The Reasonable Balancing of Rights and Interests at the Time of Pandemic

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Abstract

This essay starts with the consideration that the precautionary measures adopted by the Italian legislator and the public administration to deal with the pandemic emergency, while highly restrictive of constitutional freedoms, were commonly deemed reasonable and proportionate.

It then continues with some recent rulings of the Italian Constitutional Court. The analysis aims to show that the balance of rights implemented by the legislator and judged by the Court is affected by the state of emergency: the state of emergency makes reasonable what, in ordinary conditions, would have been absolutely disproportionate. Proportionality, in fact – which is necessarily inherent to precautionary approach – finds a different balance point according to the context in which the precautionary measures are adopted. In 2006, Italy adopted its pandemic plan, which was never updated as was required in accordance with the WHO guidelines formulated in 2017 and 2018. Nevertheless, the essay points out that the precautionary principle must not only shape the answer to the state of emergency, but also affect its planning and prevention. Moreover, the findings show there was no lack of emergency forecasts or of measures suitable for the pandemic purpose, and that Italy had failed to implement these measures. Therefore, in the long term, the measures adopted by the Italian legislature and the public administration have turned out to be completely unreasonable.

1. Introduction

In January 2020, the swift spread of the COVID-19 epidemic to the point of reaching the characteristics of a pandemic[1], has induced govern-

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1 On January 30th, 2020, the WHO declared the COVID-19 epidemic to be 'an international public health emergency': see 'COVID-19 Public Health Emergency of International Concern (PHEIC) Global research and innovation forum' (*WHO*, 12 February 2020) <www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum> accessed 12 December 2020.

ments of many countries – including Italy –[2] to adopt highly restrictive measures limiting the exercise of the fundamental rights and freedoms guaranteed by most constitutions.[3] This was done in an attempt to slow down and limit the spread of the virus, as well as to ensure the Italian national health services would have the time necessary to organize an effective response.

In Italy, the legal doctrine has focused on the constitutional legality of the norms used by the Government to impose such limitations without reaching any consensus. The criticism has been particularly directed at the government's mass recourse to President of the Council of Ministers Decrees[4] and at the vagueness of the relevant primary law engaged. [5]

The point is that the Italian Constitution – differing from others – [6] does not include any dispositions defining the arrangement and distribution of powers in the case of an emergency. The only exception is Article 78 relating to war declaration, where the Chambers are entrusted with deliberating on the declaration of war and conferring the necessary powers to the Government.[7]

Influential legal doctrine, on the contrary, identifies, in the proportionate balancing between rights and duties, the very constitutional foundation also for the state of emergency. As a consequence, it also identifies the constitutional foundation of the *extra ordinem* regulation – in the awareness of the preponderance of the traditional principles of *primum vivere* and of *salus rei publicae* – [8] indicating in the law (and in the decree law) the source of legitimation of *temporary*[9] measures restricting constitutional freedoms.

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2 On January 31st, 2020, the Council of Ministers declared the state of emergency with deliberation until July 31st, 2020, in accordance with arts 7 (1C) and 24(1) Legislative Decree no 1/2018 (or Civil Protection Code).

3 In Italy's case: the freedoms of movement, assembly, exercise of religious faith, access to education and work, and economic initiative, guaranteed by the Italian Constitution respectively in arts 16, 17, 19, 34, 35, 4 and 41.

4 In Italian, Decreto del Presidente del Consiglio dei Ministri or Dpcm.

5 Legislative Decree no. 6/2020, later substituted by Legislative Decree no. 19/2020. Legislative Decree no. 6/2020 – after having released a number of measures restricting the rights of freedom – in Article 2 entrusted the administrative authority with the power to adopt 'further measures' in order to contain and manage the emergency. The norm was abrogated by Decree Law no 19/2020, that it corrected the vagueness of the provisions contained in the first Law Decree.

6 eg French, Spanish and German Constitutions.

7 Other specific disciplines related to extraordinary events, notwithstanding the ordinary regime, are set out in the Italian Constitution in arts 77 (on the emergency decree) and 120(2) (which provides for powers of the State to replace regional ones in the event of serious danger to public safety and security).

