

# **Coronavirus and Effects on the Rule of Law: How Fundamental Rights Live with Mass Surveillance Technologies in Democratic Systems – An Analysis of Europe and Italy in a Global View**

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## **Pandemic and legal implications: not just Science, the Law at the time of Covid-19**

From 11 March 2020, following the Pandemic status declared by the WHO due to the SARS-Cov-2 virus, also called new Coronavirus, and the relative pathology affecting the respiratory tract named COVID-19, a public health emergency of global<sup>1</sup> significance was declared. The indiscriminate spread of a new disease easily transmitted and characterized by a high degree of lethality,<sup>2</sup> in combination with the lack of effective pharmacological protocols and specific vaccines, has been representing a global threat for months.

An unprecedented event such as this is producing a complex and novel situation, with a significant impact on people's individual and social lives. The effects of the infection intensity are evident, not only in the health industry but also in other fields such as the legal sector as we would like to discuss here. This new health emergency revives one of the modern topics of highest global concern, the growth of the link between Law and Science. It reflects the sphere in which Law is working alongside scientific research to curb this pandemic in its legislative dimension to guarantee public order and compliance.

The implications of Coronavirus in Europe, in strictly legal terms, will be the subject of reflection from here on out. This calls for the duty of examining the current and in perspective liberal-democratic stability of the Rule of Law, in the face of the 'disruptive' government measures that have been adopted to counter and marginalize contagions. The case study of Italy will act as a pilot in the context of the discussion.

## **Health emergency in Europe: an analysis of the Italian and inter- constitutional order**

Unforeseen, the Covid-19 Pandemic caught states and humanity unprepared. Since the initial disorientation and the bland ability to quickly understand the extent of the threat, at the beginning the response in Europe resulted in the isolated reaction from each country. The first European state affected by a manifestly high number of infections was Italy, which began, alone, to implement the first restrictive and containment measures of the infection.<sup>3</sup> The spread of the epidemiological emergency has gradually created an extraordinary situation and each state developed a pandemic plan, to be constantly updated based on WHO guidelines.<sup>4</sup> It was only sometime after isolated actions that the need for greater global cooperation was deemed necessary.

Since then, together with health care professionals and experts, governments and public security authorities have been working at the forefront of managing and combating the 'invisible enemy'. Given the extreme ease with which the virus is transmitted from one individual to another, the political choices made in Italy, and similarly in other European countries,<sup>5</sup> have gone in the direction of preparing 'social distancing' to avoid its spread through social contacts, thereby strongly limiting the exercise of fundamental rights and freedoms. It is believed that framing the regulatory management of the Pandemic in the perspective of the emergency legislation is decisive for ensuring compliance with

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<sup>1</sup> Speech of the WHO Director General of 12 March 2020 <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>>.

<sup>2</sup> Official data are available on the WHO web site at <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>>.

<sup>3</sup> The Italian government's first act was the Declaration of a State of emergency <[www.gazzettaufficiale.it/eli/id/2020/02/01/20A00737/sg](http://www.gazzettaufficiale.it/eli/id/2020/02/01/20A00737/sg)>-

<sup>4</sup> WHO Country & Technical Guidance Coronavirus disease (COVID-19) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance>>.

<sup>5</sup> Lorenzo Cuocolo (Ed.), *I diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata* (federalismi.it, 5 May 2020) <<https://federalismi.it/index.cfm>>?

fundamental rights, contracts, and compromises in their expansion.<sup>6</sup> Without prejudice to this assumption, it seems essential to reflect on the legitimacy of adopting these measures to contain the spread of Covid-19. The issue has a significant role to play in International legal contemplation. By investigating it, we can better assess whether, in the face of the emergency, the compression of fundamental rights and freedoms in a democratic system is compatible with the superior principles, foreseen from the constitution and International Charters on Human Rights. To what extent can the succession of exceptional events call into question the essential safeguards of the constitutional guarantee, in the name of *extra-ordinem* management of the current crisis, and with what implications for democratic structures? Before discussing the problems, the question appears relevant if we bear in mind that it will be unthinkable to assume that in the long run we would abandon the Rule of Law, barring unexpected situations and associated repercussions on democratic systems.

### **Balancing of fundamental rights and Italian Decrees. Hold of the institutional structure and reflections on the system of sources of Law**

It is evident to everyone that the Coronavirus emergency has undermined the norms that regulate the ordinary functioning of liberal-democratic systems. As a result, it has shown the fragility of ontological and structural certainties namely the separation of powers and the protection of fundamental rights taken for granted until a few months ago. Likewise, in Italy the 'more difficult crisis that the country has been experiencing since the Second World War'<sup>7</sup> has caused a tension in the constitutional order between the system of fundamental rights and the system of sources, affecting the organization of public powers. The Italian constitutional system lacks the ability to set out rules for a general state of emergency or to transfer special powers to a specific institution in times of crisis, unlike other EU Member States' constitutions do, such as in France (Articles No. 16 and 36) and Spain (Article No. 116). In fact in the EU, the French Constitution and primary law (Law No 55-385 of 1955) deal with exceptional events, a threat or potential danger to the French nation through three sets of provisions for derogating from the law: i) 'presidential exceptional powers'; ii) the 'state of siege'; and iii) the 'state of emergency'. In addition, in Spain Article 116 of the Constitution, together with Organic Law 4/1981, allows the possibility to declare three different states of emergency. Contrariwise Italy's legal order does not include similar mechanisms for historic reasons. In the Italian context the constituent fathers wanted to avoid a situation where powers were concentrated within a single body, after experiencing the Fascist regime. The only emergency regime provided by the Italian Constitution is activable under Articles 60 and 78 in case of war, which is not comparable to a pandemic. Pursuant to these provisions, the government can adopt decrees having the same force of law being able to derogate or suspend rights and freedoms protected by the Constitution. Furthermore, the government can step in and replace Regions and Municipalities in the exercise of their powers for reasons of public security, to preserve the legal and economic unity of the state or to guarantee essential levels of assistance concerning social and civil rights (Article 120 of the Constitution).

