



RESEARCH ARTICLE

**The Italian Emergency Regime at the Covid-19 “Stress Test”:
Decline of Political Responsiveness, Output Legitimation and
Politicization of Expertise**

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ABSTRACT

During the Covid-19 pandemic, public trust necessarily shifted towards science and technical expertise worldwide. In some liberal democracies, the Constitution and Parliament have been bypassed, with Executives using scientific and technical expertise to legitimate political choices within the crisis management process. In Italy (March–August 2020), the Executive set up expert teams (such as the Comitato Tecnico-Scientifico) acting mostly by Decrees of the President of Council of Ministers (DPCM). The Italian Parliament was not sufficiently consulted. After reviewing the current research literature on constitutional changes during emergency regimes within representative democracies, and using insights from Italy, we try to frame the discourse concerning Executive’s choices during emergency regimes in terms of (i) decline of political responsiveness, (ii) prevalence of output legitimation and (iii) politicization of expertise (with the possibility for expertise, in turn, to influence policy making) to contribute to the overall debate on the reconfiguration of powers in times of crises.

KEYWORDS: Italy; COVID-19; Emergency regime; Politicization of science; Expertise.

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1. Introduction

The COVID-19 pandemic is a typical example of a crisis or emergency context, requiring decision-makers to adopt quick and efficient political choices within emergency regimes. Social sciences researches (Cavalli 1996; Keohane 2010) have shown that while routine activities require simple management, crisis management requires, almost by definition, something exceeding simple or routine management techniques, involving the capacity to guide an organization through unprecedented situations¹. Given the ‘rigidity’ of legal and institutional mechanisms, such as constitutions within liberal democracies, the COVID-19 pandemic well represents an inviting field of research for scholars interested in the interaction between (a) configurations of democratic institutional settings and (b) the crisis management provided during emergency regimes². In order to manage a crisis amid an emergency regime, liberal democracies’ Executives typically resort to constitutional change and delegation of power³. If the role played by technical expertise in time of crisis is important, it gets even crucial in case of prolonged emergency regimes - as in the case of a pandemic - which calls for a new a configuration between politics and institutional settings.

In the light of this, the aim of our article is to shed some light on an under-researched aspect of the relevant existing research literature: the political role of scientific and technical expertise in the context of emergency legislation in times of crises⁴. In particular, by relying on account of the situation in Italy between March and August 2020 as exemplary case, we attempt to investigate some aspects that lie at the crossroads between three different disciplines: political science, sociology

¹ The crisis management, in contrast to simple management, may assume the forms of a more or less pronounced ‘leadership’ to facilitate otherwise long and complex decision-making process, both at the level of international, regional and national politics (for the regional and international contexts see: Destradi 2008; 2011; Nolte 2010; Mattli 1999; Bruno 2018, 2019, 2020, Bruno & Finzi 2019, 2020).

² On the other hand, Executives have to deal with the ‘fixity’ of the constitutions, which even if merely at the level of an ‘ideological myth’ (Freedon 2013), poses the governments in front of important limitations.

³ As it will be illustrated in the following paragraph, the current political science and legal literature investigates emergencies by framing them as i) menaces for the territorial integrity of the state or its internal cohesion, ii) economic or financial crises and iii) natural disasters.

⁴ It is worth mentioning here that with COVID-19 being the first world-wide pandemic that post-WWII democratic constitutions have faced, this issue might have gone undetected.

(especially political sociology⁵) and constitutional law. The overall research goal of the article goes in direction of investigating changes in legitimization processes and the substantial increase in Executive power during times of crisis, with the possibility of talking *de facto* of a decision-making that is gradually, and steadily, moving towards a “perpetual” state of emergency⁶.

Our main argument is that the case of Italian emergency legislation can be fruitfully framed in terms of (i) decline of political responsiveness, (ii) prevalence of output legitimation and (iii) politicization of expertise (without neglecting the possibility, in turn, of expertise influencing policy making) to contribute to the overall debate on the reconfiguration of powers⁷. Our article, taking the developments in Italy between March and August 2020 as a paradigmatic case, aims to provide some insights into questions as:

1. How is it possible for the Executive to derogate from the Constitution and marginalize the parliament during an emergency regime as the COVID-19 pandemic?
2. Can expertise stemming from the epistemic authority be instrumentally used to legitimize the lack of accountability and parliamentary checks typical of emergency legislation?⁸
3. Do Executives and elected representatives feel less obliged toward the electorate in the frame of an output based legitimacy (i.e. problem solving oriented)?

⁵ In particular the approach seeing technocrats as a *sui generis* elite with specialized knowledge, turning into fully fledged technocratic when at high levels of responsibility in a public apparatus of power (Bruno 2019, 2020; Caselli 2020).

⁶ The authors are grateful to reviewer one for the interesting point raised here.

⁷ On the one hand, emergency legislation in Italy amid COVID-19 pandemic has been legitimized by invoking scientific and technical expertise (i.e. the epistemic authorities of renewed experts, scientists and international organizations, such as the World Health Organization); on the other hand, scientific and technical expertise - *sub speciem* of the task forces of the ‘*comitato tecnico-scientifico*’ – has in some cases influenced the political agenda by virtue of expertise (asymmetry of the knowledge-driven process of problem solving).