8 M Luciani, 'Il sistema delle fonti del diritto alla prova dell'emergenza' (*Rivista AIC*, 2020) 2 Rivista AIC 109, 113-114.

9 On the necessary provisional nature of the *extra ordinem* measures, see Constitutional Court judgment no 115/2011, IT:COST:2011:115. Constitutional Court Judgments can be searched on <www.cortecostituzionale.it/actionPronuncia.do> accessed 15 December 2020.

The lively debate on the constitutional legality of the normative sources used for the emergency management seems – mostly – not to question the appropriateness of the adopted measures. There has been a very widespread consensus among the legal doctrine (and among the Italian population itself, which has rigorously respected the limitations imposed) on the appropriateness of the highly restrictive measures introduced. In order to guarantee the right to health in its dual dimension – the individual fundamental right and the public interest – these measures limit the exercise of fundamental rights and as such are prejudicial to constitutionally protected interests.[10]

Indeed, the emergency situation conditions the weighing of interests by making one (threatened by the situation that led to the emergency) prevail ('tyrant' to use a term used by the Constitutional Court)[11] over the others. In other words, what in ordinary conditions is accepted – perhaps tacitly – as a certain degree of sacrifice of each interest according to their reasonable balance is twisted in the state of emergency.

In keeping with what has happened in recent months, the legislator and the public administration have deemed proportionate to, *inter alia*: (i) cancel the rights to work and of economic enterprise for entire economic sectors; (ii) compromise the balance of the state budget and the quality of education;[12] and (iii) put at risk physical health (e.g. of those individuals whose care has been postponed to ensure an immediate and effective response to the emergency by the healthcare services) and mental health (e.g. of children who have experienced deprivation of liberty in their 'extended' time) –[13] all in order to face the risk of contagion.

Both the legislator and the administration, moreover, applied the principle of precaution, which requires a proportionality test. The terms of the proportionality test vary depending on the state of affairs – emergency or ordinary – in which the precautionary decision is taken.

However, the precautionary approach should be an imperative for the public decision-maker not only in dealing with the state of emergency, but also in the emergency response planning and in the adoption of measures to prevent the latter from arising (or to limit its toll). It should further be considered in the

10 Italian Constitution, art 32.

11 Constitutional Court Judgment no 85/2013, IT:COST:2013:85, referring to the title of the lecture held by Carl Schmitt in Ebrach in 1959.

12 Also in consideration of the different degree of computerization of schools and of households' access to the Internet.

13 On the impacts of mental health issues during the lockdown, see SK Brooks and others, 'The psychological impact of quarantine and how to reduce it: rapid review of the evidence' (2020) 395 The Lancet 912 and EA Holmes et al, 'Multidisciplinary research priorities for the COVID-19 pandemic: a call for action for mental health science' (2020) 7 The Lancet 547.

'risk society'[14] as 'a conforming element of the whole way of conceiving constitutional law'[15].

Overall, this paper demonstrates through its findings that there was no lack of emergency forecasts or of measures suitable for the purposes of managing a pandemic, and that Italy had simply failed to implement these measures. Therefore, in the long term, the measures adopted in the Italian legislation and by the public administration have turned out to be completely unreasonable. In this paper, I address this by first explaining the precautionary and the proportionality principles, as well as the relation between them (Section 2). As a follow-up, I discuss the balancing of interests under Italian jurisprudence, where the balancing varies in a time of emergency compared to what can be termed 'ordinary time'. I then continue with a discussion on the precautionary approach in prevention and emergency planning (Section 4) before finishing with a conclusion (Section 5). In the debate on the post-pandemic, I briefly elaborate some reflections so that 'nothing' goes back to the way it was before.

2. Proportionality as an essential element of the precautionary approach

First and foremost, the precautionary principle has been asserted in the German doctrine and jurisprudence since the first half of the last century, and it was later recalled in the European legal system by the Maastricht Treaty of 1992. Moreover, it received the final consecration as a principle of international law through its inclusion in the Rio Declaration of 1992, where it is enshrined in Principle no. 15:

[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[16]

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14 U Beck, *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (Suhrkamp 1986).

