The Emergency Administration between Normality and Exceptionality

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1. The Administrative State dispute in the Covid19 age

The Covid19 pandemic has been the incident to be involved again in traditional disputes with the Administrative State, given that the reaction of public powers has been very impressive[1]. As is well known, traditionally speaking, law scholars are divided according to two different approaches. Most common law scholars express skepticism about the Administrative State (for this purpose it is enough to cite the recent work by Sunstein and Vermeule[2]), whilst the European continental law scholars have a more positive attitude in the name of welfare state. This basic difference has been now challenged again, because significant questions have been raised also within the European continental legal systems considering that emergency has caused severe restrictions as well as an increasing role of the central Government prevailing on Regional as well as Local authorities. What we have seen, has been the imposition of emergency administration to an unprecedented extent. The consequence has been to foster a major debate concerning the legitimacy of public authority responses.

To what do we owe this more concerned attitude of the European doctrine, assuming the emergency administration is usually considered part of the Administrative State? Four reasons can be detected. First of all, we are used to having to do with immediate emergencies,— earthquakes, flooding, landslides, natural catastrophes and so on. These are undoubtedly

[1] A summary report on the reactions of public powers worldwide can be seen here: https://lexatlas-c19.org. For comments on some measures taken by the western European countries see A. Vedaschi, *COVID-19 and Emergency Powers in Western European Democracies: Trends and Issues*, 2021, https://verfassungsblog.de/covid-19-and-emergency-powers-in-western-european-democracies-trends-and-issues/.
[2] See C.R. Sunstein, A. Vermeule, *Law & Leviathan*, Cambridge, 2020.

harmful but these types of event are usually instantaneous. In contrast the there has been a need to respond to the pandemic since January 2020 and its duration is as yet unknown.. Time is really challenging for legitimacy and that is why questions are raised. Secondly, the global pandemic surprised everyone; in a very real sense it has been a crisis without precedent in living memory. Our administrative structures and legal systems were not prepared for a crisis on this scale. Thirdly, facing the invisible enemy has required widespread and extended restrictions of freedoms previously considered inviolable. The comparison with the war effort is one of the more misused examples of commentators to highlight the extraordinary times that we have been living through. Finally, most of the legal systems have given risen to a growing number of new public authorities—extraordinary Commissioners, technical Commissions, and new Agencies endowed with special powersgiving rise to new and overlapping administrative regimes and undermine the constitutional coherence of the emergency administration.

However, my thesis is that these concerns are probably overestimated. Assuming that the most impressive measure in terms of restrictions has been the “stay home” paradigm, I try to support the reasons justifying the coherence of that provision with the democratic and liberal Constitutions. For this purpose, I make use of the main four differences related to State of exception and State of emergency.

2. Why the emergency state during the Covid19 age has not been a danger for liberal and democratic legal systems

In order to demonstrate the overestimation of the concerns about the legitimacy of Administrative State during the Covid19 emergency I take in account the most restrictive “package” of measures the States undertake, that is the so-called “stay home” or “shelter-in place” measures. These measures which restrict the free movement of people present real challenges for legal systems with the ambition to be defined democratic.

At this point it is useful to compare the State of exception[3] with the State of emergency,[4] by reference to four major distinctions. According to long-established beliefs, when the State of exception is active, you can observe that: (a) the normal Constitutional powers are at stake; (b) ordinary legality is suspended; (c) the duration of the State of exception depends on the will of the authority declaring the suspension of the Constitutional order; (d) you are definitely out of Constitutional order. On the contrary, when the State of emergency is working, you can note that: (a) the normal Constitutional powers are confirmed, but they are altered; (b) ordinary legality is recognised, but it is derogated from by new orders; (c) the duration of State emergency is strictly linked to the crisis time; (d) you definitely remain within the Constitutional legality.

With this in mind, for the first, we can concede that the "stay home" measures did not entail any suspension of Constitutional powers whether legislative or territorial. What we have seen, was a more or less shift of the ordinary power to the Central Government, but Parliaments and Territorial authorities have continued to exercise their powers within their competences. There has been no loss or removalof powers.

Secondly, "stay home" measures have not entailed putting the ordinary legality aside. Of course many norms have changed; moreover, we could have noted many derogations to the ordinary rules by government orders, but the rule of law was not contradicted. Court activities, as for every other business, were slowed down, but have continued to carry out supervision of public authority decisions.

Thirdly, it is certainly true that the duration of the crisis is longer than others we have known so far, but restrictions and emergency administrative actions have been and continue to be strictly related to the trend of the objective data, namely the epidemiological data. As a result, restrictions have been lifted or strengthened according to the public health data. The duration of the emergency does not hinge on the discretionary will of any specific authority.