⁸ And given the asymmetry in terms of know-how, is there a risk that the *comitato tecnico-scientifico* influence the policy-making agenda, and that it escalate to a form of technocracy?

Preliminarily to the analysis, in the second paragraph we review a vast research literature, focusing on constitutional change during emergency regimes within liberal democracies, in particular (a) types of constitutional change (b) paths of emergency-produced or (c) emergency-related constitutional change and (d) constitutionalization of crisis and main features of emergency regimes.

In the third paragraph, we use the recent case of Italy (March-August 2020) as exemplary for further research on the role of expertise in emergency regimes, focusing on the establishment and features of the *Comitato Tecnico Scientifico* (CTS), the marginalization of the Parliament and the concentration in the hands of the Executive of both political communication and normative production.

In the fourth paragraph we try to provide some theoretical tools to make sense of the Italian emergency regime, using three strands of relevant scholarship, derived by the classic studies of Sartori (1970, 2005, 2011) and Scharpf (1997, 1999) on responsiveness and legitimacy, and the recent researches of Davide Caselli (2020) on the political role of expertise. In particular: (a) the notion of political ‘responsiveness’ based on expected reactions; (b) ‘the in-put and output’ legitimacies and (c) the political role of scientific and technical expertise as asymmetry.

2. Current research literature

Stability is arguably an important goal of any constitution. In pursuing it, constitutions aim at safeguarding fundamental rights and ingraining the allocation of power among the branches of government (Elkins *et al.* 2009). It goes without saying that major crises (be them economic, environmental, military, political or due to natural disasters) represent an unmatched challenge that threatens the stability, if not the very survival, of any constitutional order (Delledonne 2020). Against this background, and given the heterogeneity of constitutions around the globe, academic comparative literature has strived to map out the patterns of constitutional change in time of crisis. Nevertheless, an overview of the main findings will be provided in the following.

After briefly touching upon the main types of constitutional change, this section will provide an insight on the four main patterns of constitutional change in time of crisis as developed by recent academic literature.

Finally, the phenomenon of ‘constitutionalization of crisis’ will be evaluated, with a view to point out the advantages and the inherent dangers.

2.1 Types of Constitutional Change

In engaging with the different types of constitutional changes, the crucial distinction between constitutional provisions and constitutional norms must be addressed (Crisafulli 1964; Alexy 2002; Bernal 2014). While the former indicates the written statements of a constitution, the latter encompasses the set of meanings and praxes stemming from constitutional provisions as well as from generally accepted unwritten constitutional conventions (Bernal 2014). With the term ‘constitution’ we indicate both categories.

It should further be recalled that constitutional change can be grouped in formal and informal. Formal changes are those occurring in accordance with formal constitutional amendment rules (Karlsson 2016; Albert 2020). These are written constitutional provisions detailing the procedure for modifying the written constitution (Dixon & Holden 2012), endorse deliberation about constitutional meaning (Ku 1995), differentiate between constitutional provisions and ordinary law (Sajó 1999), indicate what can be subject to formal amendments and what is immune from it (Elster 1991), and even articulate constitutional values (Albert 2013). Informal amendments, conversely, are generally understood as ‘the alteration of constitutional meaning in the absence of textual change’ (Balkin & Levinson 2006; Albert 2017; Doyle 2017; Marshfield 2017; Passchier 2017; Lupo 2017). By far more frequent than formal, informal constitutional changes encapsulate all the constitutional modifications resulting from processes that are different from the procedures set forth by constitutional amendment rules.

Amendments to the constitution can occur by mean of at least seven mechanisms: enactment, acceptance, explicit derogation or abrogation, implicit

derogation or abrogation, interpretation, infra-constitutional mutation, and desuetude (Bernal 2014).⁹ In the light of the above, informal constitutional changes are the result of social acceptance of new constitutional norms, implicit derogation or abrogation, judicial interpretation, infra-constitutional mutation, and desuetude (Albert 2020). Informal changes (and those stemming from judicial interpretation in particular) often involve constitutional norms, rather than provisions. As a consequence, object of informal changes are often norms revolving around political ideas (e.g. freedom and equality) and political configuration and procedures, which in turns affects the allocation of power (Bernal 2014).

