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**Democracy and the State of
Exception: The Italian Experience**

State of Exception – An Overview

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6 1. – The concept of state of exception is strictly intertwined with
7 the one of legal system and indeed exception implies the suspension
8 of the usual legal order, which is suited to govern normal situations.
9 Usually, these exception rules provide either the suspension or the
10 compression of certain fundamental rights and freedoms,¹ as well as
11 for the strengthening of the executive, a faster legislative procedure
12 and the loosening of the system of checks and balances. However,
13 all constitutions provide specific instruments to deal with
14 emergencies, regardless of whether into a specific section.
15 Nevertheless, this is a way for democracy to protect herself, by
16 setting a maximum limit, above which no more exception is allowed
17 without risking to overturn the constitutional legal order.

18 Moreover, the word exception has to be interpreted in the sense of
19 unpredictable; it is from the unpredictability that comes out the
20 impossibility to resort to the usual provisions. Besides, constitutions
21 dealing with exception and emergency may consider a wide variety
22 of such situations, namely a legislative emergency, an economic
23 emergency, a state of war... Some constitutions, such as the
24 Spanish one (at Article 169), even prohibit constitutional
25 amendments during emergency.²

¹ This was the approach chosen by the Weimar Constitution at Article 48(2).

² On the limits of amendment powers, see Y. Roznai, *Unconstitutional Constitutional Amendments*, Oxford University Press, Oxford, 2017.

26 The legal notion of exception, due to its extraordinary character,
27 has been – and still is – one of the most debated issues in both legal
28 and philosophical doctrine. Exception plays a pivotal role in the
29 Schmittian theory, according to which the sovereign is the one
30 deciding on the state of exception (*souverän ist, wer über den*
31 *Ausnahmezustand entscheidet*).³ The reason is that actually the
32 sovereign power is usually divided among constitutional bodies,
33 whereas during the exception it is all regrouped in the hand of one
34 single constitutional body or individual. Italian legal scholar Santi
35 Romano as well frames the exception within the legal order.
36 According to him, although exception is something *extra-legem*,
37 nevertheless it is perfectly capable of establishing a valid legal order
38 that reflects the exception herself. Despite not being positive law,
39 exception is all the same a legal source.⁴ According to Costantino
40 Mortati, it is not possible to deny the emergency the stand of
41 autonomous source legitimising the exercise of certain powers.⁵
42 Opposite the philosopher Giorgio Agamben, according to whom
43 exception situations, because are not governed by usual legal rules,
44 establish a sort of legal vacuum.⁶

45 However, the paper does not aim at reviewing the doctrine on the
46 state of exception, whereas to analyse the peculiarity of the Italian
47 experience, which offers some interesting profiles. The main reason
48 is that even though the Italian constitution does not provide a specific
49 emergency section, the country has resort – and still is – several
50 times to emergency provisions, mainly through the law decree and
51 the administrative orders.

52 This approach raises some concerns, in particular:

³ C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, Duncker & Humblot, Berlin, 2004, p. 13 and *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*, Duncker & Humblot, Berlin, 1964.

⁴ S. Romano, *Sui decreti legge e lo stato di assedio in occasione del terremoto di Messina e di Reggio Calabria*, 1909, now reprinted in S. Romano, *Scritti Minori*, G. Zaniboni (cur.), vol. I, Giuffrè, Milan, 1950, p. 364.

⁵ L. Carlassarre, *Stati d'eccezione e sospensione delle garanzie costituzionali secondo Mortati*, in *Il pensiero giuridico di Costantino Mortati*, Giuffrè, Milano, 1990, p. 481.

⁶ G. Agamben, *Stato di eccezione*, Bollati Boringhieri, Torino, 2003, p. 63.

53 - Whether is the absence of a specific section that allows the
54 misuse of emergency instruments.

55 - Whether the misuse can lead to a modification of the balance
56 of powers between the constitutional bodies, thus producing a
57 twisting in the form of government.

58 The Italian experience is very illustrative of both the
59 aforementioned concerns.

60

61 2. – The first Italian Constitution, the Albertine Statute of 1848,⁷
62 did not provide such a chapter. Emergency was dealt with through
63 the emergency orders – whose legal basis was considered to be
64 Article 6 of the Statute – and through the martial law and the wartime
65 criminal military code, as during the riots for bread in Milan in 1898 or
66 the earthquake in Messina in 1908.⁸ By the enforcement of the
67 wartime criminal military code, the Italian legal system accepted the
68 possibility of a legitimate use of extraordinary powers – even against
69 the law – in order to preserve the State and of the legal and social
70 order. These values are considered to be hierarchically superior, thus
71 deserving the greatest protection. However, in a case that presented
72 an actual threat to the State, the Fascist March on Rome on the 22
73 October 1922, the King Victor Emmanuel III entrusted Mussolini the
74 political power in order not to declare the stato di assedio, as his
75 ministers advised him to do.

