

# Coronavirus Emergency and Public Law Issues: An Update on the Italian Situation

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Arianna Vendaschi, Chiara Graziani Do 12 Mrz  
2020

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The emergency caused by the “new” Coronavirus disease (that we discussed [here](#)) reached a new peak in Italy in the last few days, since [cases have tripled](#) compared to just a couple of days ago. Italy is now the second most affected country after China.

This situation induced Italian public authorities to take new, stricter measures to try to contain the expansion of the virus. From a constitutional law perspective, the Coronavirus sheds light on the need to reconsider Italy’s “emergency constitution” .

## The Latest Italian Measures Against the Coronavirus

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As of 8 March 2020, the Executive branch – and specifically its Head, the President of the Council of Ministers (PCM) – is acting as the “master” of the situation, in an attempt to recentralise [episodes of “localism” that took place in Italian Regions and municipalities](#).

As highlighted by the [President of the Republic, speaking to citizens about the Covid-19 emergency](#), the Constitution provides the Government “with the authority and the power to take decisions” in these exceptional circumstances, always coordinating its action with the Regions and taking into account guidelines from the scientific community.

On 8 March 2020, the PCM, by [his own decree](#), implementing [Decree Law 6/2020](#), imposed restrictive measures on those living in the most affected Italian areas (“red areas”). The latter were extended: before 8 March, [they included only 10 municipalities in Lombardy and one in Veneto](#); with the new decree the whole Lombardy and 14 provinces of other Regions were caught up. Citizens are prevented from leaving these areas, whilst people coming from outside are inhibited from entering. Exceptions are admitted for “well grounded work-related reasons or situations of need or movements for health reasons”, to be self-certified. At the same time, school and university activities as well as public events and sport competitions are suspended nation-wide. Masses and other religious ceremonies are prohibited, and worship places are allowed to be open only under the condition that people avoid crowds. Minimum distance between individuals must be of 1 meter.

Such act was quickly followed by an [order of the Civil Protection Department](#) and a [directive of the Interior Minister](#) (addressed to Prefects), explaining the provisions contained in the abovementioned Decree of the President of the Council of Ministers (DPCM).

Meanwhile, some Presidents of Regions adopted orders mandating quarantine for those who had left the “red areas” before the entry into force of the DPCM of 8 March (see [here](#)).

Due to increasing cases of Coronavirus infections in Italy, the PCM decided that restrictive measures applying to “red areas” needed to be extended to the entire Italian territory until 3 April 2020. He did so through [another DPCM, signed during the night of 9 March 2020](#), which entered into force the day after. Pursuant to this decree, all municipalities are locked down and citizens are not allowed to cross their borders, unless for self-certified work or health reasons or situations of need. All measures enacted by the previous DPCM remain in force where compatible with the DPCM of 9 March.

On 11 March, [a third DPCM](#) ordered closure of most commercial activities, with the only exception of those selling food, medicines and other essential public services.

Against this background, several public law issues arise.

## The PCM as the “Master” of Emergency

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The decrees of the PCM blatantly limit some personal freedoms enshrined in the [Italian Constitution](#): personal liberty (art. 13), freedom of movement (art. 16), freedom of assembly (art. 17), freedom to profess one’s religious belief (art. 19). Economic enterprise (art. 41) is strongly impacted as well and the right to education (art. 33) may also be impaired, although schools and universities are asked to implement distance-learning.

Such rights and freedoms are not absolute but can be limited in specific cases. However, the Constitution prescribes that some of them (e.g. personal liberty and freedom of movement) can only be restricted by law.

Decrees adopted by the PCM do not have the same legal force as laws and acts having the force of law, i.e. legislative decrees (art. 76 It. Const.) and decree laws (art. 77 It. Const.).

As regards the Coronavirus emergency, the decrees of the PCM explicitly clarify, in their title, that they implement Decree Law 6/2020. Art. 3 of the latter establishes that the PCM can adopt his own decrees to enact measures to contain or prevent the spread of the disease. Hence, a first reading to justify restrictions by the decrees of the PCM is that they are indeed grounded on a primary source.

However, art. 3 of Decree Law 6/2020 is very vague and gives the PCM *carte blanche*, allowing him to limit freedoms without precise criteria or principles to be followed. And, in any case, at least the personal liberty (and, according to some theories, also the freedom of movement), can be limited *only* by laws and acts having the force of law. Therefore, secondary sources cannot even regulate the details of restrictions.