2.2 Paths of emergency-produced or emergency-related constitutional change

In time of crisis, constitutional change most likely occurs. States of emergencies are natural catalysts for constitutional change, whether formal or

⁹ Constitutional change can result from the *enactment* of new written constitutional provisions, which express new norms affecting the whole constitutional framework. Second, change could follow the *acceptance* of new unwritten constitutional norms. In Hartian terms, *acceptance* requires: i) practice of state officials accompanied by the habit of obeying a norm; ii) the imposition of sanctions and the rise of criticism in case of deviation from the norm; iii) that the negative consequences under ii) be regarded as legitimate, justified or based on good reason (Hart 1994). Third, change can be induced by *explicit abrogation or derogation* of constitutional provisions by means of formal amendment procedures. By amending or abrogating a provision, all the set of correspondent norms stemming from the meaning of the provision at stake will be affected. Fourth, a similar result is reached through *implicit abrogation or derogation* on constitutional provisions. In such instance, however, the amendment is the result of the enactment of a new constitutional or supraconstitutional provision which is partially or totally incompatible with the pre-existing constitutional provisions (Karlsson 2016). Fifth, constitutions can change by mean of *judicial interpretation*. Judges create the connection between constitutional provisions and constitutional norms. Therefore, the meaning attributed to each norm can change over time, thus in turn affecting a correspondent set of constitutional norms (Roznai 2016; Arato 2013). Sixth, we have the frequent phenomenon of *infra-constitutional mutation*. This term indicates the constitutional change resulting by the enactment of non-constitutional rank legislation (i.e. ordinary legislation, the ratification of international treaties, the undertaking of Executive action or the implementation of political practices) that is incompatible with the constitutional framework, yet not declared unconstitutional (Lupo 2017). This can happen for numerous reasons, e.g. Courts overlook the issue, or mechanisms of constitutional review are not in place. The result of this phenomenon are infra-constitutional norms. Of a lower rank than constitutional norms, they should be declared unconstitutional. If this does not happen, however, they may end up being accepted in practice: in such case, they will replace the contradictory constitutional norms in regulating the political life of the society and result in a constitutional change. Last, *desuetude* can cause constitutional provisions and norms to lose their force. Resorting to Hart once more, desuetude is understood as the fading over time of the habit of obedience – or of any other of the expectations of norm-acceptance - to a given norm or provision (Albert & Kenny 2018). As we will see shortly in the empirical part of the article, we consider points four and six, namely *implicit abrogation or derogation* and *infra-constitutional mutation* as having played a major role.

informal (Delledonne 2020). During an emergency regime, political and judicial actors may take advantage of crisis in order to change the constitutional order. Besides that, crisis challenge the capability of a given constitutional framework to adjust by mean of law – i.e. by mean of constitutional change – and by mean of codified derogations.

Mapping out the exact correlations between constitutional change and crisis is virtually impossible, as the interaction between the two differs in each legal order and is dependent on the widest range of variables (Balkin & Levinson 2006). Such variables include, *inter alia*, the intensity and the symptoms the crisis has shown in each country, the political system each time engaged, and each constitutional design (codified or not codified, flexible or rigid, equipped with a derogation clause or not, and so on).

Despite these difficulties, some comparative constitutional literature tried their hands with the challenge to identify general paths of emergency-produced constitutional change¹⁰. Four distinct paths of constitutional reaction have been mapped out by the study: *adjustment*, *submission*, *breakdown* and *stamina*. Each of these paths will be briefly addressed in the following.

(1) *Adjustment*: It consists in the combination of formal and informal change as the constitution adapts to the requirements of the crisis, and keeps up with the developments. Through adjustment, the constitution avoids becoming obsolete and should succeed in continuing performing its functions. Such process is slow and gradual, and each step of the adjustment entails great risk of failure. Adjustment requires an understanding of constitutional change as a tool for a gradual evolution, rather than a mean to attempt rebirth¹¹.

(2) *Submission*: This path is marked by a stand-still of the constitutions hit by the crisis. In this scenario, the informal constitutional change brought about by the crisis-induced legislative production, meets the indifference of the constitutions,

¹⁰They did so by analysing how several constitutional orders reacted to the global financial crisis in 2008, and by revisiting their similarities and differences under the prism of the common stimulus set by the crisis (See in particular the account provided by Contiades 2013).

¹¹A blatant example of such Constitutional path consists in the UK reaction to the 2008 crisis. Also thanks to the uncoded nature of its constitution, combined with the lack of procedural constraints, prompt adjustments took place.

which helplessly witness the erosion of their functions. In the absence of formal constitutional change, the constitution suffers from a gradual fading of its normative power, its symbolic function and the faith in constitutional safeguards. While on the ground the crisis inevitably causes a shrinking of rights and a reallocation of powers, Constitutions fail to provide guidance and simply succumb¹².

(3) *Breakdown*: Crisis and emergencies can result in the breakdown of the constitution. That is, its total revision or replacement following its crumble. Either the people themselves or political actors can be the drive of the end of a constitutional era and the following reestablishment of a new constitutional order¹³.

(4) *Stamina*: Constitutions experience stamina when no change at all, neither formal nor informal, occur. These constitutions prove to be able to face the requirements of the crisis without resorting to any constitutional change. By mean of stretching without being deformed and contracting back, the constitution maintains its symbolic function and its normativity¹⁴.

2.3 Constitutionalization of crisis and main features of emergency regimes

Managing major crisis proves crucial with a view to preserve the cornerstones of an existing constitution.

In the light of this, a great number of constitutions entails what are generally defined 'emergency clauses'. This phenomenon is defined as 'constitutionalization' of crisis, that is, constitutional provisions allowing for temporary (yet codified)

¹²Examples of this pattern can be found in the constitutional reaction of Portugal and Spain, which have not undertaken any textual modifications.