76 After the tragedy of the Second World War and the experience of
77 the Fascist dictatorship, the Constituent Assembly (1946-1947)
78 considered the possibility to integrate in the new constitution a
79 specific chapter on the state of exception. Finally, fearing a potential
80 misuse of emergency powers to overthrow the constitutional order
81 (the experience of Fascism was still recent), the Assembly opted for

⁷ The Statute was the constitution that Charles Albert of Sardinia conceded to the Kingdom of Sardinia on 4 March 1848 and in 1861 became the constitution of the unified Kingdom of Italy. It remained in force until 1948, when was replaced by the present day constitution.

⁸ S. Romano, *Sui decreti legge e lo stato di assedio in occasione del terremoto di Messina e di Reggio Calabria*, 1909, now reprinted in S. Romano, *Scritti Minori*, G. Zaniboni (cur.), vol. I, Giuffrè, Milan, 1950, p. 349.

82 not to integrate it. However, other instruments were provided
83 whenever a situation of necessity and urgency occurs,⁹ mainly the
84 law decree, at Article 77,¹⁰ the possible establishment of shorter
85 legislative procedure for urgent bills, at Article 72(2),¹¹ the powers
86 assigned by the Parliament to the Government in case of war, at
87 Article 78,¹² and the substitute powers of the government, when
88 necessary, of Municipalities, Provinces, Metropolitan Cities and
89 Regions, at Article 120.¹³

90

91 3. – Despite lacking a specific emergency section, the Italian
92 constitution provides instruments, the most notable one being the law
93 decree.

94 The procedure under Article 77 allows skipping the ordinary
95 legislative procedure, thus ensuring a prompt action to confront
96 emergency. From a theoretical point of view, the instrument of the
97 law decree is fit to handle emergencies. However, the practice has

⁹ Here the greater concern is related to the extreme vagueness of the notion of both necessity and urgency. Therefore, the constitutional provision may be considered as a sort of blank clause, even though a system of scrutiny is in place. See A. Celotto, E. Di Benedetto, *Art. 77*, in R. Bifulco, A. Celotto, M. Olivetti (cur.), *Commentario alla Costituzione*, vol. II, UTET, Torino, 2006, pp. 1507-1530, in particular p. 1509.

¹⁰ « The Government may not, without an enabling act from the Houses, issue a decree having force of law.

When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of such introduction.

Such a measure shall lose effect from the beginning if it is not transposed into law by Parliament within sixty days of its publication. Parliament may regulate the legal relations arisen from the rejected measure. »

The law decree is also regulated by the law 400/1988.

¹¹ « The Rules shall establish shorter procedures to consider a Bill that has been declared urgent. »

¹² « Parliament has the authority to declare a state of war and vest the necessary powers into the Government. »

¹³ « Regions may not levy import or export or transit duties between Regions or adopt measures that in any way obstruct the freedom of movement of persons or goods between Regions. Regions may not limit the right of citizens to work in any part whatsoever of the national territory.

The Government can act for bodies of the regions, metropolitan cities, provinces and municipalities if the latter fail to comply with international rules and treaties or EU legislation, or in the case of grave danger for public safety and security, or whenever such action is necessary to preserve legal or economic unity and in particular to guarantee the basic level of benefits relating to civil and social entitlements, regardless of the geographic borders of local authorities. The law shall lay down the procedures to ensure that subsidiary powers are exercised in compliance with the principles of subsidiarity and loyal co-operation. »

98 proved a misuse.¹⁴ The main reason can be traced into the interplay
99 of three key factors, which are:

- 100 1. the lack of a proper definition of which emergencies can to be
101 handled through this instrument;
- 102 2. the fact that the adoption procedure is fast;
- 103 3. the peculiarity of the Italian party system and the perfect
104 bicameralism;
- 105 4. the effectiveness of the system of control on the government's
106 action.

107 Considering point no. 1, it seems quite unlikely that the lack of
108 definition can be the reason behind the abuse of the law decree.
109 Moreover, whenever a list of possible emergencies is provided, the
110 question whether the list is close always arises.

111 Point no. 2 is certainly true, but fails to take into account two
112 elements: the first being that Article 72(2)¹⁵ provides the possibility to
113 adopt a shorter legislative procedure for bills qualified as urgent and
114 the second that the non-conversion of the law decree into an ordinary
115 statute law creates problem when coming to the certainty of the law.

