Governments as Covid-19 Lawmakers in France, Italy and Spain

Continuity or Discontinuity

Elena Griglio[*]

Abstract

Executive dominance in Covid-19 lawmaking has been a major trend worldwide. Governments have leveraged emergency prerogatives to boost their legislative powers, often sidelining the role of parliaments. The impact of executive lawmaking on fundamental liberties has been unprecedented. However, government's capacity to exercise full legislative powers is not absolutely new to many European countries.

This trend is analysed in the article comparing practices in the pandemic and in normal times, not specifically related to a state of emergency. To this end, three countries have been selected because of their constitutional clauses allotting lawmaking powers to the government even outside of emergency situations. This refers to the decree-laws in Italy and Spain and the ordonnances in France. The question addressed is whether there are relevant differences in the use made of these mechanisms during the pandemic.

The results of this comparative analysis demonstrate that there is much continuity in the executive's reliance on these mechanisms. However, discontinuity may be detected on the ground of the exceptional impact produced on constitutional rights and on the substantive values that legislation should protect. Therefore, from the perspective of the rollback of the emergency legislation, the role of parliaments, based on the core difference in the democratic status between lawmaking and legislation, turns out to be crucial.

Keywords: Covid-19, emergency legislation, executive lawmaking, parliaments, decree-laws and ordinances.

* Elena Griglio is Senior Parliamentary Official of the Italian Senate and Adjunct Professor at LUISS University, Rome.

European Journal of Law Reform 2020 (22) 4
doi: 10.5553/EJLR/138723702021022004006

A Introduction. Executive Dominance in Covid-19 Lawmaking: General Trends

Executive dominance in Covid-19 lawmaking has been a major trend worldwide.[1] In order to cope with the rapid spread of the pandemic, governments have leveraged emergency prerogatives to boost their legislative powers and maximize the scope of their statutory instruments, producing an unprecedented impact on fundamental liberties.

The participation of representative assemblies in decision-making has been confined in scope – since many urgent governmental measures were adopted bypassing legislatures – and in their room for manoeuvre, since their legislative prerogatives were reduced to little more than ratifying executive proposals.[2]

However, government's capacity to exercise full legislative powers is not absolutely new to many European countries. In the last few decades, representative assemblies have been marginalized at least in their traditional role as legislators and decision makers.[3] The collapse of the traditional architecture of the separation of powers,[4] the increased technical complexity of regulatory issues and the transformation of European governance, with its expanding penetration into national constitutional systems[5] and the rise of a 'new intergovernmentalism',[6] have favoured the shift of core lawmaking from the legislative to the executive branch.[7]

These trends have gained further momentum under the pandemic. The unprecedented nature, scope and impact of the Covid-19 emergency have necessitated quick and flexible measures that can provide immediate legislative responses to urgent health, social and economic needs, to which parliaments would hardly have been able to provide an adequate answer.[8] The formality and complexity of their decision-making procedures, based on the participation of a remarkable number of MPs, was clearly challenging the limits posed by the virus

1 T Ginsburg and M Versteeg, 'Binding the Unbound Executive: Checks and Balances in Times of Pandemic' (2020) *Virginia Public Law and Legal Theory Research Paper* 2020-52 and (2020) *University of Chicago Public Law Working Paper* 747; M Steinbeis, 'Sancta Corona, ora pro nobis' (*VergBlog*, 27 March 2020).

2 A Fourmont and B Ridard, 'Parliamentary Oversight in the Health Crisis' (2020) 558 *European Issues* 1ff.

3 M Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) 39 *OJLS* 435, 442.

4 T Ginsburg and AZ Huq, *How to Save a Constitutional Democracy* (Chigaco, University of Chicago Press, 2018) 10 ff.

5 S Dullien and JI Torreblanca, 'What is Political Union?' (2012) 70 *European Council on Foreign Relations* 2.

6 CJ Bickerton, D Hodson and U Puetter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford, OUP, 2015).

7 J Blondel, *Comparative Legislatures* (Englewood-Cliffs, Prentice-Hall, 1973) 11ff; DM Olson and P Norton, 'Legislatures in Democratic Transition' (1996) 2 *Journal of Legislative Studies* 1, 7; SM Saiegh, 'Lawmaking' in S Martin, T Saalfeld, and KW Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford, OUP, 2014). U Karpen, 'Comparative Law: Perspectives of Legislation' (2003) 17 *Anuario Iberoamericano de Justicia Constitucional* 145.

8 C Möllers, 'Über den Schutz der Parlamente vor sich selbst in der Krise' (*VerfBlog*, 20 March 2020).

containment measures.[9] Moreover, information asymmetries and lack of technical capacity was preventing parliaments from acting as emergency first responders and collectors of regulatory and administrative rescue measures.

A question therefore arises in regard to what is surprising and unprecedented in the allotment of the bulk of the anti-Covid-19 legislative decisions at the executive level, given that similar trends were already detectable in many countries.

To answer this question, the article analyses the role of governments as Covid-19 lawmakers, comparing these trends with pre-existing practices, not specifically related to a state of emergency. To this end, three countries have been selected because of their constitutional clauses allotting lawmaking powers to the government even outside of the state of exceptions. This is the case for the decree-laws in Spain and in Italy and the *ordonnances* in France. The question addressed is whether there are relevant differences in the use made of these mechanisms before and during the pandemic.

After a general overview of the trends related to the use of these legislative tools before the pandemic (§ 2), the comparative analysis focuses on the adoption of the major anti-Covid decree- laws and ordinances in Spain (§ 3), France (§ 4) and Italy (§ 5) and on the related legislative outcomes, focusing on: a) the role of parliament in the legislative proceedings; b) the impact on the overall legal framework; c) the relationship with the statutory instruments; d) the respect of quality legislation standards and pre-legislative procedures.

