁴ AGAMBEN 2003, 9 with reference to FONTANA 1999, 16.

⁵ A "state of exception" positively envisaged and regulated would be proposed as a "specific" case of the legal system, consequently lending itself to a typified legal declination..

⁶ We need to clarify the scope and concept of a constitutional state of law. In its essential meaning, of a liberal matrix and inspired above all by positivist thought, the constitutional state of law tends to be resolved in the measurability of the exercise of (executive) power as a consequence of its subjection to the law (rule of law), entrusted, such control to another autonomous and independent power called therefore to enforce the will of the legislator. There are two essential profiles that ensure the effectiveness of this dimension: the existence of a legislative act that authorizes the exercise of administrative power, orienting

rationality of the organizational structure through which the State usually ensures the observance and general respect of the law, together with the particular protection of the citizens' freedom⁷.

This work intends to focus on the analysis of the complex of health emergency management acts in progress, measuring their scope in the same way as the canons of the constitutional State and the rule of law. This also in order to find possibly symptoms of that "point of imbalance between public law and political fact"⁸ that configures the State of exception, measuring, in relation to this, the dynamics of confrontation and, at the same time, the limit of regulatory effectiveness of positive law, intended to operate within a framework of ordinary legal experience⁹, in the face of the real value of not being able to subsume the actions of the

it through the provision of rules of principle (principle of legality). In this sense, the need for predictability and calculability of the executive power relates to the primacy of the law, as well as its submission to judicial control. The second assumption is to be found in the existence of a "neutral" judicial power called to review and possibly censor the illegitimate exercise (ie not in accordance with the legislative parameter) of administrative power. The original functional dimension of the rule of law is enriched in scope with the transition towards democratic constitutionalism and, as far as we are concerned, specifically, with the advent of the democratic republican charter of '48. Understood as an expression of substantive rationality, democracy enshrined in the Charter itself implies the inclusion in the sphere of the rule of law of all those rules, substantive and procedural, which serve to stabilize the dynamics of the confrontation between divergent political interests and to guarantee transparency, comprehensibility and visibility of the decision. These rules are thus added to the set of fundamental principles and rights that give the Constitution a specific axiological-functional identity, operating, from the point of view of the constitutional state of law, as a normative paradigm, respectively, to be observed - through permissive conduct - or to be implemented through the active commitment of the public authorities themselves. Moreover, the very existence of limits to the action of the State is combined with the active commitment of the latter in the implementation of the request for Justice which appears as the ultimate product of the constitutional experience.

⁷ See MAUS 1978, 13 *et seq*; LUHMANN 1978, 101 *et seq*.

⁸ AGAMBEN 2003, 9

⁹ SCHMITT 2004, 18.

public authority within the abstract type expected in the legal provision¹⁰.

On the methodological level (as well as in the epistemological approach), the reflection starts from some premises around classic categories (State of exception, State of emergency) and then proceeds to the investigation of positive regulation of constitutional emergency¹¹. Moreover, on the assumption of a difficulty in framing the complex of emergency acts in the context of rule of law and the constitutional state, the effort goes in the direction of searching for the presupposed norm of recognition that supports the whole of this complex, avoiding from the beginning the possibility of the state of exception.

2. THE STATE OF EXCEPTION AS A THEORETICAL-LEGAL PERSPECTIVE IN THE CONTEXT OF RULE OF THE CONSTITUTIONAL STATE

For the purposes of the analysis that we want to carry out here, it is not inappropriate to linger further on the characteristics and conditions of the state of exception, from the theoretical-dogmatic point of view as well as in relation to the performative force that it brings with respect to the context of the legal experience.

Preliminarily, it must be specified that terms such as "state of emergency" and "state of exception" are not to be understood as identical or synonymic categories; in fact, only a state of exception manifests its general typicality on a substantive level as a factual situation, whereas, on the other hand, the state of emergency can integrate the terms of an abstract facts envisaged and governed by law, according to the example

¹⁰ SCHMITT 2004, 19.

¹¹ It is a question of that condition of extraordinary nature in which the prefigured contrast between the State and the legal system according to the typically Schmittian vision finds meaning: („*Der Staat bestehen bleibt, während das Recht zurücktritt*“): SCHMITT 2004, 18.

that derives from other European constitutional systems (France, Germany, Spain) and, on the legislative side, by the same Italian system (Legislative Decree No. 1/2018, in the field of civil protection).

From the teleological point of view, the legitimacy of the state of exception is placed in an exclusive functional relationship with the intrinsically juridical aim of the self-preservation of the State, with the purpose of restoring as soon as possible that "factual normality"¹² of social relations which is indispensable because the legal order regularly returns to explain effect¹³. Therefore, it starts from the assumption that this regulatory complex does not explain effectiveness outside of ordinary experience (outside the "normal") and the state of exception falls under the integral and exclusive domain of the Political. It, as "contrary to the law"¹⁴, does not find, for its regulation, any regulatory limit other than that deriving from the axiological substance of this action which must aim at the prompt restoration of the legal order of the State. This axiological nature reflects the presupposition and, at the same time, the ultimate condition of existence of the state of exception, on the basis of which the latter manifests a juridical significance¹⁵ even without finding any recognition rule.