¹³An example of breakdown can be found in the experience of Iceland. After the economic crisis has exposed the inherent weaknesses of the constitution in force, a participatory process of constitution-writing begun (carried out through social networks). Similarly, Hungary reacted to the crisis by enacting a new constitution, which took apart the pre-existing allocation of power and got rid of fundamental constitutional guarantees (Chronowski & Gárdos-Orosz 2017). Hungary started to walk the path of illiberal democracy (Pap 2017). Interestingly, some authors pointed out that the constitutional breakdown could have been fostered by the fact that Hungary was the only post-communist country when the transition to democracy was not accompanied by the enactment of a new constitution (Contiades 2013).

¹⁴Stamina is a typical reaction of the US Constitution (Balkin 2008). This is the experience of the US Constitution in the after 2008 crisis. Despite the difficulties in undertaking formal change, this constitution went through the recession unscathed thanks to its flexibility and a lively argumentative constitutional debate.

derogations from the general constitutional framework. Emergency regimes, in this sense, enjoy a paradoxical status: while allowing for changes in the constitutional order through the introduction of a certain degree of flexibility and elasticity, they do so with a view to restore the pre-existing constitutional 'normalcy' and to avoid a possible slippery slope towards an irretrievable reallocation of powers and jeopardizing of fundamental rights (Delledonne 2016; Ferejohn & Pasquino 2004)¹⁵. In this sense, crisis are simultaneously a serious threat to the constitutional order and the object of constitutional provisions (Contiades & Fotiadou 2015).

According to academic literature on comparative constitutional law, 'emergency' can refer to: (a) menaces for the territorial integrity of the state or its internal cohesion, (b) natural disasters, or (c) economic and financial crises (Contiades 2013). Many constitutions, however, use the term in a rather vague manner and refrain from providing a precise definition of what a 'national emergency' entails¹⁶.

To add on that, crisis increasingly emphasize a non-exclusively domestic dimension: let us think about the COVID-19 pandemic, terrorism, or the 2008 financial crisis. As a consequence, international public law – and human rights law most notably – are becoming crucial in order to understand the legal status, and the legitimate scope, of constitutional derogations which inevitably smother fundamental guarantees and human rights¹⁷.

¹⁵In this sense, their flexible yet conservative nature is best expressed when resorting to a famous quote from the Italian novel *The Leopard* (Il Gattopardo): "*Everything changes so that nothing changes*". A recent quantitative study has revealed that nine out of ten constitutions currently in force include emergency-focused provisions: these are generally defined as 'the set of formal legal provisions encoded in the constitution that specify who can declare an emergency, under which conditions an emergency can be declared, who needs to approve the declaration, and which actors have which special powers once it has been declared that the constitution does not assign to them outside emergencies' (Bjørnskov & Voigt 2018).

¹⁶The scenario is further complicated by the fact that, due to historical reasons, different emergency regimes can be regulated within the same constitutional framework, as it is for Germany and France. In France, three emergency regimes are regulated in the Constitution and ordinary legislation: extraordinary presidential powers (Art. 16 of the Constitution of 1958), state of siege (Art. 36 of the Constitution), and state of emergency (*état d'urgence*, law no. 55-385). In turn, the German Basic Law mentions a state of defence (Art. 115a), a state of tension (Art. 80a), internal emergency (Art. 91), and assistance during disasters (Art. 35).

¹⁷ See Art. 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 4 of the International Covenant on Civil and Political Rights, and Art. 27 of the American Convention on Human Rights.

There are several typical features associated with the implementation of derogation regimes. First, a vast majority of derogation clauses imposes limitations to – or prohibit altogether - constitutional change. In this scenario, the enactment of constitutional change affecting (the fundamental core of) the constitution (e.g. fundamental rights, the form of government and so on) are explicitly prohibited¹⁸. A similar result can be achieved by means of restrictive judicial interpretation of emergency clauses by constitutional Courts, as it happened in France (Mastor & Icher 2013).

Another typical clause is the obligation to restore the pre-existing legal framework once the crisis has come to an end.¹⁹

Finally, an essential trait of emergency legislation is its temporariness. For this purpose, many Constitutions resort to so called ‘sunset clauses’, whose nature and optimal functioning is vastly debated in legal scholarship (Ackerman 2004; Dyzenhaus 2012; Ranchordàs 2014; Varol 2014). Nevertheless, in many instances legislative or administrative emergency measures end up affecting a country’s legal order durably, even outliving of the crisis which justified the emergency regime in the first place²⁰.

3. An account of the Italian emergency regime (March-August 2020)

3.1 The establishment of the comitato tecnico-scientifico

In this article we consider the crisis-induced “constitutional change” that has been produced in Italy during the so called “first wave” of the COVID-19 outbreak, and point out at (1) implicit abrogation or derogation and (2) infra-constitutional mutation as the type of factors having played a major role. Since the outbreak of COVID-19, the Italian Executive set up several expert teams, task forces and

¹⁸ A blatant example of such clauses can be found in the Israeli Constitution (Barak-Erez 2013).

