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States of emergency and fundamental rights

Italy

The state of emergency in Italy

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Primo paragrafo

1.- In the Italian Constitution there is not an explicit provision on the suspension of constitutional rights and guarantees. Nevertheless, according to a substantial common opinion of scholars, article 78 concerning the declaration of the state of war[1], allows the adoption of measures restricting the guarantee of rights. Until now the article 78 have never been applied.

Despite the lack of a constitutional rule explicitly allowing the limitation of rights, the Italian lawmaker several times limited fundamental rights in order to face security threats and those laws were also submitted to the review of the Constitutional Court. Moreover, the idea of emergency is relevant for the Italian legal system for at least two more reasons: the first one is the existence of a statute law disciplining the state of emergency ant the second one is the existence of a source of law that the founding fathers introduced in our Constitution in order to face situation of extraordinary necessity and urgency. In both these cases the Constitutional Court had the opportunity to assess the consistency of laws with Constitution.

In the rest of the paper, all the three issues will be analysed having a particular attention for the Constitutional Court decisions.

2.- In history of the Italian Republic stricter regulation and the limitation of some fundamental rights provided by law were justified by a situation of emergency, as

[1] The art. 74 of Constitution says: «The Houses deliberate the state of war and confer the necessary powers on the Government».

explicitly mentioned in the explanatory notes of statutes. In particular, the Government (by decree-law) and the Parliament enacted such emergency legislation responding to terroristic attacks (1970-80s), to a criminal association (*mafia*) (1990s) and, lately, to international terrorism.

In the late Seventies, the decree-law n. 625/1979 (confirmed into statute law n. 15/1980, *Urgent measures for the preservation of the democratic order ant the public security*) introduced specific criminal offences related to the terroristic activity and the subversion of the democratic regime, and severe punishments. Moreover, for the same offences, the preventive detention was extended for one third, special maximum security jail were built and the power of police was widened (e.g. investigative hearings without the presence of the defence lawyer, preventive telephonic wiretap, preventive arrest).

In the Nineties, the law-decree n. 306/1992 (confirmed into statute law n. 356/1992, *Urgent modifications to the criminal procedure code and measures against the crimes of* mafia) provided, for detainees convicted for offences related to *mafia* (except for those who cooperate with judges), an harsher status in prison and the prohibition of alternative punishments. This norm is no long exceptional because, after few prorogations, have been finally introduced in the statute law n. 279/2002.

Few years ago, the law-decree n. 144/2005 (confirmed into statute law n. 155/2005, *Urgent measures against international terrorism*) provided measures similar to those of the late Seventies, adding new criminal offences to the penal code and widening the power of police, although oriented to international terrorism. In particular, the new legislation rules on the powers of the public administration, signally the Ministry of the interior, in deporting foreigners.

The Constitutional Court assessed the constitutionality of these emergency law several times, but only in one law-case the Court clearly mentioned the connection between the emergency situation and the justification of a stricter limitation of rights: the decision n. 15/1982. The rule challenged was the article 10 of the law-decree

625/1979 (confirmed into statute law n. 15/1980, U*rgent measures for the preservation of the democratic order ant the public security*) providing that for crimes related to terrorism or subversion of the democratic regime the preventive detention could be one third longer than the ordinary limit provided by the criminal procedure code. According to this rule, the total limit of preventive detention became 10 years and 8 months and, before the condemnation in the first grade, 5 years and 4 months. The Constitutional Court found this rule consistent with Constitution and in its reasoning the Court considered four points: a) the limitation of personal freedom is justified by the necessity of combating terrorism that is a threat for the democratic order and the public security; b) the extension of the preventive detention is reasonable because is needed for the special difficulty in the investigations for terroristic offences. It would not have been justified if the prolongation of the detention had led to the obliteration of the guarantee; c) in situations of emergency, the Parliament and the Government have the right, the power and also the duty to enact emergency legislation; d) the emergency is a peculiar and severe situation but temporary, so it justifies unusual measures that are legitimated only for short periods and lose their legitimacy if extended for a longer time.

The Constitutional Court dealt with emergency laws also in other decisions that can be classified in four categories on the ground of the issue concerned. The first one is the prohibition for judges to reduce the punishment considering extenuating circumstances to detainees convicted for offenses related to terrorism (Decision n. 38/1985). The Constitutional Court found this rule is not unconstitutional as long as it is interpreted in a restrictive way suggested by the Court. The second one is the prohibition of conceding alternative measures besides detention and other benefits to detainees convicted for offences related to mafia (Decisions n. 306/1993, 357/1994, 68/1995, 504/1995, 445/1997, 137/1999). The Constitutional Court found partially unconstitutional this rule because held that the re-educating aim of the punishment provided by the Constitution does not allow to apply the prohibition to those who had already profited of such benefits and had no longer connection with criminal organizations even though not cooperate with judges. The third one is the harsher jail

