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# Conflict in Decision-making and Variation in Public Administration Outcomes in Italy during the COVID-19 Crisis

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### Abstract

Italy has been heavily affected by the COVID-19 pandemic. National and subnational authorities have adopted several measures to tackle the resulting crisis, including social distancing and restrictions on economic activities. However, as we will show, such measures have sometimes been carriers of uncertainty concerning the allocation of decision-making powers along the central-local government continuum and the exercise of administrative tasks by public authorities, thus producing conflict and variation within the policy-making and policy-delivery processes activated. To show this, we reconstruct the relevant events occurred during the pandemic in light of the literature on centralization and discretion as well as of the principles shaping the Italian legal system. Our analysis, based on a dialogue between political science and public law, allows us to read the Italian case as a mix of inadequate institutional coordination and insufficient central guidelines clarity which ultimately produced uncertainty, thus affecting policy-makers, policy-deliverers, and citizens in general.

*Keywords:* multilevel governance, decision-making, public administration, administrative discretion, judicial system.

### 1. Introduction

Crises are events that call for urgent public action. When they occur in multilevel governance systems, decision-makers at different levels “have to make decisive calls about courses of actions during difficult conditions of value complexity, short response time, threat, and uncertainty” (Nohrstedt, 2011: 199). In such contingencies, effectiveness might be valued as more important than the rule of law. Therefore, crises might lead to the weakening of the rule of law. In some cases, a law does not even exist to guide the management of certain unexpected situations, while in other cases there could be genuine uncertainty in the categorization of situations needing management and, consequently, in the identification of the applicable law (Wockelberg, 2011).

In pandemic crises, uncertainty is an ever-present element that needs to be voiced (De Vries et al., 2011) in order to strengthen public trust in both science and government, especially in multilevel governance systems (Versluis et al., 2019). As we will show, during the pandemic, a considerable

degree of uncertainty has shown both in the allocation of powers between the relevant actors within the Italian multilevel governance system and in the administration of justice, with particular regard, respectively, to the adoption of crisis response measures and to the organizational aspects of trials. Ultimately, although such uncertainty has been in fact voiced by both the central government and the stakeholders involved in the relevant administrative system, its very existence brought about confusion and disparities among citizens. According to this analysis, the uncertainty that arose in the Italian case has been voiced but not managed successfully, therefore showing that uncertainty voicing needs to be coupled with a successful resolution of the underlying conflicts.

For the purpose of our analysis, we have adopted an interdisciplinary approach integrating political science literature on decision-making and public administration, on the one hand, and a public-law analytical approach, on the other hand, with the former framing the issues under examination and providing scaffolding to interpret the events occurred in Italy, and the latter helping us to retrace and understand the same events through a critical analysis of laws, decrees, administrative measures, and case law, in light of the principles shaping the Italian legal system. The interdisciplinary approach we have adopted is visible in the structure of the paper as well as in the references (with twenty-five sources from the social sciences and seven contributions from the legal area, complemented by legal documents whose references are included directly in the text) as well as in the structure of the paper. In particular, the theoretical framework section elucidates the relationship between bounded rationality, centralization, and discretion, while the next section presents a reconstruction of the legislative and judicial events that took place in the country during the pandemic in the first half of 2020. In the last section, we bring together these two frames of reference to draw our conclusions. Thus, our method of analysis aims to connect two different perspectives in order to better understand the events that occurred in the Italian multilevel governance system during the pandemic.

Before presenting the results of our analysis, we first need to provide some data and information to equip the reader with knowledge about the COVID-19 pandemic in Italy. During the first half of 2020, excess mortality in Italy reached its highest peak since 2015 (Figure 1). When the seriousness of the pandemic became clear, the government adopted several measures in order to respond to the crisis generated by it. On January 31, 2020, the Council of Ministers issued a six-month state of emergency. After the COVID-19 pandemic started to spread in the country, with the first two verified cases being reported on January 30, 2020, in Rome and the first case of second-level transmission of the virus being reported on February 18, 2020, in Codogno, a municipality in Lombardy, the Council of Ministers adopted a decree-law (February 23, 2020), with measures prohibiting access to and exit from the affected municipalities, as well as suspending all public events. With an ordinance of March 22, 2020, jointly signed by the Minister of Health and the Minister of the Interior, all persons were forbidden to move by public or private means of transport to a municipality other than that in which they were located, except for verified work needs, absolute urgency, or health reasons. Several other decisions, from then on, regulated the everyday life of people, including social distancing measures and the temporary closure of some categories of economic activities. However, within the context of the policy response provided in the country, conflicts arose between decision-makers at the national, regional, and municipal levels, in particular regarding the extent of the restrictions on economic activities. In addition, there was a high degree of variation between various interpretations of the existing legal framework by public servants and in particular by the heads of judicial offices when organizing trials in compliance with the social distancing obligations.