What has been said so far explains how the effort of some European countries to expressly regulate, albeit with different inflections, the constitutional emergency connected to events capable of damaging the material or institutional integrity of the State¹⁶, must be understood essentially as the positive side to stem, if possible, any overflow of the

¹² Idem.

¹³ Idem.

¹⁴ DEPENHEUER 2007, 41.

¹⁵ ...as in the case of the existence of the conditions for a state of exception, the restoration of the normal situation is also part of the sovereign's decision.

¹⁶ MORTATI 1962, 140 *et seq.* On a specific distinction between the regular case and the limit case (*Normalfall and Ernstfall* or *Ausnahmefall*), where the latter opens up to de facto regulation,

state of exception, bringing the regulation and management of extraordinary events under the dominion of positive law. In this way, the emergency would become an ordinary case (*Normallage*), even when the related management acts introduce exceptions to fundamental rights¹⁷.

However, the silence held on this matter by many Constitutions, including the Italian one, should certainly not be understood as disinterest in what appears intrinsically not susceptible to normative regulation; rather, it can reveal the intent of the individual Constituent to maintain every emergency discipline within the framework of the constitutional legislation, on the premise that the latter bears the safeguards for a positivisation of any unexpected and unpredictable situation. The absence of express regulation of the constitutional emergency is therefore equivalent to the denial of this as a typified event of constitutional nature and its normalization within the regulatory framework ordinarily offered by the Constitution itself.

Thus, the irreducibility of the emergency within this framework would serve to project it into a factual dimension of exceptionality, in any case relevant in the legal sense¹⁸ at least as it urges the maintenance of the last instruments of functioning of the rule of law. It is in this situation that the imperative is urgent to "avoid arbitrariness as much as possible" and

¹⁷ DEPENHEUER 2007, 40 *et seq.* (in which, moreover, the A notes the identity of *Ernstfall* and *Ausnahmefall* on a legal-regulatory level). S. also Freund 1962, 70 *et seq.*

¹⁸ BÖCKENFÖRDE 1978, 1881 *et seq.* So also Depenheuer, op. ult. cit., („Der Ausnahmefall bedeutet in seiner intensivsten Form das Ende des Recht“). In the same sense, s. HESSE 1960, 105. The conclusion of E.-W. Böckenförde (1978, 1884) based on the premise that the connection between law and social reality constitutes a "constitutive moment" of the law itself is also based on the formal approach of those who support, on the basis of the rationalist thought of Emmanuel Kant - according to which of the emergency is configured as a situation in which there is no longer the right - that a decision in the legal sense can only "derive entirely from the content of a norm": so s. MOHL 2004, 13.

to maintain "some formal guarantees of the rule of law"¹⁹, using "to the maximum extent possible" the requirements of the Constitution²⁰.

Such an assumption alludes to both a presupposition and an obligation: the first consists in the unpredictability and peculiar gravity of extraordinary events, which justify an immediate defense reaction by the legal order of the State. The obligation is made to consist, instead, in the guarantee of an essential level of the protections provided by the state legal system which ensure the holding, even in such conditions, of the rule of law and the (constitutional) state of law. Even in this sense, the state of exception remains a relevant phenomenon for the Constitution and is never cataloged as a fact completely foreign to the legal sphere.

3. THE CONSTITUTIONAL SOURCES OF EMERGENCY REGULATION IN THE LEGAL ORDER

Regarding the Italian legal order, excluding in principle any reference to the emergency intended as an *extra-ordinem* source²¹, the choice of the Constituent Assembly, also gained on the experience of art. 48 of the Weimar Constitution²², was to renounce a specific regulation of the constitutional emergency that could lead to exceptions and / or suspensions of the effectiveness of constitutional provisions. The only typified forms of management of emergency situations are, therefore, that

¹⁹ MORTATI 1962, 140 *et seq.*

²⁰ MORTATI 1962, 195.

²¹ In this regard, v. especially PALADIN 1996, 447 *et seq.*, which, however, distinguishes four categories of extra-ordinary sources, including (recalling, however, the position of other Aa.) Also "every single normative act or fact that differs from the corresponding legal model, which nevertheless realizes the its purpose: that is to show itself capable of modifying the order ...".

²² with reference to the figure and powers of the Reichpräsident in the Weimar constitutional system, s. GUSY 2018, 176 *et seq.*. On the specific profile of the state of emergency, v. GUSY 2018, 278 *et seq.*

provided for by art. 78 of the Constitution (state of war) and recourse to the emergency decree, pursuant to art. 77 of the Constitution. Furthermore, the general figure of the legislative delegation pursuant to article 76 of the Constitution is also of significance in serious emergency situations, if and in as much as it is practicable.

Concerning the art. 78 of the Constitution, it should be noted that its regulatory scope is formally limited to a rather well-determined case in point and, moreover, difficult to arise, given the devolution of the power to decide military actions to international organizations. Nonetheless, the figure that it regulates, according to which the parliamentary chambers, generally, have the fundamental decision on the existence of a emergency, and then the conferral of the "necessary powers"²³ for its management to the government, is fully compliant with canons proper to the parliamentary form of government and, therefore, also seems to lend themselves to a more generalized use, beyond the typical case to which the same provision refers.