The conclusions will draw some provisional insights into the interaction of executive anti-Covid legislation with constitutional and rule of law safeguards and with the purposes of quality legislation.

B Lawmaking in Government: Comparing the Use of Decree-Laws and Ordinances in Spain, France and Italy

Many Constitutions envisage the possibility that the government might be allowed to exercise lawmaking powers in exceptional or urgent circumstances, not necessarily associated with a state of emergency. This is the case for Spain, France and Italy. These countries acknowledge different tools that – irrespective of their formal name – substantially differ in the enabling circumstances, in the related procedures and in the role allotted to parliament.

The Spanish Constitution (Art. 86) allows the government to adopt, in cases of extraordinary and urgent necessity, temporary legislative provisions in the shape of a decree-law.[10] The decree-law must be immediately submitted to the

9 On this argument, E Griglio, 'Parliamentary Oversight Under the Covid-19 Emergency: Striving Against Executive Dominance' (2020) 8 *The Theory and Practice of Legislation* 49 ff. and N Lupo, 'L'attività parlamentare "in tempi" di coronavirus' (*SOG Web Academic Seminars*, 30 March 2020).

10 Ex multis, J Salas, *Los decretos-leyes en la Constitución Española de 1978* (Madrid, Civitas, 1979) 29 ff; J Pérez Royo, *Fuentes del Derecho* (Madrid, Tecnos, 1988) 113 ff; P Santolaya Machetti, *Régimen constitucional de los decretos-leyes* (Madrid, Tecnos, 1988) spec 105 ff; F Callejón Balaguer, *Fuentes del Derecho*, II (Madrid, Tecnos, 1991) 74 ff.

European Journal of Law Reform 2020 (22) 4
doi: 10.5553/EJLR/138723702021022004006

lower House, the *Congreso*, which in the next 30 days will have to decide whether to validate or repeal the act. In the same time frame, after the decree is validated, both Houses can decide to turn the decree-law into a draft law that can be debated and, if required, amended.

This tool, originally conceived for exceptional circumstances, has become in the constitutional practice the standard way of legislating. It has prevailed over fast-tracked legislative procedures in parliament, which play a rather marginal role.[11] On average, around 25% of the legislative acts adopted in Spain are decree-laws; standard rates show that more than one decree-law is adopted every month; records of 26 decrees in 1981, 29 in 1997 and in 2012 have been reached.

These trends have been possible because the appreciation of the enabling circumstances is entirely left to the political consideration of the government.[12] Compared with the state of emergency conditions envisaged by Article 116 of the Constitution, Article 86 actually supports wider margins of interpretation. Any necessity referred to the pursuit of governmental commitments that need to find a legislative solution in a shorter delay than the one allowed by parliamentary legislative procedures can legitimately be covered through a decree-law.[13]

The main criticism against this practice relates to the strong limitation of political and legal controls. The political control of the *Cortes Generales*[14] has only occasionally led to a formal rejection,[15] and decree-laws are rarely turned into laws.[16] The *Congreso* is forced to validate or reject as a whole a single act that may cover rather different policy issues, only partially justified by extraordinary and urgent necessity. Moreover, internal and external controls on the legislative text are extremely limited: only in very few cases[17] has the legal control by the constitutional tribunal[18] led to a declaration of unconstitutionality; unlike ordinary draft laws, the decree-laws are not subject to the standard pre-legislative scrutiny procedures, and they are not submitted to the council of state in its capacity as supreme consultative body.[19]

11 The reference is to the urgency procedure or single reading procedure, respectively, envisaged by Arts. 94 and 150 of the *Congreso* Rules of Procedure. *See* Y Gómez Lugo, 'Decreto Ley versus Ley parlamentaria: Notas sobre el uso de la legislación de urgencia' (2013) 4 *Eunomía. Revista en Cultura de la Legalidad*.

12 Spanish Constitutional Tribunal, STC 29/1987. *See* M Carrillo, 'Decreto ley, ¿excepcionalidad o habitualidad?' (1987) 11 *RCG* 68.

13 Spanish Constitutional Tribunal, STC 6/1983.

14 *Cortes Generales* is the name given to the Spanish parliament, inclusive of the lower and upper House.

15 Over the decades, only four decree laws have been rejected by the *Congreso*. In two cases, the decrees were resubmitted to the *Congreso* and were finally ratified under the second scrutiny.

16 For an overview of these trends, E Arana García, 'Uso y abuso del decreto-ley' (2013) 191 *Revista de Administración Publica* 365 ff. L Martín Rebollo, 'Uso y abuso del Decreto-Ley (un análisis empírico)' (2015) 174 *Revista Española de Derecho Administrativo* 23 ff.

17 STC 68/2007 and STC 137/2011.

18 STC 29/1982. On the difference between the legal control and the political scrutiny in parliament, *see* the STC 182/1997.

19 A Segovia Marco, '¿Se produce un abuso del real decreto-ley por parte de los gobiernos?' (*El Derecho*, 28 January 2019).

A different role is allotted to the French parliament in the proceeding that enables the government to adopt, by means of an ordinance, measures normally reserved for the domain of legislation[20] (Art. 38 of the French Constitution). Parliament is expected to give its authorization ex ante, through the approval of an authorization law. After its entry into force, the ordinance is adopted in a collegial meeting of the council of ministers and promulgated by the president of the republic.[21]

Parliament is also supposed to intervene ex post, through the scrutiny of the ratification bill submitted by the government in the term fixed by the authorization law. If the government fails to respect this deadline, the ordinance loses its effect. The draft bill is debated in parliament and can lead either to the ratification of the ordinance, which thus processes into law, or to its rejection, with the re-establishment of the pre-existing legal framework. The ratification of the ordinance must be explicit: this requirement was introduced by the 2008 constitutional amendment reacting to the pre-existing practice, supported by the jurisprudence of the council of state,[22] that admitted the implicit ratification of the ordinance by amendments introduced through a statutory law.[23]

Whereas this tool was conceived as a derogation from the separation of powers,[24] it has recently acknowledged a sort of 'inflation'[25] and 'trivialization'.[26] Some scholars have pointed to several misalignments with the original conception and design of this source of law:[27] the increasing time lapse from the submission of the authorization bill to the adoption of the ordinance, which is longer than the average period required for the approval of a statutory law; the concentration in a single act of several authorizations to legislate by means of ordinances,[28] which has produced legal instability;[29] the delays and omissions in the scrutiny of ratification bills.