In the remainder of this article, we therefore present the theoretical background to our analysis (Section 2) and the features of the Italian policy response from the point of view of decision-making power allocation and administrative action (Section 3). Finally, we draw our conclusions by framing the Italian dynamics in light of the principle of loyal cooperation between the Italian state and Italian regions as well as of the centralization-discretion dilemma (Section 4).

## 2. Theoretical Framework

Value judgments and trade-offs characterize the daily process of service provision and public administration. During crises, which present a perceived threat to core values as well as features of urgency and uncertainty, alongside amplified media attention, the functioning of governing institutions is tested. Thus, public decision-makers have to make complex judgments under great uncertainty, time pressure, and heightened scrutiny (Svedin, 2011b).

As “security and risk concerns [...] work in favor of greater centralization and top-down decision-making” (Konvitz, 2016: 278), crises are characterized by a tendency to centralize decision-making power. However, as we will show, these efforts are not always successful and give rise to a kind of discretion in contrast with decisions made at the central level. While centralization is what normally occurs during a crisis, it is not always considered a suitable option to shape crisis management efforts, since the simultaneous involvement of the central government and local (regional and municipal) authorities seems more effective in dealing with the evolution of a crisis in different territorial units within a country. Similarly, an (excessive) empowerment of bureaucrats without adequate central guidance can result in undesirable behavior or decisional paralysis, because in such situations public servants will have to concentrate their energies on boundary management to avoid being overwhelmed by situational complexities (Boin & Nieuwenburg, 2011; Svedin, 2011a).

Even in stable, non-crisis times, concerns over public administrations’ activity lead to the widespread production of rules, which often do not “[say] more than to obey the law and, if the law is not clear, to do the right thing” (Cohen & Eimicke, 1995: 102; also Dalés & Hansén, 2011). These general rules represent one of the core elements of the ideal Weberian bureaucracy, which applies them to specific cases with the overall result of making the government’s actions fair and predictable (Wilson, 1989), together with hierarchical organization and impersonality of procedure (Downs, 1964; also Sager & Rosser, 2009). Weber’s ideal type of administration, by requiring abidance by rules, would help individual bureaucrats avoid many awkward situations that might occur to them (Dalés & Hansén, 2011). However, when rules are not clear in the first place, it might be hard to apply the Weberian construction, since the very source of bureaucratic action would seem to be flawed in such situations. As highlighted by Weible et al. (2020), in particular during crises, “(g)overnment non-decisions become just as important as decisions”, and in this vein, unclear decisions are comparable to absent decisions, as both of them are likely to produce consequences.

In addition, the bounded rationality of policymakers can negatively affect public policy (Cook & Levi, 1990; Simon, 1945), since it does not allow policymakers to make fully rational choices, also due to a lack of knowledge of or attention towards elements that could improve the decisions they make. This especially occurs during crises, when uncertainty is greater. For public administrations, in particular, crises can give rise to greater discretion stemming from the inability of policymakers to adopt clear rules. While generally speaking discretion is an inevitable element of policymaking and policy-delivery processes (Hawkins, 1992; Lipsky, 1980), we must distinguish between two types of discretion. Authorized discretion occurs when policymakers explicitly make room for decision-