¹⁹ See e.g. Art. 228(5) of the Polish Constitution of 1997 (“Actions undertaken as a result of the introduction of any extraordinary measure shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State”).

²⁰ Striking example of this trend consist in the constitutional developments experienced by several countries after the 9/11 (Ackerman 2004) or the emergency measures enacted following the Paris and Île-de-France terrorist attacks in November 2015 (Guérin-Bargues 2016).

technical bodies. Among these, a crucial role was played by the Comitato Tecnico Scientifico (technical-scientific committee – ‘CTS’) promptly established in February 2020. Appointed as the leading epistemic authority in Italy to face the pandemic, the CTS was in charge of advising the head of the department of civil protection – the emergency commissioner Angelo Borrelli - on the adoption of the necessary preventive measures to deal with the spread of the Sars-Cov2. Consequently, the CTS was a crucial actor in the daily discussion and political communication during the pandemic²¹, to the extent that most of the health recommendations issued during the peak of the pandemic have been drafted by this body²².

3.2 Marginalization of the Parliament and strengthening of the role of the President of the Council

In the context of emergency regime, the Italian Parliament was not sufficiently consulted. As a matter of fact, on several occasions the Government-Parliament dialogue was limited to Prime Minister Giuseppe Conte speeches before the European Council meetings.

By relying to the CTS as a source of legitimization, the legislative power was largely exerted by the Executive *de facto*. In particular, the hard core of emergency legislation during the pandemic was mostly enacted by the PM himself, in an immediate and vertical way, with the consequent impossibility of any discussion,

²¹ See in particular: www.huffingtonpost.it/entry/crisanti-nel-comitato-tecnico-scientifico-mancano-le-menti-migliori-delluniversita_it_5f830c2cc5b62f97bac40ab4; www.ilfattoquotidiano.it/2020/10/07/scontro-sileri-cts-il-vice-ministro-dal-comitato-troppo-burocrazia-la-replica-critiche-avventate-e-superficiali/5957977/; www.quotidianosanita.it/lavoro-e-professioni/articolo.php?articolo_id=83929. Viewed 15 June 2021.

²² The CTS is made up of experts who simultaneously play Executive roles in the public administration and do not receive compensation for their activities. The CTS includes, among others: the Secretary General of the Ministry of Health, the Director-General of Health Prevention of the Ministry of Health, the Director of the Coordination Office of the Maritime, Air and Border Health Offices of the Ministry of Health, the Scientific Director of the National Institute for Infectious Diseases "Lazzaro Spallanzani", the President of the Higher Institute of Health, a representative of the Health Commission appointed by the President of the Conference of Autonomous Regions and Provinces, a coordinator of the Department of Civil Protection, with the functions of coordinator of the CTS. The CTS can be supplemented by experts in relation to specific needs. Health Minister Roberto Speranza also appointed Walter Ricciardi, a member of the WHO board, a consultant to the Ministry of Emergency and Relations with international health bodies. Source: www.agi.it/cronaca/news/2020-03-05/coronavirus-iss-comitato-7339017/.

amendment or verification by the Constitutional Bodies, such as the President of the Republic and Constitutional Court. Such essential counterweights and cornerstone guarantees for the rights of individuals have been bypassed, while recurring to the CTS as a source of legitimation²³.

Some rights have been compressed in a particularly clamorous way: personal freedom, movement and residence, assembly, religion, right and duty at work, freedom of private economic initiative. Although the Italian Constitution does not provide for a specific regulation of the state of emergency, except for the - different - state of war - which, in any case, must be declared by the Chambers - it nevertheless provides for a specific emergency legislation instrument: the law decree (*decreto legge*)²⁴. On this point, in fact, it should be remembered that the legislative decree no. 6/2020 set forth the mere attribution of power to the Government in the light of the health emergency, while it alarmingly lacked any limitation in terms of forms or contents of such delegation. The provision thus bypassed the constitutional guarantees, since it established the power of the Government, without specifying with sufficient determination the meaning of the chosen action²⁵.

²³See Conte's declaration on 28 April: www.lastampa.it/topnews/primopiano/2020/04/28/news/coronavirus-parla-il-premier-conte-non-sono-pentito-rischiamo-il-contagio-esponenziale-1.38770502.

²⁴When we speak of the limitation of fundamental rights, in fact, we are moving within a framework of systematic reservation of the law which imposes the scrutiny of Parliament, although possibly within the limits of the emergency regulations. It should be taken for granted, in fact, that when citizens' guarantees of freedom are restricted, it is their representatives who have to speak out on these very sensitive issues: that is the very essence of representative democracy. This can also be done ex post, in the case of the legislative decree, or in the context of the definition of delegation, as in the legislative decree, but surely a "blank delegation" is never possible.

