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I. National practices concerning law-making procedures in case of urgent and/or exceptional circumstances

1/ Does your national legal order identify urgent and/or exceptional cases as the justification for applying special law-making procedures?

In extraordinary cases of necessity and urgency, the Italian legal order provides for a special procedure that allows the Government to adopt an act with the force of law, named *decreto-legge*. Through this procedure, it is possible to react to urgent circumstances, altering the usual assignment of the legislative power: the executive, under its own responsibility, may introduce a legal act that immediately enters in force, postponing the exam of the content of the measure by the legislative power.

As guarantee of the fundamental control by Parliament, the *decreto-legge* has to be presented on the same day to the two Chambers (*Camera dei deputati* and *Senato della Repubblica*) and, if it is non-converted in law within sixty days, it has to be considered as never adopted and loses its effects *ex tunc* (since its adoption by the Government).

The special law-making procedure is strictly connected to the exceptionality of the urgency and necessity, for that reason it is permitted to the Government to temporarily substitutes the Parliament. The conversion of the *decreto-legge* by the Italian Parliament into law makes the governmental decree ordinary law, after the control over the existence of the legal conditions for the adoption of this special legislative procedure. Parliament can also amend the governmental act: the amended articles enter into force the day after the publication of the conversion law (legge di conversion) on the Official Journal (*Gazzetta Ufficiale*), except if it is differently established.

Are the concepts of "urgency" and "exceptionality" used cumulatively or alternatively as conditions for the special law-making procedures?

According to art. 77 of the Constitution, *decreto-legge* can be adopted only in "extraordinary circumstances of necessity and urgency". According to several Authors, necessity and urgency represents a hendiadys: it is not possible to distinguish between necessity and urgency because the urgency is a *genus* of the necessity, that on the stand

represents a *species*[1]. Other Authors plead, on the contrary, that necessity and urgency need to be separately considered and contemporary present. Therefore, the Government should verify the indispensable factual need to regulate and the impossibility to resort to other "normal" instruments, because promptness of intervention is required[2].

Necessity of intervene with urgent measures could also mean that the adoption of a *decreto-legge* is urgent and necessary, but its provisions aim to a result that is not immediately achievable; in this case, it is relevant the necessity and the urgency of regulating[3].The Constitutional Court emphasizes this aspect, clarifying that the urgency is related to the necessity to regulate, even if the achievement of the goals may require more time[4]. There are several examples of *decreti-legge* that contain measures adopted for the necessity of a prompt intervention by the Government, also through action which have a long-time enforcement[5]. However, art. 15 (3) L. 400 1988 states that the *decreto-legge* shall contain measures of immediate application and their content shall be specific, homogenous and correspondent to the title. According to the recent case law, *decreto-legge* shall contain measures that need a prompt application aimed to respond quickly to an urgent and exceptional situation. For that reason the Constitutional Court has considered as unconstitutional a reform of the organization on local authority, as it is an institutional choice that needs a deep academic and political discussion and cannot arise from a circumstance of necessity and urgency[6].

It is also frequent the adoption of *decreti-legge omnibus*, that contains measures related to different subject and areas. This practice is considered an abuse of the instrument, considering that it should include only precise regulation, geared to a single situation[7]. The Constitutional Court, however, saved this practice, by holding their constitutional compatibility at if the various provisions of the *decreto-legge* are homogenous,

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[1] See A. PIZZORUSSO, *Delle fonti del diritto. Disposizioni sulla legge in generale artt. 1-9*, in *Comm. Scialoja –Branca*, 1977, p. 262 and P. RESCIGNO, in *Novissimo Digesto italiano*, XII, Utet, Torino, 1965, p. 100.

[2] About this opinion see A. CELOTTO, F. DI BENEDETTO, *Art. 77 Cost.*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (edited by), *Commentario alla Costituzione*, Utet, 2006, p. 1516 and seqq and the Authors *ivi* cited.

[3] G. ZAGREBELSKY, *Manuale di diritto costituzionale. Il sistema delle fonti del diritto*, UTET, Torino, 1988, p. 177.

[4] See Const. Court 62/2005. In par. 13 the Court declared that the necessity of introducing a regulation for the realization of the structure for the disposal of nuclear waste, preventing risks for the public heath, is a valid prerequisite for the adoption of a urgent act, even if the completion of the works requires long time.

[5] See G. D'ELIA, L. PANZERI, *Sulla illegittimità costituzionale dei decreti-legge «taglia-leggi»*, in *Giur. cost.,* fasc.1, 2009, pag. 497.

[6] Const. Court 220/2013, declaring unconstitutional artt. 23 (14, 15, 16, 17, 18, 19 and 20) D. L. 201/2011 and artt. 17 e 18 D. L. 95/2012 on the reorganization of provincial administration and introducing Metropolitan area. In par. 12 the Court declared that the organization of the local authority is ruled by a regulation that cannot be influenced by contingencies. Moreover, it is a subject that cannot be discussed by the Parliament in the limited time established by the urgency procedure.

[7] Art. 15 (3) L. 400/1988 rules that *decreti-legge* must contains measures of immediate application and their content should be punctual, homogeneous and related to the title.

evaluating the common purpose of the norms or the event from which they are originated.

Are there distinct or common law-making procedures applying in urgent and/or exceptional cases?

The *ratio* of the *decreto-legge* procedure is the introduction of a competence for the "reaction to the unforeseeable"[8], so it is a general tool that allows to rule in case of urgency and necessity. The procedure represents the general instrument that complements the ordinary law-making procedure system with a unique tool. The regulation of necessity is intrinsically a contradictory task, as the necessity by nature appears in different and unpredictable aspects and it cannot be completely dominated by several regulations.

L. 400/1988 has further regulated the instrument by setting the limits to its use (see infra). Note that the failed 2016 Constitutional reform aimed to constitutionalise the limits set in art. 15 of L. 400/1988 (see infra).

2/ Do the eventual special law-making procedures in case of urgent and/or exceptional circumstances derive from de facto practices or are they set out in the Constitution and/or in ordinary legislation?

Art. 77 of the Constitution establishes the procedure for the adoption of the *decreto-legge*[9]. Before the adoption of the Constitution, even if not formally recognised under art. 6 of the Statuto Albertino, the instrument of the *ordinanza d'urgenza* started to be used as decree to be adopted by the King. It was only the fascist law L.100/1926 that posed some constraints to the exercise of this regulatory power: *decreto-legge* could be used only if complying with the general requirements of extraordinary cases of necessity and urgency; the obligation to submit the decree to the Parliament in order convert the *decreto-legge* into a law within the third assembly from the publication; the immediate forfeiture (*ex nunc*) if not converted or after two years from the publication.

Although hesitant, the Constituent Assembly of Italy recognised the need to introduce a constitutional regulation of the instrument, reckoning that its function was considered

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[8] See A. CELOTTO, F. DI BENEDETTO, *Art. 77 Cost.,* in R. BIFULCO, A. CELOTTO, M. OLIVETTI (edited by), *Commentario alla Costituzione*, Utet, 2006, p. 1514.

[9] Art. 77 Const establishes that "*Il Governo non può, senza delegazione delle Camere, emanare decreti che abbiano valore di legge ordinaria.*

Quando, in casi straordinari di necessità e di urgenza, il Governo adotta, sotto la sua responsabilità, provvedimenti provvisori con forza di legge, deve il giorno stesso presentarli per la conversione alle Camere che, anche se sciolte, sono appositamente convocate e si riuniscono entro cinque giorni.

I decreti perdono efficacia sin dall'inizio, se non sono convertiti in legge entro sessanta giorni dalla loro pubblicazione. Le Camere possono tuttavia regolare con legge i rapporti giuridici sorti sulla base dei decreti non convertiti". ("Art. 77 The Government may not, without an enabling act from the Houses, issue decrees having the force of ordinary law. When in extraordinary cases of necessity and urgency the Government adopts provisional measures having the force of law, it must on the same day present said measures for confirmation to the Houses which, even if dissolved, shall be summoned especially for this purpose and shall convene within five days. The decrees lose effect from their inception if they are not confirmed within sixty days from their publication. The Houses may however regulate by law legal relationships arising out of not confirmed decrees").

indispensable in some occasions and a stricter constitutional regulation would have contained the abuse[10].

In 1988, Law no. 400 regulating the powers and the organisation of the Government, specified some limits to the use of the *decreto-legge.* In line with art. 72 (4) Const., art. 15 L. 400/1988 holds that *decreto-legge* cannot rule on constitutional and electoral matters, delegation of legislative powers, authorization and ratification of international treaties, and approval of budget laws. These functional preclusions mean that *decreto-legge* cannot alter the principle of separation of powers, the democratic values and the allocation of powers as set in the Constitution. Moreover, L. 212/2000 on the rights of taxpayers has prohibited the use of the *decreto-legge* for the introduction of new taxes and the extension of the existing ones to new parties.

Parliamentary regulations (regolamenti parlamentari) on the functioning of the two Chambers cover the Parliamentary procedure for the conversion of decreti-legge into law: in the Regulation concerning the functioning of the *Camera dei deputati* was introduced a title on the *decreto-legge* in 1981 with the sole art. 96 *bis*, modified in 1997. This article defines the assignments of the exam of the governmental act to a parliamentary Commission, the exam planning and the vote system[11]. In doing so, the Regulation requires that the *decreto-legge* is presented to the *Camera* accompanied by a report on the necessity and urgency requirements that sustain the adoption of the governmental act and on the expected effects by the enforcement on the factual situation and on the regulation already existent.

The Regulation on the functioning of the *Senato* (art. 78) also covers the assignment to the competent Commission and the voting system.

The failed 2016 reform of Italian Constitution aimed at constitutionalise the content of art. 15 L.400/1988, by holding that *decreti-legge* could not be adopted in constitutional and electoral matters, but with the exclusion of the organisation and the execution of the electoral procedure; legislative delegation; laws of conversion of *decreti-legge;* the adoption of international treaties and budget laws. The constitutional reform also specifically provided that a *decreto-legge* cannot reiterate unconverted *decreti-legge* and the regulation of the legal relationships constituted on their basis and cannot restore the effectiveness of acts and rules declared unconstitutional by the Constitutional Court for substantive (not procedural) flaws.

What are the main principles and the concrete proceedings of law-making in urgent and/or exceptional circumstances in your national legal order?

The *decreto-legge* is adopted by the Government through a deliberation of the Council of Ministers as a provisional act with the force of law. This means that the Government is responsible for it in terms of civil, administrative/revenue and even penal liability.

Having this origin and nature, on the very day of its adoption, the *decreto-legge* needs to be presented to the Parliament (both Chambers) to be converted into a law.

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[10] For an historical reconstruction of the *decreto-legge* see A. CELOTTO, F. DI BENEDETTO, *Art. 77 Cost.*, cited, p. 1507 and seq.

[11] See also art. 85 Regulation on the functioning of the *Camera dei deputati* for the vote system.

If Chambers are dissolved, they must be convened and they shall reassemble within five days. This is because the power to covert *decreti-legge* into law is included within the duty of continuity of public offices (the so-called *prorogatio* regime). Some Authors reckons that the Government that have not yet the confidence of the Parliament or that has received a vote of no confidence cannot adopt *decreti-legge* because can only settle the ordinary administration[12]. However, because of the prorogatio rule, any Government can adopt this kind of act if the conditions of necessity and urgency are met. This instruments should permit to the Government to react to such a situation and act for the common good.

As established by art. 15 L. 400/1988, the governmental act shall be explicitly titled as *decreto-legge* and shall contain in the recitals the conditions of necessity and urgency that support the adoption of this kind of act. Nevertheless, the lack of these elements in the text of the decree entails a sole irregularity and will not invalidate the governmental act.

The *decreto-legge* is issued by the Republic President and is published on the Official Journal immediately after his issuing. It enters directly into force: in that case is not required a *vacatio legis* period.

In the practice, the *decreto-legge* is presented to Parliament to be converted into a law on the same day of its publication, even if Art. 77 Const. seems to refer to the day of the issuing. In any case, the delay of sixty days starts from the publication. In the Chamber of Deputies (since 1997), the conversion bill is accompanied by a report by the Government that motivates necessity and urgency and illustrates the pursued objectives and the legal effects. The bill is submitted to both the competent referring Commission and the Committee for the legislation, which controls the specificity, homogeneity and correspondence to the title of the *decreto-legge* (according to art. 15 L. 400/1988).