As regards, instead, the decree pursuant to art. 77 of the Constitution, the Constituent Assembly intended to provide, in general, a regulatory instrument to the Government to deal immediately and "under its responsibility" with "extraordinary situations of necessity and urgency" through the adoption of provisional measures with the force of law with limited temporal effectiveness. The intervention of the representative Assemblies, in this circumstance, remains however ensured for the purposes of the conversion into legislative Acts of these decrees.

Beyond the constitutional level, specific rules for dealing with emergency situations can be found in legislative Act n. 833/78²⁴ and, in a more

²³ the reference is always completed by the implicit clause of the *rebus sic stantibus* which, in the case of a state of emergency, can only be considered existing always and in any case.

²⁴ ... such as the one that gives the Minister, the President of the Region and the Mayor the power to issue orders of a contingent and urgent nature in matters of hygiene, health and veterinary police (artt. 32 ss.).

organic form, in the civil protection code (legislative decree n. 1/2018) which defines a type of calamitous events (art. 7)²⁵; and determines the conditions for the declaration by the Council of Ministers of the state of emergency of national importance (art. 24)²⁶.

This provision thus makes concrete the conditions of such a declaration, while defining the powers in favor of the Government²⁷ or its components (e.g., Minister of Health), as well as the territorial authorities which can be managed of that emergency state²⁸. The same law, however,

²⁵ Art. 7, d. lgs. n. 1/2018: (*Tipologia degli eventi emergenziali di protezione civile*): “lett. b) emergencies connected with calamitous events of natural origin or deriving from human activity which by their nature or extent involve the coordinated intervention of several bodies or administrations, and must be faced with extraordinary means and powers to be used during limited and predefined periods of time, governed by the Regions and autonomous Provinces of Trento and Bolzano in the exercise of their respective legislative power;

lett. c) emergencies of national importance connected with natural calamitous events or deriving from human activity which, due to their intensity or extent, must, with immediacy of intervention, be faced with extraordinary means and powers to be used during limited and predefined time periods pursuant to Article 24.”

²⁶ Art. 24 c. 1 (*dichiarazione dello stato di emergenza di rilievo nazionale*): ““1. Upon the occurrence of events which, following a prompt assessment carried out by the Department of Civil Protection on the basis of the data and information available and in conjunction with the Regions and Autonomous Provinces concerned, have the requirements referred to in Article 7, paragraph 1, letter c), or in their imminence, the Council of Ministers, on the proposal of the President of the Council of Ministers, also formulated at the request of the President of the Region or Autonomous Province concerned and in any case having acquired the agreement, decides the state of 'national emergency, establishing its duration and determining its territorial extension with reference to the nature and quality of the events and authorizes the issuing of the civil protection ordinances referred to in article 25. ...”.

²⁷ In this case, this is a generic reference to "extraordinary means and powers" (art. 7, c. 2, lett. b) e c), d.lgs. n. 1/2018).

²⁸ the legislation speaks only of the existence or imminence of events that "meet the requirements of Article 7, paragraph 1, letter c)," then defining the procedure for the declaration.

lacks any prescription relating to methods of action and time limits, within a minimum and a maximum, of any possible measures to suspend fundamental rights. Furthermore, the attribution of management powers to the Executive remains completely indeterminate, while the provision for the use of formally administrative acts, by the Government or by a single Minister, seems rather to suggest that this case does not concern a constitutional emergency, with the consequence that, in this case, exceptions to the constitutional discipline are not allowed. To believe otherwise, moreover, it is also necessary to clarify how such a discipline can be considered compatible with the framework of constitutional legislation.

In any case, the presence of a legislative complex, aimed at the rationalization of the emergency in its fundamental aspects, suggests why the expression "state of exception" has long been considered an "*altmodisch*"²⁹ category and, therefore, of marginal importance in the context of the rule of law and constitutional state as evidenced by the same common case law³⁰.

4. THE COVID-19 HEALTH EMERGENCY IN ITALY: PROBLEMATIC ASPECTS OF AN (ALLEGED) ADMINISTRATIVE "NORMALIZATION".

The regulation of the health emergency has seen, in most European countries, the necessary retreat, in this phase, of the political action of the legislative Assemblies and, conversely, the affirmation of an absolute centrality of the Executive ("is the time of the Executive", wrote Uwe Volkmann)³¹. Its regulation, in fact, almost entirely entrusted to the

²⁹ VOLKMANN 2008, 369 *et seq.*; part. p. 374, with reference to Carl Schmitt (nt. n. 5).

³⁰ For a more specific reference to this jurisprudence, please refer, among others, to SOBRINO 2020, 185 *et seq.*

³¹ VOLKMANN 2020, 2.

Government and / or its components, usually takes place in (mainly) administrative form, which has the effect of feeding the distinction between a "first", a "during" and an "after" the phase of the health emergency.

Specifically, in the Italian case, then, upstream is the declaration of the national state of emergency, made by resolution of the Council of Ministers of January 31, 2020 (in accordance with the provisions of the aforementioned Article 24 c. 3, Legislative Decree no. 18/2001) assumed on the premise of the international public health emergency declaration of the World Health Organization (30.01.2020)³².

