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11

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Democracy and the State of Exception: The Italian Experience
# Table of Contents

1. ......................................................................................................................4
2. ......................................................................................................................6
3. ......................................................................................................................7
4. ......................................................................................................................11
5. ......................................................................................................................12
6. ......................................................................................................................13
7. ......................................................................................................................14

The Author ........................................................................................................16
1. – The concept of state of exception is strictly intertwined with the one of legal system and indeed exception implies the suspension of the usual legal order, which is suited to govern normal situations. Usually, these exception rules provide either the suspension or the compression of certain fundamental rights and freedoms,¹ as well as for the strengthening of the executive, a faster legislative procedure and the loosening of the system of checks and balances. However, all constitutions provide specific instruments to deal with emergencies, regardless of whether into a specific section. Nevertheless, this is a way for democracy to protect herself, by setting a maximum limit, above which no more exception is allowed without risking to overturn the constitutional legal order.

Moreover, the word exception has to be interpreted in the sense of unpredictable; it is from the unpredictability that comes out the impossibility to resort to the usual provisions. Besides, constitutions dealing with exception and emergency may consider a wide variety of such situations, namely a legislative emergency, an economic emergency, a state of war… Some constitutions, such as the Spanish one (at Article 169), even prohibit constitutional amendments during emergency.²

¹ This was the approach chosen by the Weimar Constitution at Article 48(2).
The legal notion of exception, due to its extraordinary character, has been – and still is – one of the most debated issues in both legal and philosophical doctrine. Exception plays a pivotal role in the Schmittian theory, according to which the sovereign is the one deciding on the state of exception (souverän ist, wer über den Ausnahmenzustand entscheidet). The reason is that actually the sovereign power is usually divided among constitutional bodies, whereas during the exception it is all regrouped in the hand of one single constitutional body or individual. Italian legal scholar Santi Romano as well frames the exception within the legal order. According to him, although exception is something extra-legal, nevertheless it is perfectly capable of establishing a valid legal order that reflects the exception herself. Despite not being positive law, exception is all the same a legal source. According to Costantino Mortati, it is not possible to deny the emergency the stand of autonomous source legitimising the exercise of certain powers. Opposite the philosopher Giorgio Agamben, according to whom exception situations, because are not governed by usual legal rules, establish a sort of legal vacuum.

However, the paper does not aim at reviewing the doctrine on the state of exception, whereas to analyse the peculiarity of the Italian experience, which offers some interesting profiles. The main reason is that even though the Italian constitution does not provide a specific emergency section, the country has resort – and still is – several times to emergency provisions, mainly through the law decree and the administrative orders.

This approach raises some concerns, in particular:

5 L. Carlassarre, Stati d’eccezione e sospensione delle garanzie costituzionali secondo Mortati, in Il pensiero giuridico di Costantino Mortati, Giuffrè, Milano, 1990, p. 481.
- Whether is the absence of a specific section that allows the
  misuse of emergency instruments.
- Whether the misuse can lead to a modification of the balance
  of powers between the constitutional bodies, thus producing a
twisting in the form of government.

The Italian experience is very illustrative of both the
aforementioned concerns.

2. – The first Italian Constitution, the Albertine Statute of 1848,\(^7\)
did not provide such a chapter. Emergency was dealt with through
the emergency orders – whose legal basis was considered to be
Article 6 of the Statute – and through the martial law and the wartime
criminal military code, as during the riots for bread in Milan in 1898 or
the earthquake in Messina in 1908.\(^8\) By the enforcement of the
wartime criminal military code, the Italian legal system accepted the
possibility of a legitimate use of extraordinary powers – even against
the law – in order to preserve the State and of the legal and social
order. These values are considered to be hierarchically superior, thus
deserving the greatest protection. However, in a case that presented
an actual threat to the State, the Fascist March on Rome on the 22
October 1922, the King Victor Emmanuel III entrusted Mussolini the
political power in order not to declare the stato di assedio, as his
ministers advised him to do.

After the tragedy of the Second World War and the experience of
the Fascist dictatorship, the Constituent Assembly (1946-1947)
considered the possibility to integrate in the new constitution a
specific chapter on the state of exception. Finally, fearing a potential
misuse of emergency powers to overthrow the constitutional order
(the experience of Fascism was still recent), the Assembly opted for

\(^7\) The Statute was the constitution that Charles Albert of Sardinia conceded to the Kingdom
of Sardinia on 4 March 1848 and in 1861 became the constitution of the unified Kingdom of
Italy. It remained in force until 1948, when was replaced by the present day constitution.