On the whole, the main criticism against this practice lies in the marginalization of the role of parliament,[30] which does not find a limit in the jurisprudence of the *Conseil constitutionnel*. The latter has validated the

20 JL Pezant, 'Loi/règlement, la construction d'un nouvel équilibre' (1984) 34 *Revue français de science politique* 922 ff. B Mathieu, 'La part de la loi, la part du règlement. De la limitation de la compétence réglementaire à la limitation de la compétence législative' (2005) 114 *Pouvoirs* 73.

21 On the nature and limits of the presidential power of promulgation, M Troper, 'La signature des ordonnances – Fonctions d'une controverse' (1987) 41 *Pouvoirs* 76 ff.

22 *See* C Castaing, 'La ratification implicite des ordonnances de codification' (2004) 58 *Revue française de droit constitutionnel* 275 ff.

23 The explicit ratification of the ordinances was informally started even before the 2008 reform, to inflate legal certainty, *see* Sénat, Les ordonnances prises sur le fondement de l'article 38 de la Constitution (*Rapport de la direction de la Séance du Sénat*, February 2014).

24 AM Le Pourhiet, *Les ordonnances, la confusion des pouvoirs en droit français* (Paris, LGDJ, 2011).

25 After a limited use in the first 30 years (158 ordinances from 1960 until 1990), the number of ordinances escalated rapidly: since 2007, the average is of 43 ordinances per year, with a record of 81 ordinances in 2017.

26 JM Sauvé, 'La législation déléguée' (*Conseil d'État*, 6 Juin 2014).

27 Sénat, 'Bilan de l'application des lois au 31 mars 2020' (*Rapport d'information no 523*, 2019-2020).

28 M Guillaume, 'Les ordonnances: tuer ou sauver la loi?' (2005) 114 *Pouvoirs* 117 ff.

29 Sénat, 'Bilan de l'application des lois' (n 27).

30 P Devolvé, 'L'été des ordonnances' (2005) *RDFA* 909.

European Journal of Law Reform 2020 (22) 4
doi: 10.5553/EJLR/138723702021022004006

enlargement in the number and scope of the authorizations;[31] it has argued that through the authorization the government must tell the parliament the purposes of the measures to be adopted, but not the content of the policy options;[32] it has admitted that the 'urgency' as 'enabling' cause may also consist in the need to overcome the congestion of parliamentary agenda.[33]

Finally, Article 77 of the Italian Constitution allows the government to adopt provisional decrees having the force of law in extraordinary situations of necessity and urgency. The decree-laws must immediately be submitted to the two Houses in order to be converted into law within the following 60 days; in case of no conversion, the decrees lose their effects from the beginning, but the parliament can regulate the legal consequences produced meanwhile. Unlike the Spanish experience, the conversion of the decree-law in parliament involves both Houses and supports a complete political scrutiny of the text submitted,[34] which includes the tabling and voting of amendments.[35]

Whereas in the constitutional design the decree-laws were expected to cover exceptional circumstances, in practice they have become the standard way of legislating, independently of real urgency and necessity conditions. Moreover, the fast-tracked nature of the conversion procedure, lasting no longer than 60 days, has pushed MPs to use this window of opportunity to have their proposals approved in the shape of amendments. This has produced a significant increase not just in the overall number of decree-laws adopted by the government,[36] but also in their final size and scope after the conversion.[37]

In reaction to the increasing number of parliamentary amendments, since the VIII legislative term (1979-1983) the government has developed a procedural safeguard that, through a vote of confidence, overcomes the debate and vote of all amendments. This has become a recurring practice: after being debated in committee, where several amendments might be approved, the decree-laws are submitted to the plenary, where the government poses a vote of confidence on

31 Décision 2003-473 DC, 26 June 2003 and 2004-506, 2 December 2004.

32 On this point, Conseil constitutionnel, Décision 76-72 DC, 12 January 1977 and 86-207 DC, 25 and 26 June 1986.

33 Conseil constitutionnel, Décision 99-421, 16 December 1999 and no 2017-751, 7 September 2017. On this argument, *see also Cahiers du Conseil constitutionnel* no 15 sur décis. 2004-473 DC.

34 L Paladin, 'In tema di decreti-legge' (1958) *Rivista trimestrale di diritto pubblico* 544 and A Panetta, 'Il problema degli emendamenti in sede di conversione in Parlamento' (1981) 6-8 *Parlamento* 26.

35 This issue has been intensively debated in the literature: against the possibility to submit amendments, C Esposito, 'Decreto-legge', XI, in *Enciclopedia del diritto* (Milano, Giuffrè, 1962) 849 ff and V Crisafulli, *Lezioni di diritto costituzionale* (Padova, Cedam, 1970) 90. The practice has confirmed the opposite thesis, supported by V Di Ciolo, *Questioni in tema di decreti-legge* (Milano, Giuffrè, 1970) 369 and S Labriola, 'Questione di fiducia e disegno di legge di conversione: note critiche' (1980) *Giurisprudenza costituzionale* 1385.

36 The monthly rate of decree-laws increased from 0.5 to 1 in the first three republican legislative terms until 6 in the VIII legislative term (1979-1983) and then decreased after 1996, when the constitutional court (Sent. no. 396/1996) blocked the manifest abuse of the reiteration of the decree-laws. *See* www.senato.it/leg/17/BGT/Schede/Statistiche/Leggi//DecretiLegge Emanati .html.