making powers into the implementation instructions for public servants, while rule-compromise discretion occurs when policymakers are not able to agree on appropriate rules and therefore implicitly pass the responsibility on to public servants (Hawkins, 1992). In this latter regard, one of the most commonly recognized sources of rule-compromise discretion is policymakers' inability to program the action of street-level bureaucrats (SLBs), with the term SLBs referring to public servants "at the interface between target groups and the state" (Thomann, 2015: 179). This inability is further strengthened by both the availability of incomplete information and policymakers' inability to fully understand the available information itself (Wilensky, 1967). SLBs include "teachers, police officers and other law enforcement personnel, social workers, judges, public lawyers and other court officers, health workers, and many other public employees [...]" (Lipsky, 1980: 3), albeit it has been highlighted how sociolegal scholars have often tended to avoid such categorization with regard to judges when these are the subject of study (Biland & Steinmetz, 2017). Their discretion, which is hard to control in normal times and routine policy processes, might be well needed during crises. Since crisis managers do not have sufficient information to instruct first responders in detail, nor do they often have the means to communicate with them, SLBs might be forced to act in the exercise of their own (rule-compromise) discretion, possibly with different perceptions with regard to what to do as well as extensive room to choose between alternative courses of action (Boin & Nieuwenburg, 2011; Hill, 1979). Therefore, the bounded rationality that characterizes policymakers would also reflect on the action of public servants provided with "unrequested" discretion.

It follows that policy outcome variation is a natural consequence when it comes to crises. In the literature, the variation between the responses provided by different national governments to the COVID-19 pandemic has already been detected (Capano et al., 2020). In this paper, we elaborate on the features of such variation *within* the Italian multilevel governance system, with particular regard to the response given by public authorities at different levels as well as by the justice administration system. In other words, we show that differences in policy responses to crises as well as in public servants' action can arise not only between different states but also within the same state, especially when this is a multilevel system. Indeed, multilevel arrangements can complicate the design of response to a pandemic due to fragmentation and disjointed action (cf. Huberfeld et al., 2020). We also show how policy outcome variation can result in conflict between the actors involved in policy action and/or consumption.

### **3. Decision-making and Public Administration during the COVID-19 Pandemic in Italy**

#### ***3.1. Uncertainty and Conflict in the Allocation of Powers along the Central-Local Government Continuum***

In Italy, during the COVID-19 pandemic, the relationships between the central government and regional and local authorities proved to be conflictual. The central government played a particularly strong and incisive role in the initial phase of emergency management (Mandato, 2020). However, the ambiguous formulation of the decree-law no. 6 of February 23, 2020, which attributed to yet unspecified "competent authorities" the power to take unspecified "further measures" in order to prevent the spread of the COVID-19 pandemic, triggered a clash between different levels of government.

In particular, citizens' freedoms have been drastically limited by regional governments in contrast with the central government's measures (Giorgio, 2020). The Regional Administrative Court

(hereinafter “TAR”) of Ancona (court urgent order no. 63 of March 4, 2020) suspended the ordinance by which the President of the Marche Region ordered the closure of schools, university, and museums and prohibited public events of any nature for seven days (regional ordinance no. 1 February 25, 2020), even if there were, at that time, no confirmed cases of contagion in the regional territory of Marche. Subsequently, the Italian decree-law no. 19 of March 25, 2020 (hereinafter “decree-law no. 19/2020”) intervened to remedy the situation of uncertainty and thus eventually resolved the state-regions conflict in the management of the emergency (Giorgio, 2020). The decree-law no. 19/2020 (Art. 3) allowed regions to adopt measures with local efficacy provided that these: i) are aimed to operate in the absence of measures adopted by the central government; ii) are justified by a “supervening aggravation of the health risk” in place in the region concerned; iii) consist in measures “further restricting” social and productive activities in the region concerned.

However, even after the entry into force of the decree-law no. 19/2020, a new conflict arose between the central government and another regional government authority regarding the limitations imposed on economic activities: the regional government of the Calabria region established the resumption of catering services and table service in restaurants (regional ordinance no. 37 of April 29, 2020). This time, thus, the regional measures proved to be (illegitimately) less restrictive than those imposed by the central government: the TAR of Catanzaro (judgment no. 841 of May 9, 2020) declared the unlawfulness of the regional ordinance itself, challenged by the Italian central government (Presidency of the Council of Ministers). The contested ordinance proved to be in contrast with the provisions of the Presidential Decree of April 26, 2020, which, with effect from May 4, 2020, to May 17, 2020, established the suspension of catering services and only authorized restaurants to provide home delivery services as an exception to the general ban on catering services. The judiciary (TAR Catanzaro, judgment no. 841 of May 9, 2020) stated that it is up to the Italian President of the Council of Ministers to identify the necessary measures to counter the spread of the COVID-19 virus, since the constitutional principle of subsidiarity requires that, in the case of an emergency of an international nature, the identification of precautionary measures must be carried out at the unitary central administrative level.