This declaration, which was extended several times, was followed by the adoption of a series of legislative decrees and a long series of formally administrative acts, for the concretization / implementation of the measures determined by the first. In addition to the general indication of limitations and / or suspensions of constitutional freedoms, these legislative decrees in fact provide for the attribution to the competent bodies, originally not better identified (see Article 1, Legislative Decree 6 of 2020) of the power to adopt in concrete the aforementioned measures or to assume even more restrictive ones (see art. 3 c. 1, l.d. n. 19/2020 ;; art. 1 l.d. n. 125/2020) or even derogatory and / or expansionary compared to those enshrined in the legislative decree (art. 1 c. 16, l.d. n. 33/2020).

The atypical nature of these acts³³ lies first of all in the provisions that simultaneously realize the contraction / suspension of a series of constitutional freedoms - from personal freedom to that of domicile, from freedom of assembly to that of movement and residence and the freedom to exercise religious ritual - with the consequence of letting arise

³² ... as well as in compliance with legislative parameters: artt. 7 c.1 lett. c. e 24, c. 1, dello stesso dlgs. n. 1/2018.

³³ On the qualification of the source system in the emergency condition, s. LUCIANI 2020, 208 *et seq.*

a legal system which assumes, as rule, that of the prohibition of any exercise of freedom³⁴, with the exception of conduct expressly permitted and considered lawful by public power³⁵.

On the other hand, the vagueness of these provisions clearly contrasts with the guarantee of the absolute reserve of legislative act³⁶ to protect the aforementioned constitutional rights, while enabling an administrative specification and implementation of the measures provided for therein, both at the national level (orders of the PdCM, or of the Minister of Health) as at the territorial level (ordinances of Presidents of Regions and Mayors). A real political intensity is therefore conferred on the acts of concretization, well beyond their respective typical form, which underlies their effectiveness, even derogatory, of the provisions contained in the primary legal source.

4.1. Follows: the Mandatory Health Treatments provided for by regional ordinances and the traffic ban.

In this order of ideas, the conformity of the complex of these acts to the level of constitutional legitimacy appears to be no small problem. If, in fact, on the one hand, the existence, for each of them, of a recognition

³⁴A similar orientation can be found in German (not only constitutional) jurisprudence in which, often, the complaints at the basis of the appeal are rejected on the basis of the mere affirmation of prevalence of the right to life and health over other competing rights and in which it appears little for this very reason, the method of balancing the interests. For more specific jurisprudential references.

³⁵ S. d.l. n. 125/2020 and other previous acts (dpcm and regional ordinances), in which the expression "it is allowed" "it is allowed" is often used, etc. to define, alongside the prohibitions, the interstitial areas of freedom that power itself, in the forms and conditions established by it, allows to exercise.

³⁶Only in the case of material areas reserved in (only) way relating to the law, can the intervention of secondary acts of implementation be admitted, in compliance with the rules of principle eventually sanctioned by the primary sources.

rule does not seem to be questioned; but this is not enough to consider them certainly integrated within the sphere of the rule of law and constitutional state. In particular, for the contents of the legislative decrees in question the provision of art. 77 of the Constitution is not enough in itself to justify them, except to understand the same provision as a rule for safeguarding the system, so as to legitimize any intervention (even derogating from constitutional norms) aimed at preserving the conservation of the constitutional order.

On the other hand, a specific issue of compatibility with the constitutional regulatory framework concerned the provision of mandatory vaccination treatments for the so-called categories “at risk”, sanctioned by orders of Regional Presidents³⁷. This question may present a further problematic implication regarding the general legitimacy of the Regions to be able to intervene in material areas that the Constitution reserves to the legislative act when the former fall within the sphere of material competences (e.g. health protection) of regional legislators (pursuant to art. 117, cc. 3 and 4, Constitution). In this case, the rule of recognition of the exercise of these regional powers would also be found in the constitutional discipline. In the case under discussion, the regulation of the ordinance integrates a case of M.S.T. for which a general legislative act reservation is required (art. 32 para. 2 of the Constitution), considered by the prevailing doctrine

³⁷ S. the ordinance of the President of the Lazio Region of 17 April 2020, n. Z00030, containing “Further measures for the prevention and management of the epidemiological emergency from COVID-2019. Ordinance pursuant to art. 32, paragraph 3, of the law of 23 December 1978, n. 833 on hygiene and public health. Provisions regarding the influenza vaccination campaign and the pneumococcal vaccination program for the 2020-2021 season”;

as absolute³⁸ and reinforced³⁹, as well as of an exclusively state competence⁴⁰. With this in mind, the regulation of the regional ordinance, which does not find any rules of recognition, as well as in the Constitution, even in the provisions of Legislative Act no. 833/78 (in conjunction with Articles 20, 32 p. 2 and 33)⁴¹, which also regulates the adoption of ordinances of the local authorities, for unforeseeable and urgent reasons, should be justified solely on the basis of the reference to mere necessity as an extra-ordinary source of the legal system.