116 Point no. 3 is more suitable to explain the abuse. The highly
117 fragmented party system, combined with a proportional
118 representation – in particular until the popular referendum of 1993 –
119 produced coalition governments, whose genetic instability is fearful of
120 parliamentary confrontation. Furthermore, the perfect bicameralism
121 characterising the Italian Parliament has been blamed for the
122 excessive slowness of the legislative procedure.

123 Finally, point no. 4, the long-awaited intervention of the
124 Constitutional Court¹⁶ took place in 1996, with the decision no. 360,
125 sanctioned practice of the re-issuing of an unconverted law decree

¹⁴ In particular starting from the VI Legislature (1972-1976).

¹⁵ « The Rules shall establish shorter procedures to consider a Bill that has been declared urgent. »

¹⁶ The approach of the Constitutional Court to the issue had previously (but also afterwards) been a bit fluctuating, because did not want to step into the political debate.

126 as unconstitutional,¹⁷ because violating both the prerogatives of
127 Parliament – as the law-making body – and the certainty of law.¹⁸

128 When analysing the use made of the law decree by Italian
129 governments, what strikes most is the fact that a governmental
130 legislation (*legislazione governativa*)¹⁹ has been put in place. The
131 fact raises concerns with respect to the separation of powers;
132 through this *legislazione governativa*, the government ends up
133 cumulating executive and legislative powers. It is as if Schmitt's idea
134 of the concentration of sovereignty in one single individual during the
135 state of emergency were realised. Following this reasoning, it is as if
136 Parliament was divested his role as legislator.

137 However, it is convenient to outline that not all subject matters
138 may be regulated through the law decree. Article 74(4) provides a list
139 of those, which have to be regulated following the ordinary legislative
140 procedure.²⁰ Moreover, the law decree encounters the same limits as
141 constitutional amendments²¹ and cannot regulate matters of
142 constitutional importance.²²

143 Besides, there still is the Constitutional Court as supreme
144 watchdog entitled to review the actual existence of the emergency as
145 well as the subject matter.

146 The law decree has been further regulated by the law 400/1988, at
147 Article 15.²³ Paragraph 1 specifies that in the preamble the
148 government has to clearly identify the extraordinary circumstances
149 leading to the adoption of the law decree. This provision is of a
150 pivotal importance, because is the basis for the scrutiny of the

¹⁷ The most remarkable example of the misuse of the re-issuing is represented by a law decree re-issued 29 times, therefore remaining in force for four years.

¹⁸ The Court started to warn the Government against this practice already at the end of the 80s, with the decision 302/1988.

¹⁹ Expression borrowed from G. Agamben, *Stato di eccezione*, p. 28.

²⁰ « The ordinary procedure for consideration and direct approval by the House is always followed in the case of bills on constitutional and electoral matters, delegating legislation, ratification of international treaties and the approval of budgets and accounts. »

²¹ Article 139 is interpreted extensively: « The form of Republic shall not be a matter for constitutional amendment. »

²² See the decision 220/2013 on the reorganisation of the Provinces.

²³ The law is entitled "Discipline on the activity of the government and of the presidency of the Council of Ministers", thus having a broader focus than the law decree.

151 Constitutional Court. Moreover, that reveals the provision being
152 something far away from a blank clause. The Constitutional Court
153 herself has stressed that necessity and urgency are requirements to
154 the constitutional validity of the law decree,²⁴ thus deeming as
155 unconstitutional the governmental practise of reiterating unconverted
156 law decrees.²⁵ However, until the mid-70s, the majority of
157 constitutional scholars claimed that the character of necessity and
158 urgency was a political question, therefore, not for the Court to
159 scrutinise. Still with respect to the content, Paragraph 3 states that is
160 has to be homogeneous, specific and corresponding to the title;
161 again, this is a key provision introducing a new profile for the scrutiny
162 of the Constitutional Court.²⁶ Paragraph 2 better specifies what is out
163 of the scope of the law decree. Paragraph 2, at letter c), allows the
164 Government to re-issue a law decree, which Parliament has not
165 converted due to inertia, rather than to a precise political choice;
166 while letter d) prohibits the Government to regulate the legal
167 relationships created by a non-converted law decree by issuing
168 another. Therefore, the law does not completely rule out the possible
169 re-issuing of a law decree. What emerges is that actually the law 400
170 failed to rationalise properly the resort to the law decree by the
171 Government.