Yet, contemporary threats such as health emergencies or international terrorism led the public debate to reflect on the necessary constitutional regulation not limited to war for protecting the legal system and its fundamental principles. Presently, this would have ensured the action of the public powers to address the emergency within form and limits already pre-established, averting possible fractures due to the pressures arising from the emergency condition. Even at the supranational level the emergency clauses in compliance with Articles No. 15 of the ECHR and No. 4 of the ICCPR are designed to delimit the powers' expansiveness in the state of emergency. However, it should be noted that only the Spanish government declared a state of alarm, whereas the French parliament preferred to adopt a law on urgent measures (Law No 2020-290) instead of applying a state of emergency to the health crisis.<sup>8</sup>

After the resolution on the state of emergency was approved by the Executive on 31 January 2020, the Italian crisis management began through a chain of *extra-ordinem* acts, involving the Centre and the Periphery: State at the central level with Regions and local authorities at the peripheral level.<sup>9</sup> The resulting regulatory framework is extremely broad and complex to coordinate, being made up of a

<sup>6</sup> European Agency for the Protection of Fundamental Rights, *Coronavirus Pandemic in the EU - Fundamental Rights implications*, Bulletin No.1 (20 March 2020) <<https://fra.europa.eu>>.

<sup>7</sup> Statements by the Italian President of the Council of Ministers (PCM) on the new measures to contain the Pandemic <<http://www.governo.it/it/articolo/dichiarazioni-del-presidente-conte/14361>>.

<sup>8</sup> Krisztina Binder et al., States of emergency in response to the coronavirus crisis: Situation in certain Member States (European Parliamentary Research Service, June 2020) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS\\_BRI\(2020\)649408\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS_BRI(2020)649408_EN.pdf)>.

<sup>9</sup> Marco Olivetti, *Le misure di contenimento del Coronavirus, fra Stato e Regioni (Il Quotidiano giuridico*, 10 April 2020) <<https://www.quotidianogiuridico.it>>.

variety of provisions including civil protection orders and Health Ministry decrees and orders, in addition to local ordinances.<sup>10</sup>

Without going into the merits of the single measures enacted, this article will discuss 3 main categories: the obligation of home quarantine and possible compulsory hospitalization of COVID-19 positive individuals; the precautionary quarantine of individuals who have had close contact with individuals tested positive for COVID; and the obligation to apply forms of 'social distancing' as a precautionary practice.

Legally speaking, the Italian government has adopted the regulatory instrument for instant emergencies according to Article 77 of the Italian constitution, *id est* the Law Decree. The first restrictive measures were initially approved by the first Italian Law Decree 23 February 2020 No. 6 and were later implemented by the Decree of the President of Council of Ministers (Decree of the PCM) for only Northern regions (Lombardy and Veneto); subsequently, they were extended to the whole national territory with the Decree adopted by PCM of 9 March.<sup>11</sup> At the beginning, the measures were targeted to specific areas but were standardized later with the Decree of the PCM of 11 March and with the order of the Ministry of Health of 20 March 2020, until the adoption of a provision to close all non-essential production activities with Decree of the PCM of 22 March.

At least formally a laceration of the constitutional order seems to be averted so far. The measures are issued by the Law Decrees which are a source of primary legislation allowed by the constitution in 'extraordinary cases of necessity and urgency' and have limited validity in time. The temporal factor is crucial since their constitutionality depends on the provisional nature and limitation in terms of effectivity. However, particular attention needs to be paid to the rapid succession over time of many Law Decrees which very often relate to the same or similar objects. This might undermine the meaning and value of the required temporariness. The risk that the constitution can be progressively eroded and violated has to be assessed, due to the prolonged stress to which it has been subjected.

In any case, the Italian scholars argue that this 'urgent legislation' finds endorsement in the constitution as a response from the pandemic because the latter could only be insured with the Law Decree and not otherwise<sup>12</sup>.

Conversely, using non-legislative acts such as the Decrees of the PCM for implementing the restrictive measures of inviolable rights raised major doubts of constitutionality and violation of the principle of legality.

According to Art. 3 of Law Decree 6/2020 the PCM can adopt his Decrees to enact '*any other necessary measures*' to stop the spread of the disease. Overall, the PCM's 'self-attribution' of *extra-ordinem* powers creates 3 specific problems. Firstly, as the constitution prescribes that rights and freedoms can only be restricted by Law or acts having the force of Law, the Decrees of the PCM do not have legal force and cannot even regulate the details of restrictions or impose criminal sanctions; secondly, unlike the Law Decrees, the Decrees of the PCM are excluded from the control of the parliament and the President of the Republic; thirdly, the highly controversial 'open clause' allows the PCM to limit rights without precise criteria and provisions to be followed. The genericity of Art. 3 was corrected under Law Decree 19/2020 with a more precise forecast of the limits to respect in the adoption of prime ministerial decrees.<sup>13</sup>

The preference of the Decree of the PCM has been justified for being a more agile and flexible tool to manage an evolving and unpredictable emergency; in fact, it does not imply, unlike the Law Decree, the approval by the Council of Ministers or the transposition into Law by the parliament within 60 days without losing effect. On the other hand, marginalizing the parliament for limiting contagion acts as a counterpoint and could be extremely dangerous to democracy. If some authors<sup>14</sup> interpret the Decrees

<sup>10</sup> Gaetano Azzariti, *I limiti costituzionali della situazione d'emergenza provocata dal Covid-19* (Questione giustizia, 27 March 2020) <[www.questionegiustizia.it](http://www.questionegiustizia.it)>.

