Coronavirus, Health Emergencies and Public Law Issues

Arianna Vedaschi & Chiara Graziani

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The outbreak of the "new" Coronavirus disease (Covid-19) – first detected in China at the end of 2019 and then spread in at least 90 countries – triggered an epidemic potentially evolving into a pandemic. Data published by the World Health Organization (WHO) shows more than 99.000 confirmed cases and 3.400 deaths.

Several factors – e.g. the fact the virus was unknown, its rapid transmission person-to-person, the severity of resulting illness in some patients, lack of clarity over transmission dynamics – contributed to raising serious public health concerns. On 30 January 2020, the WHO declared an international public health emergency. The day after, the US Secretary of Health and Human Services issued a declaration of emergency, followed by governments of many other countries, among them Italy. Italy is one of the most affected areas, with 3.858 cases, confirmed by tests that public authorities are extensively performing on the population.

Taking a closer look, this scenario highlights a number of challenging issues that can teach us valuable "public law lessons".

Information, Confidence and the Rule of Law

The relationship between public institutions and citizens in times of emergency is crucial, especially in Western democracies. It was alleged that some governments are reluctant to supply information on the virus and to allow experts to talk openly about the epidemic.

To what extent should authorities disclose news about the contagion, potentially inducing fear and overreactions among the population? Which is the right balance between transparency that states must guarantee *vis-à-vis* citizens and the need to avoid mass hysteria?

Respect for the rule of law implies that openness towards citizens is a primary duty of public authorities, even during emergency, as long as information is verified and correct, and its disclosure is necessary in the light of public interest. Lack of information may impair people's confidence towards public institutions, resulting in the erosion of democracy.

In order to fairly balance the values at stake, only scientifically accurate and clear information should be circulated. In this way, public authorities would avoid "paternalistic" attitudes (hiding data to mitigate anxiety) and, at the same time, they would refrain from fuelling alarmism. However, nowadays, this goal is not easy to achieve because of the risk of fake news and manipulated information.

Coronavirus: A Global Threat without a Global Approach

Covid-19 has already affected a large number of countries, making it a global threat. Thus, if the danger is global, then the response should be global too.

However, such a global reaction is long in coming, at least as regards legally binding rules. The only international binding tool about the prevention of the spread of diseases on a global scale are the 2005 International Health Regulations (their effectiveness to cope with the new Coronavirus has been discussed here). They provide for some general cooperation duties among states in case of pathogens that spread worldwide, but they obviously do not contain any specific provision on Covid-19, which was unknown until recently. Consequently, the current situation has been managed at the international level by some WHO guidelines and recommendations. They are not binding, so compliance is up to national governments.

On the regional level, the European Union (EU) has also chosen a "soft" approach up to now. No legislative acts have been approved (yet), but the European Commission established a "Covid-19 response team", with five commissioners coordinating the work in different areas.

In time of emergency, the adoption of legally binding international sources might prove too lengthy and complex, but other "soft" forms of international cooperation are essential to guarantee timely and coordinated responses. Coronavirus emergency should push international actors towards enhancing their cooperative efforts. And, at the regional level, a more proactive role of the EU would be welcome.

Coronavirus and the Vertical Separation of Powers Paradox: Regionalism and "Inverted Trends"

The situation is different at the domestic level. Here, there is a strong interplay between levels of government in addressing the health emergency. Indeed, Coronavirus impacts the vertical separation of powers.

Traditionally, states of a federation enjoy more autonomy than regions in a regional system. Yet, an inverted trend characterized the handling of the coronavirus emergency. While the new Coronavirus is working as a "centripetal force" within the US federal system, for example, in Italy, a regional system, significant "centrifugal" trends gained momentum, at least at the very first stage.

The Italian Constitution safeguards "health as a fundamental right of the individual and as a collective interest" (art. 32). Both the state and the regions are authorized to enact legislation on "health protection" (art. 117, para 3, It. Const.). The state determines general principles and the regions adopt detailed rules.

The Italian system is further complicated because, pursuant to arts. 117, para 6, and 118, para 1, It. Const., regulatory powers and administrative functions are attributed both to regions and to local levels of government (i.e. municipalities, provinces and metropolitan cities), except for a number of matters on which only the state can legislate (art. 117, para 2, It. Const.). Since health protection is not included in this list, sub-regional levels can issue regulatory and other administrative acts regarding health matters. This framework often caused uncertainty about the boundaries of state, regional and local competences.

The legal response to the Coronavirus emergency reflected this intricate background. At the national level, the Council of Ministers approved Decree Law 6/2020 enacting emergency provisions. This act was then implemented by Decree Law 9/2020 (focused on economic measures) and by secondary sources: two Decrees of the President of the Council of Ministers (4 March 2020 and 1 March 2020), a Decree of the Ministers of Economics and Finance (24 February 2020), orders of the Ministry of Health and of the Civil Protection Department (see here for the full list).