It is true that the protection of health falls within the enumeration of concurrent legislation, but the constitutional provision clearly seems to establish, in this case, a regime of exclusive competence of the State (Article 32, paragraph 2 of the Constitution), also for the purpose of to avoid unjustified discrimination on the national territory with regard to the prophylaxis and prevention of health risk, according to an interpretation supported by the same legislator of 1978⁴² and by

³⁸In the sense of qualifying this reserve as absolute, s. BARILE, 1984, 153; CARETTI 2005, 434. *Contra*, supports the condition of relative reserve of art. 32 Cost., MODUGNO 1982, 303 *et. seq.*; ROMBOLI 1988.

³⁹ CARAVITA DI TORITTO 1990, 222, which also shows the distinction between compulsory health treatments and coercive health treatments (for which the lawfulness is considered in compliance with the guarantees enshrined in Article 13 of the Constitution). In this sense, s. also P. Caretti, *op. ult. cit.*, p. 434.

⁴⁰ Simoncini 2006, 667. S. also B. Caravita di Toritto, *Sub Art. 32 Cost.*, *cit.*. In the same sense is also the position of R. Bin, PITRUZZELLA 2019, 19 *et seq.*, where the legal reserve is defined in relation to the dynamics of the parliamentary form of government.

⁴¹ S. the art. 33, c. 1, l. n. 833/78 provides that the health authority, in the cases provided for by law, has the power to dispose of TT.SS.OO. "according to art. =32 of the Constitution".

⁴² The l. n. 833/78 gives the Minister of Health (art. 32, c. 1), as well as the President of the Region and the Mayor (art. 32 c. 2), the power of ordinance, to deal with "contingent and urgent" situations, then expressly specifies how the law of the State should provide for the cases in which "compulsory medical examinations and treatments" may be ordered by the health authority (art. 33, c. 1)..

common⁴³ and constitutional case-law⁴⁴. The latter in fact seemed to mean that art. 32 para. 2 of the Constitution is an attribution of competence in favor of the (only) state legislator⁴⁵, excluding interventions by the regional legislator that are not in some way in a coherent functional connection with the national regulation aimed at protecting health.

An indirect confirmation of this address can also be deduced from a recent decision by the Lazio Regional Administrative Court which excluded, in the absence of certain conditions, any power of the regional authority to provide for vaccination obligations⁴⁶.

⁴³ V. sent. TAR Calabria n. 1462 del 15 settembre 2020. V. anche TAR Palermo, sent. n. 1952 del 25 settembre 2020.

Constitutional jurisprudence (first of all the sentence no.5 of 2018) would in fact be oriented to affirm that compulsory vaccination, as a health treatment to be imposed on individual citizens, falls within the sphere of attribution of central power.

⁴⁴ Corte cost. sent. n. 5/ 2018.

⁴⁵ PANUNZIO 1979, 876 *et. seq.*; More specifically, for the regional affair, s. MESSINEO 2009, 354 *et seq.*, S. also PLUTINO 2017; CARAVITA 1990, 221 *et seq.*; Simoncini 2006, 667.

⁴⁶ The Lazio Regional Administrative Court specified as "it is true that art. 32 of law no. 833 of 1978 provides in the third paragraph that the president of the regional council may adopt contingent and urgent ordinances in matters of public health, but it is equally true that this provision must now be read in one with the provisions of art 117 of the legislative decree n. 112 of 1998 and pursuant to art. 50 of the legislative decree n. 267 of 2000 (as amended on this point by decree-law no. 14 of 2017), these provisions respectively came into force following the administrative decentralization and the reform of Title V of the Constitution. In particular, they provide that similar powers of ordinance (state or regional) may be exercised "by reason of the size of the emergency". It goes without saying that, where the aforementioned dimension has infraregional (and in any case supra-municipal) value, the president of the region concerned will be well entitled to intervene. Where, on the other hand, the dimension assumes at least ultraregional or even national significance (as indeed in the present case), the competence to adopt similar urgent measures can only be reserved for the ministerial charge center ".

Other similar issues may raise the limiting measures of freedom of movement and residence enshrined in regional or local ordinances⁴⁷ in relation to the provision of the general legislative reserve pursuant to art. 16 of the Constitution, even if such a limitation on the part of such acts has been provided in general as possible in the aforementioned emergency legislative decrees. In fact, the compliance of the exercise of this power with the constitutional provision remains no less doubtful, given that this seems to recognize only to the state legislator the power to introduce limitations of this freedom "for reasons of health or safety"⁴⁸.

5. THE LEGAL PROBLEMS OF EMERGENCY MANAGEMENT: IN SEARCH OF THE BASICNORM (GRUNDNORM) OF RECOGNITION.

From what has been said derives the representation of a heterogeneous complex of management acts which, although on the formal level they appear to be ordered and coherent, do not find a sure citizenship within the framework of constitutional law⁴⁹. The chain of emergency measures⁵⁰ seems to arise only on a formal level in a coherent relationship with the coordinates of the rule of law and constitutional state of law. Without

⁴⁷ By way of example, see the order no. 8 of 8 March 2020 and, above all, Ordinance no. 15 of 13 March 2020 of the President of the Campania Region.

⁴⁸ V. the critical considerations, absolutely acceptable, in D'ALOIA 2020.