37 In the XVII legislative term, 80% of the decree-laws were converted with amendments.

the approval of a maxi-amendment resuming the whole text of the decree, with the amendments approved in committee. This procedure can be reproduced in both Houses.[38]

These trends have invited deep criticism from constitutional scholars as they enable the adoption of decree-laws covering extremely heterogeneous matters,[39] which are only partially scrutinized by MPs. The constitutional court has tried to limit some of these deviations by stating that not just the decree-law adopted by the government, but also the law of conversion approved in parliament, must be homogeneous.[40] At the same time, however, the court has still not explicitly ruled the unconstitutionality of the maxi-amendment practice, which is nonetheless defined as 'problematic'[41] because it inhibits a specific debate and a due deliberation on the single aspects of the legislative text.[42]

C Decree-Laws in Spain as the Dominant Covid-19 Legislative Response: The Sidelining of Parliament

Decree-laws have represented the main legislative tool during the *estado de alarma* declared by the Spanish government under Article 116 of the Constitution and the Organic Law 4/1981 of 1 June 1981 to face the consequences of the Covid emergency.[43] From 10 March 2020 until the beginning of August, the Spanish government adopted 22 decree-laws,[44] one every week, all of which have been

38 In the current legislative term (started in March 2018), the average rate of decrees/month is around 1.6, covering 34% of the legislative production. During the conversion, the normative content of the decree almost doubles. 45% of the decree-laws submitted for conversion are approved through a vote of confidence. Servizio Studi – Osservatorio sulla legislazione, *Rapporto 2019-2010 sullo stato della legislazione* (Roma, Camera dei Deputati, 2020) 31 ff.

39 Sometimes the decrees are heterogeneous from the beginning, as in the case of the so-called 'decree-law omnibus'; *see* A Simoncini, *Le funzioni dei decreti legge. La decretazione d'urgenza dopo la sentenza n. 360/1996 della Corte costituzionale* (Milano, Giuffré, 2003) 454-455 and N Lupo, 'Decreto-legge e manutenzione legislativa: i c.d. decreti-legge "milleproroghe"', in A Simoncini (ed), *L'emergenza infinita: la decretazione d'urgenza in Italia* (Macerata, Edizioni Università di Macerata, 2006) 173 ff. In other cases (R Di Cesare, 'Omogeneità del decreto-legge e introduzione di deleghe legislative' (2005) 4 *Giurisprudenza costituzionale* 867 ff), the heterogeneity is introduced during the parliamentary conversion.

40 Constitutional Court, Sentence no. 22/2012 and no. 32/2014.

41 Constitutional Court, Sentence no. 251/2014, at 5.

42 Constitutional Court, Sentence no. 32/2014, at 4.4. *See* V Di Porto, 'La "problematica prassi" dei maxi-emendamenti e il dialogo a distanza tra Corte costituzionale e Comitato per la legislazione', in V Lippolis e N Lupo (eds), *Il Parlamento dopo il referendum costituzionale. Il Filangieri. Quaderno 2015-2016* (Napoli, Jovene, 2017) 113 f. On Constitutional Court, Ordinances no. 17/2019 and no. 60/2020, *see* N Lupo, 'I maxi-emendamenti e la Corte costituzionale (dopo l'ordinanza n. 17 del 2019)' (2019) 1 *Osservatorio sulle fonti*.

43 Royal decree 463/2020 of 14 March, introducing the state of alarm, prorogued six times.

44 From the decree-law no. 6/2020 dated 10 March until the decree-law no. 27/2020 of 4 August.

European Journal of Law Reform 2020 (22) 4
doi: 10.5553/EJLR/138723702021022004006

validated in due time. However, the *vote bloqué* asked to MPs has not allowed the *Congreso* to play a significant role.[45]

In the same period, no ordinary law was approved in parliament. The government has made extensive use of the regulatory powers allowed by the state of emergency,[46] adopting over six decrees, 120 ministerial ordinances and around 80 ministerial resolutions, which have often challenged the limits posed by Article 11(a) the Organic Law 4/1981:[47] the latter allows the executive acts to limit (but not to suspend) the freedom of movement.[48]

This hyper normative production by the executive marks a record when compared with pre-existing practices, which has already seen a gradual increase in the use of decree-laws.[49] Two concomitant factors may help explain this trend: the unprecedented nature of the emergency at stake; the absolute novelty of a coalition government that finds in parliament unfavourable party conditions.[50]

This way of legislating has raised several problems. First, problems of transparency and participation have featured the adoption of decree-laws: published in the Official Journal to produce their effects the day after, they were debated and voted in camera by the council of ministers with no previous announcement and no right to access to the decision-making proceedings.

Second, decree-laws and executive regulatory acts have often challenged the basic requirements of legal drafting as well as of legal certainty and knowability: they have included heterogeneous provisions not fully consistent with the policy issues at stake; they have been subject to ongoing adjustments, thus making it hard for citizens to know which provisions are applicable; the issue of their temporal validity alongside the state of alarm has raised several doubts.[51]

Third, the anti-Covid executive lawmaking has resulted in a complete marginalization of parliament. The *Cortes Generales* have been prevented from scrutinizing the legislative measures singularly. The time devoted by the *Congreso* to the debate and vote of the decree-laws has been extremely limited, following a rather formalistic procedure.[52] Parliamentary minorities have been given no real

45 Only for the decree-law submitted on 9 June 2020 and regulating the rollback of emergency measures, the approval by absolute majority in the *Congreso* was conditioned on the contextual submission of a draft bill.

46 A Nogueira López and G Doménech Pascual, 'Fighting COVID 19 – Legal Powers and Risks: Spain' (*VerfBlog*, 30 March 2020).