15 G Zagrebelsky, 'Decidere noi della scienza' (*La Repubblica*, 21 February 2012) <www.repubblica.it/scienze/2012/02/21/news/scienza_e_democrazia_intervento_zagrebelsky-30263309/> accessed 12 December 2020.

16 The legal literature on the precautionary principle is very extensive. See, among many: R Kegge, 'The precautionary principle and the burden and standard of proof in European and Dutch environmental law' (2020) 13 Review of European Administrative Law 113; P Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 694ff; D Bourguignon, 'European Parliamentary Research Service – The Precautionary Principle: Definitions, applications and governance' (*European Parliament*, 9 December 2015) <www.europarl.europa.eu/RegData/etudes/IDAN/2015/573876/EPRS_IDA(2015)573876_EN.pdf> accessed 12 December 2020; B Berthoud, *The Precautionary Principle in EU Risk Regulation. A Matter of Priorities* (Anchor Academic Publishing 2014); N Morag-Levine, 'The History of Precaution' (2014) 72 American Journal of Comparative Law 1095; D Vogel, *The Politics of Precaution: Regulating Health, Safety and Environmental Risks in Europe and the United States* (Princeton University Press 2012); CE Foster,

Hence, the principle is established in relation to environmental protection and, as such, it has been enshrined in international[17] and European[18] law, as well as in several national laws.[19] In various legal systems, the application of the principle has been extended to safeguard also other interests. Nevertheless,

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Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality (Cambridge University Press 2011); J Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions* (Cambridge University Press 2010); P Arremoës et al (eds), *The Precautionary Principle in 20th Century. Late Lessons from Early Warnings, Environmental Issue Report* (Earthscan 2009); F Ewald, C Golliers and N De Sadeleer, *Le principe de précaution* (2nd edn, Puf 2008); A Trouwborst, *Precautionary Rights and Duties of States* (Martinus Nijhoff 2006); E Fischer, J Jeones and R Von Shomberg (eds), *Implementing the precautionary principle: perspectives and prospects* (Edward Elgar 2006); A Bianchi and M Gestri (eds), *Il principio precauzionale nel diritto internazionale e comunitario* (Giuffrè 2006); J Cazala, *Le principe de précaution en droit international* (Anthemis 2006); F De Leonardis, *Il principio di precauzione nell'amministrazione del rischio* (Giuffrè 2005); A Travi, 'Droit publique et risque: Italie' (2003) 15 Revue européenne de droit public 491; A Gossement, *Le principe de précaution* (L'Harmattan 2003); C Leben and J Verhoeven, *Le principe de précaution. Aspects de droit international ed communautaire* (Éditions Panthéon-Assas 2002); J Scott and E Vos, 'The Juridification of Uncertainty: Observations on the Ambivalence of the Precautionary Principle within the EU and the WTO' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002); T O'Riordan and J Cameron and A Jordan, *Reinterpreting the Precautionary Principle* (Cameron May 2001); D Freestone and E Hey (eds), *The Precautionary Principle and International Law. The Challenge of Implementation* (Kluwer Law International 1996).

17 In the Earth Summit in Rio de Janeiro in 1992, which ended with the aforementioned declaration, the Framework Convention on climate change was adopted. It contemplates the precautionary principle in Article 3.3. The Preamble of the Convention on Biological Diversity, adopted at the same Conference, also refers to the precautionary principle. Even earlier, the principle had been the subject of reference in the World Charter of Nature adopted by the General Assembly of the United Nations in 1982, then taken up again in the second half of the 1980s in documents on the international protection of the marine environment (the Ministerial Declarations of the First and Second International Conference on the Protection of the North Sea, adopted respectively in Bremen on 1 November 1984 and in London on 25 November 1987 and the Paris Convention for the protection of the marine environment for the North-East Atlantic of 1992), and quoted in the Preamble of the Vienna Convention for the protection of the ozone layer of 1985 and the related Montreal Protocol of 1987.