²⁵The system of guarantees of individual citizens is under discussion, precisely in relation to the forms of control over the actions of the Executive in a very delicate matter: the limitation of individual freedoms in ways previously unknown and extraordinarily profound. Even the successive partial resolutions of the problems in question, by the D.L. n.19/2020, have occurred only late and accompanied by quite a few controversies on the need for a parliamentary procedure, perceived by some as a hindrance to the urgent situation. See in particular: www.lastampa.it/politica/2020/04/28/news/attacchi-ai-decreti-di-conte-politici-e-giuristi-chiedono-che-il-parlamento-possa-intervenire-1.38776097.

3.2 Centralization of political communication and normative production

Political communication during the COVID-19-related emergency regime has had several particular and unprecedented characteristics: simplification, immediacy, centralization in the figure of the President of the Council and the CTS, with daily TV briefings between the beginning of the outbreak until May, with a systematic representation of the extreme urgency. These phenomena seem to find their parallel in the innovative method of normative production and the consequent constitutional tensions. Even the collective limitation of individual liberties in the first phase of the emergency, occurred mainly through Decrees of the President of Council of Ministers (DPCM)²⁶, in a context of objective marginalization of the role of Parliament (however already underway in light of cross-cutting and multiple trends such as economic crisis, participation to the EU, global governance of various areas which renders impotent and too slow parliaments in the face of rapid decision-making that they require)²⁷. Communication has been simplified to the extreme, often without any particular concern as it comes to the constitutional consequences of what has been accepted, supported and desired; the rules, in parallel, have undergone an alarming simplification and deviated from the system of institutional guarantees and counterbalances, with the role of Parliament being marginalized.

In the same vein, institutional communication was largely centralized in the CTS and in the figure of the President of the Council; besides, it has generally been exerted informally and outside institutional channels (with numerous on TV lives, talking directly to the population often even before the announced measures were actually drafted). In parallel, rule-making was centralized in the hands of the PCM, especially through the instrument of the DPCM. It is to be noted that, initially, such

²⁶ A ministerial decree ("decreto ministeriale" or D.M.), in the Italian legal system, is an administrative act issued by a Minister in the performance of his duties and in the field of matters within the competence of his department. When this type of act is adopted by the President of the Council of Ministers (*Presidente del Consiglio dei Ministri*), it is the "Decree of the President of the Council of Ministers" (DPCM).

²⁷ See the analysis by Arianna Vidaschi (2020) "Italy and COVID-19: A Call for an "Italian Emergency Constitution"?" at www.justsecurity.org/70081/italy-and-covid-19-a-call-for-an-italian-emergency-constitution.

informal delegation of power was carried out in the absence of adequate delegation and delimitation of powers by the superordinate regulations.

4. Framing the Italian case in terms of responsiveness, output legitimation and expertise politicization

To summarize some trends emerging from the account of the Italian case, we note that (1) communication was used as a source of legitimation for the PM and partially delegated to the *Comitato Tecnico Scientifico*, with an interesting mechanism of centralization during the emergency regime of both (a) political communication and (b) legislative production, in the hands of the PM and the CTS; (2) the establishment of the CTS allowed the Italian Executive to use epistemic authority as a source of legitimation for an immediate and vertical legislative production, resulting in a particular form of top-down and technocratic approach to policy-making during the emergency regime; (3) there was a lack of transparency and gray governance of the CTS (including controversial accreditation as Executives of World Health Organization).

What theoretical tools can help make sense of the mechanisms in action in Italy in the first half of 2020? In this paragraph we try to provide some insights on the interplay between politics, institutional settings and technical expertise, based on the Italian case, by following three strands of scholarships from interdisciplinary political studies, including political science, political sociology and European studies. The three strands of scholarships are the following:

- the political ‘responsiveness’ scholarship;
- the ‘in-put’ vs ‘output’ legitimacy scholarship;
- the political role of ‘expertise as asymmetry’ scholarship.

The first scholarship strand, based on the notion of political ‘responsiveness’, was mainly conceived by Giovanni Sartori. He inferred it from the works of German-American professor and political theorist Carl J. Friedrich (1901-1984) on the ‘expected reactions’, in order to explain the behaviors of elected representatives in the context of the Schumpeterian ‘minimal definition of democracy’.

As concerns the scholarship of the 'input' and 'output' legitimacies, it was originally proposed by Fritz Scharpf, based on the distinction of legitimacy built (1) upon electoral participation and consensus and a (2) legitimacy built on the capacity of governments to provide problem solving.

The third scholarship considers the concept of expertise fundamentally an asymmetric distribution in terms of knowledge and know-how among experts and ordinary citizens, and has been recently used in a theoretically and empirically innovative way by recent works of Davide Caselli.