Meanwhile, regional and local authorities took further measures. Among them, some mayors' orders closed schools, prohibited mass concentration of people (see here), even obliged those coming from affected regions not to enter their municipalities. According to art. 54 of Legislative Decree 267/2000, Italian mayors can adopt *extra ordinem* orders, when urgent circumstances make it necessary. These acts are very debated since they might clash with the constitutional framework (despite not being allowed to do so).

To avert divergences between national and sub-national levels, the central government stemmed "localist drifts" through art. 35 of Decree Law 9/2020, depriving these orders of "any effect" when they are not consistent with national measures. The Decree of the President of the Council of Ministers of 4 March 2020 confirms the attempt to "re-centralize" efforts to fight Covid-19.

Personal Freedoms and Fundamental Principles

From a substantive viewpoint, several personal freedoms, protected by domestic constitutions and international legal tools, are put under stress, if not restricted for preventive purposes.

One of the first responses, after that earliest cases of Coronavirus, was to cancel direct flights from and to high-risk areas. In January 2020, major air carriers stopped commercial flights connecting China to other countries. As the disease spread to other locations, flight suspensions were no longer limited to China, but they affected Iran, Italy, South Korea, etc.

At the same time, national governments are temporarily banning the entry of non-citizens who have travelled to places with cases of Coronavirus or had contact with people coming from those areas. For instance, non-US citizens who have recently visited

China are denied entry into US soil. Other countries are imposing quarantine on people (included citizens) returning from risk areas (e.g. Romania does so with those arriving from Italian regions impacted by the infection).

In some cases, travel restrictions were taken within the same countries: in Italy, where most cases are located in the northern area (especially in Lombardy and Veneto), some mayors in the Campania region banned people from these two regions from entering the island of Ischia. The order was declared null and void by the Prefect of Naples (representing the central government at the local level).

Meanwhile, although there are no plans to suspend the Schengen agreement at the EU level, many European countries have introduced stricter border checks (e.g. Austria).

Freedom of movement, but also personal freedoms (insofar as people may be subject to compulsory measures, such as quarantine), privacy (due to mandatory checks of health status implemented in some jurisdictions), data protection (because of the processing of health data) come to be balanced with public health.

Moreover, the threat of a mass epidemic put pressure on national healthcare systems, which are a primary guarantee for the right to health. Covid-19 could emphasize differences among healthcare systems of countries affected, leading to discriminatory approaches, since those who live in areas with more efficient healthcare systems have more chances to recover from this "new" disease rapidly and without infecting others.

Further issues arise from some discriminatory behaviour reported against Chinese communities (since the infection hit, at least initially, people coming from specific areas of China).

Economic Implications

Last but not least, the economic impact should be examined.

According to the Organization for Economic Co-operation and Development (OECD), Covid-19 is the greatest danger to global economy since the 2007 financial crisis. Estimated economic growth decreased by 1,5%, and the more the epidemic expands, the worse financial stock markets perform.

Governments are trying to mitigate such negative economic effects of Coronavirus. Some countries, like Portugal and Spain, are not drawing attention to the emergency situation, perhaps hoping to avoid negative economic consequences (e.g. deterring tourism).

In other countries, instead, public debates are focused on the economic repercussions of Covid-19 and possible countermeasures. The Italian Minister of Economy announced that the government is introducing tax credits and cuts for companies at certain conditions as well as extra resources for the public health system. Although such steps may support the economy in the short term, their long-term consequences may be questioned.

Additionally, Italy has asked the EU for authorization to increase the 2020 budget deficit. This is an opportunity for the EU to gain a more pronounced role, at least in the economic field.

"Public Law Lessons" from Coronavirus

Notwithstanding its negative effects, the Coronavirus emergency and the approaches adopted to handle it have taught us at least four "public law lessons".

First, since the relationship between politics and information is at the core of democracy, communication from public authorities to citizens should be open, transparent and supported by scientific evidence.

Second, international cooperation is a key component of an effective response to global crises. Therefore, reinforcing trust in international partners and improving reciprocal cooperation is vital to ensure appropriate reactions to global threats.

Third, since the interplay between different levels of government might be needed to effectively deal with challenging circumstances, a coordinated approach is critical.

Fourth, limitations of some personal freedoms may be necessary to safeguard public health. Yet, restrictions should be proportionate to the goal pursued, should not breach fundamental principles – such as non-discrimination – and, especially when

they have a global impact, should take into consideration economic consequences.

ABOUT THE AUTHORS
Arianna Vedaschi
Prof. Arianna Vedaschi is a Full Professor of Comparative Public Law at Bocconi University, Milan.
Chiara Graziani
Chiara Graziani is an Assistant Professor of Comparative Public Law at Bocconi University, Italy.

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