<sup>11</sup> *Collection of documents containing urgent measures regarding the containment and management of the epidemiological emergency from COVID-19*, Official Gazette of the Italian Republic <https://www.gazzettaufficiale.it>.

<sup>12</sup> Antonio Ruggeri, *Il coronavirus, la sofferta tenuta dell'assetto istituzionale e la crisi palese, ormai endemica, del sistema delle fonti* (1/2020, ConsultaOnline, 2020) <[www.giurcost.org](http://www.giurcost.org)>.

<sup>13</sup> Law Decree 19/2020 <<https://www.gazzettaufficiale.it/eli/id/2020/03/25/20G00035/sq>>.

<sup>14</sup> Mazzarolli L., «*Riserva di legge*» e «*principio di legalità*» in tempo di emergenza nazionale. *Di un parlamentarismo che non regge e cede il passo a una sorta di presidenzialismo extra-ordinem, con ovvio, conseguente strapotere delle pp.aa. La reiterata e prolungata violazione degli artt. 16, 70 ss., 77 Cost., per tacer d'altri* (federalismi.it, 13 March 2020) <<https://federalismi.it>>, according to which the Law Decrees, as a primary source, must dictate immediately applicable rules, without being implemented by administrative act as the Decrees of PCM.

of the PCM as the inadequacy of the emergency powers, for others<sup>15</sup> it is the proof that the constitutional framework is effective even in the face of an exceptional pandemic crisis. A more precise emergency discipline, missing in Italy, would offer an evident advantage regulating the limits of non-legislative interventions and would clarify conditions for the parliamentary action to reach a more effective constitutional balance.

The health emergency has required a reconciliation of different constitutional values in conflict. In this scenario, the balancing technique is indispensable to overcome conflicts of rights and fundamental principles at stake, through a proportionate and reasonable weighting. On these assumptions, the constitutional framework has held up because fundamental rights and freedoms have been sacrificed by the public authorities. Civil liberties and social rights, rights to work and to free economic initiative and private property, and to rapid justice have been progressively compressed to assign priority protection to the fundamental rights of life and health, in the individual and collective under Article 32 of the Constitution. The legitimacy of the measures adopted raising the question of their proportionality will be subject to a degree of parliamentary oversight. Redress against the emergency decrees also remains subject to the ordinary rules on jurisdiction (constitutional, ordinary and administrative).

### **A look at Europe through Italy: measures from Covid-19, ECHR and ICCPR**

After an initial divergence, the European countries affected by COVID-19 have progressively conformed to the so-called 'Italian model'<sup>16</sup> of social distancing. First the countries of Mediterranean Europe and shortly afterwards the countries of northern Europe (Iceland, Holland and the United Kingdom, which initially aimed at the rapid development of 'herd immunity'), as well as the Russian Federation adopted measures similar to those in Italy, following the scientific criteria developed internationally by the WHO. The Italian regulatory complex hinders a rational reconstruction, being the result of numerous and heterogeneous measures. Having produced restrictive measures on fundamental human rights, it has impacted not only on the constitution as mentioned, but also on the most important International agreements, which constitute the inter-constitutional order.<sup>17</sup> Among these, we will deal with the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). It should be emphasized that we are preparing to face a phenomenon that involves almost all the states parties to these agreements. So much so that the Council of Europe<sup>18</sup> and the Human Rights Committee<sup>19</sup> have intervened to warn member states against the risk that measures to combat the pandemic could lead to unacceptable sacrifices to human rights. The analysis is conducted considering the most critical aspects which emerged in the legal doctrine with reference to the Italian regulatory situation.

Taking up the framework of freedoms and rights involved in the anti-virus measures, outlined without any claim to completeness in the previous paragraph, we can see how these have been compromised despite many internationally guarantees: personal freedom,<sup>20</sup> freedom of movement,<sup>21</sup> the right to private and family life,<sup>22</sup> right to privacy,<sup>23</sup> which may also be limited by the use of Software and Apps,<sup>24</sup> the right of peaceful assembly, religious freedom,<sup>25</sup> freedom of expression,<sup>26</sup> the right to education,<sup>27</sup>

<sup>15</sup> Massimo Luciani, *Il sistema delle fonti del diritto alla prova dell'emergenza* (ConsultaOnline, 11 April 2020) <http://www.giurcost.org>.

<sup>16</sup> European Union Agency FRA – For fundamental rights, *Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications* <[https://fra.europa.eu/sites/default/files/fra\\_uploads/italy-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/italy-report-covid-19-april-2020_en.pdf)>.

<sup>17</sup> Meaning the interactions between both national and supranational constitutional charters within a "system of systems". Antonio Ruggeri, *Per uno studio sui diritti sociali e sulla costituzione come "Sistema". Notazioni di metodo* (ConsultaOnline, 2015) <<http://www.giurcost.org>>.