4.1 The 'dampening' of the political responsiveness

In his classic *Democrazia: cos'è* (2011), a monumental work revised over the years from 1993 to 2011, Giovanni Sartori attempts at the hard task of defining the concept of 'democracy' in all its complexity and aporias. He does so by distinguishing its normative and descriptive aspects, considering both its horizontal and vertical dimensions (from the public opinions to the elites) and also confronting democracy with ideologies, from liberalism to socialism, dwelling upon what democracy is not and cannot be. Sartori moves within the horizon of the democratic conception developed by Joseph. A. Schumpeter (1942, 1947) and Robert Dahl (1971), defined 'minimalist', 'procedural' or 'competitive'. In particular, following Schumpeter, Sartori argues that 'competitiveness' is a key feature, as the competition between the selected elites in power is far more important than the possibility to select representative through the elections (Schumpeter 1947). According to Sartori, the demos is thus empowered, in a democracy, to judge the fortune of the competitors. The mechanism that allows to control the different sides of the competition is left to the 'demos', and is to be found in the key concept of 'responsiveness'. Such concept is inferred by Sartori from the works of Carl Friedrich (1941) on the 'expected reactions' (1941): according to this mechanism, elected representatives are sensitive and responsive (Sartori 2011: 108), as "[...] *in un contesto competitivo gli eletti sono quotidianamente condizionati dall'aspettativa di come i loro elettori reagiranno alle decisioni che prendono. Dunque la lotta competitiva produce 'responsiveness' o (in calco) responsività*".

Now, we propose that in times of crises, the mechanism of responsiveness of the elected representatives is temporarily soften or even halted, in particular during a pandemic, when public opinion was partially overridden by the epistemic community²⁸. This may help explain the politicization of science by the Italian Executive, i.e. the political use of science to legitimize, in essence, political decisions or, perhaps, circumvent responsibility, specifically by relying on “expert” opinion. Following this reasoning, we bring into play another strand of scholarship particularly adapt to explain the different typology of legitimacy induced during the peak of the first wave of Covid-19 pandemic in Italy: the in-put and output legitimacy.

4.2 The ‘trade-off’ between in-put and output legitimacy

The division of legitimacy into in-put and output was developed by Fritz Scharpf (1970, 1997, 1999) in the frame of researches concerning legitimization mechanisms in the European Union.

According to Scharpf, input legitimacy refers to the participatory quality of the process leading to laws and rules as ensured by the ‘majoritarian’ institutions of electoral representation, while output legitimacy is rather concerned with the problem-solving quality of those very laws and rules²⁹. The possibility to ‘split’ the legitimization mechanism in in-put and output can help us in adding an innovative element to what we have already seen in the review of the current research literature of constitutional derogation. In times of emergency legislation in the frame of emergency regimes - as in the case of Italy in the early 2020 - it is possible to identify a sort of ‘trade-off’ between the participatory quality of the decision-making process, under the belief that the bitter (output) ‘medicine’ would be effective in tackling the COVID-19 pandemic (problem-solving). The trade-off between participation and problem-solving may partially explain the possibility by the Italian Executive to

²⁸ With the words of PM Giuseppe Conte 28 April 2020: “I cannot let myself be swayed by public opinion, even if I understand those feelings very well myself.” Conte acknowledged the scientific committee advising him was “rigid”, but said the overriding concern was to prevent a second wave of infections. See www.aljazeera.com/news/2020/04/28/conte-defends-slowly-slowly-lifting-of-italys-lockdown/.

²⁹ Vivien Schmidt (2012) has added a third normative criteria: throughput legitimacy.

sideline constitutional and institutional settings, in particular if considered in relation to the undisputable existence of a pandemic and the “perpetual” state of emergency characterizing specifically the EU since the sovereign bond crisis started in 2011-2012

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4.3 A double-edged weapon: expertise, asymmetry and dependence

The third scholarship that may help us to better understand the Italian case revolves around the study of expertise as an asymmetric relationship, in particular the research of Caselli. Davide Caselli (2020) has been recently developing an innovative approach, in both theoretical and empirical terms, of ‘expertise’. In his view ‘expertise’ is conceived as a dynamic network of relationships, therefore extending beyond a pure, yet static, codified knowledge. Following the insights of a number of recent studies on the role of expertise in social sciences (among others: Flinders & Buller 2006; Flinders & Woods 2014; Sapiro 2009; Pellizzoni 2011; Moini 2012; Eyal 2013) and building upon the classic theoretical contributions of sociologists and philosophers, Caselli employs an interesting definition of ‘expertise’ as an³¹: “asymmetric relationship between actors recognized as bearers of a knowledge in a certain field and actors not endowed of this recognized feature or, in others cases, between actors possessing knowledges that are different in quantitative and qualitative terms”(Caselli 2020: 35; but also Pellizzoni 2011)³². Conceived as an asymmetric relationship, ‘expertise’ naturally tends to develop ‘dependence’ between the two groups of actors. To be noted, such ‘dependence’ is established behind the appearance of apparent neutrality, as the ‘recipients’ of the expertise are mostly unaware of the complex know-how dynamics behind the relationship (Caselli 2020: 31). Conversely, according to the lecture of the critical sociology reframed by Caselli *et al.*, experts themselves may interestingly develop strong dependence towards their commissioners or patrons, both in terms (a) definition of the problem to investigate

³⁰ In this regard see: Adriano Cozzolino (2019) Reconfiguring the state: Executive powers, emergency legislation, and neoliberalization in Italy. *Globalizations*, 2019, 16.3: 336-352.

³¹ In particular, Max Weber (2005), Pierre Bourdieu (2010, 2012) and Michel Foucault (2004, 2005).