regime for detainees convicted for offences related to mafia (Decisions n. 349/1993, 410/1993, 351/1996, 376/1997). The Constitutional Court found this rule is not unconstitutional as long as in its application: i) limits to the power of the Ministry besides the power of the judge are respected; ii) measures adopted by the Ministry are expressly justified in order to guarantee the judicial assessment; iii) measures respect the human dignity; iv) any breach to the re-educating aim of the punishment is expressly justified; v) measures not infringe inviolable rights of detainees such as hygiene, health, worship, reading. The last one is the right to appeal against the decree of expulsion of a foreigner adopted by the Ministry of Home affairs (Decision n. 432/2007). The Constitutional Court did not admit most of the request of the judge a quo and found no unconstitutionality in the rule according to which the appeal does not imply the suspension of the measure.

3.- Although the state of emergency is not mentioned in the Constitution, it is mentioned in a statute law. It is the law regarding the institution of the National Service for the Civil Protection, the statute law n. 225/1992. In this law there is a definition of the state of emergency: the state of emergency can be declared by the Council of ministers, at the instance of the President of the Council of Ministers, under the circumstances of "*natural calamity, catastrophes or other events that, for their intensity and extent, must be faced with extraordinary means and powers*". Under the state of emergency the President of the Council of ministers can issue ordinances which can repeal in part and provisionally any law in force. The only limit is that those ordinances shall respect the *general principles* of the state order. The President of the Council may also appoint delegated commissioners for a limited time and define its duty.

Since 1992, when this law entered into force, it has been applied really often and in several circumstances. Some examples of the reasons why the state of emergency has been declared on the ground of the article 5 of the law 225/1992 are: natural calamities such as storms and earthquakes; dryness in the north of Italy; the presence of Roma population in Campania, Lazio and Lombardia; the high number of immigrants in the

south of Italy; saving the archaeological site of Pompei; the Iraqi war: in order to face any terroristic attack or immigrant flows; managing of garbage disposal in Campania, Sicily, Calabria; traffic in Rome, Naples, Reggio Calabria, Vicenza and Treviso.

The cases of declaration of the state of emergency in the last few years show that the word “emergency” is interpreted widely. The assessment of the consistence of the ordinances issued during the state of emergency with law belongs to the regional administrative tribunal (TAR) of Lazio. Moreover Constitutional Court assessed the consistency of this statute law with the Constitution for two times but only on the side of the allocation of competences between State and regions.

In the decision nr. 418/1992 the case arose from the challenge of the law by Region Lombardia because of the breach to the competences of the Region; Constitutional Court dismissed the question of constitutionality arguing that in the case of a calamity there is the need of coordination of the institutions involved but it does not imply a concentration of power or competences. In the decision nr. 127/1995 Region Puglia challenges the ordinance of the state of emergency for a cholera epidemic. In that case-law the Constitutional Court held that i) the situation of emergency does not justify an unlimited “sacrifice” of the powers of the regions that is guaranteed by the Constitution; ii) the law nr. 225 respect the proportionality between the measure and the event; iii) the law 225 foresees limits of time and content for the activity of commissioners; iv) an agreement with the region is mandatory.

The same law has been challenged again by regions after the amendment of the Constitution on 2001. It is relevant because the current art. 117 par. 3 says that the competence in the field of civil protection is a concurrent competence, is to say that in that topic the State can set fundamental principles and then the competence belongs to regions.

Last but not least, in the decision nr. 284/2006 the Constitutional Court ruled on the state of emergency declared in Calabria for environment emergency (water and garbage). In this case the State challenged a law of the Region claiming it is not

consistent with an ordinance issued on the ground of the l. 225/1992 because suspends the building of a plant for the disposal of the garbage. The Constitutional Court declared the regional law unconstitutional because the law is not compatible with the fundamental principles issued by law 225 that sets the fundamental principles in the field of civil protection during the situation of urgency; moreover the law 225 sets 3 levels of situation, compared to the seriousness of the situation and only in the third case it foresees the intervention of the State.

4.- The *decree-law* is a source of law passed by the Government and issued by the President of the Republic, that has the same status of a statute law of Parliament in the hierarchy of law sources. The executive can pass a decree-law only in case of extraordinary necessity and urgency (Art. 77.2, Const.). Moreover the *decree-law* has to be confirmed by Parliament in an statute law within 60 days after the publication. The Houses are allowed to amend the confirming bill, whose original content is the same of the *decree-law*. If the latter is not passed by the Parliament, it loses its effect also in the past so it is like it had never been in force, though the Parliament may rule (by statute law) on the legal relations produced by the non confirmed *decree-law* (art. 77.3, Const.). Therefore it is an extraordinary instrument as the Constitutional Court held.