<sup>18</sup> UN-experts, *COVID-19: States should not abuse emergency measures to suppress human rights* (Office of the High Commissioner, 16 March 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722>>.

<sup>19</sup> Commissioner for Human Rights, *States must give a renewed impetus to realizing human rights for all* (Council of Europe, 3 June 2020) <<https://rm.coe.int/speech-at-the-greek-cm-chairmanship-event-effectively-responding-to-a-s/16809e9323>>.

<sup>20</sup> Article No. 5 ECHR and Article No. 9 ICCPR.

<sup>21</sup> Article No. 2 of Protocol No. 4 to the ECHR of 16 November 1963 and Article No. 12 ICCPR.

<sup>22</sup> Article No 8 of the ECHR and Article No. 17 ICCPR.

<sup>23</sup> Article No. 11 ECHR and Article No. 21 ICCPR. The issue will be examined in detail in the next paragraph (2.3) of this paper.

<sup>24</sup> The issue will be examined in detail in the last paragraph (3) of this paper.

<sup>25</sup> Article No. 9 ECHR and Article No. 18 ICCPR.

<sup>26</sup> Article No. 10 ECHR and Article No. 19 ICCPR.

<sup>27</sup> Article No. 2 of the Additional Protocol n.1 to the ECHR of 20 March 1952.

the right to a fair trial and the judicial protection of one's rights,<sup>28</sup> the right to work and economic initiative.<sup>29</sup>

The evident prejudice suffered by internationally guaranteed human rights does not automatically entail their violation or the illegality of the measures applied. In compliance with the principle of proportionality, some clauses of these agreements allow restrictions and derogations in time of public emergency. Although the doctrine is not unanimous on which is the distinctive element between restrictions and derogations,<sup>30</sup> we consider as decisive on the point the 'exceptionality' of the derogation clauses compared to the 'ordinariness' of the restriction clauses.

Even if the measures adopted by the Italian government can be contemplated as necessary and proportionate to fight an unprecedented world health crisis, this should comply with the relevant provisions of the ECHR and the ICCPR. Some problems have been raised in legal doctrine casting doubt on the complete legitimacy of the measures themselves. It should be noted that the questions would not have arisen if Italy had made use of the procedure of derogation from the obligations under the agreements. As provided for by Articles No. 15 of the ECHR and No. 4 of the ICCPR, Italy remained within the framework of 'ordinary' restrictions on individual human rights, unlike other States<sup>31</sup> which have resorted to exceptions. This critical profile is particularly relevant since if the measures were not legitimately adoptable according to these agreements' provisions, the relative legislative acts (Law Decree and Laws that confirm the Law Decree) could be declared unconstitutional by the Italian Constitutional Court for violation of Article No. 117.<sup>32</sup> or subjected to review by the European Court of Human Rights and the Human Rights Committee. Because the pandemic emergency is undisputedly part of the regime of derogations of the ECHR and the ICCPR, Italy's decision not to use it raised the issue whether an obligation was breached or not.

Firstly, it should be considered that despite strict measures, Italy would not have been obliged to require the procedural requirements under Article No. 15, par. 3, ECHR and Article No. 4, par. 3, ICCPR. In fact, states parties have a right and not an obligation to activate the derogation procedures. The explanation can be seen by considering that there is no automatic symmetry between the emergency nature of the situation to be faced and the measures that can be adopted. Thus, in the face of an exceptional situation that threatens the life of the citizens, the state, on case-by-case evaluation, has a margin of appreciation and discretion in deciding to suspend certain rights or to take restrictive measures (generally permitted for ordinary situations).<sup>33</sup>

Secondly, excluding the non-activated derogation regime, the Italian measures only have the possibility to fall under the discipline of restrictions. As restrictions of rights, such measures must be enacted to compress - and not totally suppress - human rights and must be traced back to the protection of health or the general interests of society or the rights of others. The Italian measures tend to be motivated by the need to fight a pandemic which is able to jeopardize its population's welfare and survival. In a democratic society, restrictions over human rights are allowed for public health interests<sup>34</sup>, if provided for by law. The recognized proportionality of measures in relation to the purpose of protection does not exhaust the questions relating to their lawfulness.

A further problem concerns the compliance of the restrictions with the principle of legality. What has already been said regarding the interactions between the Law Decree (primary source having the force of law) and Decree of the PCM (secondary source act) could be recalled. However, human rights can be limited only by a legislative act that respects the requirement of legality both formally and substantially. Satisfying the general character of a legislative act, from a substantive point of view, implies that the legislation must be accessible, precise, predictable. The emergency regulations in Italy

<sup>28</sup> Articles No. 6, par. 1, and 13 of the ECHR and Article No. 14, par. 1, ICCPR.

<sup>29</sup> Article No. 1 of the Protocol No. 1 to the ECHR.

<sup>30</sup> The Human Rights Committee believes that «*derogation from some obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant*», *General Comment No. 29: Article 4: Derogations during a state of emergency*, 31 August 2001, par. 4.

<sup>31</sup> Some member States of the Council of Europe have communicated the derogation for the COVID-19 emergency, such as Romania, Armenia, Moldova, and Latvia. Patricia Zghibarta, *The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19*, (EJIL: Talk!, 11 April 2020) <[www.ejiltalk.org](http://www.ejiltalk.org)>.

<sup>32</sup> Article No. 117.1 Italian Constitution: «*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*».

<sup>33</sup> Declaration of the Human Rights Committee, (24 April 2020): «*States parties should not derogate from Covenant rights or rely on a derogation made when they can attain their public health or other public policy objectives through invoking the possibility to restrict certain rights*».