47 MA Presno Linera, 'Beyond the State of Alarm: COVID-19 in Spain' (*VerfBlog*, 13 May 2020). D Fernández de la Gatta Sánchez, 'Los problemas de las medidas jurídicas contra el coronavirus: las dudas constitucionales sobre el Estado de Alarma y los excesos normativos' (*Diario La Ley*, 6 May 2020).

48 On this point, *see* the action of unconstitutionality raised by the 52 deputies of Vox against the decrees on the state of alarm, Tribunal Constitucional, STC 7/2012 and 83/2016.

49 The Sánchez government has doubled the statistics of his socialist predecessors in the absolute and relative number of decree-laws adopted.

50 J Escudero, 'Un nuevo 'decretazo' cada semana: Sánchez bate su proprio récord a raíz del coronavirus' (*El Confidencial*, 29 June 2020).

51 R Rincon, 'El estado de alarma: un bosque de 209 normas exceptionales' (*El País*, 17 May 2020).

52 *See* Arts. 151 and 74.2. *Congreso* Rules of Procedure.

guarantee to have their position considered by the government.[53] It can therefore be argued that the ratification of the decree-laws has formally safeguarded the appearance of parliamentary control, but with no real power to influence executive decision-making.[54]

It might be questioned whether this way of legislating is consistent with the constitutional order. In fact, in the last decade the constitutional tribunal has loosened its interpretative criteria on the enabling circumstances. The presence of a 'concrete situation of recession and economic, financial, real crisis'[55] is in itself considered a sufficient and reasonable justification for activating the Article 86 Const. clause. This jurisprudence has *de facto* legitimated the transformation of the crisis into a 'state of exception' that enables the government to legislate exclusively through decree-laws.

D The Use of Ordinances in France During the Pandemic: Parliament Fighting to Safeguard Its Prerogatives

In France, as in Spain, the Covid crisis has enabled the executive to exercise extensive regulatory powers. The first period of the pandemic has seen a reactive parliament that, in less than two months, from mid-March until mid-May 2020, has approved five strategic laws.[56]

Among them, the Law of 23 March 2020, adopted in five days through the urgency procedure,[57] declared a state of health urgency under the public health code[58] for the following three months, authorizing the government to legislate through ordinances in several policy areas.[59] In response to these authorizations, 60 ordinances (which represent a record for the V Republic), numerous decrees and deliberations were adopted.[60] A second 'package' of authorizations was

53 AM Carmona Contreras, *La configuración constitucional del decreto-ley* (Madrid, CEPC, 1997) 232 ff.

54 On the relevance of parliamentary control in terms of influence, *see* I Sarasola, 'El control parlamentario y su regulación en el ordenamiento español' (2000) 60 REDC 96 ff.

55 Tribunal Constitucional, STC 18/2016 (FJ 5). *See also* the SSTC 12/2015, 81/2015, 91/2015. In literature, AM Carmona Contreras, 'El decreto-ley en tiempo de crisis' (2013) 47 *Revista catalana de dret public* 3 ff; P García Majado, 'El presupuesto habilitante del decreto-ley ante la crisis económica' (2016) 25 *Revista de Derecho Constitucional Europeo.*

56 Law no. 2020-289 of 23 March 2020 and no. 2020-473 of 25 April 2020 (Rectifying Finance Acts) and Organic Law no. 2020-365 of 30 March 2020.

57 Law no. 2020-290 of 23 March 2020, see also the Law no. 2020-546 of 11 May 2020, which prorogued the state of health urgency. On the fast-tracked approval of the law as a sign of the weakness of the French parliament, C Haguenau-Moizard, 'Governing Through Fear in France: The Pandemic, Parliament and Citizens' Rights in France' (*VerfBlog,* 1 April 2020).

58 Art. L. 3131-1 of the Public Health Code. *See* O Beaud and C Bargues, 'L'état d'urgence sanitaire: était-il judicieux de créer un nouveau régime d'exception' (*Recueil Dalloz*, April 2020).

59 Art. 11 of the Law no. 2020-290.

60 Sénat, 'Contrôle de l'application de la loi d'urgence pour faire face à l'épidemie de covid-19' (last adjourned 3 August 2020), available at: www.senat.fr/application-des-lois/pjl 19-376.html#nonreg.

European Journal of Law Reform 2020 (22) 4
doi: 10.5553/EJLR/138723702021022004006

introduced by the Law of 17 June 2020,[61] a 'catch-all' law[62] formally directed at facing the uncertainties related to the health crisis, but *in concreto* acting as a broom-wagon for legislating through ordinances in several fields, not necessarily related to the pandemic.

The health urgency regime had already been activated several times in France,[63] opening to the adoption of rather intrusive executive measures justified by the doctrine of the 'state of exceptional circumstances'.[64] However, under the Covid crisis the deviations from the optimal legislative standards were brought to their extreme consequences.[65] Only parliament was able to limit the most striking excesses, posing conditions on the delegation of regulatory power to the government.

First, the legal framework set by the first authorizing Law of 23 March 2020 was not limited to the Covid emergency but introduced a perpetual regime for the management of health crises, modifying the public health code.[66] To ensure that emergency legislation was kept limited, time-bound and proportionate to the nature of the emergency,[67] the French senate introduced an intermediate deadline, corresponding to 1 April 2021, when parliament will be asked to evaluate the implementation of executive measures and decide whether to confirm them or not.

Second, the delegation of regulatory powers set by the two authorizing laws (of 23 March and 20 June 2020) was extremely vast and open, both in the number of authorizations to legislate through ordinances and in the margins of manoeuvre allotted to the executive. The two Houses tried to correct these aspects, minimizing or revising the most questionable authorizations, listing the restrictive measures to be adopted, placing some conditions on their implementations.[68]

Third, the procedure for the adoption of the ordinances saw a long implementing period (up to 30 months for the approval of the ordinance and 3 months for the ratifying law), which clearly exceeded the emergency framework.