³² Translation of the authors.

and (b) the expected solutions, once again undermining the possibility of neutrality (Bruno 2019, 2020, see also Bruno & Downes 2020a, 2020b)³³.

5. Conclusions

From an historical perspective, it is possible to consider Italy as a laboratory for what regards the role of technocratic expertise and centralization of decision-making power in the hands of the Executive³⁴(see McDonnell & Valbruzzi 2014 and their classification technocrat-led and technocratic governments). Conversely, some recent forms of populisms in Italy, and to some extent in Europe, can be regarded as strictly related to increasing role of technocratic expertise. Both technocracies and populisms have contributed, by taking advantage of the misuse and the of trivialization of complexity respectively, to the crisis of liberal democracy in Italy, with institutions in need of popular legitimacy and liberal constitutionalism requiring technocratic elements to function, highlighting an "elected-unelected" unavoidable tension.

Before passing to the conclusions of the article, it is again important to highlight how the analysis of the Italian case, with its specific recent developments in terms of *(i) decline of political responsiveness, (ii) prevalence of output legitimation and (iii) politicization of expertise (with the possibility for expertise, in turn, to influence policy making) to contribute to the overall debate on the reconfiguration of powers in times of crises*, shows how Italy represents a very specific and sui generis case. Indeed, if those peculiar developments emerged in the framework of the COVID-19 pandemic, from one hand can be regarded as part of a greater “perpetual” state of emergency, that has been interestingly framed as ‘crisification of policy making’ in the European Union

³³ Clearly, according to Caselli (2020: 21), the current relevance of experts and expertise has been growing, due to the proliferation of technical and regulatory standards and tools influencing everyday life, thus explaining experts being among the preferred controversial targets of populist parties, of both the right and left of the political spectrum (Parsi 2018; Author 2018, 2019; Author & Author 2020).

³⁴ Particularly important in light of the recent Executive led by Mario Draghi (March 2021).

(Rhinard 2019), on the other hand make the Italian case not easy to compare with other European countries.

As concerns the specific perspective of constitutional law, although the Italian case has resulted to be particularly controversial and problematic, the Judges of the constitutional court have stated that the model offered by the legislation in force appears to be in accordance with the constitutional design³⁵. To this regard, it is possible to say that the trade-off between responsiveness (input legitimacy) and technocratic solutions (output legitimacy) suggests that health emergencies do impact the balance towards output legitimacy, which is not a new phenomenon.³⁶ Once again, it is important to highlight that the main takeaways of the articles regards exclusively Italy, a country that represents undoubtedly a quite unique case of changes in terms of legitimization processes, through the political role of scientific and technical expertise often mis-used to increase the role of the Executive at the expenses of others.

The questions we tried to – at least partially - address in the article, concerned the mechanisms allowing the Italian Executive to derogate from the Constitution and marginalize the Parliament, as well as the use of expertise and epistemic authority as a source of legitimization during a pandemic-related emergency regime³⁷. Arguably, they are far too complex to be considered exhaustively examined. Adriano Cozzolino (2020), studying the evolution of legal and institutional mechanisms over the last forty years in Italy, argued that the strengthening of the policy-making role of the Executive during emergency legislation in time of crisis proved to be key in the insulation and imposition of neoliberal and austerity policies, in parallel with the constant marginalization of the policy-making role of the parliament.

³⁵ <https://www.open.online/2021/03/18/coronavirus-dpcm-incostituzionali-sentenza-corte-constituzionale/>

³⁶ The authors are once again very grateful to the anonymous reviewers for the extremely useful feedback provided.

³⁷ Mark Rhinard crafted the term ‘crisification’ to describe the crisis management features of the policy-making in the European Union in the last decades. Author and Parsi, among others, have talked of the complementary roles of technocracies and populisms in compressing party-politics and the role of parliaments.

Now, the concomitant centralization of both (a) political and institutional communication and (b) normative production in the hands of the Executive, together with the establishment of a gray technocratic body as the ‘comitato tecnico-scientifico’, goes exactly in this direction, in that it reconfigures institutional dynamics and power mechanisms. We believe that the framing of the discourse concerning the risks of policy-making during emergency regimes in terms of (i) decline of political responsiveness, (ii) prevalence of output legitimation and (iii) politicization of expertise (without neglecting the possibility, in turn, of expertise influencing policy making) can contribute to the overall debate on the reconfiguration of powers³⁸.

³⁸Interestingly enough, the role of parliaments, and party politics overall, in Europe and beyond is not endangered solely by the imposition of ‘technocratic’ top-down approaches: the almost omnipresent ‘crisification of policy making’ (Rhinard 2019) is an important source also for populist politics, in particular populist radical right parties (Bruno 2018, 2019, 2020; Parsi 2018). In fact, the direct and unmediated ‘bottom-up’ approach to politics typically invoked by such parties renders them increasingly involved with the shrinking space for political participation targeting party politics and political institutions. In this regard, see also the critics of Sartori (2011) of direct democracy and its supporters or of the non-well specified notion of political ‘participation’ within representative democracies.

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