\(^8\) S. Romano, *Sui decreti legge e lo stato di assedio in occasione del terremoto di Messina e

-6-
not to integrate it. However, other instruments were provided whenever a situation of necessity and urgency occurs,\(^9\) mainly the law decree, at Article 77,\(^{10}\) the possible establishment of shorter legislative procedure for urgent bills, at Article 72(2),\(^{11}\) the powers assigned by the Parliament to the Government in case of war, at Article 78,\(^{12}\) and the substitute powers of the government, when necessary, of Municipalities, Provinces, Metropolitan Cities and Regions, at Article 120.\(^{13}\)

3. – Despite lacking a specific emergency section, the Italian constitution provides instruments, the most notable one being the law decree.

The procedure under Article 77 allows skipping the ordinary legislative procedure, thus ensuring a prompt action to confront emergency. From a theoretical point of view, the instrument of the law decree is fit to handle emergencies. However, the practice has

\(^9\) Here the greater concern is related to the extreme vagueness of the notion of both necessity and urgency. Therefore, the constitutional provision may be considered as a sort of blank clause, even though a system of scrutiny is in place. See A. Celotto, E. Di Benedetto, Art. 77, in R. Bifulco, A. Celotto, M. Olivetti (cur.), Commentario alla Costituzione, vol. II, UTET, Torino, 2006, pp. 1507-1530, in particular p. 1509.

\(^{10}\) « 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 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. »

The law decree is also regulated by the law 400/1988.

\(^{11}\) « The Rules shall establish shorter procedures to consider a Bill that has been declared urgent. »

\(^{12}\) « Parliament has the authority to declare a state of war and vest the necessary powers into the Government. »

\(^{13}\) « Regions may not levy import or export or transit duties between Regions or adopt measures that in any way obstruct the freedom of movement of persons or goods between Regions. Regions may not limit the right of citizens to work in any part whatsoever of the national territory. The Government can act for bodies of the regions, metropolitan cities, provinces and municipalities if the latter fail to comply with international rules and treaties or EU legislation, or in the case of grave danger for public safety and security, or whenever such action is necessary to preserve legal or economic unity and in particular to guarantee the basic level of benefits relating to civil and social entitlements, regardless of the geographic borders of local authorities. The law shall lay down the procedures to ensure that subsidiary powers are exercised in compliance with the principles of subsidiarity and loyal co-operation. »
The main reason can be traced into the interplay of three key factors, which are:

1. the lack of a proper definition of which emergencies can to be handled through this instrument;
2. the fact that the adoption procedure is fast;
3. the peculiarity of the Italian party system and the perfect bicameralism;
4. the effectiveness of the system of control on the government’s action.

Considering point no. 1, it seems quite unlikely that the lack of definition can be the reason behind the abuse of the law decree. Moreover, whenever a list of possible emergencies is provided, the question whether the list is close always arises.

Point no. 2 is certainly true, but fails to take into account two elements: the first being that Article 72(2) provides the possibility to adopt a shorter legislative procedure for bills qualified as urgent and the second that the non-conversion of the law decree into an ordinary statute law creates problem when coming to the certainty of the law.

Point no. 3 is more suitable to explain the abuse. The highly fragmented party system, combined with a proportional representation – in particular until the popular referendum of 1993 – produced coalition governments, whose genetic instability is fearful of parliamentary confrontation. Furthermore, the perfect bicameralism characterising the Italian Parliament has been blamed for the excessive slowness of the legislative procedure.

Finally, point no. 4, the long-awaited intervention of the Constitutional Court took place in 1996, with the decision no. 360, sanctioned practice of the re-issuing of an unconverted law decree.

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14 In particular starting from the VI Legislature (1972-1976).
15 “The Rules shall establish shorter procedures to consider a Bill that has been declared urgent.”
16 The approach of the Constitutional Court to the issue had previously (but also afterwards) been a bit fluctuating, because did not want to step into the political debate.
as unconstitutional,\textsuperscript{17} because violating both the prerogatives of the law-making body – and the certainty of law.\textsuperscript{18}

When analysing the use made of the law decree by Italian governments, what strikes most is the fact that a governmental legislation (legislazione governativa)\textsuperscript{19} has been put in place. The fact raises concerns with respect to the separation of powers; through this legislazione governativa, the government ends up cumulating executive and legislative powers. It is as if Schmitt’s idea of the concentration of sovereignty in one single individual during the state of emergency were realised. Following this reasoning, it is as if Parliament was divested his role as legislator.

However, it is convenient to outline that not all subject matters may be regulated through the law decree. Article 74(4) provides a list of those, which have to be regulated following the ordinary legislative procedure.\textsuperscript{20} Moreover, the law decree encounters the same limits as constitutional amendments\textsuperscript{21} and cannot regulate matters of constitutional importance.\textsuperscript{22}

Besides, there still is the Constitutional Court as supreme watchdog entitled to review the actual existence of the emergency as well as the subject matter.