18 Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/49, art 191(2))

19 Italy, Germany, Spain, Belgium, Sweden, the Netherlands, and the United Kingdom. The Italian legislator codified the principle in Legislative Decree no 152/2006 establishing the Environmental Code: the principle is recalled by art 3-ter within the principles regarding environmental action, and it is disciplined by art 301. The precautionary and proportionality principles had already entered the Italian legal system with the 2005 reform of law no 241/1990 on administrative procedure, which included in art1(1) – among the principles on the basis of the administrative activity – the 'principles of the European Community'. In 2004, France included the principle in Article 5 of its Constitution, which reads: *'lorsque la réalisation d'un dommage, bien qu'incertaine en l'état des connaissances scientifiques, pourrait affecter de manière grave et irréversible l'environment, les autorités publiques veillent, par application du principe de précaution, à l'adoption de mesures provisoires et proportionnées afin d'éviter la réalisation du dommage ainsi qu'à la mise en uvre de procédures d'évaluation des risques encourus'*.(emphasis added).

for all of these interests – such as the protection of human health,[20] for which scientific uncertainty on the possibility of damage is detected – the principle can be traced back to the environmental value in its broadest sense.

Contrastingly, a thesis such as Sunstein's which places the principle in relation to any interest worthy of protection is not acceptable.[21] His thesis finds a precautionary approach even in the decision of the United States to wage war on Iraq, despite not having the certainty that Iraq was in possession of weapons of mass destruction. The principle in this case inevitably triggers a logical short circuit because, seen in this way, any decision arises as a precautionary measure with respect to an interest and will at the same time be prejudicial to other conflicting interests – while still being worthy of protection itself.[22]

Therefore, it can be affirmed that the principle consecrates a predominant trend of interests in the environment and human health protection prevailing over other conflicting interests.[23]

Article 191(2) of the Treaty on the Functioning of the European Union (TFEU) contemplates the precautionary principle not as an 'absolute' principle, but as one of the principles on which the environmental policy of the Union is based, which, pursuant to paragraph 3 of the same article, the principle must take into account, in addition to the available scientific and technical data, the environmental conditions in the various regions of the Union, the potential benefits and costs of action or lack of action, and the socio-economic development of the Union as a whole and the balanced development of its regions.

Consistently, the European Commission has indicated as general principles of good risk management, on the basis of which precautionary measures are legitimately adopted, 'proportionality', 'non-discrimination', 'consistency', 'examination of the advantages and of the charges deriving from the action or

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20 cfr Case C-616/17 *Blaise and others*, EU:C:2019:800, para 41: '*It must be noted, first, that, while Article 191(2) TFEU provides that the policy on the environment is to be based on, inter alia, the precautionary principle, that principle is also applicable in the context of other EU policies, in particular the policy on the protection of public health and where the EU institutions adopt, under the common agricultural policy or the policy on the internal market, measures for the protection of human health*' (emphasis added).

21 CR Sunstein, *Laws of Fear. Beyond the Precautionary Principle* (Cambridge University Press 2005) *passim*.

22 cf ibid, 27: this limit is recognized by Sunstein himself, who indicates that the real problem of the precautionary principle (as understood by the Author) in its most stringent form lies in the inconsistency, since the regulatory measures that the principle induces to adopt generate new risks – i.e. the principle itself forbids what it simultaneously imposes to do.

23 In this sense, see Consiglio di Stato Ruling of 11 May 2020 no 2964 (*Comune di Rovigo v Aurora s.p.a.*) available to search on <www.giustizia-amministrativa.it/dcsnprr> accessed 15 December 2020: '*[t]he"precautionary principle", which is a general principle of Community law, requires the competent authorities to take all appropriate measures in order to prevent certain potential risks for public health, for safety and for the environment, making the requirements connected with the protection of these values prevail over other competing interests*' (emphasis added).

failure to act' and the 'examination of scientific evolution'.[24] However, it seems clear that these principles are all an explanation of the first, the principle of proportionality – [25] a key concept of global constitutionalism and the result of the spread of legal models and argumentative techniques in the multilevel system of protection of human rights.[26]

Second, the principle of proportionality is also a general principle of the European system. It is set out in Article 5(4) of the Treaty on European Union (TEU), and has been adopted by the European Courts – of Justice and Human Rights – as a parameter for the validity of national measures or of Union acts that affect the exercise of fundamental rights and freedoms.