<sup>34</sup> Additional Protocol No. 1 to the ECHR, Art. No. 1 (20 March 1952): States can regulate by Law the use of goods following the general interest; ECHR, Art. No. 6, par. 1 and ICCPR, Art. No. 14, par. 1: exceptions to publicity are allowed for national security matters.

being the result of a variegated and heterogeneous plurality of acts, coming from different organs including State, Regions, Municipalities, are far from easy to be known, understood, and coordinated<sup>35</sup>.

It is difficult to determine whether the measures in question can only be defined as 'restrictions' for upholding the exercising of human rights or, on the other hand, as genuine 'derogations' particularly in situations where the distinction is not as evident as it is on the theoretical level. This makes the matter complex because the Italian government has not exercised the right to derogate from its obligations through official and public adherence.<sup>36</sup> In this way, if the measures adopted against the COVID-19 pandemic were to cause exceptions to the rights involved and not restrictions, there would be a violation of the international announcements contained in the two agreements (ECHR and ICCPR).

## **COVID-19 and mass surveillance needs: the principle of proportionality and exceptions to the protection of personal data**

The current crisis is revolutionizing our society in several fields and it seems reasonable to believe that these challenges will intensify for its entire duration, although we are not able to foresee the extent of the stabilization of their effects. COVID-19's impact on all national policies has influenced the digital industry. It could not have been otherwise if we just think that due to social distancing many work, educational and social functions have been transferred thanks to digital technologies. This has generated an impressive push towards digitization and placing of impressive quantities of personal data on the Internet network. A technological deficit in Italy is particularly evident in the management of public services such as public education and justice which have relied on private IT platforms in the absence of public ones.

The tracking of personal contacts for health surveillance purposes and the relative protection of health data are other issues of the 'emergency law' at the time of COVID-19. The processing of personal data determined from the adoption of contact-tracing systems also evokes the dual theme so far discussed of the limit within which the fullness of safeguards and the balance between different rights and interests are possible.

On this point as for the European context the EU agenda through the work of the Commission is focused on the ability to produce clusters of data<sup>37</sup> in a technological and regulatory European dimension, where protection is enhanced. Science and Law are intertwining together with digital technology and health to combat the pandemic, paving the way for a new debate on strategies connected to the rights of the protection of personal data (GDPR, Article No. 4 n. 1) and privacy. The disclosure of controversial mass surveillance programs for national security has evoked an international debate on the right of citizens to be protected from the illegitimate or warrantless collection and analysis of their data and meta-data.<sup>38</sup> The use of big data to track citizens in quarantine, surveillance of individuals, development of tracing apps with sharing information with the various authorities, are further safeguards that governments can choose to adopt as virus containment measures, in addition to social distancing. We are moving towards the field of mass surveillance measures and contact tracing activities, aimed at outlining the chain of contagion of the virus and preparing a more effective and targeted reaction.<sup>39</sup>

*"You can't fight fire blindfolded. And we can't stop this pandemic if we don't know who is infected".*<sup>40</sup>

<sup>35</sup> Ugo Villani, *Le misure italiane di contrasto al Covid-19 e il rispetto dei diritti umani* (2/2020, La Comunità internazionale, 2020) p. 165-188.

<sup>36</sup> In the absence of an official and public notice of derogation, Article 15 does not apply to the Statal measures (*Cyprus v. Turkey*, Commission report of 4 October 1983, §§ 66-68). European Court of Human Rights, *Guide on Article 15 of the European Convention of Human Rights. Derogations in time of emergency* (31 December 2019) <<https://www.echr.coe.int>>, 11.

<sup>37</sup> [European] Commission and Germany's Presidency of the Council of the EU underline importance of the European Health Data Space, Brussels (11 November 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2049](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2049)>. A legislative proposal on a European health data space is planned for 2021 <[https://ec.europa.eu/info/publications/2021-commission-work-programme-key-documents\\_en](https://ec.europa.eu/info/publications/2021-commission-work-programme-key-documents_en)>.

<sup>38</sup> Science and Technology Options Assessment, *Mass Surveillance Part 1: Risks and opportunities raised by the current generation of network services and applications* (European Parliamentary Research Service, December 2014) <<https://www.statewatch.org/media/documents/news/2015/jan/ep-stoa-report-mass-surveillance-part-1.pdf>>.

<sup>39</sup> The tracking of human Epidemics infections using Artificial Intelligence tools were used for Ebola Epidemics. In terms of experimentation, the BBC4 program in UK in 2018 tried to trace a "simulated" virus while moving through an app named "Pandemic" installed on the smartphones of groups of volunteers. Gianpaolo Maria Ruotolo, *Alcune osservazioni sulle app di tracciamento dei contatti e dei contagi alla luce del diritto dell'Organizzazione Mondiale del Commercio* (SIDIBlog, 13 May 2020) <[www.sidiblog.org](http://www.sidiblog.org)>.

<sup>40</sup> Tedros Adhanom Ghebreyesus, in *WHO Director-General in the media briefing* (16 March 2020) <<https://www.who.int>>.

The high capacity of data collection and analysis of recent technologies represents a precious resource in emergency situations. It is also important not to underestimate the consequences for individual rights and freedoms, and hence a balance must be maintained. Tracking technology devices represent innovations that can't ignore the regulatory framework for the processing of personal data, because of public interest, based on the principles of proportionality and social solidarity.