The law decree has been further regulated by the law 400/1988, at Article 15.\textsuperscript{23} Paragraph 1 specifies that in the preamble the government has to clearly identify the extraordinary circumstances leading to the adoption of the law decree. This provision is of a pivotal importance, because is the basis for the scrutiny of the

\textsuperscript{17} The most remarkable example of the misuse of the re-issuing is represented by a law decree re-issued 29 times, therefore remaining in force for four years.

\textsuperscript{18} The Court started to warn the Government against this practice already at the end of the 80s, with the decision 302/1988.

\textsuperscript{19} Expression borrowed from G. Agamben, \textit{Stato di eccezione}, p. 28.

\textsuperscript{20} «The ordinary procedure for consideration and direct approval by the House is always followed in the case of bills on constitutional and electoral matters, delegating legislation, ratification of international treaties and the approval of budgets and accounts.»

\textsuperscript{21} Article 139 is interpreted extensively: «The form of Republic shall not be a matter for constitutional amendment.»

\textsuperscript{22} See the decision 220/2013 on the reorganisation of the Provinces.

\textsuperscript{23} The law is entitled "Discipline on the activity of the government and of the presidency of the Council of Ministers", thus having a broader focus than the law decree.
Constitutional Court. Moreover, that reveals the provision being something far away from a blank clause. The Constitutional Court herself has stressed that necessity and urgency are requirements to the constitutional validity of the law decree,\textsuperscript{24} thus deeming as unconstitutional the governmental practise of reiterating unconverted law decrees.\textsuperscript{25} However, until the mid-70s, the majority of constitutional scholars claimed that the character of necessity and urgency was a political question, therefore, not for the Court to scrutinise. Still with respect to the content, Paragraph 3 states that is has to be homogeneous, specific and corresponding to the title; again, this is a key provision introducing a new profile for the scrutiny of the Constitutional Court.\textsuperscript{26} Paragraph 2 better specifies what is out of the scope of the law decree. Paragraph 2, at letter c), allows the Government to re-issue a law decree, which Parliament has not converted due to inertia, rather than to a precise political choice; while letter d) prohibits the Government to regulate the legal relationships created by a non-converted law decree by issuing another. Therefore, the law does not completely rule out the possible re-issuing of a law decree. What emerges is that actually the law 400 failed to rationalise properly the resort to the law decree by the Government.

Therefore, the Italian constitutional architecture considers the legislative power of the government as something residual with respect to the legislative power belonging to Parliament, who can freely decide to deal with the emergency himself. In such a hypothesis, no room is left to the government. Nevertheless, Parliament is always assigned the power to scrutinise very closely

\textsuperscript{24} Decisions 29/1995, 34/2003, 171/2007. In this last decision, the Court actually struck down a law decree based on lack of proper motivation. See A. Celotto, C’è sempre una prima volta... (La Corte costituzionale annulla un decreto–legge per mancanza dei presupposti), in Giustizia amministrativa, at www.giustamm.it; R. Dickmann, Il decreto–legge come fonte del diritto e strumento di governo. Note a Corte cost. 23 maggio 2007, n. 171, in Federalismi.it; A. Ruggeri, Ancora una stretta (se pur non decisiva) ai decreti–legge, suscettibile di ulteriori, ad oggi per vero imprevedibili, implicazioni a largo raggio (a margine di Corte cost. n. 171 del 2007), in Forum di Quaderni Costituzionali, at www.forumcostituzionale.it.


\textsuperscript{26} The most relevant is the decision 22/2012.
any governmental (legitimate) deviation into the legislative power. Indeed the necessity and urgency requirements are strictly scrutinised by both Chambers when deciding whether to convert the law decree into a statutory law.

A much more defined emergency is provided at Article 78, devoted to the state of war.27 When this is the case, the government will be assigned the necessary powers and just these, thus upholding the separation of powers. However, it is up to Parliament to declare the state of war. Moreover, Parliament will be at the government’s side through all the war, therefore continuing to exercise his power and his scrutiny on the government. Because the constitution does not expressly provides the suspension of the powers of any constitutional body, it results that the state of war has to be handled collectively by all constitutional bodies.

4. – The emergency issue is not just a constitutional matter, because a handful of ordinary laws have provided specific powers and instruments to be implemented during more or less clearly defined emergencies. The most notable examples are the legislative decree no. 625/1979,28 against the left-wing terrorism (the so-called *Brigate Rosse*, Red Brigades) – strengthening the police powers and compressing suspect rights –, the law against natural disasters29 and the law no. 225/1992 establishing the Protezione Civile (Civil Defence).30

This last provision is of paramount importance because it has been under this law that the government still passes a large amount of orders to handle emergencies or supposed emergencies. Here the intent seemed more to provide procedures and structures able to confront extraordinary situations and to make their developments

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predictable rather than to assign powers to handle actual emergencies.