The principle of proportionality originated in German law,[27] and later the Court of Justice brought it to the European level,[28] revised it, and returned it to the Member States (MS).[29] This happened according to a process that Merusi defines 'Germanic circularity', as it involved the formation of almost all European legal system principles.[30]

The proportionality test is divided into three levels of judgment: (i) suitability; (ii) necessity; and (iii) proportionality in the strict sense. The first evaluates the adequacy of the measure adopted relative to achieving expected objectives of public interest; the second is aimed at making sure that the measure is the

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24 Commission, 'on the Precautionary Principle' (Communication) COM(2000) 1 final.

25 As observed 'le principe de précaution est indissociable du principe de proportionnalitè. Il repose sur un art des pondération': F Ewald, C Golliers and N De Sadeleer, *Le principe de précaution* (2nd edn, PUFF 2009) 56.

26 TA Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale Law Journal 943. See also A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal Transnational Law 72. On the principle of proportionality in general, see F Borriello, 'Principle of Proportionality and The Principle of Reasonableness' (2020) 13 Review of European Administrative Law 155; P Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 642ff.; DU Galetta, 'General Principles of EU Law as Evidence of a Common European Legal Thinking: The Example of the Proportionality Principle (from the Italian Perspective)' in HJ Blanke et al (eds), *Common European Legal Thinking: Essays in Honor of Albrecht Weber* (Springer 2016) 221ff; S Cognetti, *Principle of proportionality. Profili di teoria generale e di analisi sistematica*, (Giappichelli 2011); G della Cananea, 'Reasonableness in Administrative Law' in G Bongiovanni, G Sartor and C Valentini (eds), *ReasonablenessandLaw* (Springer 2009) 171 and E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999).

27 See, in this regard, A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 175.

28 The EEC Court of Justice has made explicit reference to it since its very first judgments: see Case 8/55 *Fédération charbonnière de Belgique v High Authority*, EU:C:1956:7 (dated 16 July 1956); Joined Cases C-5-11/62 and 13-15/62 *San Michele and Others v High Authority*, EU:C:1962:46 (dated 14 December 1962) and Case C-18/63, *Schmitz v EEC*, EU:C:1964:15 (dated 19 March 1964).

29 On Europeanisation of law, intended as convergence of national legal systems and cultures, primarily under the influence of supranational processes and institutions, see: T Tridimas, 'The general principles of EU law and the Europeanisation of national laws' (2020) 13 Review of European Administrative Law 5.

30 F Merusi, *La legalità amministrativa. Altri sentieri interrotti* (Il Mulino 2012) 14.

one which is the least damaging to any other conflicting interest (between those abstractly suitable for achieving the same objective); the third is a comparative assessment of the assets and interests involved by the measure itself. The last level of the test has a residual nature: it is only used when the highest level of realization of a public interest is ensured by the measure that – among the various possible ones – affects the conflicting interests the most. In this case, a real balancing of interests will have to be carried out to decide, in the present case, whether the benefits of the measure is should be privileged or whether the damage it causes to the conflicting interests should be avoided.

Robert Alexy identifies the 'law of balance' in the following rule: 'the higher the degree of non-realization or of damage to a principle, the greater the importance of the realization of the other principle must be'[31].

The judgment of proportionality therefore takes the form of an assessment which, if it concerns legislative measures, has a political nature: the choice of the public interest objectives to be pursued is political; the decision about the benefits to be privileged and the benefits to be sacrificed in the balancing operation is again political[32]. However, the balancing operation is a matter of political discretion conditioned both by external global limits – represented by customary norms of international law and by the commitments undertaken in that arena – and by internal limits – more specifically, the limits of the reasonableness of the comparative weighting of interests involved by virtue of the protection guaranteed to them by the legal system.

3. The balancing of rights and interests in ordinary time and in time of emergency in the Italian constitutional jurisprudence

In one of his valuable essays, Gustavo Zagrebelsky defines 'constitutional mildness' as the necessary coexistence of values and principles on which the Constitution is based, which requires that each of these values and principles be assumed in a non-absolute value, compatible with those with which must coexist.[33]

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31 R Alexy, 'Dignità umana e proporzionalità' (2018) 10 Lo Stato 13, 17. This distinguished author states that the principles of adequacy and necessity refer to the optimization in relation to the factual possibilities, which consists of avoiding avoidable costs. However, costs are unavoidable when principles collide, and then balancing becomes necessary. Balancing is the object of the third sub-principle of the principle of proportionality in the strict sense. This principle expresses the meaning of optimization in relation to the legal possibilities.