Moreover, differently from secondary sources adopted by the Government as a whole –

i.e. governmental regulations –, decrees of the PCM are not issued by the President of the Republic, who has the duty to guarantee that acts he promulgates (laws) or issues (acts having the force of law and governmental regulations) do not clash with the Constitution.

According to a second reading, the decrees of the PCM might be legitimate in the light of the state of emergency declared in January 2020 by the Council of Ministers, pursuant to Legislative Decree 1/2018 (Civil protection code). Yet, such legislation does not explicitly empower the Government (nor the PCM) to limit rights and freedoms by decree. And, even if it did, there would be the same problem as described before: the Constitution provides that restrictions to some freedoms cannot be enacted nor regulated by sources other than laws and acts having the force of law.

Following a third reading, it is possible to wonder whether the decrees recently adopted by the PCM to address Coronavirus emergency could be grounded on a very extensive interpretation of art. 78 It. Const. Pursuant to this provision, the Government, in case of war, can adopt decrees having the same force of law and, according to Italian scholars, these decrees can derogate or suspend rights and freedoms protected by the Constitution. Nevertheless, this hypothesis is not viable for several reasons. First, a public health emergency is not war, even in the broadest interpretation of the term “war”. Second, the Constitution grants such powers to the Government, and not to the PCM alone. Third, it is explicitly required that the Government is authorized by the Parliament to issue war decrees. None of these conditions has been met in the present situation.

Neither could it be claimed that the decrees of the PCM do not set fully-fledged limitations to rights and freedoms guaranteed by the Constitution, but rather “highly recommend” some behaviours. These acts impose criminal sanctions in case their prescriptions are not respected, since who infringes them shall be convicted pursuant to art. 650 of the Italian Criminal Code (punishing those who violate orders of public authorities) and art. 76 of Decree of the President of the Republic 445/2000 (if false self-certifications are provided).

In this scenario, the question arises as to why the Government did not take these measures through a decree law (as it did, for example, for suspending judiciary activity, with Decree Law 11/2020). The latter is adopted by the Government (as a whole) “in case of necessity and urgency” (art. 77 It. Const.), so it could be the most appropriate tool in the present case.

However, adopting a decree law implies that the Council of Minister is convened to discuss and approve the text, whilst circumstances called for quick actions. Moreover, immediately after a decree law is adopted, it shall be introduced “to Parliament for transposition into law” (if the decree is not transposed into law within 60 days, it loses effect). From a practical viewpoint, convening Parliament creates the risks of spreading contagion. As a matter of fact, to vote on the increase of budget deficit to tackle the emergency, the heads of parliamentary groups decided that the Chamber of Deputies

and the Senate will be gathered only once a week and agreed that, on 11 March, only half of the members of each House would be in Parliament. Limiting the functioning of Parliament to such an extent could prove extremely dangerous to democracy.

## Emphasising the Need for an Emergency Constitution

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The Coronavirus, recently labelled a pandemic by the World Health Organization, has undeniably triggered a large scale non-political emergency, to which Italy reacted promptly.

The response by the Head of the Italian Government is the most direct, even “natural” one, but it emphasises the lack, in the Italian Constitution, of a framework regulating emergencies. When the Constitution was originally drafted, this choice depended on the will to avoid concentration of powers in the hand of a single body, after the Fascist regime. Yet, contemporary threats (not only health emergencies, but also, for example, international terrorism) might require an “update” of the text or, at least, political debate on whether (or not) this step is necessary.

Italy has already missed an opportunity to do so. The so-called Renzi-Boschi reform – which failed due to a negative outcome of the constitutional referendum in December 2016 – only proposed some stylistic changes to art. 78 It. Const. on the state of war (merely depending on the need to adapt its wording to a modified bicameral system). This constitutional reform, though, could have offered the chance to shape an Italian “emergency constitution” (including, but not limited to, war).

Once the Coronavirus emergency is over, it would be desirable to open a debate on the regulation of emergency in the Italian Constitution.



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All the best, *Max Steinbeis*

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SUGGESTED CITATION Vedaschi, Arianna; Graziani, Chiara: *Coronavirus Emergency and Public Law Issues: An Update on the Italian Situation*, *VerfBlog*, 2020/3/12, <https://verfassungsblog.de/coronavirus-emergency-and-public-law-issues-an-update-on-the-italian-situation/>.

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