The law decree 343/2001 (amending the law 225/1992),\(^1\) introduced, at Article 5(1), the possibility to resort to emergency instruments even in situations not properly of emergency – since not of unexpected – but that could generate risky situations,\(^2\) the so-called great events, such as the 2006 Winter Olympics in Turin or the 2015 Expo in Milan. In such circumstances, the connection to the extraordinary character of the situation is lacking; nevertheless, the government exercises all the same emergency powers.\(^3\) In doing so, there is no more connection between an extraordinary situation and the extraordinary powers. Moreover, another critical profile is that there is a weak system of control of the Protezione Civile’s order, which are kept out of the scope of the Court of Audit.

5. – Alongside the orders of the executive power, it is convenient to mention what are called within the Italian legal system as strong orders, namely the orders issued at local level by either the prefetto (prefect) or the sindaco (mayor).

Under the royal decree 773/1931, now Article 2 TULPS, the prefect, in cases of urgency or public need, can issue orders in order to protect the public welfare and security. No further recommendations form the point of view neither of the content nor of the goal is given, thus leaving broad room to discretion and interpretation.

When coming to the mayor, a similar power is vested with him under Article 54(4) TUEL, which provided the power to issue orders

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\(^1\) The law 27/2012 has taken the competence for great events out of the scope of the Protezione Civile.

\(^2\) The Court of Account specified the definition of great events as events that could endanger life, private property and public goods. However, the category is open. The Constitutional Court herself stated that the potential risk was enough to resort to emergency powers (see decision 127/1995).

\(^3\) The law 152/2005 has extended the power to issue emergency orders even for events that take place abroad.
to handle any threat to urban security and public safety. This power has been progressively curtailed and specified at Article 6(4-bis) of the legislative decree 9/2008, providing a clear definition of both urban security and public safety.

However, up to now, neither the prefects nor the mayors have ever abused nor misused the power of issuing orders.

6. – Furthermore, the recent economic crisis has provided further remarks on the twisting of the Italian form of government (and of the form of State, according to some scholars) in situations of emergency, namely with respect to the role of the President of the Republic and of the Constitutional Court.

The economic crisis has produce the highest level of political incertitude in Italian Republic history. The President of the Republic has then emerged as the pivotal constitutional body, the only one capable of granting stability to the country. Indeed, the Italian constitution does not go much into details when coming to presidential powers. Therefore, constitutional scholars have interpreted the provisions as granting the President a set of powers whose extent varies according to the contingent situation; meaning that they enlarge during period of crisis.

The active engagement of President Napolitano (starting from the Berlusconi’s crisis of government in 2011 until his resignation in 2015) as a strong advisor of governments seems to have proved right Esposito’s theory according to whom – since the president is given the same powers as the monarch in the constitutional monarchy – it is up to him to actively intervene during emergency.

The Constitutional Court’s activism may also rises some concerns, with respect mainly to a certain number of decisions marking a straightforward intervention in the competence of Parliament and government, when balancing spending review and rights’ protection.
According to Ruggeri, the recent years have witnessed a torsion in both the form of government and even the form of State, because of the extreme activism of the bodies that are entrusted with the protection of the Constitution: the President of the Republic and the Constitutional Court. The former when refusing to dissolve Parliament after the decision of the Constitutional Court on the unconstitutionality of the electoral law, thus trying to boost foreign confidence in the country as well as reforms within the country. The latter when delivering decisions upholding human dignity, thus trying to call Parliament to his duty.

7. – Following the brief analysis of the Italian emergency experience, some key elements may be drawn:

- the lack of a specific emergency section is not a problem per se for the resort to emergency provisions; because the emergency is something unpredictable, the constitutional enshrinement of all the foreseeable extra ordinem intervention may turn out to be useless;

- it is not the aforementioned lack per se that has generated the abuse/misuse of the instrument of the law decree. Opposite, the constitution herself provides a system of checks. It was a combination of political leading to the misuse;

- the constitution provides a margin of appreciation for both the Head of State and the Constitutional Court that may decide the appropriate moment for stepping in as custodians of the constitutional legal order. This goes in particular for the President of Republic, whose role is not clearly defined by the constitution, which, on the contrary,

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35 Decision 1/2014.
allows a certain flexibility and adaptability of the presidential powers to the political contingency;

- the resort to specific legislation in order to handle specific emergencies is not something characterising just the Italian experience. Moreover, as for any other primary legislation, the Constitutional Court is the guardian against unlawful compression of rights and freedoms or any other possible sort of abuses;

- the resort to specific legislation and/or orders in order to handle situations that, even though not properly emergencies, can turn into emergencies if not handled properly conveys the idea of the failure of politics and the lack of managerial skills rather than a voluntary alteration of the balance of powers from the part of the government;

- the very peculiar interplay of all the aforementioned elements has produced a temporary twisting of the form of government, resulting in an alternation in the balance of powers between the main constitutional bodies.
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