Similarly, the central government limited Italian mayors’ emergency management powers. The decree-law no. 19/2020 establishes that mayors cannot adopt emergency measures conflicting with state prescriptions, while in normal times a mayor can adopt ordinances carrying exceptions to the law in order to face urgent local issues. The TAR of Bari (judgment no. 733 of May 22, 2020) quashed the order of the mayor of Peschici, a municipality in the Apulia region, which, without being supported by any epidemiological data and in contrast with the rules adopted by the central government, prohibited the introduction of bakery products into the municipal area thus suspending the production, transport, marketing, and delivery of food products, always permitted by the emergency law (decree-law no. 19/2020). In order to prevent the spread of the pandemic, the TAR of Bari established that the mayor could, in line with state prescriptions (decree-law no. 19/2020), introduce a ban on the entry into the municipality for a limited period of time and only in the presence of a verified aggravation of health risks, with measures which have to be proportionate to the epidemiological situation of the local territory at a given moment (judgment no. 733 of May 22, 2020).

### ***3.2. Uncertainty and Variation in the Outcomes of Justice Administration***

In Italy, besides settling disputes, some judges also work as heads of judicial offices and have organizational tasks with regard to the public service they deliver. Their tasks in this capacity include scheduling judicial hearings and the adoption of guidelines concerning the practical conduction of trials in accordance with the law. While these tasks do not involve any direct contact with public service users, they are nonetheless essential for the organization of public service involving direct contact with users themselves, since the practical features of trial conduction directly depend on the organization and scheduling tasks that the judicial office heads' activity involves.

During the COVID-19 pandemic, the Italian justice administration system has tried to dynamically adapt to the evolution of the emergency circumstances in order to prevent a paralysis (Veltri, 2020, with reference in particular to the administrative justice system). This approach involved the adoption of several legislative measures over a short period of time. To regulate the operation of the administrative justice system, which is intended to protect the legitimate interests of individuals before public authorities, there were six legislative interventions in two months (decree-law no. 9 of March 2, 2020; decree-law no. 11 of March 8, 2020; decree-law no. 18 of March 17, 2020; decree-law no. 23 of April 8, 2020; decree-law no. 27 of April 24, 2020; decree-law no. 28 of April 30, 2020). The resulting legal framework regulating administrative trials during the emergency proved to be partially obscure and even presented some legal vacuum. Therefore, several non-legislative acts, such as the four guidelines of the President of the Council of State (i.e. the administrative appellate court) as well as numerous decrees and notes of the heads of the judicial offices, were adopted with the intention of clarifying and integrating the application of the law. In some cases, however, additional requirements and burdens for judges, lawyers, and court clerks were added to what was prescribed by the law, thus neither facilitating nor simplifying the practical conduction of trials (Volpe, 2020).

The early phase of emergency management within the justice administration system, in a nutshell, was characterized by the suspension of hearings as well as by the postponement of all the procedural deadlines, with the only exception of urgent matters, which are often concerned by provisional measures that do not necessarily imply a decision on the substance. Subsequently, the legislator ruled in favor of the adoption of judgments on the substance and did so in stages. At first, "written hearings" – to be conducted exclusively through an exchange of written notes – were imposed (decree-law no. 18 of March 17, 2020). Soon after the adoption of the provisions imposing written hearings, "videoconference hearings" – to be attended by counsels and parties only – were introduced (decree-law no. 28 of April 30, 2020) as an alternative to the adoption of medical protection devices and to the observance of social distancing measures in hearings to hold in civil and criminal courts. Measures to face the health emergency were taken in all areas of justice: even the Constitutional Court started to conduct "virtual" hearings (Constitutional Court of Italy, decree of April 20, 2020).

However, a considerable degree of variation due to administrative discretion was detected with regard to the practical tools opted for in order for judicial authorities to carry out their duties, since the law authorized the heads of judicial offices to adopt functional measures for the resumption of their activities. The individual judicial offices, all over Italy, adopted measures which – while recalling the guidelines issued by the Superior Council of the Judiciary (resolution of March 26, 2020) – appear extremely varied and generated serious uncertainty regarding the modes of conduction of

trials (Altieri & Blasi, 2020). The extent of this discretion is well exemplified by the case of the District Court of Appeal of Rome (civil and criminal justice). While this court mainly avoided videoconference hearings, other courts chose instead to arrange virtual hearings subject to the express consent of the parties (Altieri & Blasi, 2020).