61 Law no. 2020-734 of 17 June 2020.

62 *See* Sénat, 'Rapport fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale par Muriel Jourda' (no 453, 20 May 2020).

63 Some precedents may be found in the Law of 3 April 1955, which, at the onset of the Algerine War, allotted exceptional powers to the prime minister, and in the Law 20 November 2017, adopted in response to the terrorist attacks in France.

64 CE 28 févr. 1919, Dames Dol et Laurent. On the exceptional circumstances doctrine, *see* S Platon, 'From One State of Emergency to Another – Emergency Powers in France' (*VerfBlog*, 9 April 2020).

65 The impact assessment report that accompanies the bill is drafted in half page.

66 Sénat, 'Rapport fait au nom de la commission de lois constitutionelle, de législation, du suffrage universel, du Règlement et d'administration générale par Philippe Bas' (no 381, 19 March 2020) 23 f.

67 R Cormacain, 'Keeping Covid-19 Emergency Legislation Socially Distant from Ordinary Legislation: Principles for the Structure of Emergency Legislation' (2020) *The Theory and Practice of Legislation*.

68 *See* the amendment COM-29 of the rapporteur, modifying the new text of Art L. 3131-23 of the Public Health Code.

During the parliamentary scrutiny, the original deadlines were drastically reduced. Moreover, the ordinances adopted under the health emergency were at first excluded from the mandatory consultations set for legislative or regulatory acts,[69] but this derogation was abolished by the Law of 17 June 2020.

Fourth, some of the ordinances authorized by the Law of 17 June 2020 were given retroactive value ('if required, since 12 March 2020'). The council of state, in its opinion on the draft bill, legitimized this faculty if required by a condition of necessity, subject to a case-by-case scrutiny by the government. To comply with this jurisprudence, the government was therefore asked to provide the list of measures with retroactive application.

Finally, the health emergency has confirmed the ongoing problems related to the ratification of the ordinances, which continues to record significant delays and omissions. In this peculiar situation, the *Conseil constitutionnel* has adopted a milestone decision (Décision no. 2020-843 QPC of 28 May 2020), which marks a step backwards in the principle of the explicit ratification. If the crisis can explain the chronology of this decision, its impact is clearly expected to exceed the emergency.[70]

On the whole, the legislation approved in the French parliament during the emergency has served as a reinforced enabler allotting extensive regulatory powers to the government. An exceptional use has been made of the ordinances, which have covered the most disparate sectors, only partially counterbalanced by parliament's oversight of the executive.[71]

E Decree-Laws in Italy and the Covid-19 Regulation Through Administrative Acts: Escaping From the 'Emendator' Parliament[72]

In Italy, the regulatory answer to the Covid crisis was strongly centred on the executive and based on a combination of decree-laws and other administrative acts, including the ordinances allowed by the deliberation of the council of ministers 31 January 2020 on the state of national emergency[73] and among all the decrees of the president of the council of ministers (hereinafter DPCMs).[74] 15

69 In its opinion on the draft bill, the council of state judged this exemption as an opportunity choice that remains justified by the contextual conditions.

70 J Dupriez, 'Ordonnances: une décision du Conseil constitutionnel vue comme «une bombe à retardement»' (*Public Sénat*, 30 June 2020).

71 *See* Griglio, 'Parliamentary Oversight Under the Covid-19 Emergency' (n 9) and E Lemaire, 'Le Parlement face à la crise du Covid-19 (2/2)' (*JP Blog*, 13 April 2020). JP Camby, 'Contrôle parlementaire et coronavirus' (*Blog du coronavirus du Club des juristes*, 31 Mars 2020).

72 To contextualize this expression, see the distinction between transformative and arena legislatures by NW Polsby, 'Legislatures' in FI Greenstein and NW Polsby (eds), *Handbook of Political Science*, V (Reading, Addison-Wesley, 1975) and the distinction between *policy-influencing and policy-making parliaments* by P Norton, 'Parliaments: A Framework for Analysis' (1990) 13 West European Politics 1, 5 ff.

73 These are based on the civil protection code (Art. 24.1 of the Legislative Decree 2 January 2019, no. 1).

74 M Luciani, 'Il sistema delle fonti del diritto alla prova dell'emergenza' (2020) 2 *Rivista AIC* 109 ff.

European Journal of Law Reform 2020 (22) 4
doi: 10.5553/EJLR/138723702021022004006

decree-laws, 37 ordinances and 16 DPCMs were adopted in the February-July period.

Beyond the quantitative perspective, the DPCMs have been the absolute protagonist of the anti-Covid regulation in Italy. These are atypical administrative acts,[75] adopted by the president of the council of ministers free from any binding procedure.[76] Because of their procedural flexibility and simplicity, the DPCM, rather than the decree-laws, have provided the daily regulation of the fundamental individual, collective and economic liberties.

To enable a general administrative act breaching into the sacred sphere of the constitutional rights,[77] a new 'source of legal production' was required, but, paradoxically, this was provided through a supposedly exceptional act such as the decree-law,[78] which in itself sets a derogation from the standard methods of legislation.

Some procedural limits of the DPCMs were 'adjusted along the way',[79] strengthening the involvement of parliament through the setting of political directions before their adoption[80] and clarifying the relationship between the different types of urgency acts, their geographical and temporal validity. Nonetheless, several problems relating to the regulatory quality of the decree-law/DPCM anti-Covid patchwork have remained. Some of them already existed before the pandemic, but under the crisis they have triggered increasing criticism both in the political[81] and in the academic debate.[82]

First, the parallel adoption of a series of decree-laws and DPCMs has led to an intense fragmentation and overlapping of the legislative and administrative

75 They are defined as 'general administrative acts' in Sentence no. 841/2020 of the first-level administrative judge for Calabria (TAR Calabria) on the appeal raised by the president of the council of ministers against point no. 6 of the ordinance of the president of the Calabria Region 29 April 2020, no. 37.

