Coping with Disloyal Cooperation in the Midst of a Pandemic: The Italian Response

Cristina Fasone 2021-03-08T09:00:40

Introduction

The activity of the coalition Government between the Five Star Movement (5SM), the Democratic Party and other centre-left junior allies to tackle COVID-19 has been praised by some and severely criticized by others. Looking back at this first year of pandemic, a crucial problem of the Italian management of the disease and the related economic and social crises has been the lack of loyal cooperation; a principle entrenched into the Constitution (Art. 120, second para, Const.), with regard to the relationship amongst the different levels of government. The lack of sincere cooperation, however, has gone well beyond the (mal)functioning of the regional state and has also affected the relationship between the Government and the Parliament, amongst political parties, even within the governmental coalition, and has ultimately impaired the trust of citizens in the institutions (as further confirmed by the approval, with an overwhelming majority, of the constitutional reform to reduce the seats in Parliament from 630 to 400 deputies and from 315 to 200 senators at the referendum of 20-21 September 2020).

The State of Emergency and the Worsening of the Legislative-Executive Imbalance

The state of emergency was firstly declared by the Council of Ministers with no involvement or discussion in Parliament on 31 January 2020 (Art. 24, Legislative Decree no 1/2018). Since then, upon deliberation of the Council of Ministers, it has been postponed three times, the last one, so far, on 13 January 2021 and is expected to last until 30 April 2021 (on the maximum length and the prorogation of the state of emergency, see here). The state of emergency ensures wide rule-making powers to the Government, not just within the Council of Ministers – for example many were the orders adopted by the Minister of Health – but also on its serving administrative apparatus, like the Department of Civil Protection. Although the Constitution does not directly regulate the state of emergency, it identifies specific tools for emergency situations (Art. 77 Const.): Decree-laws are temporary measures adopted by the Government “in case of necessity and urgency” that lose their effect retroactively if they are not converted into law by the Parliament within a 60-days deadline since their publication. Since the initial declaration of the state of emergency and by the end of 2020 no fewer than 18 decree-laws have been adopted by the Council of Ministers. While the abuse of decree-laws goes back

to the 1990s and the Parliament has never hesitated to heavily amend them, their size, the overall number, and the quick conversion into law, in order to enable the adoption of further executive measures, have significantly strengthened a trend toward the marginalization of parliamentary deliberation.

The Government has tried to push parliamentary procedures to the extreme of limiting the discussion and voting in the plenary and the bicameral nature of the legislative process, whereas the Chamber of deputies and the Senate enjoy the same law-making powers and authority in conferring and withdrawing the confidence to the executive. During the pandemic, the constitutionally disputable practice of adopting key governmental measures – like decree-laws and budget bills – through maxi-amendments (amendments composed of one article and thousands of paragraphs, replacing the entire text of the bill) combined with questions of confidence triggered by the executive has been systematically used. As a consequence, the voting of the bills in the plenary article by article, as it should be, has been inhibited. The severity and urgency of the situation has also compelled the two Houses to speed up the legislative process consolidating a sort of “hidden” unicameralism. The House were a decree-law or a bill is first introduced is able to examine and amend it; the House intervening as the second in the order tends to pass it as it is in a few days (or hours) with almost no scrutiny.

Protection of Fundamental Rights

Besides the many decree-laws enacted to tackle the health and the economic emergency, 17 decrees of the President of the Council of Ministers (d.P.C.M.s) and a plethora of orders by the Minister of Health and by the Head of the Department of Civil Protection (in addition to all the orders of regional and local authorities) were adopted last year. This paved the way to an abnormous body of legal instruments dealing with the pandemic, often repealing or replacing in sequence those that had been previously adopted. Many of these measures have deeply affected fundamental rights: to health care, privacy, freedom of assembly, religious freedoms, free movement, right to education, freedom to conduct a business. Yet, only some of them are legislative acts or acts having the same rank as legislation, like decree-laws and legislative decrees, the latter passed by the executive upon delegation by the Parliament.

There is no unanimous agreement on the ability of such decree-laws and legislative decrees to fulfil the constitutional requirements set to restrict fundamental rights as domains reserved to (parliamentary) legislation (see e.g. here). Even more disputed is the circumstance that d.P.C.M.s and ministerial orders, formally administrative acts, satisfy this condition. If contested by some (e.g. here and here), others have pointed out that overall decree-laws can intervene in the domains reserved to legislation and have been properly used as enabling acts for d.P.C.M.s (e.g. here and here), thereby remedying and supplementing their legal weakness. Especially during the first lockdown in Spring 2020 doubts were raised on the sufficient clarity and precision of the “enabling” decree-laws (in particular, the first one, no. 6/2020) for the legitimate adoption of the subsequent d.P.C.M.s imposing severe restrictions on personal freedoms. Moreover, despite their highly sensitive contents, until the

adoption of Decree-Law no. 19/2020 (Art. 2) no involvement of the Parliament whatsoever was envisaged on d.P.C.M.s and, even later, parliamentary scrutiny has remained marginal, on measures that had been already pre-packaged by the executive. Nor constitutional review of legislation can be carried out by the Constitutional Court on d.P.C.M.s given their nature of administrative acts, if not indirectly targeting the relevant enabling decree-law.

Till recently the proportionality of the executive measures could not be easily subject to parliamentary and public scrutiny either, as the ground for their adoption – the evidence and transcripts of the meetings of the scientific-technical committee, a non-partisan advisory body of the government composed of experts – was not disclosed. The publication of the verbatim reports of the scientific-technical committee and the possibility for the Parliament as well to acquire the information needed from this committee could signal a renewed collaboration between the legislature and the executive.