Art. 72(3) of the Constitutions allows parliamentary regulations to decide if and how conversion bills can be examined by specialised Commissions. According to art. 72 (3) of the Constitution, this legislative procedure presents some variations introduced by parliamentary regulations, which ensure that the conversion occurs in due time and that the Chambers can control the existence of the requirements of necessity and urgency. In the Senate, the Commission for Constitutional Affairs expresses a mandatory opinion on the existence of the requirements of necessity and urgency.

According to art. 77 (3) of the Constitution, if the *decreto-legge* is not converted within 60 days from the publication, it loses its efficacy from its adoption (*ex tunc*).

The Chambers can rule about the legal relationships derived from unconverted *decreti-legge* within the limits of the Constitution and with particular regard to the principle of equality (*legge di sanatoria*). This law can rule either by crystallising through a standard formula the legal effects produced between the adoption of the *decreto-legge* and its missed conversion or by reproducing retroactively the rules provided in the *decreto-legge* with the effect that it can continue to govern the relations that may subsequently originate but referring to that period of time.

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[12] For an analysis of this topic see F. SORRENTINO, cited, p. 201 and seq. and G. BOCCACCINI, *Governo dimissionario e decretazione d'urgenza*, in *Quaderni costituzionali,* 1987, p. 144 and seq.

Through the conversion law (*legge di conversione*) Parliament regains the exercise of its legislative power on the matter and gives the assent on the existence of the circumstances of necessity and urgency. *Legge di conversione* replaces the *decreto-legge* and rules on the legal relationships hereinafter. In the practice, it is sufficient that the Assembly adopts the *legge di conversione* within the sixty days, it is not required that in the same terms it is issued and published.

Parliament has also the power to amend the text of the *decreto-legge*. Art. 15 L. 400/1988 establishes that any modification has to be explicitly enumerated in an annex to the act and enters into force the day after the publication of the law, unless differently disposed.

3/ What is the respective role of the legislative and the executive power, and eventually of other institutions, in dealing with urgent and/or exceptional circumstances?

Do the Head of the State, the Parliament and the Government retain a particular role?

In circumstances of necessity and urgency, the Italian Constitution previews a legal procedure that allows the Government to temporary take the place of the Parliament in the exercise of the legislative power. The representative of the executive power can adopt an act that enters immediately into force and has the force of law. This act is valid within sixty days; in this term the Parliament can convert the *decreto-legge* into law. If it is not converted, the governmental act is considered as never adopted and lose its effects *ex tunc*.

There are two different interpretations of the relation between the role of the representative of the executive and of the legislative power in the adoption of a *decreto-legge*. The first[13] considers that the Government has an exceptional power to handle extraordinary cases of necessity and urgency that could not be regulated through the ordinary legislative procedure. Therefore, the *decreto-legge* has to be considered as an act with a validity conditioned to the conversion within the term of sixty days. According to the second interpretation, the Government does not have a legislative power: the *decreto-legge* is an invalid act that, if converted by the Parliament, is retroactively replaced by the conversion law or will lapse his effects if not.

The Government is politically responsible for the fulfilment of the conditions of exceptional necessity and urgency and it is also responsible in terms of civil, administrative/revenue and even penal liability. Through the conversion in law of the governmental act, the Parliament confirms the respect of the conditions required and assumes the responsibility of the correct use the *decreto-legge*[14].

Also the Head of the State plays a relevant role, carrying out a preventive control on the legitimacy and, in some terms, on the opportunity of the *decreto-legge* adopted by the

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[13] This first theory is the most widespread and is supported by Authors like F. CRISAFULLI, G. ZAGRABELSKY and F. MODUGNO, the second is supported by F. SORRENTINO and C. ESPOSITO. For a recognition of the different interpretation see F. SORRENTINO, cited, p. 196 and seq.

[14] See *Decreto-legge, in Encicolpedia del diritto*, Milano, 1963, 838 and seq.

Government[15]. So, the *Presidente della Repubblica* can refuse the issuing of the decree or sand back it to the Government if it does not respect the Constitution or the legal order. The Head of State has an effective power, considering that only after his signing and issuing the *decreto-legge* is published, so enters in force and starts the terms for the conversion into law. Generally, there are informal contact between the Head of State and the *Presidente del Consiglio*, that prevent a formal refusal. Furthermore, often the *Presidente della Repubblica* does not express a formal refuse of the signing for the authorization but sands back the decree to the Government, even adding a letter in which explains his objection.

The first case of refusal of signing and issuing a *decreto-legge* happened during the presidency of Sandro Pertini in 1980, for a decree that aimed to assign to the Corte di Appello the control on the respect of the signatures for a *referendum* few days before the term for the collection of the signatures of ten *referendum*. In a statement of the *Presidenza della Repubblica* it was explained that the Head of Stated considered unconstitutional the modification of the rules for the ongoing proceedings. The Council of Ministers abandoned the *decreto-legge* and presented a bill to the Parliament with the same content.

Also in 1993, after a letter of the *Presidente della Repubblica* Scalfaro, the Government headed by Amato renounced to a decree on the party financing and presented a bill to the Parliament. The Head of State pleaded for the institutional fairness, underling that the *decreto-legge* could cancel an ongoing referendum procedure.

Recently, the *Presidente della Repubblica* Napolitano refused the signing the *decreto-legge* of 6th February 2009 forbidding the stop of the feeding of persons in vegetative status, considering that it did not accomplished the circumstances of necessity and urgency. He considered that a *decreto-legge* is an inappropriate solution for ruling this issues and the urgency was founded on a sole case (Eluana Englaro) that was also settled by a judgment (on this topic see also question n. 5).

4/ On what occasions and how frequently have the urgent and/or exceptional law-making procedures been applied in your national legal order?

Have they been activated in abusive ways and has there been a political criticism against their application?

Art. 77 of the Italian Constitution requires strict conditions for the adoption of decreto-legge. It contemporary requires the existence of "extraordinary cases" of "necessity" and "urgency". In addition, the prescriptions of the Law 400/1988 should limit the use of the *decreto-legge*. Nonetheless, this legislative source has been used quite frequently in the history of the Republic of Italy[16], not always in compliance with the legal framework.

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[15] See L. PALADIN, *Diritto Costituzionale*, CEDAM, 1998, p. 471.

[16] In the present work, it will be analyzed only the legislation of the Republic of Italy from the Constitution, in force from the 1° January 1948. However, it is possible to recognize forms of urgency legislation also in the era of the monarchy, under the Statuto Albertino (the first decreto-legge was probably adopted in 1853), and during the Fascism, under the law 31 January 1926, n. 100.

In fact, only in the very first years after the entrance into force of the Constitution the use of the *decreto-legge* was reserved to cases that fully matched the requirements of the Constitution. In the I Legislature (1948-1953), 29 *decreti-legge* were adopted; in the II one (1953-1958), 60; and in the III one (1958-1963), 30 and they were all converted in law by the Parliament, except one in the I Legislature[17]. Among these *decreto-legge*, there were also some "*decreti catenaccio",* that are decree, usually related to fiscal matters, to increase duties, taxes, etc., so called because they were issued in such a form as to avoid the run to the stock of goods that would occur if the measure would be known before its entry into force (as it would be if it were issued in the form of a law).

In the IV Legislature (1963-1968), the number of the *decreto-legge* raised to 94 as well as its percentage compared to the total number of the laws: in the same time, it grew the number of missed conversion into law, as well as the criticism and the concern for the use of this kind of act, not complying with the legal framework[18]. In the V Legislature (1968-1972), the number of the *decreto-legge* adopted was 69, with only 3 missed conversion[19].

Progressively, the *decreto-legge,* instead of an exceptional legislative measure for extraordinary cases of necessity and urgency, became an instrument to respond quickly to legislative needs characterized by political urgency. The first *decreto-legge* which was strongly criticized was the so-called 'decretone Colombo', d.l. 621/1970, which contained 70 heterogeneous articles in financial matters (so-called *decreto omnibus*) and which was also reiterated in the absence of conversion.

The growth of *decreto-legge* was also accompanied by their missed conversions into law. The praxis of reiteration occurred: if Parliament failed to convert in law the *decreto-legge* before the expiration of the sixty days, the Government used to re-submit to Parliament an identical *decreto-legge*, just after the expiration, granting the effect of the previous decreto-legge not converted into law. This praxis was adopted for several years and it caused paradoxical situations: for example, a *decreto-legge* was reiterated for 29 times[20]. This has given rise to chains, where the effectiveness of the provisions was renovated every two months, with severe effects on the principle of legal certainty.

In the Seventies, Italy was characterized by a period of political instability of the institutions and it provoked an increase in the use of the *decreto-legge*, often outside the limits of the Constitution: in the VI Legislature, 124 *decreto-legge* were adopted and only 108 were passed into law: therefore, in that period, two *decreto-legge* par month were adopted and it became one-tenth of the total legislative production so that the abusive use of this act was manifest[21].

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[17] A. CELOTTO, *L' "abuso" del decreto-legge*, Padova, 1997, p. 246. The only one *decreto-legge* that was not passed into law was the d.l. 9 April 1951, n. 207, that contained a prorogation of the legislation on the limits to the hospitality sector.

[18] A. CELOTTO, *L' "abuso" del decreto-legge*, cit., p. 248.

[19] *Ibidem*, p. 250.

[20] This is the case of the Decreto milleproroghe: adopted for the first time in 1992, it has been converted only in 1996 and in the meantime, it was repeatedly reiterated.

[21] A. CELOTTO, *L' "abuso" del decreto-legge*, cit., p. 250.

The doctrine started to highlight the different pathological characters of this use of the *decreto-legge*: the more and more frequent adoption outside the limits of necessity and urgency, the loss of power by the Government in the conversion of the law and the addition of amendments in the *iter* of conversion[22]. For example, the *decreto-legge* was used, in this period, to create the Ministry of Culture[23]. According to Predieri[24], it became a kind of "governmental bill reinforced by the rapid constitutional procedure for adoption". The growth of *decreto-legge* was the response to the crisis of the law as an instrument to rule effectively and in a timely manner.

In the VII Legislature (1976-1979), 167 *decreto-legge* were adopted, five per month, and they represented the 25% of the total legislation.

Despite the growing consciousness of the use of the *decreto-legge* outside its constitutional limits, the Constitutional Court at first avoided scrutinizing the requirements of necessity and urgency, as they were considered political in nature[25]. The control over the existence of the requirements of necessity and urgency was then left to the political sphere. The requirement of extraordinary circumstances was ignored; necessity was interpreted as a social and political situation undetermined and urgency as a subjective requirement of the entire *decreto-legge* and not as an objective characteristic of its single provisions.

In the VIII legislature (1979-1983), 275 *decreti-legge* were adopted, almost 6 per month, amounting at 29% of the legislation, confirming the growth of the phenomenon. The doctrine, unanimously, condemned this misuse of the *decreto-legge*, that became an alarming praxis of the governments[26].

During this legislature, the President of the Republic, Pertini, for the first time refused to sign a *decreto-legge* that it deemed not in line with the Constitutional provisions[27]. All this brought to the reform of Parliamentary regulations aimed at checking the existence of the requirements of necessity and urgency (in 1981 and 1988 the Chamber of Deputies; in 1982 the Senate).

The criticism could not stop the increasing number of the *decreto-legge*: they were 302 in the IX Legislature (1983-1987), 6,2 par month and that represented the 38% of the legislation, and 466 in the X (1987-1992), 9,7 par month, that represented the 44% of the legislation. In the same time, only the 40% of the *decreto-legge* were converted into law[28].

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[22] See what reported by A. CELOTTO, *L'"abuso" del decreto-legge*, cit., Padova, 1997; A. SIMONCINI, *Le funzioni del decreto-legge*, Milano, 2003.

[23] See *decreto-legge* 14 novembre 1974, n. 657.

[24] A. PREDIERI, *Il Governo colegislatore,* in F. CAZZOLA, A. PREDIERI AND G. PRIULLA (eds), *Il decreto legge fra Governo e Parlamento* (Giuffrè 1975), IX-LI.