[3] Of course, the most important and controversial author of the State of exception concept was Carl Schmitt. See. C. Schmitt, *The Guardian of the Constitution*, Cambridge, 2015.
[4] A brilliant comment on this difference by the lawyer Gustavo Zagrebelsky was published in the Italian newspaper, la Repubblica, which has opened a huge debate; G. Zagrebelsky, *Non è l'emergenza che mina la democrazia. Il pericolo è l'eccezione,* in *La Repubblica,* 29 luglio 2020.

Finally, the measures taken by the Chinese authorities against the spread of infections are sufficiently clear to establish the boundaries between the emergency administration and state of exception. During the pandemic measures were put in place to limit freedom of movement but we can identify a considerable difference inthis respect. In China the emergency measures in question which were draconian were policed by force. From this point of view no one has yet been taken into custody during the current emergency administration, so that we would say this experience has remained within the Constitutional legality.

For all these considerations, the State of exception has not operated in the previous months, even when the restrictions had the most extended strength[5].

3. Conclusions with a specific focus in Italian case

Placing the Covid19 restrictions in the scope of the State of emergency helps us to understand the real challenges the legal scholars should deal with. In fact, even moving the considerations in a more abstract sense, the conclusion, which I have advanced, is also confirmed. What we note when we are in a State of emergency, is that the emergency administration is a condition through which you can see the alteration of powers and the derogation from the ordinary rules which the legal system would normally observe with the aim of protecting public interests. In this sense, emergency administration does not introduce new interests, that you can deem out of Constitutional order, but it is an attempt to fulfill the mandates of the Administrative State when a sudden and unpredictable event takes place. There is a common line between Administrative State and emergency administration, even if the latter is legitimated only if a certain conditions are in force.

In the specific case of Covid19, the continuity of public interest subjected to protection has concerned public health and that is an ordinary public interest which public powers are called upon to assure. The emergency is only the condition forcing the public powers to react in order to address the new problems it has created. Of course, the extraordinary event of crisis has forced the legal system to find new ways to tackle it, but the final goal is always the same.

[5] See also the conclusions by T. Ginsburg, M. Versteeg, *The bound executive: Emergency powers during the pandemic*, in *Int. J. Const. Law*, 2021, https://academic.oup.com/icon/advance-article-abstract/doi/10.1093/icon/moab059/6308959?redirectedFrom=fulltext.

On the other hand, if public powers, using the ordinary rule, were not able to protect the public health, the consequences, even for the Constitutional order, would be much more dangerous.

This conclusion does not mean to say that questions for legitimacy should not be raised[6]. From this point of view it is right to monitor constantly these conditions for legitimacy, at least according two points of view. First of all, it is notable that emergency administration has to be limited in terms of time. The length should not depend on the Government will but must have a legal basis and decisions on duration must rest upon objective evidence. The power of extending the emergency state has to taken in accordancewith the law and be based upon sound scientific evidence. Secondly, all the derogation and all the alteration of powers are to be strictly related to the efficacy of measures in a time of crisis, meaning that proportionality is the main tool for Courts to review and verify issues of legitimacy. Proportionality means that legality is assured if powers during the emergency administration are strictly necessary, sufficient and fit for public interests. Observance of these two basic conditions ensures that the Administrative State remains linked to the emergency state so that the Constitutional order is not upset.

To conclude, it seems to be right if we say, generally speaking, the emergency administration during the pandemic Covid19 did not infringe Constitutional legality, even if it is possible specific violations occurred: however, this is a matter that the Courts have kept under review.

The real problem was that the Covid19 situation has brought into question the recognition of the continuity between the Administrative state and the emergency administration. If I look at the Italian case, the real problem has been that the ordinary discipline of the emergency administration has been overlaid by new frameworks with the result that it has been limited by the new concurrent normative. A long natural disaster chain, which has hit Italy in the late years, forged a specific legislation for the emergency so that Italy can boast one of the most advanced disciplines for treating the emergency through the ordinary way. This legislation has the merit of making normal the emergency administration, including that within a precise framework. However, as the pandemic has erupted, the Government was surprised and has believed the ordinary rules for emergency were not able to be conducive for this new

[6] See also the interesting considerations by A. Greene, *Emergency Powers in a Time of Pandemic*, Jstor, 2020.

crisis so that new instruments were sprung up. This new framework has coexisted with the previous by creating uncertainty in terms of application[7].

For all what I said, this means that the route for the normalisation of the emergency administration seems pretty long again, but this is not a trouble for Constitutional aspects. This is a trouble for the Administrative State effects.

[7] Cf. A. Simoni, *Limiting Freedom During the Covid-19 Emergency in Italy: Short Notes on the New "Populist Rule of Law"*, in *Global Jurist*, 20, 3, 2020, pp. 23; S. Civitarese, *The Italian Response to Coronavirus and Constitutional Disagreement*, in https://ukconstitutionallaw.org/2020/04/30/stefano-civitarese-matteucci-the-italian-response-to-coronavirus-and-constitutional-disagreement/.