The measures taken in response to the crisis were not without criticism emanating from both judges and lawyers: the Italian Council of State questioned the compatibility of “written hearings” with the Italian Constitution if these hearings are interpreted in the sense of precluding the possibility of carrying out an oral discussion (Italian Council of State, court order no. 2539 of April 21, 2020; for a different view, cf. TAR Napoli, judgment no. 2074 of May 29, 2020). Bar associations, on their part, objected that they would have preferred to restore the oral conduction of trials and questioned the compliance of criminal “videoconference hearings” with the law (Giunta UCPI, 2020).

#### **4. Conclusions**

The article offers a lens to read the Italian policy response to COVID-19 and to understand the extent to which conflict and differences in public policy and administration are caused and can cause, at the same time, uncertainty. The analysis carried out represents an interdisciplinary effort to understand the dynamics in place within a multilevel governance system. As we show in our case study about the Italian system, the uncertainty caused by crises can imply both issues in the allocation of powers along the central-local government continuum and differences in the practical outcomes of the activities carried out by public authorities, which in our case are exemplified by judicial offices. Under critical circumstances, central authorities often aim to concentrate decisional power but are only sometimes successful, thus paving the way for considerable uncertainty for local authorities, administrative bodies, and, ultimately, for citizens.

The adoption of regional and mayoral measures not aligned with those of the central government shows the different perception of the risk of contagion, which entails uncertainty in the qualification of the emergency situations, as well as in the identification of the applicable law and measures, to the point that the central government took legal action to enforce the national emergency law. In this regard, closer cooperation between the central government and local (regional and municipal) authorities and greater involvement of the latter in the management of the emergency might well favor certainty during pandemic crises, because of local authorities’ greater and more direct knowledge of the specificities and needs of the areas under their jurisdiction (Deslatte et al., 2020). This solution is corroborated by the principles that shape the Italian legal system itself: the principle of loyal cooperation must inform state-regions relationships both in day-to-day running activities and in emergency management, especially in policy areas with intertwined state and regional competencies such as health protection (Mandato, 2020). Cooperation is also advocated by recent contributions on COVID-19 and wicked problems in general, which are characterized by uncertainty and consequences crossing traditional policy boundaries. Due to these characteristics, wicked problems such as the COVID-19 pandemic can hardly be addressed by single actors, who will therefore have to create networks to organize an effective response to the problem in question (Grizzle et al., 2020). Moreover, in all the specific contexts where a lack of coordination is observed, post-hoc evaluators will have to deal with the hard task of discovering the root cause of insufficient communication between the different levels involved in the response to the pandemic, in order to “create meaning, to enable learning, or to fairly assign blame and praise” (Wockelberg, 2011: 163).



At the same time, public administrations (i.e., in our case study, judicial offices) interpreted the law in very diverse ways, thus contributing to an increase in the degree of discretion in the implementation of the rules established by the government. This discretion, stemming from the inability of the central government to adopt univocal rules, showed in the exercise of the administrative tasks related to the organization of trials and brought about a great variation between policy implementation outcomes, which in some cases gave rise to the discontent of the stakeholders involved in the conduction of trials, due, in particular, to the uncertainty regarding the practical features of trial conduction for both lawyers and citizens, as well as to the uneven treatment of these latter. As a possible solution to the tensions inherent in the centralization-discretion dilemma, a “balanced combination of both centralization and empowerment” (Svedin, 2011a: 242 recalling the proposal elaborated by Boin & Nieuwenburg, 2011) was suggested in the past and seems to apply to our case study with regard to the relationship between the authorities involved in the justice administration system, as well. Administrative discretion is unavoidable and potentially beneficial to policy outcomes. However, in order to achieve high-quality policy outcomes, responsible politicians and policymakers should at the same time be actively involved in policy setting (Boin & Nieuwenburg, 2011), inter alia by defining detailed binding guidelines to be used by national public authorities in the exercise of their administrative duties in order to avoid uncertainty and disparities.

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