This purpose can be detected in the combined reading of multiple supranational and national sources, where the right to privacy finds regulatory confirmation and possible exceptions. The exceptions are offered above all in relation to data relating to health, for which, in most cases, superior safeguards are expressly demanded. Some international and regional regulations that Italy is part of, will be considered. The ICCPR warns that '*the protection of privacy is necessarily relative*' (Article No. 17) and may be derogated in accordance with the regime established by Article No. 4, paragraph 7. Generally prohibited (General Comment No. 16 of the Human Rights Committee), interference is legitimate if authorized by Law and if it conforms to the provisions, aims, and objectives of the agreement itself (paragraphs 3 and 4). Within the Council of Europe, the Article No. 8 par. 2 of the ECHR lists the conditions of interference: they must be provided for by a Law; necessary in the framework of a democratic society; correspond to the protected purposes, among which national security and health protection are indicated. Coming to the European Union we first refer to the Article No. 23 of the GDPR requiring that a limitation respects '*the essence of fundamental rights and freedoms*', as a necessary and proportionate measure in a democratic society '*to safeguard [...] public health*'. According to Article No. 4 n. 15, the surveillance techniques concern the category of data relating to health subject to special treatment, since, pursuant to Recital No. 51, this deserves increased protection being particularly sensitive. Article No. 9 paragraph 2 indicates the public health sector and the health (letter 'h' and 'i') among the ten cases in which the prohibition on the processing of special data ceases. Also, the EU Charter of Fundamental Rights reiterates the non-absoluteness of the fundamental rights of privacy and protection of personal data under Articles No. 7 and 8. Furthermore, under Article No. 52 the rights and freedoms can be limited by legislative provision and in compliance with the principle of proportionality, for meeting general interests recognized by the Union or for protecting the rights and freedoms of others.

So far, the research has revealed the prominent recognition assigned to the principle of proportionality<sup>41</sup> in allowing emergency measures to compress human rights, including contact tracing ones. This principle consists of three components: suitability, necessity, and proportionality in the strict sense, or adequacy.<sup>42</sup> In turn, all three are a phase of the proportionality test, developed as a dynamic system of interdependencies with progressive concatenation. It unfolds through a distinct and sequential examination of each element, which is a logical deductive presupposition of the other occurred in the next phase.<sup>43</sup>

It is no coincidence that the scheme underlying the principle of proportionality is contained within numerous European documents relevant to the issue dealt with here. Starting from 2002, Article No. 15 of the e-Privacy Directive<sup>44</sup> guarantees the member states the possibility of limiting data confidentiality obligations with 'legislative provisions' for specific purposes and provided that it is 'a necessary, appropriate and proportionate measure within a democratic society'. The same concept is addressed in the guidelines redacted by the European Data Protection Supervisor before the pandemic<sup>45</sup> and taken up in numerous documents drawn up by a plurality of national and international actors, following the spread of COVID-19.<sup>46</sup>

<sup>41</sup> Stefano Cognetti, *Principio di proporzionalità, Profili di teoria generale e di analisi sistematica* (Giappichelli Editore, 2011).

<sup>42</sup> Suitability is the ability of the means used to achieve the aim pursued. Necessity indicates its irreplaceable with another milder means for the equal realization of the goal. Proportionality in the strict sense is the need that the means, even if appropriate and necessary, not to be too burdensome compared to the convenience of the result. *Ivi*.

<sup>43</sup> Only if suitability and necessary have given a positive result, can we move to proportionality. The last phase of balancing interests and values is subjected to a cost-benefit assessment.

<sup>44</sup> European parliament and the Council, *Directive 2002/58/EC (12 July 2002)*, concerning the processing of personal data and the protection of privacy in the electronic communications sector, <https://eur-lex.europa.eu>.

<sup>45</sup> European Data Protection Supervisor (EDPS), *Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A Toolkit* (11 April 2017) <[https://edps.europa.eu/sites/edp/files/publication/17-04-11\\_necessity\\_toolkit\\_en\\_0.pdf](https://edps.europa.eu/sites/edp/files/publication/17-04-11_necessity_toolkit_en_0.pdf)>; *Idem*, *Guidelines on assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data* (19 December 2019) <<https://edps.europa.eu>>.

<sup>46</sup> Such as the *European Commission Recommendation (8 April 2020)*, [eur-lex.europa.eu](https://eur-lex.europa.eu); *the documents prepared by the e-Health Network* (15 April 2020) <<https://ec.europa.eu>>; *the European Commission guidelines* (16 April 2020) <<https://ec.europa.eu>>; *the European Committee Guidelines for the protection of personal data 4/2020* (21 April 2020) <[edpb.europa.eu](https://edpb.europa.eu)>; *the indications of the Italian Minister for technological and digital innovation* (21 April 2020) <<https://innovazione.gov.it>>; *The Immune Task Force legal technical report about the adoption of a contact tracing solution* (30 April 2020); *Communication from the Commission to the European parliament and the Council Data Protection as a pillar of citizens' empowerment and the EU's approach to the digital transition, Brussels* (24 June 2020) <<https://ec.europa.eu>>.