[25] See Const. Court 55/1977.

[26] See A. CELOTTO, *L' "abuso" del decreto-legge*, cit., p. 256 and the authors ivi quoted.

[27] It was a decree on the decentralization of the tribunals for the verification of the signature deposited to present the request of an abrogation referendum.

[28] See A. CELOTTO, *L' "abuso" del decreto-legge*, cit., p. 263.

In the '80s, legal scholarship recognized the unique genetic connection between the *decreto-legge* and the conversion law[29].

By the adoption of art. 15 of the Law 400/1988, the legislator tried to limit the misuse of the *decreto-legge.* By the judgement 10 February 1988, n. 302, the Constitutional Court expressed a first censure of the praxis of the reiteration, holding unconstitutional of a *decreto-legge* reiterated several times, underlying the need of a reform. In fact, in the '80s and the '90s this was a widespread practice: in the VII legislature (1976-1979), the 60% of *decreto-legge* were reiterated; in the VIII legislature (1979-1983), the 76,3%; in the IX legislature (1983-1987), the 96,4%; in the X legislature (1987-1992), the 84,8%; in the XI legislature (1992-1994), the 90,3% and in the XII legislature (1994-1996), the 97,8%[30].

Instead, the Constitutional Court still refused to develop a strict scrutiny on the fulfilment of the condition to adopt a *decreto-legge*, focusing only on the manifest absence of the requirements of necessity and urgency in the conversion law. Only in the '90s, the Constitutional Court recognized its competence to ascertain the existence of the requirements of necessity and urgency with the goal of protecting the order of the sources of law[31]: the absence of the requirements in the *decreto-legge* was treated as an *error in procedendo* in the adoption of the conversion law. This could happen because the Court recognised the particular genetic nature of conversion law and denied that conversion law could legitimize the flaws of the *decreto-legge.* The Constitutional Court, therefore, by judgement 29/1995, an exceptional judgement, whose principles where reaffirmed only in 2007, pointed out that if the requirements of necessity and urgency are missing, their lack cannot be cured by conversion into law and this creates an error *in procedendo* in the adoption of the law[32].

In the XI (1992-1994) and XII (1994-1996) Legislature, the number of *decreto-legge* increased again, reaching one per month, becoming a regular way to rule instead of a special measure for extraordinary cases of necessity and urgency. In fact, in the first one, 490 *decreto-legge* were adopted, and in the second one 718. The reaction of the judges was to refuse to apply the *decreto-legge* systematically reiterated in criminal law and to raise in every case the question of constitutionality for the violation of art. 77 Constitution.

In the XIII (1996 – 2001), 458 *decreto-legge* were adopted and only 219 were converted into law. In the XIV (2001- 2006), 226 were adopted and 200 converted into law[33]. In

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[29] G. PITRUZZELLA, *La legge di conversione del decreto-legge*, 1989.

[30] A. CELOTTO, E. DI BENEDETTO, Art. 77, in R. BIFULCO, A. CELOTTO AND M. OLIVETTI (eds), *Commentario alla Costituzione*, 2006.

[31] See Const. Court 29/1995.

[32] see Const. Court 270/1996 and 330/1996.

[33] See the statistics of the Senate:

http://www.senato.it/documenti/repository/relazioni/libreria/raffronto_legislazione_XIII-XVI.pdf and http://www.senato.it/application/xmanager/projects/leg17/file/repository/notizie/2016/Attivit2016_VentaglioLuglio.pdf.

this latter, the government asked for the vote of confidence on the 8,5% of the conversion laws.

The Constitutional Court strongly declared the practice of the reiteration unconstitutional only in 1996[34] , on the ground that the chronic reiteration was against the function pursued by *decreto-legge*. The praxis of the reiteration, in fact, alters the temporary nature of the *decreto-legge,* postponing the limits of the sixty days established by the Constitution for the conversion. It then eliminates the extraordinary feature of the conditions of necessity and urgency, because it prolongs in the time the reasons of urgency of the decreto-legge. It finally weakens the sanction of the loss of efficacity for the lack of conversion, creating the expectation to consolidate the effect of the decree. In addition to that, the praxis of reiteration alters the institutional balance of the powers, because it erodes the legislative function of the Parliament. This ruling ended the practice of reiteration and it also contributed to reducing the adoption of *decreti-legge*.

Therefore, only in 2007 the Court declared art. 7 (1) a) of *decreto legge* n. 80/2004 on local government unconstitutional, as it did not meet the requirements of necessity and urgency and also invested of the same control the conversion law[35]. In fact, the rule concerned the introduction of a new cause of ineligibility for the role of mayor in a regulation of local finance.

In the following years, the number of *decreto-legge* started to decrease: in the XV Legislature (2006-2008), 51 *decreto-legge* were adopted and 32 converted into law, and in XVI legislature (2008-2013), 39 were adopted and 30 converted into law[36].

Another abuse of *decreto-legge* that emerged during the years, is to be identified in the praxis of the Government and of the Parliament to insert in the law of conversion some norms that do are not relevant with the core of the *decreto-legge* and that do not present the feature of necessity and urgency required by the Constitution. In 2010, the Constitutional Court clarified that the conversion law should meet those requirements only where amending or adding rules directly connected to the *decreto-legge* and not where adding further heterogeneous rules[37].

Alongside the introduction of spurious rules in a *decreto-legge*, the practice has offered cases of different regulations combined in a unique *decreto-legge*. The goal is to reduce the number of *decreti-legge* to submit to the Parliament and reduce its workload for the conversion. A particular case is the so-called *decreto milleproroghe*, which has been introduced to extend or solve urgent issues by the end of the current year. It was introduced as an exceptional measure in 2005 and by then it has been adopted every year to solve urgent issues that could not be delayed. These acts may be legal as long as

[34] Const. Court 360/1996.

[35] Const. Court 171/2007.

[36] See footnote n. 33.

[37] Const. Court 355/2010.

all the various provisions share a homogenous goal: if, for example, they need to postpone urgently expiration dates[38].

The Constitutional Court has finally pointed out that the *decreto-legge* is a contingently founded act that needs to be homogeneous and to contain immediately applicable rules. It also clarified that these requirements should concern not only the *decreto-legge* itself (substantive requirement)[39], but also the conversion law (procedural requirement)[40]. The subject of the *decreto-legge* and the objective pursued should be homogeneous or, at least, a predominant subject/objective/ratio should be identified[41]. If this is not clearly identifiable, the conversion law that adds a new content needs to connect it to one of the contents already identified in the *decreto-legge* [42]. This case-law shows that the conversion law is an atypical law, not free to choose its goals, but strictly connected to the conversion process[43]. The judgement 32/2014 clearly declared unconstitutional the norms introduced by heterogeneous amendments.

This case law set aside both case 355/2010 which admitted heterogeneous rules in the conversion law and case 237/2013 which admitted the introduction of delegation rules in the conversion law.

Another abuse that raised criticism, is represented by the the *decreti legge* aimed to introduce general reforms by taking advantage of the accelerated procedure for their approval as a law.

For instance, *decreto-legge* 201/2011 converted into Law 214/2011 (so-called Salva Italia) and *decreto-legge* 95/2012 converted into Law 135/2012 (so-called Spending Review) reformed the systems of Provinces by introducing a complete reform of local government (powers, election, composition of the governmental organs and the relationships with Regions and Municipalities) which affected the entire functioning of these entities within the Constitutional framework.

The Constitutional Court sanctioned this practice by pointing out that a *decreto legge* was not a suitable instrument for such a general reform[44]. According to the Constitutional Court, a *decreto legge* could affect a single function of local governments, single aspects of their electoral systems and specific issues of their composition, but a general reform is 'logically and legally' incompatible with the Constitution as it does not

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[38] Const. Court 22/2012.

[39] Const. Court 171/2007 and 22/2012.

[40] Const. Court 22/2012 and 32/2014.

[41] Const. Court order 34/2013.

[42] Const. Court 32/2014.

[43] See G.M. FLICK, *Decreto legge e legge di conversione nella più recente giurisprudenza costituzionale*, in *Federalismi.it*, 1/2014; A. FRANCO, *La evidente disomogeneità tra decreto-legge e legge di conversione nella recente giurisprudenza della Corte costituzionale (a margine di Corte Cost. n. 32 del 2014),* in *Federalismi.it*, 1/2014, A. CELOTTO, *Uso e abuso della conversione in legge*, in *Federalismi.it*, 1/2014.

[44] Const. Court 220/2013.

have its origin in an extraordinary case of necessity and urgency. The system of the provinces was thus regulated by Law 56/2014.

After these cases, the Government tried to follow the homogeneity criterion for the adoption of new *decreto-legge*, by supporting *decreto-legge* with legislative bills (e.g., *decreto-legge* 34/2014 on the relaunch of job market and the support to enterprises and the bill on the so-called Jobs act).

However, the Government could not stop the practice to adopt *decreto-legge* with a wide reach (*decreto-legge* 90/2014 for the legal simplification, administrative transparency and the reform of judicial offices; *decreto-legge* 91/2014 on agriculture, protection of the environment and the energetic efficiency of schools and universities, competitiveness, electric fees, the fulfilment of obligations under EU law).

In addition, it could not stop the practice of making substantive sectorial reforms through *decreti-legge*. This is the case of *decreto-legge* 132/2014 on the reform of civil process, which introduced inter alia arbitration and a fast-track for divorce.

In the present Legislature, the XVII (2013 – present), 80 *decreto-legge* were adopted (until today) and 65 were converted into law.

Recently, the Government adopted *decreto-legge* for the fight to illegal immigration[45], for the urgent intervention for the citizens involved in the 2016 – 2017 earthquake[46], for the protection of the saving in the credit sector[47].

The failed 2016 Constitutional reform aimed to constitutionalize the limits set in art. 15 of L. 400/1988.

At first, the new art. 77 of the Constitution established that the proposal of the law of conversion should be presented to the Chamber of Deputies, even if it is an act relevant to subject that may be adopted by both the Chambers collectively.

Secondly, the Reform established that, in case the President of the Republic requires a new deliberation on the law proposal, the deadline for the adoption of the law of conversion is postponed for thirty days.

The reform then included in the Constitution some features of the *decreto legge* written in the Law 400/1988, that exclude the possibility to adopt by way of *decreto legge* the norms concerning electoral issues, except for the organization of the voting day. It then prohibited the praxis of the reiteration of *decreto legge* not converted into law or declared unlawful for substantial reasons. In the end, the new article 77 established that the *decreto legge* shall contain immediate enforcement measures, norms specific and homogeneous and coherent with the title, and that the law of conversion could not contain norms not relevant with the title and to the scope of the *decreto legge*.

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[45] *Decreto-legge* 17 February 2017, n. 13, converted into Law 13 April 2017, n. 46.

[46] *Decreto-legge* 9 February 2017, n. 8, converted into Law 7 April 2017, n. 45.

[47] *Decreto-legge* 23 December 2016, n. 237, converted into law 17 February 2017, n. 17.

In addition to that, the reform inserted a procedure to assure a fast approval of the law proposal of the Government considered as priority, because the new version of art. 72 Cons. Stated that they should be approved within seventy days[48].

However, the Constitutional Reform did not pass the constitutional referendum on 4 December 2016, so that the art. 77 of the Constitution remains unchanged.

5/ Are the urgent and/or exceptional regulatory procedures and measures subject to judicial review in your country?

In particular, is this review the task of a constitutional court?

Is the existence of the "urgent" and/or the "exceptional" situation a factual or a legal issue?

Is there a special duty for the executive to give reasons for the application of an urgent and/or exceptional regulatory procedure? Are these reasons subject to judicial control, and, if so, to what extend?

The first controls for the adoption *decreti-legge* are political. The *decreto-legge*, in fact, are adopted under the responsibility of the Government, which decides autonomously to issue such a decree in the cases it deems necessary. In the preamble, the Government shall indicate the extraordinary circumstances that justify the adoption of the *decreto-legge* and the previous deliberation in the Council of Ministry[49].

The *decreto-legge* is then submitted to the President of the Republic for its promulgation: only when the *decreto-legge* is signed by the President of the Republic and published on the Gazzetta Ufficiale (Official Journal), it is in force. The President of the Republic has the power to make a preliminary control over the *decreto-legge* and he can refuse to sign it if the Constitutional requirements for its adoption are not met. The President can also require the Government to revise the *decreto-legge*.