⁴⁹ In experience, this structure is characterized by a conspicuous use of the instrument of the dpcm, as well as of the ordinance by the Minister of Health and the Presidents of the Region and Mayors, with the effect of having structured a real emergency system hinged on the principle of prohibiting the exercise of almost all constitutional freedoms except for the exceptions brought about by the emergency acts themselves. On this point, with regard to the German legal system, see the considerations of Cristoph Möller who spoke of living in a condition of almost absence of freedom ("in einem quasi grundrechtsfreien Zustand"): così riportato in HASE 2020, 700.

⁵⁰ speaks expressly of an "emergency regulatory chain" Luciani 2020, 111.

wishing to evoke classic dogmatic perspectives, which in material areas reserved for the legislative power exclude any form of intervention by the government, the fact remains that the emergency legislative decrees reveal an atypical nature on a substantive level which seems to lack valid legitimate support to constitutional level.

The same is true for the ordinances of local authorities as well as for similar acts, acts of other organs of the State which, together with the aforementioned legislative decrees, create a complex juridical system of the emergency; the ultimate foundation of this regardless of a maximal declination of art. 77 of the Constitution, is certainly not found in the Republican Constitution. In the rule of law and constitutional state (it was said) the formal criterion is not sufficient in itself to define the typical characteristics of an act. The measure of the effectiveness of the act, together with the determination of the related sphere of competence, contributes no less decisively to the definition of the type⁵¹.

But the by now clear recognition of the Constitution as a system of values, whose strength on the juridical level is expressed mainly (though not exclusively) by the system of fundamental principles that characterize it, cannot fail to have any impact on the delineation of a typical (normative) act which is intended to be supplemented by the teleological element. This leads to the impossibility of finding in the Constitution the norm of recognition of acts which, although formally typical, nevertheless carry out, albeit provisionally, the setting aside and / or subversion of the existing constitutional order and its values

In this regard, the objection that the emergency legislative decrees fully fulfill the conditions defined by the provision (Article 77 of the Constitution)⁵² cannot be valid, nor would it make much sense, in this circumstance, to appeal to the rhetoric of the error of calculation (*Fehlerkalkül*) to reaffirm the recognition of the act in the light of the state

⁵¹ CRISAFULLI 1978, 179 *et seq.*

⁵² MERKL 2010, 893 *et seq.*

legal order⁵³. In fact, this would presuppose an illegitimacy of the latter, which instead turns out to be completely non-existent both in terms of constitutional provisions and, even more, in the same way as the extraordinary structure, based on a different ultimate regulatory assumption. Equally inconvenient, then, is shown the reference for the purpose of the emergency legislative decrees for the protection of constitutional rights, which would leave the integrity and effectiveness of the existing order unaffected, only temporarily contracted through the suspension of the rights of freedom. Apart from the questionability of the declared outcome, which is accompanied by a duration that is quite different from the application of the emergency regime, it attests to essentially the objective and, currently, irrefutable fact. This is represented by the set of strict limits imposed on the exercise of these freedoms in a logic of prevention which tends - as has been said - to root a new organizational structure on the basis of the principle of authority, a principle which in turn implies the absolute availability of the latter to any decision regarding the exercise of fundamental rights and this, moreover, regardless of the observance of every criterion of reasonable balance in the comparison between constitutionally protected interests.

Therefore, for the emergency legislative decrees, although formally corresponding to the constitutional provision, it does not seem to be found in this the constitutional norm of recognition suitable for integrating them into the sphere of acts *secundum ordinem*. The juridical foundation of their legitimacy, then, is to be sought elsewhere because the reference to necessity as a source of legitimacy for the entire strategy to combat the health emergency is not enough in itself to overcome any doubt about the nature of *extra ordinem* acts of these legislative decrees, even if the latter expressly refer in the text to the observance of the parameters of necessity, proportionality and adequacy, designed to ensure the effectiveness of the indisputable guarantees connected to the rule of

⁵³ MERKL 2010, 1323 *et seq.*

law. In this perspective the effectiveness and validity of these acts, on a legal level, could not be admitted except on the assumption of the validity of "another" norm of recognition, distinct and different from art 77 of the Constitution.

The problems presented above and connected to the lack, in the Constitution, of a specific and detailed regulation on the emergency situations, along the lines of the Spanish and / or French model, appear here even more evident and end up enveloping in a shadow also the perspective according to which paradigms sufficient to avoid a state of exception according to the Schmitt's model⁵⁴ can still be found in the Fundamental Law. Indeed, the axiological and functional antinomy between the complex of emergency measures and the rule of law and constitutional state tends to manifest itself in a rather marked way in the experience of which it is spoken, and above all reveals an insuperable conflict between competing logics⁵⁵: that of connected prevention to the management of an emergency situation⁵⁶ and that of the rule of law. The first aims exclusively at complying with the request for maximum security, endorsing single-direction action strategies; the logic of the rule of law and constitutional state on the other hand, favors the pluralism of rights and interests, of individual and collective requests, starting from the

⁵⁴ The choice of the Italian Constituents to remain silent on the regulation of the constitutional emergency appeared in the Assembly anything but unconscious, dictated above all by the intention, it has been said, to avoid the configuration (in a constitutional way) of commissioner powers, along the lines of the art. 48 WRV.

⁵⁵ BALDINI 2020The legitimacy of such a legislative provision could be justified only in terms of implementation of a specific constitutional discipline of the emergency, missing in the Italian Constitution, with the consequence that the one mentioned by art. 24 of the legislative decree. n. 1/2018 cit., Is an emergency that cannot imply suspensions of constitutional guarantees..