Some governments, especially in Asia, hastened to expand their use of surveillance technologies to track the movements of geolocated individuals and map the movements of the virus. China, South Korea and Israel are examples of countries which created a system of 'contact tracing' to monitor the spread of COVID-19 to have constant control over the position and status of people who tested positive and collect a huge amount of data, coming from government databases and beyond<sup>47</sup>. China has developed a surveillance system with the use of 200 million security cameras and specific applications for the creation of big data clusters, to enforce the quarantine of infected patients and to map the movements of potentially infected individuals and therefore of the virus. The tracing systems require users to register with their name, national identification number and telephone number. Through an online search on the code of the report, it is possible to retrieve a cross-data analysis discovering further details of the infected person, including the face, photographs, and family information. South Korea preferred to completely sacrifice the right to privacy, derogating from the 'General South Korean Data Protection Regulation' and the principle of data minimization, which requires that the processing of personal data must be adequate, relevant, and limited to what is necessary under the circumstances. Another country that has decided to use technological systems to deal with the pandemic of surveillance, sacrificing the right to privacy, is Israel. The Israeli prime minister authorized the internal secret service to use confidential technological tools, normally used to fight terrorism, to follow coronavirus patients without statutory authorization. However, by an intervention of the Israeli Supreme Court<sup>48</sup> these measures did not actually enter into force.

Conversely the European attitude has remained more attentive to the safeguards to be guaranteed due to a democratic, cultural, and legal frame of reference. The adoption of contagion tracing apps, as implementation of the anti-contagion measures already mentioned, has involved many EU countries (although not in their entirety<sup>49</sup>) making masks, quarantine and a mandatory ban on public gatherings.

The opportunity to dwell on the European framework at this point is given to us by the possibility of analysing the solution chosen in Italy: a platform for the management of a virtual alert system, 'Immuni' established through a Law Decree<sup>50</sup> and authorized for use by the National Data Protection Authority.<sup>51</sup> This app is downloadable on smartphones and tracks people's interactions, triggering an alarm if one of them is positive. The mechanism notifies, in the form of anonymous encrypted codes, close contacts with subjects who tested positive. In accordance with the National Authority, *Immuni* respects the criteria defined at the national level, based on European legislation, following the purpose (public health), the legal requirement with primary sources (Law Decree later converted into Law)<sup>52</sup>, and voluntariness (no prejudicial consequences or penalties are envisaged for those who do not make use of it). The transparency criteria are respected allowing users, before activating the app, to receive clear and complete information on the purposes, processing operations concerning only necessary data, pseudonymization techniques, and data retention times (Article 6 paragraph 2 letter A). The use is subject to the acceptance of the privacy policy and terms of service. Regarding the burning issue of personal data protection, *Immuni* does not geo-locate the user, the entire data registration mechanism is decentralized to guarantee privacy and to avoid the risk of identification as required by European guidelines. The user data collection is destined to be deleted or made anonymous by 31 December 2021, to further ensure privacy.<sup>53</sup> On one hand, the effectiveness of the app is affected by the digital divide, there is a digital divide among the population where individuals with poor digital skills such as the elderly who are more at risk would be affected;<sup>54</sup> on the other hand, the Bluetooth technology used to geo-locate can be deactivated by the user himself. This makes the app more of an 'active'

<sup>47</sup> Martina Cardone, Marco Cecili, *Osservazioni sulla disciplina in materia di tutela dei dati personali in tempi di Covid-19. L'Italia e i modelli sudcoreano, israeliano e cinese: opzioni a confronto*, (1/2020, Nomos, 2020) <<https://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2020/05/Cardone-Cecili-1-2020-REV-1.pdf>>.

<sup>48</sup> Adv. Shachar Ben Meir v. The Prime Minister (19 March 2020) HCJ 2019/2020 <<https://supreme.court.gov.il/sites/en/Pages/FullCase.aspx?&CaseYear=2020&CaseNumber=2109>>.

<sup>49</sup> European Commission, Mobile contact tracing apps in EU Member States <[https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/travel-during-coronavirus-pandemic/mobile-contact-tracing-apps-eu-member-states\\_en](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/travel-during-coronavirus-pandemic/mobile-contact-tracing-apps-eu-member-states_en)>.

<sup>50</sup> Art. 6 of the Law Decree 30 April 2020, n. 28, converted into Law by Law 25 June 2020, n. 70.

<sup>51</sup> Garante per la protezione dei dati personali, *Provvedimento di autorizzazione al trattamento dei dati personali effettuato attraverso il Sistema di allerta Covid-19, App Immuni* (1 June 2020) <<https://www.gpdp.it>>.

<sup>52</sup> On 10 August, the Italian Authority for the protection of personal data denounced the phenomenon of the proliferation of invasive data-tracking applications, unauthorized and illegal, which violate privacy <<https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9447462>>.

<sup>53</sup> Vincenzo Cuffaro, Roberto D'Orazio, *La protezione dei dati personali ai tempi dell'epidemia* (il Corriere giuridico 6/2020, 2020).

<sup>54</sup> The Digital Economy and Society Index – DESI (19 June 2020) <<https://ec.europa.eu/digital-single-market/en/desi>>.

Bioethics Commission, *Tracing of contacts for the containment of the infection from SARS-CoV-2*, Accademia Nazionale dei Lincei (8 May 2020) <<https://www.lincci.it/>>.



surveillance, depending on user collaboration.<sup>55</sup> Another doubt relates to the collection of data since the Law Decree (Art. 6 par. 2 letter e) does not clarify where the data will be stored 'other than on mobile devices'. Despite these latter aspects about the effectiveness of its functioning<sup>56</sup> raised by Italian legal doctrine, based on the considerations made so far, the app seems compatible with the European and national legislation on the protection of personal data.<sup>57</sup>

## Conclusions

*How is the rule of law doing today?*

The moment of overcoming the acute crisis we are experiencing in Europe needs a legal reflection. The emergency is set to continue for months<sup>58</sup> and inevitably leads us to ponder upon the direction we are moving. Further extensions of the state of emergency are highly possible and a 'normalization' of the emergency cannot be excluded *a priori*. To sum up, what stands out from the analysis is that the emergency, despite being a legal condition, can legitimize limitations of freedoms provided they are proportionate and confined to this period.