The first time that a Present of the Republic refused to sign a *decreto-legge* was in 1980, when Pertini refused to issue a decree that charged the Courts of Appeal, instead that the Court of Cassazione, of the task to verify the authentication of the signatures for a referendum, presented by the Government only few days after the closure of the signatures collection. In the opinion of the President, this decree should have altered a procedure already in progress and the balance between the direct democracy and the representative one[50]. In this case, President Pertini refused to sign for reasons of opportunity, not explicitly because of the lack of the criteria of necessity and urgency.

It should be observed that in some occasions also the President of the Republic refused to sign some *decreto-legge*, because they were not in line with the constitutional *ratio* of the instrument: President Scalfaro on the decriminalization of the offence of illicit financing of parties (1993) and President Napolitano on the ban to the interruption to

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[48] On the proposed reform, see E. ROSSI, *Una Costituzione migliore? Contenuti e limiti della riforma costituzionale,* Pisa University Press, 2016, p. 107-112.

[49] See Law 400/1988, art. 15.

[50] See A. GHIRIBELLI, *Il potere del presidente della repubblica in sede di emanazione dei decreti-legge: il "caso Englaro",* in *Giurisprudenza Costituzionale*, www.giurcost.it.

feed and hydrate non-self-sufficient persons in the Englaro case (2009). In this latter occasion, the President strongly underlined that such an issue should have to be deal with by the Parliament and that there was not a case of necessity and urgency. This was controversial because this decree was proposed by the Government to prevent the death of Eluana Englaro, that was on a vegetative coma since many years, and her father wanted to stop the nourishment and the hydration of her daughter.

After the issuance of a *decreto-legge*, the control on the compliance with the constitutional requirements of necessity and urgency is made by the Parliament in the conversion procedure.

The Rules of the Senate and of the Camera contain specific norms on the control of the requirements of necessity and urgency. As far as the first one is concerned, Rule 78 states that the enacting bill submitted by the Government shall be referred to an appropriate committee. If the Committee issue a negative opinion, on the ground that the bill fails to meet the requirements provided in article 77(2) of the Constitution or in current legislation, the opinion shall be immediately forwarded both to the appropriate committee and to the President of the Senate, who shall put it to the vote in the Senate within five days. The Senate shall vote on the negative opinion of the 1st Standing Committee by simultaneous roll-call vote. If the Senate decides that the requirements under Article 77(2) of the Constitution or current legislation are not met, the enacting bill shall be rejected. If, however, the vote only applies to parts or individual provisions of the decree-law or the enacting bill, the effects of the vote shall only apply to those parts or provisions, which shall be deleted accordingly[51].

[51] See Rules of the Senate, Rule 78, Bills enacting decree-laws «1. When the President receives a bill enacting a decree-law from the Government under Article 77 of the Constitution, if the Senate has been dissolved or adjourned, the Senate shall be immediately convened to sit within five days. 2. The enacting bill submitted by the government or transmitted by the Chamber of Deputies to the Senate shall, as a rule, be referred to the appropriate committee on the day of submission or transmission. When referring such bill to a committee, the President shall appraise the circumstances and accordingly set the date for consideration of the bill. 3. Within the deadline indicated in paragraph 2 above, the enacting bill shall also be referred to the 1st Standing Committee, which shall submit its opinion to the appropriate committee within five days of referral. Should the 1st Standing Committee issue a contrary opinion, on the ground that the bill fails to meet the requirements provided in article 77(2) of the Constitution or in current legislation, the opinion shall be immediately forwarded both to the appropriate committee and to the President of the Senate, who shall put it to the vote in the Senate within five days. The President shall also put the committee's opinion to the vote in the Senate within five days, if so requested by one-tenth of the members of the Senate within one day after the date on which the opinion has been expressed. No more than one speaker for each parliamentary group may take part in the debate, and for a maximum of ten minutes each. The Senate shall vote on the negative opinion of the 1st Standing Committee by simultaneous roll-call vote. 4. If the Senate decides that the requirements under Article 77(2) of the Constitution or current legislation are not met, the enacting bill shall be rejected. If, however, the vote only applies to parts or individual provisions of the decree-law or the enacting bill, the effects of the vote shall only apply to those parts or provisions, which shall be deleted accordingly. 5. The enacting bill introduced by the Government in the Senate shall at all events be put on the Senate agenda in time to ensure that the final vote takes place by no later than the thirtieth day from the date of referral. 6. All amendments submitted to the committee and those endorsed by the whole committee shall be submitted as such to the Senate and shall be printed and distributed before the beginning of the general debate». https://www.senato.it/documenti/repository/istituzione/reg.%20ing.pdf.

As the Chamber is concerned, the Rules have a complex filter: the appropriate commission analyzes the *decreto-legge* and the motivation given by the Government. The commission can also ask to the Government to complete the motivations for the adoption of the *decreto-legge*, also with reference to specific provision of the *decreto-legge.*

Then, it is submitted also to the Committee for the legislation, that within five days gives its opinion to the competent commissions, also indicating the norms to be deleted because not compliant with the Constitution and the Law 400/1988[52].

In both the Chambers, anyway, this is a political control.

The legal control of the *decreti-legge* is then the task of the Constitutional Court.

Decreto-legge are acts with the force of law which are subject to the control of constitutionality. However, the practice had to face the reality that if not converted, the *decreto-legge* expires after sixty days. The scrutiny of the Constitutional Court had therefore to be delivered within sixty days, otherwise the question could not be admissible. The Constitutional Court has therefore intervened on the conversion laws with significant, but sporadic rulings which contributed to bring the instrument back to its constitutional limits.

The Constitutional Court, with the judgement 29/1995, has affirmed that the preliminary existence of a factual situation characterized by necessity and urgency to be faced with a *decreto-legge* is a condition of the adoption of the act, so that the lack of that factual situation implies the unconstitutionality of the *decreto-legge* as well as an *error in procedendo* of the law of conversion, because this one has erroneously supposed the existence of the conditions required by the Constitution. The Constitutional Court therefore declared to have the full scrutiny of the compliance with the conditions of necessity and urgency and that its control was to be considered different from the one of the Parliament, for its task to preserve the constitutional order and the sources of legislation of the State.

The Court has then specified that the existence of the conditions for the adoption of a *decreto-legge* can emerge from 1) the preamble; 2) the normative context; and 3) the governmental report that accompanies the bill for conversion.

By the judgement 390/1996, the Constitutional Court condemned the praxis of the reiteration. The Court in fact declared that the *decreto-legge* has to be used by the Government only in exceptional cases of urgency and necessity, and that if it is not passed by law within the limit of sixty days by the Parliament, it cannot be reiterated by the Government whit the same content. The praxis of the reiteration, in fact, alters the temporary nature of the *decreto-legge,* postponing the limits of the sixty days established by the Constitution for the conversion. It then eliminates the extraordinary feature of the conditions of necessity and urgency, because it prolongs in the time the reasons of urgency of the *decreto-legge*. It finally weakens the sanction of the loss of efficacy for the lack of conversion, creating the expectation to consolidate the effect of

[52] http://www.camera.it/leg17/437?conoscerelacamera=237.

the decree. In addition to that, the praxis of reiteration alters the institutional balance of the powers, because it erodes the legislative function of the Parliament.

In 2007, the Constitutional Court declared for the first time the unconstitutionality of a *decreto-legge* for the manifest lack of the conditions of necessity and urgency. In that case, the Government had adopted a *decreto-legge* on the ground of the necessity to deal with some problems of the Municipality for financial reasons and for the governance, but it also inserted a norm on the ineligibility for the role of mayor. The Court recalled the importance for the Government to use the *decreto-legge* only in extraordinary cases, to avoid to infringe the principle of the separation of powers. The control of the Constitutional Court also invested the conversion law.

The following year, the Court confirmed its previous statements in cases 29/1995 and 127/2007 by the judgement 128/2008.

In its case law, the Court also underlined the link between the existence of the factual conditions established by art. 77, 2° c., Const., and the intrinsic coherence of the norms included in a *decreto-legge*, from a material and objective point of view or from the scope and the functionality. The urgent necessity to intervene by a legislative urgent measure can originated by the same goal to face situations extraordinary, complex and heterogeneous. Instead, the insertion, in the *decreto-legge,* of norms not coherent with the scope and the goal of the act, breaks the legal and logic link between the estimation of the urgency to intervene made by the Government and the legislative urgent measures adopted[53].

As already explained under question n. 4, the Constitutional Court has also condemned the use of the *decreto-legge* to adopt general reforms.

6/ Do you think that any general or particular feature of your national special law-making procedures could be used at a European level for the management of urgent and/or exceptional circumstances?

Which criteria could be apt to guide this transposition?

Despite the abuse of the *decreto-legge*, it has revealed to be useful to deal with situation of exceptional emergency. The conditions posed by the Constitution, that is extraordinary cases of necessity and urgency, underline the peculiarity of this power of the Government in the context of the framework of the legislative sources and of the separation of powers. The norms of the Constitution provide for general clauses that can be used in a huge variety of cases.

The Constitution and the Law 400/1988 also provide for a procedure to assure the conversion of the *decreto-legge* into a proper law by the Parliament, within sixty days from the adoption of the decree.

While it could be difficult to adopt at an EU level a general clause enabling the executive power to adopt legislative measures to faces extraordinary cases of urgency and necessity that lose their validity in sixty days, the Italian model may serve as an example to give the European Parliament the power to convert into a regulation or another

[53] Const. Court, 22/2012.

legislative act the urgency decision that could be taken by the European Commission (in hypothesis).

An important criterion that could be used is the principle of homogeneity of the conversion law with the urgent provision: this could be usefully transposed at an European level, in case it will create a system for adoption of urgency legislative measures like the Italian one, in order to guarantee the correct use of the legislative sources and procedures and to avoid the insertion of norms not in line with urgent act.

7/ Do you think that under the current circumstances your national Government would be willing to grant competence for urgent and/or exceptional legislation to the EU?

The Italian membership of the EU is based on art. 11 of Constitution, which states that Italy allows, on equal terms with other states, the limitations of sovereignty necessary for an order that ensures peace and justice between the nations[54]. Italy then, has a constitutional base to limit its sovereignty if this is necessary to assure peace and stability.

Currently, the Italian Government has a positive attitude towards the European Union and it clearly supports the Italian participation to the European policies: at the same time, there are some parties, like *Movimento 5 stelle* and Lega Nord, which have a critical approach to the EU and support the exit (especially, from the Eurozone) or, in any case, aim to contrast some EU policies.

However, the Government has also had tensions with the EU concerning in particular the Italian economy and the compliance with the Stability and Growth Pack. The Ministry of Economy, Pier Carlo Padoan, has recently expressed his opposition to the communication sent by the EU warning Italy to adopt remedies for the high public debt and the excessive debt[55] and the Commission prospected an infringement procedure.

However, it is possible that if the emergency procedure is limited to certain areas, like immigration and fight to the terrorism, Italy would be willing to accept the urgent and/or exceptional procedure to allow the intervention of the EU institutions in extraordinary cases.

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[54] In 2001, art. 117, par.1, Const. has been inserted to add a new legal basis to the EU membership: "Art. 117 Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations".

[55] See the information appeared in the newspaper: http://www.repubblica.it/economia/2017/02/02/news/il_tweet_di_padoan_nessuna_manovra_estemporanea_-157411532/; http://www.ilsole24ore.com/art/notizie/2017-01-27/padoan-procedura-ue-sarebbe-grosso-problema-reputazione-italia--125831.shtml?uuid=AExK4BJ.

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UNITED KINGDOM

I. National practices concerning law-making procedures in case of urgent and/or exceptional circumstances

1/ Does your national legal order identify urgent and/or exceptional cases as the justification for applying special law-making procedures?

Are the concepts of "urgency" and "exceptionality" used cumulatively or alternatively as conditions for the special law-making procedures?