172 Therefore, the Italian constitutional architecture considers the
173 legislative power of the government as something residual with
174 respect to the legislative power belonging to Parliament, who can
175 freely decide to deal with the emergency himself. In such a
176 hypothesis, no room is left to the government. Nevertheless,
177 Parliament is always assigned the power to scrutinise very closely

²⁴ Decisions 29/1995, 34/2003, 171/2007. In this last decision, the Court actually struck down a law decree based on lack of proper motivation. See A. Celotto, *C'è sempre una prima volta...* (La Corte costituzionale annulla un decreto-legge per mancanza dei presupposti), in *Giustizia amministrativa*, at www.giustamm.it; R. Dickmann, *Il decreto-legge come fonte del diritto e strumento di governo. Note a Corte cost. 23 maggio 2007, n. 171*, in *Federalismi.it*, at www.federalismi.it; A. Ruggeri, *Ancora una stretta (se pur non decisiva) ai decreti-legge, suscettibile di ulteriori, ad oggi per vero imprevedibili, implicazioni a largo raggio (a margine di Corte cost. n. 171 del 2007)*, in *Forum di Quaderni Costituzionali*, at www.forumcostituzionale.it.

²⁵ Decision 330/1996. M. Siclari, *La "evidente mancanza" dei presupposti di necessità e urgenza ei decreti-legge*, in *Italia Oggi*, n. 38, 1996, p. 2.

²⁶ The most relevant is the decision 22/2012.

178 any governmental (legitimate) deviation into the legislative power.
179 Indeed the necessity and urgency requirements are strictly
180 scrutinised by both Chambers when deciding whether to convert the
181 law decree into a statutory law.

182 A much more defined emergency is provided at Article 78, devoted
183 to the state of war.²⁷ When this is the case, the government will be
184 assigned the necessary powers and just these, thus upholding the
185 separation of powers. However, it is up to Parliament to declare the
186 state of war. Moreover, Parliament will be at the government's side
187 through all the war, therefore continuing to exercise his power and
188 his scrutiny on the government. Because the constitution does not
189 expressly provides the suspension of the powers of any constitutional
190 body, it results that the state of war has to be handled collectively by
191 all constitutional bodies.

192

193 4. – The emergency issue is not just a constitutional matter,
194 because a handful of ordinary laws have provided specific powers
195 and instruments to be implemented during more or less clearly
196 defined emergencies. The most notable examples are the legislative
197 decree no. 625/1979,²⁸ against the left-wing terrorism (the so-called
198 *Brigate Rosse*, Red Brigades) – strengthening the police powers and
199 compressing suspect rights –, the law against natural disasters²⁹ and
200 the law no. 225/1992 establishing the Protezione Civile (Civil
201 Defence).³⁰

202 This last provision is of paramount importance because it has
203 been under this law that the government still passes a large amount
204 of orders to handle emergencies or supposed emergencies. Here the
205 intent seemed more to provide procedures and structures able to
206 confront extraordinary situations and to make their developments

²⁷ A. Patroni Griffi, *Art. 78*, in R. Bifulco, A. Celotto, M. Olivetti, *Commentario alla Costituzione*, vol. II, UTET, Torino, 2006, pp. 1531–1544.

²⁸ Law decree 625/1979, converted into law 15/1980.

²⁹ Law 996/1970 and Presidential decree 66/1981.

³⁰ Law 225/1990.

207 predictable rather than to assign powers to handle actual
208 emergencies.

209 The law decree 343/2001 (amending the law 225/1992),³¹
210 introduced, at Article 5(1), the possibility to resort to emergency
211 instruments even in situations not properly of emergency – since not
212 of unexpected – but that could generate risky situations,³² the so
213 called great events, such as the 2006 Winter Olympics in Turin or the
214 2015 Expo in Milan. In such circumstances, the connection to the
215 extraordinary character of the situation is lacking; nevertheless, the
216 government exercises all the same emergency powers.³³ In doing so,
217 there is no more connection between an extraordinary situation and
218 the extraordinary powers. Moreover, another critical profile is that
219 there is a weak system of control of the Protezione Civile's order,
220 which are kept out of the scope of the Court of Audit.

221

222 5. – Alongside the orders of the executive power, it is convenient
223 to mention what are called within the Italian legal system as strong
224 orders, namely the orders issued at local level by either the prefetto
225 (prefect) or the sindaco (mayor).

226 Under the royal decree 773/1931, now Article 2 TULPS, the
227 prefect, in cases of urgency or public need, can issue orders in order
228 to protect the public welfare and security. No further
229 recommendations form the point of view neither of the content nor of
230 the goal is given, thus leaving broad room to discretion and
231 interpretation.