In the EU, the Pandemic is posing unprecedented institutional challenges obliging governments to adopt strict measures affecting citizens' rights. Crucial aspects discussed here dealt with the exercise of public powers under a global health threat. The paper offered an overview of the institutional responses adopted in Italy, compared to those of other States, in the light of i) the inter-constitutional framework and of ii) the kinds of measures adopted within the emergency legislation and their legitimation.

Although the measures taken to address the public health emergency are similarly invasive in the EU member states from a content point of view, the divergent constitutional frameworks caught our attention. Unlike some European constitutions that include detailed rules providing for a state of emergency as in France or Spain, Italy addressed the pandemic by making use of constitutional rules foreseen to manage urgent and exceptional situations, modifying the normal balance between the executive and legislative powers. While having emphasized in the Italian constitution the lack of regulation of emergency, we have also highlighted that some countries have not activated it, despite the provisions in the constitution. It is interesting how, even with specific emergency constitutional mechanisms, France preferred not to trigger them because they were perceived as too repressive.

Up to now, the pandemic does not seem to compromise the stability of the European constitutional systems. Our analysis focused on emergency legislation questions inherent to legal certainty, scope and proportionality, and temporal limitations. The Italian response to Coronavirus was led by using governmental legal instruments in the form of Law Decrees, Decrees of the PCM and ministerial orders. The Law Decrees and related Prime Minister Decrees were formally the viable solution in the face of a pandemic emergency. From a substantive point of view, on the proportionality of the measures taken it is, on the one hand, up to the parliament to confirm them or to let them expire within sixty days after their adoption (during the necessary transposition procedures from Law Decrees into Laws) and on the other hand, to the judges to rule on the merits of the content of the measures. The degree of parliamentary and judicial control over the measures adopted is helping to assure the resilience of the system. The Italian trend to use Decrees (government) instead of Laws (parliament) in existence before the emergency<sup>59</sup> leads us to be more vigilant now that it implies a constant limitation of the fundamental rights based on the progress of an situation persistently unpredictable.

As required by the national constitutions and supranational Charters, human rights and freedoms are subject to the checks and balances system in compliance with the principle of proportionality and the incompressibility of their essential core. On the supranational level the continuing lack of communication of derogation under the ECHR and the ICCPR may be worrying since derogation constitutes an obligation in the case of generalized suspension of the protected rights. This aspect is strictly related to the issue that the complex emergency normative has to be coordinated with the principle of legality on

<sup>55</sup> Marco Plutino, "Immuni". Un'exposure notification app alla prova del bilanciamento tra tutela dei diritti e degli interessi pubblici (2/2020, [dirittifondamentali.it](https://dirittifondamentali.it), 26 May 2020) <<https://dirittifondamentali.it/>>.

<sup>56</sup> Dianora Poletti, *Il trattamento dei dati inerenti alla salute nell'epoca della Pandemia: cronaca dell'emergenza* (Persona e Mercato, 2020).

<sup>57</sup> Art. No. 23 of the GDPR, Art. No.15 of the e-privacy Directive, Edbp's guidelines 4/2020, the Italian Code for the protection of personal data.

<sup>58</sup> WHO Director-General, Tedros Adhanom Ghebreyesus: «We hope to get out of this pandemic within two years» (Corriere della sera, 21 August 2020).

<sup>59</sup> Giovanni Di Cosimo, *The evolution of the form of government in Italy*, in Massimo Meccarelli et al., *Innovation and transition in Law: Experiences and Theoretical Settings* (Editorial Dykinson, 2020).

which the 'restrictions' are currently adopted, based on the provisions of both the ECHR and ICCPR, as discussed. The lockdown measures produce a substantial impact on many fundamental rights, and the possibility to have crossed the borders within which simple 'restrictions' are allowed arouses apprehension<sup>60</sup>, considering that rights might continue to be compressed, given the current increase in infections.

A final examination to verify the state of the rule of law regarded the impact of Artificial Intelligence and potential invasive technologies on people's daily lives to pursue national purposes in European democratic societies. The tracing apps are paradigmatic of the dynamic balancing between the interest to protect the subjective rights of citizens (privacy and data confidentiality) and to ensure public health interests.

The European identity trait of high standards of personal data protection has required an organic approach to the adoption of the tracing apps. Unlike what happened at the beginning of the emergency, the European institutions have guided the regulatory process on digital issues through guidelines to direct the State policies towards providing national solutions. The COVID-19 pandemic is driving an acceleration towards the digital transition and it is not hard to believe the digital approach incisiveness is destined to grow. Because of this, the technique of balancing fundamental human rights is even more important now. In this scenario adapting the regulatory framework to the emergency implies any possible derogation as long as it is not irreversible. Precise limits established are indispensable with the management of human rights and personal data protection, pondering that there is no turning back from technological innovation. Moreover, the combination of emergency regulation and technology matters should require, at the end of the pandemic, that government fully re-establishes the constitutional guarantees which are suppressed during the pandemic. Maximum attention needs to be given to data protection and the digital divide to ensure a humanly and legally sustainable digital transformation.

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<sup>60</sup> Ugo Villani, *Le misure italiane di contrasto al Covid-19 e il rispetto dei diritti umani*, op.cit.