The *decree-law*, in the history of the Republic, has not always been used according to the spirit of the Constitution. In fact, from 1970s this instrument has been often used by the Government in absence of a circumstance of extraordinary necessity and urgency. This misuse was possible also for the “adaptable” attitude of the Constitutional Court as it held that formal flaws (*in procedendo*) of the *decree-law* (which include also the lack of the extraordinary necessity and urgency) are rectified by the confirmation of the Parliament (it does not happen for substantial flaws) (decision nr. 108/1986). When converted in law, the CC can no longer assess the respect of formal constitutional requirements and limits stated in art. 77.

Until 1990s the misuse of this emergency instrument consisted also in the approval of *decree-law* containing various measures, in the reiteration of the approval of a *decree-law* not confirmed by the Parliament within the term provided by the Constitution and in the wide amendment of the content of the *decree-law* during the confirmation procedure. Actually the *decree-law* became a privileged bill due to its immediate effect and the more rapid parliamentary *iter*: a valuable tool for weak government majorities in an instable political system. The use of *decree-law* can be resumed in few numbers: in 1996 the Government approved 361 *decree-law* (whereas the Parliament passed 133 acts) and a *decree-law* was "reiterated" for 29 times.

From the middle of 1990s the Constitutional Court intervened and first overruled about its possibility to assess the respect of the constitutional requirements of extraordinary necessity and urgency, (sentence nr. 29/1995) but there were not practical consequences.

Then, in the decision nr. 360/1996, it declared unconstitutional the "reiteration" of the *decree-law*.

Because it is not consistent with the temporally nature of this instrument and with the extraordinary nature; because it creates an expectation of the consolidation of the effect of the decree-law. It also modify the balance of powers between legislative and executive branch and may violate the principle of the rule of law.

Anyway in the last few years the aberrant use of this instrument has not finished as there are **still abuses** in the respect of the requirements of the extraordinary urgency and necessity, in the content (it is not homogeneous and often it contains wide and important reforms, particularly concerning criminal and economical matters) and in the phase of the confirmation by the Parliament (wide adding amendments also not related to the original subject). Recently two sentences of the Constitutional Court (sentences nr. 171/2007 and 128/2008) finally declared unconstitutional some rules of *decree-laws* due to the evident lack of constitutional required elements.

Besides the exam of the Constitutional Court, the Constitution provides also an exam of the **President of the Republic** in two occasions: the authorization of the presentation to the Houses of bills initiated by the Government (as for the *decree-law*) and the issue of statutes passed by the Government. Scholars debate on the precise limit of the power of the Head of State in the exercise of these functions in relation to the *decree-law*.

Looking at the history, in several cases the Head of State had a decisive influence on the enactment of a *decree-law* but only in one case – during the mandate of the President Cossiga – he refused to issue a *decree-law*. Generally Presidents use their capacity of **moral suasion** to persuade the Government into modifying the content of the draft of the *decree-law* or into renouncing to pass it. Also the current President Napolitano applied this practice in order to avoid the enactment of *decree-law* lacking the constitutional requirements without refusing the issue when the Government has already passed them, and to ask for the respect of the ratio of the Constitution rules during the parliamentary *iter* of confirmation. Since the beginning of his mandate, several times he has warned the Presidents of the Houses of the Parliament and the Government, especially the Prime Minister, against the misuse of the *decree-law*, through public speeches or private letters. His advices concerned the reform of the Rules of proceedings about the evaluation of the admissibility of amendments to decree-law in order to guarantee the respect of the limits provided by the article 77 of the Constitution; the use of a decree-law to pass important financial rules out of the ordinary financial session of the Parliament; the informal practice of the advance information to the President of the Republic about draft of decree-law. Mr Napolitano has finally refused the issue of a decree-law concerning the Englaro case, as did not agree with the choice of enacting a decree-law in order to avoid the stopping of the artificial alimentation of a woman in persistent vegetative state. Then the President came back to the moral suasion.

On April 9th the Italian President of the Republic posted a letter to the Presidents of the two Houses of the Parliament, to the Prime Minister and to the Ministry of

Economy and Finances inviting them to respect constitutional rules about the *decree-law* and, in particular, about its conversion in an statute law of the Parliament. So the letter the President Napolitano posted in April is the last message of a long series. In particular it is related to the amendment of the *decree-law* during the parliamentary *iter* of confirmation. The Head of State concern raises from the late request to promulgate the statute law deriving from the confirmation of a *decree-law* (the *decree-law* February 10, 2009 nr. 5) whose content had been widely modified. The presence of lots of new rules in the bill close to the 60 day term – Mr Napolitano argues – does not allow the President to verify the respect of the constitutional requirements about the *decree-law* and the financial balance within the term for the promulgation of the statute law. Moreover in the exam of the bill the President should also consider the effect of the potential non confirmation of the *decree-law*. This is the content of a release of the Quirinale published on its website eight days after the posting of the letter. In truth the original intent of the President of the Republic was to keep the letter private but few days after the recipients had received it, press agencies had been informed.