⁵⁶ ... of any kind of security (e.g. food, environmental, security such as public order, border protection, etc.). On this point, reference is made to ROBBERS 1987, 235 *et seq.*; primarily to DENNINGER, 1990, 33 *et seq.* S. also DENNINGER 2005, 223 *et seq.*

fundamental principle of freedom, within the framework of a legal order inspired, in any case, by a set of values that underlie the dynamics of legal experience, favoring the balancing of competing instances⁵⁷.

Therefore, the search for the ultimate regulatory premise capable of supporting the legal-validity of the set of emergency acts on the premise of their legitimacy, albeit outside the ordinary framework of constitutional legality, is certainly not incongruous. Such an assumption can be found in the tacit imperative of general compliance with the prevention measures provided for by the acts taken by competent bodies, to deal with the health emergency. This tacit imperative, like the Grundnorm of such a complex, necessarily operates in parallel to that underlying the Constitution of '48, from the point of view of a pluralism of legal systems, albeit implying, in this case, a radical distinction / tension between the latter and the “regular” legal order⁵⁸. The maintenance and validity, even in a state of emergency, of the guarantees provided by the legal system towards illegitimate acts of public power, from the complex of means and judicial protections (articles 24, 97, 101 and 113 of the Constitution) up to the appeal to the constitutional judge, as also happens in other European countries, it is not in itself decisive to revoke such an assumption in doubt, nor is it sufficient to deny an operational regression of the set of conditions that make the rule of law and constitutional state effective. In addition to the real data, even the juridical one does not seem to justify different perspectives, but rather makes congruous the representation of a real emergency system based on a general principle of authority, parallel and opposed to the typical one defined in the Constitution, since in principle it denies freedom as a general and primary instance.

⁵⁷ BALDINI 2016.

⁵⁸On the admissibility of a pluralism of legal systems, each dating back to a distinct and specific Grundnorm, s. GRUSSMANN 1993, 54 *et seq.*

In this order of ideas, the reference to the jurisprudence of legitimacy is also rather incongruent and sterile. Apart, in fact, a rather hasty exegesis of the emergency provisions by the judges, it is in principle that the application of the principle of legality has led the latter to have as paradigms of reference in the evaluation on the administrative acts of implementation mainly the authorizing provisions⁵⁹ of the mentioned legislative decrees, without thinking of appealing to the Constitutional Court on the question of their legitimacy. In this way, following the ratio of prevention in an integral and often uncritical way, jurisprudence has ended up by conferring absolute prevalence on the right to life and health over all the other constitutional rights⁶⁰.

6. CONCLUSIONS: THE HEALTH EMERGENCY BETWEEN THE LIMITS OF A "PARALLEL" LEGAL ORDER AND SYMPTOMATIC ELEMENTS OF INVOLUTION OF THE MODEL OF DEMOCRACY

Therefore, the analysis conducted so far leads back to the question posed at the opening of this work, namely what relationship exists between the set of government acts adopted to combat the health emergency and the regulatory framework of the rule of law and constitutional state.

On the juridical-positive level, if it moves - as we do here - from the premise that the norm of recognition not only bears a paradigm of form and effectiveness, but also includes an axiological-substantial element among these, due to the non-neutral nature of the Constitution, on the level of values, it follows that on the whole such a norm of recognition

⁵⁹ Da ultimo, on the dubious legitimacy especially of the first emergency decree-laws, which carried overly generic provisions, see also CHELI 2020.

⁶⁰ In a similar sense, however, the German jurisprudence has also moved: s. BALDINI 2020.

(*Erkenntnisnorm*) seems to lack, with the consequence of not making the respective acts recognizable in the context of the state legal system.

In other words, it seems that well beyond the legal-formal discourse, the sequence of events tends to be explained almost exclusively through the domination of the Political, which is the condition of the state of exception. The same effort to arrange and legitimize emergency acts through the reference to necessity understood as a source of law⁶¹ reflects such a condition, at least in so far as it certifies the irreducibility of the latter within the framework of ordinary legality.

From this point of view, it is not entirely incongruous to believe that the risk of a permanent transfiguration of the essential features of the constitutional order coexists with the management of the emergency through the arrival of a preventive State structure whose existence in legal terms is based on a different Basicnorm (*Grundnorm*), distinct from the one underlying the Republican Charter of '48. In this direction, moreover, some significant symptomatic element is not lacking, starting from the progressive shift of the real power of political decision from institutions to autocratic forms of power (*Prozesse der Ent-Institutionalisierung*)⁶² intolerant to the observance of procedural and substantive constraints, enshrined in the legal order⁶³.

This contributes more to weakening the position of elected assemblies - at national and territorial level - as institutions of political representation and to progressively favoring an alternative idea of democracy to that of a parliamentary type based on a constant dynamic of confrontation between competing interests.

⁶¹ DEPENHEUER 2007, 40.

⁶² LEPSIUS 2017, 324.