76 D Tega and M Massa, 'Fighting COVID 19 – Legal Powers and Risks: Italy' (*VerfBlog*, 23 March 2020).

77 L Cuocolo, 'I diritti costituzionali di fronte all'emergenza Covid-19: la reazione italiana', in Id (ed), *I diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata* (*Federalismi.it*, 5 May 2020) 13 ff. and G Brunelli, 'Democrazia e tutela dei diritti fondamentali ai tempi del coronavirus' (2020) *Diritto virale* 46 ff.

78 Art. 3.1-6 of the decree-law no. 6/2020 and Art. 2.1-4-5 of decree law no. 19/2020, further complemented by decree-law no. 33/2020. On the legitimacy of these procedures, *see* I Massa Pinto, 'La tremendissima lezione del Covid-19 (anche) ai giuristi' (*Questione Giustizia*, 18 March 2020).

79 J Beqiraj, 'Italy's Coronavirus Legislative Response: Adjusting Along the Way' (*VerfBlog*, 8 April 2020).

80 Art. 2.5 of decree-law no. 19/2020.

81 *See* the motions 1-00346 and 1-00348 debated in the Chamber of Deputies in the plenary meeting of 19 May 2020, committing the government to prefer the use of the decree-law when limits to the fundamental rights shall be posed.

82 A Ruggeri, 'Il coronavirus, la sofferta tenuta dell'assetto istituzionale e la crisi palese, ormai endemica, del sistema delle fonti (2020) 1 *Consulta online: periodico telematico* 210 ss. A Lucarelli, 'Costituzione, fonti del diritto ed emergenza sanitaria' (2020) 2 *Rivista AIC* 558 ss. E Longo and M Malvicini, 'Il decisionismo governativo: uso e abuso dei poteri normativi del Governo durante la crisi da COVID-19' (2020) 28 *Federalismi.it* 219 ff.

measures. The interweaving of decree-laws produced questionable outcomes,[83] including the melting of entire legislative sections whose scrutiny was still pending and the repealing of provisions that still needed to be converted.[84] At the same time, the sequence of DPCMs, some of which have produced their effects only for a few days,[85] has challenged the basic standards of legal certainty.

Second, the decree-laws have seen a boost in their volume during the conversion.[86] The large number of amendments submitted and approved in the committee stage has forced the government to limit the substantive scrutiny of the act in one House, reserving to the other House only a few days for ratifying the final text. This practice is not completely new to the Italian parliament,[87] and yet it has experienced a significant increase during the pandemic.

Third, the continuous referral to DPCMs has confirmed that large parts of the decree-laws are not self-executing and immediately effective.[88] Again, this is not a novelty for the Italian legal framework, and yet, for the very first time through a decree-law, the government has set a norm of procedure deferring to an atypical source of law the full definition of the regulatory measures.

Fourth, the anti-Covid decree-laws have seen a severe limitation of the time spent on ex ante impact assessment. One unequivocal sign of this trend is offered by the decree-law 17 March 2020, no. 18, which prorogued all terms of legislative delegation expiring from 10 February until 31 August 2020 without punctually indicating the list of acts affected by this form of prorogation 'omnibus'.[89]

On the whole, many of the excesses featuring the anti-Covid legal patchwork can be interpreted as a sort of acceleration and intensification of trends that were already under way.[90] These find in the executive the master of the regulatory choices, with the parliament either participating as a sort of 'emendator' or intervening ex ante and ex post to provide political directions and oversee governmental action.

83 Against these techniques, which found isolated precedents before the pandemic, *see* the opinions from the Joint Committee on Legislation of the Chamber of Deputies dated 6 December 2016 and 11 December 2019.

84 *See* decree-laws no. 23 and 24/2020.

85 To cite a few examples, the two DPCM dated 23 and 25 February 2020, adopted to give execution to decree-law no. 6/2020, have ceased to produce their effects a few days after, owing to the adoption of the DPCM of 1 March 2020, which, in its turn, jointly with the DPCM 4 March 2020, was overcome by the DPCM 8 March 2020.

86 Servizio Studi – Osservatorio sulla Legislazione, *Appunti del Comitato per la Legislazione. Le parole delle leggi* (Roma, Camera dei deputati, 4 marzo 2020).

87 P Gambale and G Savini, 'Tendenze dell'attività normativa del Governo nella prima parte della XIV legislatura' (2004) 143-144 *Studi parlamentari e di politica costituzionale* 63.

88 L Paladin, 'Articoli 76-82. La formazione delle leggi', in G Branca (ed), *Commentario alla Costituzione*, II (Bologna, Zanichelli, 1979) 58 and Di Ciolo, *Questioni in tema di decreti legge* (n 35) 201 f.

89 *See* the opinion by the Joint Committee for legislation of the Chamber of Deputies dated 15 April 2020.

90 *Ex multis*, see N Lupo, 'Il ruolo normativo del Governo' (2010) *Il Filangieri, Quaderno* 81 ff; R Zaccaria (ed), Fuga dalla legge? Seminari sulla qualità della legislazione (Brescia, Grado, 2011) spec. 69 ff, and G Rivosecchi, *Considerazioni sparse in ordine alle attuali tendenze della produzione normativa*, in *Osservatorio AIC*, n. 1-2, 2019, 92 ss.

European Journal of Law Reform 2020 (22) 4
doi: 10.5553/EJLR/138723702021022004006

F Conclusions

The legislative responses to the Covid crisis adopted in Spain, France and Italy seem to show more continuity than discontinuity. Most of the excesses deplored by the political and academic debate are rooted in the general trend towards the empowerment of the executive in the regulation of highly sensitive issues and in the adoption of urgent measures.