Are there distinct or common law-making procedures applying in urgent and/or exceptional cases? *

The UK has developed a peculiar approach to urgent and emergency legislation, which aim to compromise the fundamental principle of Parliamentary sovereignty with the need to tackle critical situations. In his *Introduction to the Study of the Law of the Constitution* (1885), Dicey theorized the principle of Parliamentary supremacy. By affirming the 'right of Parliament to make or unmake any law whatever', legally speaking, Parliament can make laws concerning anything. This principle has been affirmed in *Madzimbamuto v Lardner-Burke*,[56] where Lord Reid emphasised that only moral, political and other reasons can limit the legal capacity of the Parliament, as 'most of the people would regard as highly improper if Parliament did these things'.

The UK approach to critical situations relies on this principle of the UK unwritten Constitution that applies without exceptions. Nonetheless, urgency and emergency have been addressed as distinct situations that may require flexibility in the design and the management of legal action. The situation in the UK is somewhat exceptional in that ordinarily Parliament will enact specific laws to deal with specific types of contingencies.

To deal with urgent legislative matters more effectively, the so-called fast-track legislation has been introduced through the procedural acceleration of the normal law-making procedure. The fast-track procedure expedites the ordinary legislative process, without altering from a formal point of view the competence of Parliament to rule also in critical situations. In these cases, the Government considers that additional legislation dealing with the critical situation is necessary and introduces a bill that may be fast-tracked before Parliament. This kind of legislation is generally subject to sunset clauses and renewal procedures, so that Parliament may have the opportunity to verify whether the situation persists or the intervention is no longer necessary and normality has been restored. Fast-track legislation is an additional instrument, but it only informs about the urgency in the adoption of the legislative act. The regulation of emergency situations can be subject to such expedited procedure, but the normal legislative process is not necessarily excluded. If urgency is a necessary condition for the activation of fast-track legislation, emergency is not necessarily required.

In addition, in 2004, Parliament enacted a specific statute aimed to regulate emergencies through a general system of legislative and administrative instruments: The Civil Contingencies Act. This represents a case of umbrella type legislation, covering all the types of emergencies, in contrast with the also used ad hoc approach aimed to cope with specific types of emergencies (see H P Lee 1984, 9-15; E. Shorts - C. de Than 1998, 581). The Civil Contingencies Act 2004 introduces a general notion of emergency, regulates the kind of action that emergency may require and it distinguishes the competences that the different UK bodies and institutions may retain. Emergency has been defined as an event or a situation which threatens serious damage to human welfare, to the

* For this national report, I would like to thank prof. Jeff King for his suggestions and insights. Usual disclaimers apply.

[56] [1969] AC 645

environment or to the security. More specifically, emergency is an event or situation that threatens damage to human welfare only if it involves, causes or may cause a loss of human life; human illness or injury; homelessness; damage to property; disruption of a supply of money, food, water, energy or fuel; disruption of a system of communication; disruption of facilities for transport; or disruption of services relating to health.[57] The damage to the environment is defined as an event that may cause contamination of land, water or air with biological, chemical or radioactive matter or the disruption or destruction of plant life or animal life.[58]

According to the territorial extension of the emergency, action may involve only the employment of the local arrangements for civil protection (Part 1 of the Civil Contingencies Act 2004) or the resort to emergency powers to adopt temporary special legislation (emergency regulations) by the Government under the scrutiny of Parliament (Part 2 of the Civil Contingencies Act 2004). This second part of the Act updates the 1920 Emergency Powers Act to reflect the developments in the intervening years and to integrate the (current and future) risk profile in the regulation of emergencies. It complements the planning arrangements at the local level with last resort powers that can help to tackle the most serious and unexpected emergencies. The basic problem with using directly prerogative powers to manage emergencies is that things inevitably must be done to interfere with rights and the standard legal position is that this is not possible under prerogative powers.

2/ Do the eventual special law-making procedures in case of urgent and/or exceptional circumstances derive from de facto practices or are they set out in the Constitution and/or in ordinary legislation?

What are the main principles and the concrete proceedings of law-making in urgent and/or exceptional circumstances in your national legal order?

These distinct legislative procedures aimed at dealing with urgent and emergency situations have different origins. Fast-track legislation derives from the de facto practice of the Houses of Parliament to expedite the legislative process to respond to urgent situations. Emergency regulation, instead, is a specific instrument set out and regulated in the ordinary legislation by the Civil Contingencies Act 2004.

When accelerating the ordinary legislative procedure, fast-track legislation follows the same procedural stages but significantly cut the normal intervals between the different stages with the effect of significantly shortening the timetable required for the adoption of the relevant Act of Parliament. Fast-track legislation can follow different procedural timetable and in practice different kind of acceleration may occur. In 2009, the House of Lords' Select Committee on the Constitution submitted a Report on the constitutional implications and safeguards of fast-track legislation (15th Report of Session 2008–09). As it was noticed, fast-track legislation can cover

- "Legislation which has been taken through all its stages in the Commons in one day;

[57] Sections 1 (2) and 19 (2) of the Civil Contingencies Act 2004.

[58] Sections 1 (3) and 19 (3) of the Civil Contingencies Act 2004.

- Legislation which has had two or more of its stages taken in one day in the Lords (Standing Order 47 having been dispensed with);
- Legislation where there has been a significant departure from the normal intervals between stages;
- Legislation which Parliament has been recalled to consider and pass;
- Legislation which, even though none of the above apply, has been expedited because of an urgent situation (see for an example of this the Clerk of the Parliaments' written evidence on the Prevention of Terrorism Act 2005, pp 159, 166)" (HL Select Committee, 15th Report of Session 2008–09, para 28).

To avoid delays, No. 2 bill procedure has been occasionally used to pass a bill more quickly. This procedure allows both Houses to consider a bill simultaneously. When a bill is introduced in the Commons, an identical one is introduced in the Lords, either at the same time or shortly afterwards (No. 2 bill). Both Houses follow their legislative procedure, but when the Lords receive the Commons' bill after second reading, the No. 2 bill is withdrawn, and the original bill then proceeds through its Committee and remaining stages in the Lords (see HL Select Committee, 15th Report of Session 2008–09, para 164). If this procedure allows to stick to a deadline for the adoption of the Act, it does not favour a thorough debate between the two Houses and the introduction of amendments from the Government.

The Northern Ireland (Temporary Provisions) Act 1972 which suspended Northern Ireland's Parliamentary powers and reintroduced the Home Rule was adopted with this procedure. As Sir Joseph Piling emphasized in the HL Report, this procedure is deplorable from a Parliamentarian's standpoint, but in the case of Northern Ireland it allowed to take decisive action in a very short time (see HL Select Committee, 15th Report of Session 2008–09, para 169). The Clerks of Parliament pointed out before the HL Select Committee, most recently this procedure has been used in the Banking Bill 2008. However, in this case the bill itself was not emergency legislation. Although it had been enacted by the deadline of the expiration of Banking (Special Provisions) Act 2008, the Banking Bill was passed after almost three months after its arrival in the Lords (see HL Select Committee, 15th Report of Session 2008–09, para 166). This means that more recently, the No. 2 bill procedure has not been understood and used as a means for fast-track legislation, but as a distinct instrument to expedite the ordinary parliamentary procedure.

Emergency regulations under the Civil Contingencies Act 2004 see an even more active role of the Government. If the conditions for the existence of an emergency are satisfied, her Majesty by Order in Council and a senior Minister of the Crown may make emergency regulations for preventing, controlling or mitigating an aspect or an effect of such emergency.[59] The Government has a power to amend the classification of events and situations threatening damage to human welfare so as to include or exclude them from the emergency regulations.[60] Emergency regulations 'shall as soon as is reasonably

[59] Sections 20-22 of the Civil Contingencies Act 2004.

[60] Sections 19 (4) of the Civil Contingencies Act 2004.

practicable' be laid before Parliament for its approval. If Parliament does not pass a resolution adopting them, these regulation lapse after seven days.[61] However, Parliament is free to pass a resolution holding that emergency regulations 'shall cease to have effect' and 'shall have effect with a specified amendment'.[62] Once approved, emergency regulations are valid for thirty days unless revoked.[63] If this allows Parliament to keep its sovereignty, nothing prevents the making of new regulations and the effects produced before Parliamentary decision cannot be questioned.[64] This means that emergency regulations cease to have effect only *ex nunc*, from the moment of Parliamentary intervention that does not have any retroactive effect.

3/ What is the respective role of the legislative and the executive power, and eventually of other institutions, in dealing with urgent and/or exceptional circumstances?

Do the Head of the State, the Parliament and the Government retain a particular role?

As a legislative procedure, fast-track legislation sees a central role of the Houses of Parliament. However, the Government plays a key role in the decision and in the procedure to fast-track legislation. As the Clerk of the House of Commons has pointed out in the HL Select Committee's Report, the Government submits to Parliament bills that must be enacted swiftly and then uses its political power to control the Parliamentary time to secure the adoption of the Act (HL Select Committee, 15th Report of Session 2008–09, para 27).

The political proximity between the Houses of Parliament and the Government affects the speed of the procedure. The House of Commons may be pressured to a faster timetable that can be completed even in one day, whereas the House of Lords has a more autonomous approach to the consideration of the urgency/emergency of the situation. Alongside political proximity, some procedural differences between the Houses also affect fast-track legislation. For instance, the House of Lords decides by consensus, whereas the House of Commons votes. This means that in the Commons, any cross-party agreement on a deadline for the adoption of an Act is not subject to veto powers. In addition, in the House of Lords, there is no selection of amendments and all those that are tabled must be called and may be debated. In the Commons, instead, Government bills that are proceeded with urgency are subject to a specific motion with guillotine effects that regulate each stage and include also time for exchange with the Lords. In the Commons, Report and Third Reading are almost always taken on the same day; in the Lords, Report and Third Reading amendments are nearly always taken on separate days and amendments may be tabled and considered at Third Reading (see HL Select Committee, 15th Report of Session 2008–09, paras 58-62).

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[61] Section 27 (1) of the Civil Contingencies Act 2004.

[62] Section 27 (2)- (3) of the Civil Contingencies Act 2004.

[63] Section 26 of the Civil Contingencies Act 2004.

[64] Section 27 (4) of the Civil Contingencies Act 2004.

It may therefore happen that an Act is fast-tracked only in the House of Commons, as it happened in the case of British Shipbuilders (Borrowing Powers) Bill 1983, Town and Country Planning (Compensation) Bill 1985, Dangerous Dogs Bill 1991, Aggravated Vehicle Taking Bill 1992, Humber Bridge (Debts) Bill 1995 and Hong Kong Economic and Trade Office Bill 1996 (see HL Select Committee, 15th Report of Session 2008–09, para 29).

Like all legislation, to be enforced, fast-track legislation requires the approval by Royal Assent. Considering the principle of Parliamentary sovereignty, the Royal Assent is a formal passage, but there are no substantive powers of the Queen to oppose the decision of Parliament to take a specific position on a particularly urgent situation or in an emergency.

Under the Civil Contingencies Act 2004, emergency regulations may be adopted by Order in Council or by statutory instruments. The former case is the rule; while the latter is an alternative in case of urgency. In fact, Orders in Council are passed by the Privy Council on the advice of Ministers. For all practical purposes they are equivalent to any other Departmental secondary legislation. If the situation cannot wait for the next meeting of the Privy Council, emergency regulations may be adopted by a senior Minister of the Crown; that is, the Prime Minister, a Secretary of State or one of the Government Whips (Commissioners of HM Treasury).[65] The array of powers that can be exercised under emergency regulations is very broad. The Government can legitimately adopt any provision which is 'appropriate for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency in respect of which the regulations are made',[66] including the requisition and confiscation of property; the prohibition of movement and assembly; the creation of an offense to fail to comply with emergency regulations; the conferral of discretionary functions; the deployment of troops; and the disapplication of enactments. Some limitations, however, apply: emergency regulation cannot conscript people into military service;[67] they cannot prohibit strikes;[68] and there are limitations on the kind of criminal offences that may be introduced.[69] The Government may also decide to make regulations that replicate existing primary legislation, or that could be made under another power, but it has to consider if the non-emergency approach would risk serious delay or might be insufficiently effective for some other reason.[70]

Parliament is not consulted on the adoption of these emergency regulations, but it has a scrutiny role on them, insofar as it shall approve, reject or amend by resolution the regulations taken by the Government. The management of the emergency is clearly led by the Government and Parliament has a role of reflection on the opportunity of the

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[65] Sec 20 (3) of the Civil Contingencies Act 2004.