A Regional System Out of Control

The complex functioning of the State-Regions relationship during the pandemic has been a real test bench for the Italian regional system. From February to April 2020, after hearing the Presidents of the Regions, the Government adopted incrementally restrictive measures evenly affecting the entire territory through a national lockdown although only the North of Italy was hit by the disease. Since the end of October, the spread of the disease throughout the country has requested a more tailored-made approach by the Government according to the territorial situation (i.e. the Rt index in the regions and the regional health care assistance guaranteed).

Regions enjoy shared legislative competences with the State on crucial subject matters like the protection of health (Art. 117, third para Const.), save for the basic level of health care assistance under the exclusive competence of the State (Art. 117 Const., second para, lit. m), and education (Art. 117, third para Const.), except for the general provisions. During the pandemic this has translated into even more asymmetric guarantee of these basic rights as soon as the national restrictive measures were released before the summer. Some regional health care systems were more under stress than others and the schools, both at primary and secondary level of education, re-opened with teaching in presence in most Regions in September, but not in all of them (like Campania and Puglia, upon unilateral decision of the President of the Region). In theory, the central Government could step in to enforce exactly the same measures on the whole territory by using its exclusive competence on international prophylaxis (Art. 117, second para., lit. q), which appears well fit for a pandemic. Likewise, in compliance with the principles of subsidiarity and of loyal cooperation, the State could exploit its power to substitute itself to Regions and municipalities (under Art. 120 Cost.). Such a “centralistic option” was not the one followed over the last few months.

The Government has used its competence on international prophylaxis and to set the fundamental principles in matters of health to fix a common regulatory framework within which the concrete daily administration of the epidemiological emergency

rests upon the Regions. In any event, according to Decree-Law no. 19/2020 the Presidents of the Regions were authorized to adopt more restrictive measures compared to the State under the circumstances foreseen by the same Decree-Law and when witnessing a serious deterioration of the health care risk in the Region; such regional orders, also in agreement with the Minister of Health, kept being applied although, in principle, they would have lost their effects following the adoption of the next d.P.C.M. (d.P.C.M. 10 April 2020).

This system of "governance" has remained in place even when the d.P.C.M of 3 November 2020 divided for the first time the country into three areas (yellow, orange and red) depending on the level of epidemiological risk of each Region, every area having its own corollary of restrictive measures. Within a common regulatory framework, which for example fixes a national curfew at 10pm, Regions can shift from one coloured area to another depending on COVID-19 data collected and transmitted to the central government. The mapping of Italy by area of risk (still in force, with some revisions), however, has not decreased the tension between State and Regions, the latter often adopting milder or stricter measures, also depending on the political convenience.

What's Next?

The orders of the Presidents of the Regions have repeatedly come under the review of regional administrative tribunals for departing, without due reasons, from the national regulatory framework, with more restrictive (see the decision of TAR Marche no. 56, 27 February 2020) or with looser provisions (see the decision of TAR Calabria no. 841, 9 May 2020). The derogation from the national rules by Regions has even been solved in opposite ways by administrative judges within the same regional territory (see the decree of TAR Puglia, Bari, no. 680 of 6 November 2020 and decree of TAR Puglia, Lecce, no. 695 of 6 November 2020).

Remained at the margin of the political struggle between State and Regions as well as between the Government and the Parliament, due to the design of the access to constitutional adjudication, the Italian Constitutional Court has nonetheless ensured the continuity of its proceedings and recently has been given the opportunity to step in for the first time on the measures to contrast the pandemic. In the framework of a constitutional challenge introduced by the national Government against Law no. 11/2020 of Aosta Valley, one of the five Italian Regions with a special statute, on 14 January 2021 the Constitutional Court first ordered the suspension of the effects of the regional law as an urgent matter (order no. 4/2021) and, then, on 24 February 2021 declared unconstitutional the regional legislative provisions violating State legislation, clarifying that the State exclusive competence on international prophylaxis grounds the legislative authority of the central level of government in contrasting the pandemic (compared to other competences, e.g. health protection, which would have granted a more significant role to Regions). While the judgment has not yet been published (see the press release), the Court pointed out in the order that the diversification amongst regions of the response to the pandemic is not prohibited *per se*. Yet, it has to occur in compliance with the principle of loyal cooperation.

It is precisely this constitutional principle – expressly emphasized also in the last annual Report by the Italian Constitutional Court's President – that has been the most neglected during the pandemic, while the unprecedented emergency the country is facing would have required a much more genuine collaborative effort on the part of State and Regions but also in the inter-institutional relationship at national level between the executive and the Parliament and within the governmental coalition itself.

With the fifth biggest death toll worldwide and the mass vaccination that is only starting now, the governmental crisis declared on 26 January, following the withdrawal of the support by a small coalition partner, Italia Viva, led by the former President of the Council of Ministers, Matteo Renzi, took many by surprise and disoriented. One of the reasons put forward for triggering the crisis was the alleged lack of a "cooperative method" inside the coalition, with a top-down approach imposed to the allies by Giuseppe Conte with the support of the 5SM. The appointment of the former ECB President, Mario Draghi, to lead the new Government, formed by several "technical" Ministers (non-elected eminent experts in their field) in key positions and by representatives of all major political groups, with a couple of exceptions, supported by an overwhelming majority in Parliament, is really the last call for Italy to retrieve a basic level of loyal cooperation and its premise, the sense of responsibility in the fulfillment of institutional functions, at all levels of governments and by political actors.