⁶³ LEPSIUS 2017, 323 *et seq.*

A certain rhetoric of the health emergency also goes in this direction which, as a form of targeted emotional public communication⁶⁴, in addition to making every person aware of the state of the emergency in progress, to confer a more or less serious dimension of the danger in place, thus ending up arousing in the community a feeling of widespread attention and fear.

In any case, it produces the effect, albeit mediated, of generalizing a social justification of the strategy of struggle undertaken by the national government and the territorial bodies, to protect individual and general life and health.

An improper political compensation is thus achieved, where widespread popular support for emergency measures compensates for the sacrifice of freedom rights, as well as other social rights, imposed by the state of emergency, although such a sacrifice causes serious damage to conditions of individual and social life⁶⁵.

Rhetoric as a method of “organizing natural language” essentially contributes to a form of consolidation of solutions and measures which also manifest a deficit, sometimes large, of constitutional legitimacy. In this sense, it is symptomatic of a certain cultural crisis that involves the sense of democracy as an organizational model of substantial rationality⁶⁶,

⁶⁴ This is the communication of data, in aggregate and disaggregated form, regarding the situation of the contagion, from which the severity of the contagion and the unbearable load that such a situation determines on functional health structures (hospitals, intensive care, etc.) can be derived.

⁶⁵ Rhetoric is a well-known figure in philosophical thought. Its use, far from infrequent in political debate, aims above all - as is well known - to the intent of provoking, in the listener, the conviction about the goodness of the narrator's arguments over those of his direct or indirect antagonist to turn inducing him, in the end, to orient his consent by virtue of this emotional propensity.

⁶⁶ On democracy as a form of rationalization of the political process, aimed at rational decision, see mostly HESSE 1999, 62. It emphasizes these connotations of democracy according to the thinking of Konrad Hesse MASING 2019, 443 *et seq.* S. also DREIER 2019, 81.

declining it in the false and hasty form of an identity democracy⁶⁷. The almost exclusive exaltation of the (procedural) timeliness and simplicity of the decision on the dialectical confrontation of competing interests, its primacy over the value of the argument⁶⁸, are the implications of this crisis whose significance can reach the ultimate foundations on which rests the constitutional democracy⁶⁹.

In conclusion, even "in ... times of ... orderly disorder" like these, it is necessary to avoid the serious error, even on a legal level, of finding

⁶⁷ This prospect is connected in a binding and complementary way with the representation of democracy in the sense of identity and also with the prevalence, in this, of the decision on the importance of rational argument. In the exercise of the individual right to vote, however, for Schmitt the form of manifestation of the indistinct unity of the people is not found: "Die Gleichheit aller Menschen als Menschen ist nicht Demokratie sondern eine bestimmte Art Liberalismus": SCHMITT 1996, 18. ("Es gehört zu den undemokratischen, im 19. Jahrhundert aus der Vermengung mit liberalen Grundsätzen entstandenen Vorstellungen, das Volk könne seinen Willen nur in der Weiße äußern, daß jeder einzelne Bürger, in tiefstem Geheimnis und völliger Isoliertheit, also ohne aus der Sphäre des Privaten und Unverantwortlichen herauszutreten, unter „Schutzvorrichtungen“ und „unbeobachtet“ - ...- seine Stimme abgibt, dann jede einzelne Stimme registriert und eine arithmetische Mehrheit berechnet wird": SCHMITT 1996, 22). People and citizens appear, in this construction, as antinomic and irreconcilable points since the former takes on a unitary and indistinct dimension, whose will cannot be translated by the unanimous orientation of a multitude which, instead, contains only the complex of individual wills individual ("Die einstimmige Meinung von 100 Millionen Privatleuten ist weder der Wille des Volkes, noch öffentliche Meinung": Idem). The will of the people is destined to be fulfilled essentially in the invocation, in the acclamation of the Head, in an event that goes beyond the forms of positive law and takes place in the exclusive perception of the indistinct unity of the people

: "Der Wille des Volkes kann durch Zuruf, durch *acclamatio* (corsivo dell'A.: n.d.r.), durch selbstverständliches, unwidersprochenes Dasein ebensogut und noch besser demokratisch geäußert werden als durch den statistischen Apparat...": Idem).

⁶⁸ For a distinction between decision-making democracy and argument democracy, s. ALEXY 2015, 210.

⁶⁹ BÖCKENFÖRDE 1991, 112; on the subject, v. also HABERMAS 2005, 106 *et seq.*

"natural" everything that happens because now "it happens every day"⁷⁰. The constitutional jurist, in particular, must not give up the habit of questioning whether what is usually happening, in a sense that is not exactly in accordance with constitutional legality, should be considered necessary for the protection of the constitutional order itself; that is, whether the fight against the emergency, in order to be profitable, requires or imposes the measures undertaken with the effective sacrifice of constitutional rights.

If the exception (the prohibition) becomes the rule and the latter (the exercise of freedoms) degrade to the exception, the action of legal research must be even more strict and rigorous. Especially in these circumstances, there is a need to reaffirm the value of the Constitution as a fundamental order of social life and an unfailing parameter of political action, avoiding to consider the concrete experience as fully legitimate. Whoever aspires to so much even in the name of democracy is actually a clear enemy of democracy⁷¹.

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⁷⁰ BRECHT 1998, 231.

⁷¹ VOSSKUHL 2018, 121.

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