[66] Sec 22 (1) of the Civil Contingencies Act 2004.

[67] Sec 23 (3) a) of the Civil Contingencies Act 2004.

[68] Sec 23 (3) b) of the Civil Contingencies Act 2004.

[69] Sec 23 (4) of the Civil Contingencies Act 2004.

[70] Sec 21 (5)-(6) of the Civil Contingencies Act 2004.

action taken, but with no power to nullify the effects produced before its intervention. Eventually, the Royal Assent is necessary to approve the statutory instrument.

The process of adoption of emergency regulations may encroach with the system of devolved powers to the different nations that are part of the UK. Section 29 of the Civil Contingencies Act 2004 provides that if the governmental action affects wholly or partly the devolved powers, consultation with the devolved institutions is required. More specifically, the Government shall consult the Scottish Ministers, the First Minister and deputy First Minister in Northern Ireland and the National Assembly for Wales. However, reasons of urgency may legitimately justify the disapplication of this consultation requirement.[71] In addition, a failure to satisfy the consultation requirement does not affect the validity of the emergency regulations in question.[72] The absence of effective legal sanctions to the consultation with devolved administrations makes the consultation process entirely political and conventionally subordinated to the circumstances of the case.

In addition, it should be recalled that until 2013 the Government had the power to establish a new tribunal through emergency regulation.[73] Like for the devolved institutions, this provision would provide the consultation with the Council on Tribunals, but this requirement could be legitimately superseded by reason of urgency[74] or in the case the Council on Tribunals has already consented to the establishment of a tribunal.[75] Like for the devolved institutions, a failure to satisfy the consultation requirement would not affect the validity of the emergency regulations in question.[76] When the Council on Tribunals was consulted, it would submit a report to the Government. The Minister could not adopt the emergency regulation before such submission, unless the reason of urgency was opposed and also in this case, the failure to comply with this requirement did not affect the validity of the regulations.[77] 'As soon as is reasonably practicable after the making of the regulations', the Government would also lay before Parliament the report of the Council on Tribunals giving reasons of why and how the regulations follow or depart from the report.[78] If the Minister of the Crown would make emergency regulations without consulting the Council on Tribunals, he would consult it afterwards 'as soon as reasonably practicable', the Council would make the report to the Minister and the procedure before Parliament would apply.[79]

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[71] Sec 29 (4) a) of the Civil Contingencies Act 2004.

[72] Sec 29 (4) b) of the Civil Contingencies Act 2004.

[73] Sec 25 of the Civil Contingencies Act 2004.

[74] Sec 25 (2) a) of the Civil Contingencies Act 2004

[75] Sec 25 (2) a) of the Civil Contingencies Act 2004.

[76] Sec 25 (2) c) of the Civil Contingencies Act 2004.

[77] Sec 25 (3)-(4) of the Civil Contingencies Act 2004.

[78] Sec 25 (5) of the Civil Contingencies Act 2004.

[79] Sec 25 (6) of the Civil Contingencies Act 2004.

The Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013/2042[80] repealed this power. This choice amounts to a significant restriction of the governmental powers during emergencies.

4/ On what occasions and how frequently have the urgent and/or exceptional law-making procedures been applied in your national legal order?

Have they been activated in abusive ways and has there been a political criticism against their application?

Fast-track legislation has been used in different occasions to respond to urgent and/or emergency situations. The HL Select Committee has identified eleven different situations where fast-track legislation has been used: in the Northern Ireland peace process and devolution settlement, which is the single largest category in terms of number of bills; to remedy an anomaly, oversight, error or uncertainty that has come to light in legislation; to respond to the effects of a court judgment; to ensure that legislation is in force in time for a forthcoming event; to deal with economic crisis; to change a public authority's borrowing or lending limit or other funding issues; to deal with a crisis in prisons as a result of industrial action; to respond to international agreements; to implement Treasury announcements in the Budget or autumn statement; to respond to public concerns; in counter-terrorism related policies (HL Select Committee, 15th Report of Session 2008–09, para 22). Although this list cannot be considered exhaustive, none of the witnesses could produce to the HL Select Committee a definite list of circumstances under which fast-track legislation is constitutionally acceptable (HL Select Committee, 15th Report of Session 2008–09, para 25). Prof. David Miers estimated that the HL Select Committee's list of over thirty bills passed in the last twenty years represents 'something less than five per cent of the total' legislation (HL Select Committee, 15th Report of Session 2008–09, para 21).

Nonetheless, some abuses have been identified. First, fast-track legislation has been used to reassure the public that some action is taken to respond to a specific situation. The HL Select Committee's Report effectively identifies this circumstance as the "something must be done" syndrome (HL Select Committee, 15th Report of Session 2008–09, para 47). This has been the case in the passage of the Aggravated Vehicle Taking Act 1992, which introduced the new offence of aggravated vehicle-taking combines the taking of a vehicle without the owner's consent with driving it dangerously, causing injury, or causing damage to the vehicle or other property. The origin of this legislation is in the fact that gangs of youths used to steal high performance cars and attracted spectators for night races and this received a resounding prominence in the media. The need to stop this criminal practice quickly drove the resort to fast-track legislation (HL Select Committee, 15th Report of Session 2008–09, paras 47-48). Another example of this "something must be done" syndrome has been the Criminal Justice (Terrorism and Security) Act 1998 introduced in response to the Omagh bombing and the attacks to the US Embassy in Nairobi and Dar es Salaam. As prof. Brice Dickson pointed out in the HL Select Committee's Report, the main provision concerning the conviction of people on the basis of their membership of a proscribed organisation

[80] Para 29.

on the word of a senior police officer has never been used, as it was a measure 'for the optics' and not 'a genuine security requirement' (HL Select Committee, 15th Report of Session 2008–09, para 73).

Second, it may also happen that a case is exaggerated on purpose for fast-tracking. The Government may be particularly tempted to do this to pass more quickly measures that may enhance its own powers. The counter-terrorism related matters may offer a useful occasion to extend governmental powers even with weak evidence (HL Select Committee, 15th Report of Session 2008–09, para 50). In addition, the resort to fast-track legislation to react to Courts' rulings is not always self-evident. Some variations exist that also relate to the political importance of the matter. For instance, following the decision of the Supreme Court about the invalidity of the control orders adopted to give effect to the UN asset-freezing measures,[81] the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 maintained the orders in questions until a new and permanent framework was adopted. This intervention allowed Parliament to reverse the effects of the ruling and reaffirm the supremacy of Parliament (Kouroutakis 2017, 102). In the HL Select Committee's Report, prof. James Lee warned about the dangers of using fast-track legislation to reverse specific judicial decisions and the Law Society argued that the Government should prepare in advance in relation to those cases that may have major constitutional implications (HL Select Committee, 15th Report of Session 2008–09, para 51).

Third, another major risk of abuse is the temptation to include non-urgent matters in fast-tracked bills. In the HL Select Committee's Report, the Clerk of the House of Commons emphasized the need to ensure that a bill which is to be taken with 'unusual expedition' contains only urgent provisions and no the speeder procedure is not employed to pass spurious provisions (HL Select Committee, 15th Report of Session 2008–09, para 53).

Fourth, there is a risk that emergency legislation can be used for purposes different from its original scope. Emergency legislation can provide powers that can be used in further emergencies. The HL Select Committee's Report identifies this undesirable scenario as "Act in Haste and Repent at Leisure", which is the likelihood that fast-track legislation once enacted remains on the statute book (HL Select Committee, 15th Report of Session 2008–09, para 55). According to the HL Select Committee's Report, an example of this abuse can be found in the Prevention of Terrorism (Temporary Provisions) Act 1974, which was passed in the aftermath of the Guildford and Birmingham bombings. This Act was poorly drafted and hastily enacted. It did not take into account the requirements of the Human Convention of Human Rights and the seven-day detention power was struck down by the European Court of Human Rights.

Sunset clauses and renewal procedures may help to avoid this scenario. By this process, a piece of legislation would expire after a certain date, unless Parliament chooses either to renew it or to replace it with a further piece of legislation subject to the normal legislative process. The Anti-Terrorism, Crime and Security Act 2001 is an example of an Act providing this post-legislative scrutiny. In reaction to the Belmarsh case where the

[81] *Ahmed v HM Treasury* (2010) UKSC 2.

House of Lords declared the incompatibility of the indefinite detention of suspected foreign terrorists under the Anti-Terrorism, Crime and Security Act 2001 with the Human Rights Act 1998,[82] the Secretary of State introduced the Prevention of Terrorism Bill proposing the alternative measure of control orders to be adopted through the fast-track legislative procedure. The sunset clause amendment prosed by the Lords found the opposition of the Commons and this delayed the adoption of the Act. As the Government was in a hurry to pass the Act, it eventually found a compromise (see Kouroutakis 2017, 102). According to the HL Select Committee, sunset clauses and renewal procedures are "additional safeguards" that ensure the protection of human rights and the correct use of the fast-track legislation. The Government should therefore set out the terms of the sunset clause in the Ministerial Statement. If in some cases sunset clauses might not be effective and appropriate to deal with the situation, the Government should make the case for their exclusion in the Ministerial Statement (HL Select Committee, 15th Report of Session 2008–09, Volume I: Report, para 198). As Kouroutakis has emphasized, sunset clauses may also operate between different legislatures and arise significant discussion about the agenda setting with the indirect chance of citizens to influence the political parties on the renewal of a sunset clause (Kouroutakis 2017, 104-108).

Quite interestingly, the Government declined the request to insert sunset clauses in the Civil Contingencies Act 2004, because emergency can no longer be treated as a circumscribed event. Flexibility in the use of emergency powers has been considered key for an effective protection. By empowering the Government to do anything that could be done by Act of Parliament and to disapply sections of the Act itself, this legislation has strongly increased governmental powers. In his 2009 British Academy Maccbbaean Lecture, prof. Sir John Baker QC however observed that despite the initial willingness of the Government, many of these powers have not been used (Baker 2013, 14). However, the evidence shows that so far the Government has made no use of the emergency regulations (see HL Select Committee, 15th Report of Session 2008–09, Volume II: Evidence, 4 and 48). Previously the Emergency Powers Act 1920 was used only on twelve occasions, mainly in response to strikes (Bradley 2015, 560).

5/ Are the urgent and/or exceptional regulatory procedures and measures subject to judicial review in your country? In particular, is this review the task of a constitutional court?

Is the existence of the "urgent" and/or the "exceptional" situation a factual or a legal issue?

Is there a special duty for the executive to give reasons for the application of an urgent and/or exceptional regulatory procedure? Are these reasons subject to judicial control, and, if so, to what extend?

Alongside the absence of any restriction on the capability of Parliament to rule, the principle of Parliamentary supremacy also consists of a legal rule that governs the relationship between the legislature and the judiciary. In Dicey's words, 'no person or body is recognised by the law of England as having a right to override or set aside the

[82] *A v Secretary of State for the Home Department* [2004] UKHL 56.

legislation of Parliament' (*Introduction to the Study of the Law of the Constitution* 1885). Legally speaking this means that courts must apply the legislation made by Parliament[83] and have no constitutional power to set aside the provisions of any Act of Parliament as incompatible with constitutional principles. They may not hold an Act of Parliament to be invalid or unconstitutional as in *Pickin v British Railways Board*,[84] where the House of Lords refused to look behind the text of the British Railways Act 1968 and consider the allegations of procedural impropriety during the adoption of the Act (the so-called enrolled Bill rule). There is no exception to this rule.[85] Fast-track legislation follows this rule and there is no chance for courts to review the process leading to the adoption of an Act of Parliament. Under the Civil Contingencies Act 2004 there is no automatic provision for appeal against orders made in performance of discretionary functions conferred by the emergency regulations, but consideration would have to be given to the practicability and desirability of providing for an appeal when the regulations were made.[86]

In this framework, courts leave the evaluation of the existence of an emergency or an urgent situation to Parliament and they do not review this substantive assessment of Parliament. Emergency and urgency therefore are treated as factual issues left to the comprehension of Parliament. Under the Civil Contingencies Act 2004, the existence of an emergency is also a legal issue, insofar as the powers of the Government are bound to the conditions for the identification of an emergency under section 19 and for counter-action under section 21 of the Civil Contingencies Act 2004. In addition, the Government adopting emergency regulations is made accountable of his action before Parliament. Although there is no duty to consult Parliament before the adoption of emergency regulations, the duty to submit them before the Parliament for approval[87] aim to maintain Parliamentary scrutiny on the existence of an emergency and the instruments necessary to regulate it. This allows Parliament to check and keep under control the exercise of special legislative powers by the Government.