During the pandemic, several democratic deficiencies have been detected in the role allotted to representative assemblies, but in fact – at least in the three countries examined – the legal answer has not led to authoritarian solutions or to a break in the constitutional principles and rule of law.[91]

This assumption does not imply that the anti-Covid lawmaking has been compliant with the highest standards of democratic legitimacy and quality legislation. The comparative overview in the three benchmark countries shows four main undesirable effects.

First, the role of parliament in the scrutiny of executive legislative acts has been formally preserved but substantially limited by urgent health needs, time pressures and also by the overwhelming number of regulatory responses. Whereas this trend is not completely new to the three countries, the pandemic has made the marginalization of representative assemblies a particularly severe factor owing to the unprecedented impact produced by the anti-Covid measures on core constitutional rights.

Second, the three countries show common legislative trends, resulting in the overlapping, interweaving and continuous change of urgency measures. Owing to time pressures, fear and uncertainty, executive legislation has experienced a sort of 'trial by doing'. Some of the worst practices in the pre-existing law-making processes have been reactivated, thus exacerbating the problems of legal uncertainty already under way.

Third, the decree-laws in Spain and Italy and the ordinances in France are only the apex of a plethora of statutory instruments, adopted by different executive bodies in response to the pandemic. The boundaries between what is in the legislative or sub-primary legal sphere have been missed, at least in Spain and in Italy, where serious restrictions to fundamental liberties have been regulated through non-legislative acts. The Italian case of the DPCMs is paradigmatic in this regard. This is a relatively new phenomenon, specifically related to the nature of the Covid emergency.

Fourth, the disregard for the standards of quality legislation and for pre-legislative scrutiny procedures is a common weakness of Covid-19 lawmaking.[92]

91 Luciani, 'Il sistema delle fonti' (n 74) and A Ruggeri, 'Il coronavirus, la sofferta tenuta dell'assetto istituzionale e la crisi palese, ormai endemica, del sistema delle fonti' (2020) 1 *ConsultaOnline* 214.

92 Emergency legislation is traditionally regarded as being difficult to reconcile with the requirements for good quality legislation, *see* CT Carr, 'Crisis Legislation in Britain' (1940) 40 *Columbia Law Review* 1309, LJ Wintgens, *Legisprudence: Practical Reasons in Legislation* (London, Routledge, 2012) 307 and M De Benedetto, 'Regulating in Times of Tragic Choices' (*The Regulatory Review*, 6 May 2020).

The internal and external controls have been minimized. If this might be exceptionally justified in the short run, the transition towards a post-emergency legal framework would clearly demand that the basic guarantees be restored.

These trends are strongly influenced by the contextual political conditions:[93] the presence of a coalition government in Spain and Italy has played its role, respectively, in pushing the government to legislate by means of decree-laws and in enabling substantive amendment of the decrees during their conversion. Nonetheless, in a broader perspective, the role of parliament turns out to be a crucial one.[94] Representative assemblies would clearly be unfit to act as first emergency responders, yet they should play a fundamental role in readdressing towards sustainable outcomes the legislative trends started by the executive. Parliaments have a specific responsibility towards restoring citizens' trust in legislation because they are structurally conceived to embody the principles of transparency, inclusiveness and pluralism and because parliamentary legislation is deemed to be quality legislation.[95]

There are two potential ways to enable parliaments to play this role.

One way is by rediscovering urgent or fast-tracked legislative procedures in parliament, which are too often sidelined and disregarded. These procedures might offer a good compromise between the safeguard of transparency and participatory standards and the respect of time constraints.

The other way is by strengthening parliamentary oversight of the executive. Parliaments have an urgent duty to oversee budgetary measures, evaluate increasing public debt and monitor the implementation and unintended consequences of the Covid-19 legislation.[96] Their scrutiny function is crucial 'not only for preventing the abuse of emergency measures, but also for increasing the effectiveness of emergency measures'.[97]

These points may well explain why, from the perspective of the overcoming of the emergency framework, parliamentary participation cannot be underestimated. In order to cope with the risks of self-referential, opaque and low-quality legislation, rediscovering the difference in the democratic status

93 On this argument, referred to the Belgian experience, *see* P Popelier, 'COVID-19 Legislation in Belgium at the Crossroads of a Political and Health Crisis' (2020) 8 *The Theory and Practice of Legislation* 131 ff.

94 The other available guarantee against the excesses of executive dominance comes from the courts, *see* VF Benítez R, 'Hercules Leaves (But Does Not Abandon) the Forum of Principle: Courts, Judicial Review, and COVID-19' (*I-CONnect*, 8 May 2020). Ginsburg and Versteeg, 'Binding the Unbound Executive' (n 1).

95 C Leston Bandeira, 'Parliaments' Endless Pursuit of Trust: Re-focusing on Symbolic Representation' (2012) 18 *The Journal of Legislative Studies* 514 ff. N Lupo, 'Confidence of Diffidence in Law-Making? The Evolution of the "Normative Role" of the Italian Government', in M De Benedetto, N Lupo and N Rangone (eds), *The Crisis of Confidence in Legislation* (Baden-Baden, Nomos-Hart, 2020) 197 ff.

96 F De Vrieze, 'Preparing for the Roll-back of Covid-19 Emergency Legislation: What Needs to be Done?' (*LSE Europp Blog*, 4 May 2020).

97 J Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) 8 *The Theory and Practice of Legislation* 71 ff.

European Journal of Law Reform 2020 (22) 4
doi: 10.5553/EJLR/138723702021022004006

between lawmaking and legislation[98] becomes a priority for the well-being of our representative democracies.

98 J Waldron, 'Representative Lawmaking' (2009) 89 *Boston University Law Review* 339.