232 When coming to the mayor, a similar power is vested with him
233 under Article 54(4) TUEL, which provided the power to issue orders

³¹ The law 27/2012 has taken the competence for great events out of the scope of the Protezione Civile.

³² The Court of Account specified the definition of great events as events that could endanger life, private property and public goods. However, the category is open. The Constitutional Court herself stated that the potential risk was enough to resort to emergency powers (see decision 127/1995).

³³ The law 152/2005 has extended the power to issue emergency orders even for events that take place abroad.

234 to handle any threat to urban security and public safety. This power
235 has been progressively curtailed and specified at Article 6(4-bis) of
236 the legislative decree 9/2008, providing a clear definition of both
237 urban security and public safety.

238 However, up to now, neither the prefects nor the mayors have
239 ever abused nor misused the power of issuing orders.

240

241 6. – Furthermore, the recent economic crisis has provided further
242 remarks on the twisting of the Italian form of government (and of the
243 form of State, according to some scholars) in situations of
244 emergency, namely with respect to the role of the President of the
245 Republic and of the Constitutional Court.

246 The economic crisis has produce the highest level of political
247 incertitude in Italian Republic history. The President of the Republic
248 has then emerged as the pivotal constitutional body, the only one
249 capable of granting stability to the country. Indeed, the Italian
250 constitution does not go much into details when coming to
251 presidential powers. Therefore, constitutional scholars have
252 interpreted the provisions as granting the President a set of powers
253 whose extent varies according to the contingent situation; meaning
254 that they enlarge during period of crisis.

255 The active engagement of President Napolitano (starting from the
256 Berlusconi's crisis of government in 2011 until his resignation in
257 2015) as a strong advisor of governments seems to have proved
258 right Esposito's theory according to whom – since the president is
259 given the same powers as the monarch in the constitutional
260 monarchy – it is up to him to actively intervene during emergency.

261 The Constitutional Court's activism may also rises some concerns,
262 with respect mainly to a certain number of decisions marking a
263 straightforward intervention in the competence of Parliament and
264 government, when balancing spending review and rights' protection.

265 According to Ruggeri,³⁴ the recent years have witnessed a torsion
266 in both the form of government and even the form of State, because
267 of the extreme activism of the bodies that are entrusted with the
268 protection of the Constitution: the President of the Republic and the
269 Constitutional Court. The former when refusing to dissolve
270 Parliament after the decision of the Constitutional Court on the
271 unconstitutionality of the electoral law,³⁵ thus trying to boost foreign
272 confidence in the country as well as reforms within the country. The
273 latter when delivering decisions upholding human dignity, thus trying
274 to call Parliament to his duty.

275

276 7. – Following the brief analysis of the Italian emergency
277 experience, some key elements may be drawn:

- 278 - the lack of a specific emergency section is not a problem
279 per se for the resort to emergency provisions; because the
280 emergency is something unpredictable, the constitutional
281 enshrinement of all the foreseeable *extra ordinem*
282 intervention may turn out to be useless;
- 283 - it is not the aforementioned lack per se that has generated
284 the abuse/misuse of the instrument of the law decree.
285 Opposite, the constitution herself provides a system of
286 checks. It was a combination of political leading to the
287 misuse;
- 288 - the constitution provides a margin of appreciation for both
289 the Head of State and the Constitutional Court that may
290 decide the appropriate moment for stepping in as
291 custodians of the constitutional legal order. This goes in
292 particular for the President of Republic, whose role is not
293 clearly defined by the constitution, which, on the contrary,

³⁴ A. Ruggeri, *Stato costituzionale e stato d'eccezione nella più recente esperienza italiana: dalla alternative alla mutua integrazione?*, in *I quaderni europei*, n. 66, 2014, at www.cde.unict.it/quadernieuropei.

³⁵ Decision 1/2014.

294 allows a certain flexibility and adaptability of the presidential
295 powers to the political contingency;

296 - the resort to specific legislation in order to handle specific
297 emergencies is not something characterising just the Italian
298 experience. Moreover, as for any other primary legislation,
299 the Constitutional Court is the guardian against unlawful
300 compression of rights and freedoms or any other possible
301 sort of abuses;

302 - the resort to specific legislation and/or orders in order to
303 handle situations that, even though not properly
304 emergencies, can turn into emergencies if not handled
305 properly conveys the idea of the failure of politics and the
306 lack of managerial skills rather than a voluntary alteration of
307 the balance of powers from the part of the government;

308 - the very peculiar interplay of all the aforementioned
309 elements has produced a temporary twisting of the form of
310 government, resulting in an alternation in the balance of
311 powers between the main constitutional bodies.

312

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