Nonetheless, courts interpret Acts of Parliament in conformity with those values that are considered fundamental under the unwritten British constitution. This particularly means that courts interpret the Acts of Parliament in conformity with the rule of law on fundamental rights as enacted in the Human Rights Act 1998 (HRA 1998). If Parliament intends to legislate contrary to the protection of fundamental rights, there is no legal obstacle to do it under domestic law, but it shall do so expressly or by necessary implication, so that courts are advised of the changed willingness of Parliament.[88]

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[83] See *Cheney v Conn (Inspector of Taxes)* [1968] 1 WLR 242, [1968] 1 All ER 779

[84] [1974] AC 765, [1974] 1 All ER 609, [1974] UKHL 1.

[85] See *International Transport Roth GmbH v. Secretary of State for the Home Department* [2003] QB 728, paras 81-87.

[86] Sec 22 (5) of Civil Contingencies Act 2004.

[87] Sec 27 of Civil Contingencies Act 2004.

[88] See *R v Secretary of State for the Home Department, Ex part Simms* [1999] QB 349; *R v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539; under common law see *Regina v Lord Chancellor, Ex parte Witham* [1998] QB 575; *R (Jackson) v Attorney General* [2005] UKHL 56.

Under section 19 HRA 1998, the Minister in charge of a Bill must make a statement that an Act is compatible with HRA 1998 or a statement about incompatibility. By this statement, the Minister takes the responsibility for this change. Under section 4 HRA 1998, courts can make a declaration of incompatibility between an Act of the Parliament and HRA 1998, but this is not a declaration of invalidity of the legislation. The legislation continues to be operative and enforced. This is only a signal that UK Parliament is acting in breach of its international law obligations; that is, inconsistently with its domestic rule of law obligation to adhere to commitments that bind the UK as a state in international law.

Before the adoption of the HRA 1998, under the Emergency Powers Act 1920, courts were quite flexible in the recognition of the compatibility of the restrictions of fundamental rights in times of emergency. They stuck to the willingness of Parliament and they limited their judicial review to the control of the unreasonableness of intervention (Morris 1979, 374). For instance, the limitation to the right to be heard by the Minister of the Crown was considered legitimate for reasons of national security.[89] Likewise, the House of Lords held compatible with common law and statutory law the lack of legal assistance in the police interrogation during the detention under the Prevention of Terrorism Act 1989.[90] The delay of legal assistance under section 15 (8) del Northern Ireland (Emergency Provisions) Act 1987 was considered legitimate and evidence gathered without the presence of barristers were considered lawfully acquired.[91] The Law Lords also held the legitimate suspicion sufficient to arrest someone without judicial authorisation under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984.[92] Likewise, the arrest, the seizure and the detention of a suspected terrorist without the communication of the reasons were considered legitimate under sections 14 and 21 del Northern Ireland (Emergency Provisions) Act 1978.[93]

After the adoption of the HRA 1998, significant problems of compatibility of emergency legislation with the protection of human rights started to emerge under domestic law. The most relevant case concerns the powers of the Home Secretary to detain foreign nationals without a trial under sections 21, 23 and 25 of the Anti-Terrorism, Crime and Security Act 2001. The problem was brought before the House of Lords in the Belmarsh case that held the power incompatible with the Convention of Human Rights.[94] As the power of indefinite detention was not removed, detainees act to recover compensation before the European Court of Human Rights.[95] Following this ruling, the House of Lords held that procedural rules should be interpreted as to ensure that the detainees have 'sufficient information about the allegation' and the Special Advocate could effectively

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[89] *R. v. Secretary of State for Home Affairs, ex parte Hosenball* [1977] 1 WLR 766.

[90] *R v. Chief Constable of the Royal Ulster Constabulary ex parte Begley* [1997] 1 WLR 1475.

[91] *R v Chambers (Richard)* (CA (Crim Div) (NI)), [1994].

[92] *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286.

[93] *Murray v Ministry of Defence* [1988] 2 All E R 521.

[94] *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.

[95] *A v United Kingdom* [2009] ECHR 301, (2009) 49 EHRR 29.

provide to the defence.[96] Only by the Prevention of Terrorism Act 2005 removed the incompatibility by introducing new instruments of executive restraint: non-derogating control orders, consistent with the Convention of Human Rights, made by the Home Secretary, and derogating control orders, which being inconsistent with the Convention of Human Rights could be imposed only by a court on the application of the Home Secretary. In 2010 the Supreme Court quashed a control order restricting the possibility to live in the same place of the family to avoid radicalization, because in exceptional cases this may infringe art. 5 of the Convention of Human Rights on the right to liberty and security.[97] This regime was abolished in 2011 thanks to a coalition agreement to urgently review counter-terrorism legislation (Bradley 2015, 555). The Terrorism Protection and Investigation Measures Act 2011 introduces as an alternative restrictive order the notice of terrorism protection and investigation measures (TPIM notice) to be issued under a series of conditions for a period up to one year.

Under section 20 (5) of the Civil Contingencies Act 2004, emergency regulations are required to carry a statement that the necessary statutory conditions are satisfied, and that the provision made by the regulations is proportionate and compatible with the European Convention on Human Rights. These limitations bind emergency regulations to the provisions of the Civil Contingencies Act 2004 and to the protection of human rights. Emergency regulations cannot amend the Civil Contingencies Act 2004, so that they cannot remove limitations to their scope. In addition, section 30 (2) of the Civil Contingencies Act 2004 treats emergency regulations as secondary legislation for the purpose of the HRA 1998. This means that even if they amend primacy legislation, they cannot infringe human rights and courts may strike down emergency regulations on human rights grounds.

6/ Do you think that any general or particular feature of your national special law-making procedures could be used at a European level for the management of urgent and/or exceptional circumstances?

Which criteria could be apt to guide this transposition?

The UK law-making procedure might represent a model at the European level, insofar as it does not have any special legislative procedure, but it rather adapts the ordinary legislative procedure to the necessity to deal with an emergency promptly. On the one hand, fast-track legislation expedites the ordinary bicameral legislative procedure without formally changing the allocation of powers. On the other hand, the Civil Contingencies Act 2004 is an ordinary statute which confers on the Government special powers to deal with emergency under the scrutiny of Parliament. Although the legitimacy of these regulatory choices rests upon the fundamental principle of Parliamentary supremacy, some key features might be compatible with the different framework of EU law.

[96] *Home Secretary v AF* [2009] UKHL 28, [2009] 3 All ER 643.

[97] *Home Secretary v AP* [2010] UKSC 24, [2011] 2 AC 1.

Legally speaking, fast-track legislation would be compatible with the timetable provided in the EU ordinary legislative procedure.[98] More specifically, the procedure under art. 294 TFEU might be expedite on the grounds that it only provides the maximum limits for the duration of the procedure, but it does not fix a minimum duration of parliamentary procedure. If there is a clear willingness to act, legislation could somehow be fast-tracked also at the EU level. However, the much more complex and fragmented political framework makes fast-tracking more difficult at the EU level. Lacking the national proximity between the Government and Parliament (at least, in the House of Commons), the decision to expedite the legislative procedure is subject to the agreement of the different Member States in the Council and the initiative of the Commission may not be decisive to persuade the Member States of the opportunity to accelerate the law-making process.

The identification of an umbrella type legislative act dealing with emergencies on the model of the Civil Contingencies Act 2004 appears to be more problematic, as at the EU level it should comply with the principles of conferral and institutional balance. The EU legislator is not sovereign in the same manner as UK Parliament is under the English Constitution, so it cannot act beyond the powers conferred on it by the Treaties. In addition, as long as the Court of Justice has jurisdiction on the acts of EU institutions, these powers would be subject to judicial review and they may fail to meet the allocation of powers as set in the Treaties. Nonetheless, it might be possible to imagine an EU legislative act delegating non-legislative powers to deal with emergency situations to the European Commission under articles 290-291 TFEU. In addition, under specific conditions also EU agencies might play a role in the regulation and management of an emergency.

7/ Do you think that under the current circumstances your national Government would be willing to grant competence for urgent and/or exceptional legislation to the EU?

Considering that on the 29th of March 2017 the UK has formally started the procedure for the withdrawal of its membership from the EU, this issue is not a relevant question anymore. No further conferral of competences from the UK to the EU is going to happen in the next future. However, it should be noticed that during the more than forty year of membership of the EU, the UK has always been careful in the transfer of competences to the supranational level. The UK opted out many EU key policies aimed to strengthen the integration, such as the Schengen Agreement on the abolition of border controls between Member States and the Economic and Monetary Union so that the UK maintained its own currency. The UK also had a flexible opt-out from the legislation adopted in the area of freedom, security and justice (AFSJ) and it negotiated a protocol on the limited application of the Charter of Fundamental Rights.

Even if the UK would have continued to be a member of the EU, probably it would not have accepted to confer a general power to deal with emergency/urgent situations to the EU, unless under circumscribed and controlled conditions.

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II. Potentialities of an urgent and/or exceptional law-making procedure at the European level

1/ How could an urgent and/or exceptional law-making procedure be established at the EU level?

In particular, could one use the current EU rules by broadening their scope of the application or is it necessary to introduce new provisions, exclusively destined to address urgent and/or exceptional circumstances?

Is a revision of the Treaties necessary or is it possible to reach a solution by means of secondary law? In the former case, would it be sufficient a simplified procedure according to the article 40 TEU?

The current framework of the Treaties does not include a general legislative procedure aimed to address urgent and/or exceptional situations. For the time being, only the ordinary legislative procedure may cover these situations. This reading is based on the assumption that ordinary legislative procedure does not designate the procedure used to legislate on ordinary situations, but the ordinary procedure used to legislate on any kind of situation.

It should be noted that accordance with art. 294 TFEU, the Commission holds the legislative initiative, but it may be argued that the Commission has not the necessary political legitimacy to identify on its own the exceptional and urgent situations where a common legislative action is needed. This is a highly political task that should be exercised either by the Council which carries out policy-making[99] or by the European Council which defines the general political directions and priorities of the EU.[100]

The allocation of competences in the Treaties would suggest that the Council should be the institution competent to identify an emergency as it retains legislative powers. This already happens in many fields of EU law. For instance, art. 2 (1) of Regulation 2016/369 on the provision of emergency support within the Union holds that in case of an ongoing or potential, natural or man-made disaster, the decision about the activation of the emergency support shall be taken by the Council on the basis of a proposal by the Commission, specifying where appropriate the duration of the activation. Likewise, in the different field of financial markets regulation, the founding regulations of the European Supervisory Authorities (ESAs) confer the power to determine the existence of an emergency on the Council, in consultation with the Commission and the ESRB and, where appropriate, the ESAs.[101]

To the contrary, in accordance with art. 15 (1) TEU, the European Council shall not exercise legislative functions. However, as Dougan (2008, 627) pointed out, the Treaties confer on the European Council significant powers 'to take legally binding decisions of "quasi-constitutional" or "high politics" nature', among which the definition of the

[99] Art. 16 TEU.

[100] Art. 15 TEU.

[101] Art. 18 of Regulation 1093/2010; 1094/2010; and 1095/2010

strategic interests and objectives of the Union in the field of external relations[102] and of the strategic guidelines for action within the Area of Freedom, Security and Justice.[103] It would not be inappropriate therefore to imagine a possible involvement of the European Council in the determination of the existence of an emergency where the very nature of the emergency is not clearly identified in the legislation, but requires high politics decisions.

If the power to declare the existence of an emergency is conferred on the Council, it may identify the emergency and (somehow) require the Commission to act. For instance, an inter-institutional agreement could require the Commission to exercise its right to legislative initiative when the Council identifies an extraordinary situation of necessity and urgency. According to art. 16 (3) TEU, the Council shall act by qualified majority voting (QMV), except where the Treaties provide otherwise. It is therefore possible that the decision about the existence of the emergency is shared only by a qualified majority of Member States. This would make the declaration more effective than the application of the unanimity rule, but it pays the trade-off that the decision may be less shared between the Member States.

If the power is allocated to the European Council, instead, the mandate to exercise the legislative initiative in exceptional or urgent cases can be given to the Commission in a special meeting of the European Council with the participation of competent ministers and competent members of the Commission, in accordance with art. 15 (3) TEU. According to Article 15(4) TEU, except where the Treaties provided and unanimity or QMV apply, the European Council shall reach decisions by consensus. In addition, an 'informal' invitation of the President of the Parliament to the special meeting of the European Council. This way the European Council's special meeting would become the very place where the decision is taken. Clearly, in the absence of a specific legal provision governing this urgent/exceptional legislative procedure, the more consensus about the necessity to act is reached, the more the procedure will be legitimate.

The procedure itself would consist of an acceleration of the ordinary legislative procedure. In fact, the introduction of a new fast-track legislative procedure would be incompatible with the current framework of the Treaties. However, if all the EU institutions involved agree, the time for the adoption of the legislative act could be significantly reduced, as art. 294 TFEU fixes the maximum time-limits for the development of the legislative process, but it does not fix any minimum time. This solution has been already used on some occasions, especially in financial market regulation: The International Accounting Standards (IAS) Regulation, the Transparency Directive, the 2009 CRD II revisions and the 2009 Regulation on Credit Rating Agencies (Moloney 2010, 1339). This fast-track law-making procedure basically consisted of the adoption of the legislation after the first reading of the European Parliament.

Although fast-track legislation risks to stretch the current framework of the Treaties, an expedite version of the ordinary legislative procedure could be applied, as in principle it does not substantively modify the allocation of powers between the EU institutions

[102] Art. 22(1) TEU.

[103] Art. 68 TFEU.

involved in the legislative process. Fast-tracking legislation presupposes strong cooperation among the Commission, the Council and the European Parliament. It would particularly require an inter-institutional agreement fixing the modalities of intervention, the details of the procedure and the reduction of the time for the adoption of the legislative acts. To ensure the possibility to fully debate on the legislative act before its adoption, in principle I would not exclude the possibility to have also a second reading within a close time-limit. A sort of precedent can be found in the UK system of fast-track legislation, which expedite but do not skip the normal readings. The problem with the adoption of EU legislative acts on the first reading is that it risks to shift the decision-making process 'from the formal inclusive to informal secluded arenas' (Reh, Héritier, Bressanelli and Koop 2013). The Council might strongly influence the decision-making process with limited chances of European Parliament to have a meaningful say.

Secondary law may also fix these rules and bind all the EU institutions to act in urgent/exceptional cases; however, this secondary legislation runs a high risk of being incompatible with the Treaties and being struck down by the Court of Justice. To avoid such a case, it would be therefore necessary that the procedure ensures the reach of consensus about the necessity to resort to the procedure. This clearly limits the effectiveness of the procedure itself and indirectly suggests that the fast-track can be used only in cases where it is self-evident that such necessity exists.

To introduce a general law-making procedure for an urgent/exceptional situation, it is therefore extremely advisable to revise the Treaties. By introducing a new legislative procedure, this revision would amend Part Six of the TFEU and the simplified procedure reserved to the revision of Part Three of the TFEU would not be applicable. The simplified procedure could be used only if a choice to limit the material scope of the fast-track legislative procedure to internal policies and action of the EU is made. This would mean that the fast-track procedure would be an ad hoc instrument used to regulate urgent/exceptional situations that may arise in a specific policy area, and not a general instrument at disposal of the EU legal order. The definition of the goal and the scope of the fast-track legislation is therefore preliminary to the identification of the method for the Treaties' revision.

2/ Which cases are to be considered as "urgent" and/or "exceptional" in the EU legal order?

Is it necessary to distinguish between "urgent" and/or "exceptional" cases?

Are there any sensitive domains that should be excluded from the application of urgent and/or exceptional EU law-making procedures?

Emergency is a critical situation that cannot be effectively faced through the ordinary means at disposal of a legal order. For this reason, extraordinary powers need to be introduced to restore ordinary course. The legal element of the introduction of extraordinary powers is connected to the substantive fact of the unpredictability of the situation under the existing law. In this sense, exceptionality differs from urgency: the former identifies an unpredictable situation, where the latter may be associated to both an exceptional case and an ordinary case that for some reasons requires to be addressed

quickly. Emergencies are generally characterized by both unpredictability and urgency, as delays may aggravate the situation.

The legal understanding of the relationship between law and facts is key to define the kind of instruments that can be introduced to face the emergency. If facts are to be considered as a source of law or as a premise of law-making, the legislator should be able to adopt laws that respond to an emergency. If law is considered as the source that shall regulate facts, then emergency powers are generally granted to the Government so that it can tackle emergencies in advance.

Broadly speaking, the former conception may be identified in the UK system of fast-track legislation, whereas the latter may resemble the Italian system of decreti-legge. As Mortati pointed out during the adoption of the Italian Constitution, the introduction of a general clause covering the extraordinary cases of necessity and urgency is more effective than a list of matters and cases where such intervention can be required. To make these measures to work effectively, some flexibility in the recognition of the cases is needed. This is also because the nature and the reach of an emergency is not predictable. If law aims to cover these phenomena effectively, it should be prepared to the unexpected.

As far as the EU legal order is concerned, the first issue to disentangle is therefore what kind of relationship between law and facts EU law designs. The complexity of the EU legal order and the peculiar distribution of public powers makes this investigation particularly difficult. The principle of conferral and the balance of powers[104] restrict the possibilities to act and implied powers to act where necessary to the achievement of the EU objectives may operate only in internal market.[105]

EU Treaties do not envisage a general system of emergency regulation that allocates general emergency powers to the executive, but it may identify specific powers to act in emergency under specific policies. For instance, in the area of immigration and asylum, art. 78 (3) TFEU considers the possibility of an emergency situation characterized by a sudden inflow of nationals of third countries in the Member States and gives the Council the power to adopt -on proposal of the Commission and in consultation with the European Parliament- provisional measures for the benefits of the concerned Member States.

This suggests that the EU approach to emergencies is a case-by-case one, where only punctual provisions may empower EU institutions to face emergencies. In addition, as the sovereignty of the EU is limited to the conferred competences, it may also be possible that the EU has not the legal competence to tackle an emergency.

Today's major emergencies in the EU have been immigration, terrorism and the financial crisis; tomorrow, probably the relation between humans and robots can give rise to new emergencies. So far, the instruments provided in the Treaties have proven to be ineffective to tackle the current crises. Issues of legal competences, procedures and

[104] Art. 5 and art. 13 TEU.

[105] Art. 352 TFEU.

political strategies have made them weak instruments in the management of crises and intergovernmental solutions have been adopted.

Urgent and exceptional matters do not receive a distinct treatment under the current framework of the Treaties. However, if urgent matters might be addressed by somehow speeding up ordinary procedures, new exceptional powers cannot be introduced without infringing the constitutional setting of the Treaties. A Treaty revision would be necessary to endorse new powers that may change the institutional balance of the conferred competence to tackle emergency situations.

3/ Can you suggest a possible model for urgent and/or exceptional EU law-making procedures?

In particular, what would be the different phases of such procedures, the institutions involved and their respective roles as well as the applicable timetable for the issuing of an urgent and/or exceptional EU regulatory measure?

The introduction of a fast-track legislative procedure for emergency situations in the EU should keep into account the ordinary framework of competences and modify it as much as strictly necessary to effectively manage the emergency in question.

The first sensitive issue in such a procedure would be the identification of the emergency itself. The institution retaining the power to identify the emergency, in fact, would retain the power to activate the emergency law-making procedure. Being this a highly political task, the EU framework of powers suggests that the Council or the European Council should be empowered with the responsibility to identify the emergency that needs to be tackled. This would also allow to reach a political agreement between the different Member States about the opportunity to take a common action to face an emergency. The Council or the European Council should contextually define the guidelines and the priorities about how to cope with the emergency and should require the activation of the emergency law-making procedure to manage the crisis.

The articulation of this law-making procedure would reflect the approach of the EU to exceptional situations. Considering the particular nature of the EU legal order as a Union of Member States, I think that it should aim to make EU institutions participate as much as possible. The key issue is therefore how to reconcile the need to act with urgency and effectiveness with the counter-need to reach a reasonable and shared approach to the emergency management. This is a question that is at the core of every emergency legislative procedure and that necessarily involves a trade-off between the two competing interests.

The model of fast-track legislation would be able to maintain the current balance of powers, as it forces the time schedule of the legislative process, but does not substantively alter the competence to legislate. The leading role of the Government in fast-track legislation would be performed by the Council or the European Council who identify the emergency.

The procedure would expedite the ordinary legislative procedure laid down by art. 294 TFEU, by ensuring that both the Council and the European Parliament as co-legislator participate in the approval of the emergency legislation. As examined under the UK case, it would be advisable that fast-tracked legislation includes sunset clauses or renewal

procedures that ensure that the emergency intervention is still necessary and tailored on the changed circumstances of the case. If the crisis is rationally managed and kept under control, the renewal procedure may also follow the ordinary legislative procedure, so that a more thorough reflection on the opportunity to maintain emergency measures can be conducted in both the European Parliament and the Council. This would help to avoid that emergency becomes a permanent state (Dyzenhaus 2001) and goes beyond the necessary period to reverse the exceptional situation, or 'a form of governance and a way of ruling' to be apply to critical situations yet pertaining to the ordinary (Ophir 2007), also to speed the decision-making process (White 2015).

4/ What kind of control is to be provided for the eventual urgent and/or exceptional EU law-making procedures and measures?

Would you consider a system of judicial review or rather a system of political accountability?

In what terms should either system operate?

The system of emergency legislation aims to provide a fast-track procedure for the adoption of still ordinary legislation that applies during emergencies. This means that there should be no suspension of the Treaties and of the ordinary functioning of the Union. Emergency measures should be maintained within the framework of the Treaties and in accordance with the rule of law. This means that the application of the system of judicial review should always be guaranteed. The intensity of the judicial scrutiny, however, may be adjusted to recognition of the highly political nature of the measures at stake and the discretion of political institutions to decide how to cope with an emergency. The Court of Justice already does this, as its standard of judicial review is generally based on the manifest error of assessment.

If the Court of Justice may easily review the procedure followed in the adoption of fast-track legislation and the conformity to the general principles, its scrutiny on the existence of an emergency may be particularly problematic. Necessarily some discretion needs to be recognised to the political institutions about the existence of an emergency. In some cases, the Court of Justice has already done this. For instance, in *Denise McDonagh v Ryanair Ltd*,[106] the Court of Justice was called to interpreted the meaning of 'extraordinary circumstances' under Articles 5 (1) (b) and 9 of Regulation 261/2004/EC establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. In the preliminary ruling, the Court clarified that the closure of airspace as a result of the Icelandic volcanic ash crisis comes under the notion of 'extraordinary circumstances' and therefore the air carrier, Ryanair, was obliged to provide care to passengers. According to the Court, in everyday language extraordinary circumstances cover all the events that are out of the ordinary and therefore beyond the control of air carriers, with no exception about the nature, cause and gravity of the extraordinary event.[107] In the absence of a legal

[106] C-12/11, ECLI:EU:C:2013:43.

[107] C-12/11, para 29.

definition of emergency, the Court of Justice would rely on its everyday meaning and take into account the context of the case and the purposes of the rules.[108]

This approach to emergency as something out of the ordinary and beyond control is (necessarily) so broad that it restricts the chances of the Court of Justice to strike down fast-track legislation because the competent EU institution(s) wrongly assessed the circumstances of the case as being an emergency. For this reasons, it is important that emergency legislation is backed-up by a system of political accountability that keeps the risk of abuses under control and ensures the allocation of responsibilities.

The emergency law-making procedure should therefore ensure that the decision about the existence of an emergency can be regularly revised by the legislative power through the introduction of sunset clauses and renewal procedures. The fact that the decision about the existence of an emergency and the general framework for action are adopted in the Council or in the European Council ensures the participation of the Member States in the reach of a political agreement on the decision-making process. This structures an accountability system between the Member States and these EU institutions that keeps the emergency action under the control of the States.

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