32 See Commission, 'on the Precautionary Principle' (Communication) COM(2000) 1 final, 3: '(j)udging what is an "acceptable" level of risk for society is an eminently political responsibility'.

33 G Zagrebelsky, *Il diritto mite* (Einaudi 1992) 11-17.

This consideration (or observation) 'practiced' over time by constitutional jurisprudence[34] was immortalized by the Constitutional Court in the controversial Judgment no. 85/2018 (or *ILVA* case) ruling,[35] which stated that:

[A]ll fundamental rights protected by the Constitution are in a relationship of mutual integration and, therefore, it is not possible to identify one of them as absolutely prevalent over the others. Protection must always be "systemic and not split into a series of uncoordinated and potentially conflicting rules" (Judgment no. 264/2012). If this was not the case, there would be an unlimited expansion of one of the rights, which would become a "tyrant" against other constitutionally recognized and protected legal situations, which together constitute an expression of the dignity of the person.[36]

The ruling was heavily criticized, also because among the rights discussed in the balancing was the right to health (and to a healthy environment), qualified as 'fundamental right' by Article 32 of the Italian Constitution. The Constitutional Court, contrary to the referring judge, placed as fundamental the right to work, enshrined in Article 4 of the Italian Constitution.[37] However, the Court did not agree with the assumption that the adjective 'fundamental' would reveal a 'pre-eminent nature' of the right to health with respect to all human rights. [38] Recalling its own jurisprudence,[39] the Court affirmed that the definition given of the environment and health as 'primary values' does not imply a 'rigid' hierarchy between fundamental rights.

Indeed, the Italian Constitution – like other contemporary democratic and pluralist Constitutions – requires a continuous and reciprocal balance between fundamental principles and rights without any claim to absoluteness for any

34 See, *inter alia*, Constitutional Court Judgment no 1/2014, IT:COST:2014:1, Constitutional Court Judgment no 1, IT:CONST:2005:1 and Constitutional Court Judgment no 108/2005, IT:CONST:2005:108.

35 Constitutional Court Judgment no 85/2013, IT:COST:2013:85 (or the *ILVA* case): The appeal to the Court was proposed by the investigating judge and the Taranto review court against Legislative Decree of 3 December 2012 no 207, with which the Government had precluded the unfolding of the effects resulting from the order for the seizure of ILVA industrial plants, issued on the basis of two appraisals which attributed to the plant's emissions very strong repercussions on the health of citizens residing in the vicinity. The referring judges indicated the freedom of enterprise as a term of balancing with the right to health and environmental protection, guaranteed by Article 41 Italian Constitution. The Court, on the other hand, identified the other balancing term in the right to work due to the impact on employment that the shutdown of the plant would have determined, guaranteed by Article 4 Italian Constitution.

36 ibid, para 9 under 'Considerato in diritto'.

37 Luciani claims it to be the only right explicitly defined 'fundamental' in the Constitution: see M Luciani, 'Salute. I) Diritto alla salute - Diritto costituzionale', *EnciclopediaGiuridicavolXXVII* (Treccani 1991).

38 See Constitutional Court Judgment no 85/2013, IT:COST:2013:85, para 9 under 'Considerato in diritto'.

39 Constitutional Court Judgment no 365/1993, IT:COST:1993:365.

of them. Therefore, the qualification of environmental and human health values as 'primary' values means that they cannot be sacrificed to other interests – albeit constitutionally protected – but it doesn't mean that they are placed at the top of an absolute hierarchical order. Because the balance point is dynamic and not fixed in advance, it must be assessed – by the legislator in establishing the norms, and by the judge in making sure they are followed – according to the proportionality and reasonableness criteria, so as not to sacrifice their fundamental aspects.

The same principles were laid down by the Court in two judgments which concerned Legislative Decrees no 182/2017 and 58/2018, Decrees also relating to the *ILVA* case. The *ILVA* case, however, ended with the declaration of unconstitutionality of the government's legislative provision deemed as unreasonableness. Hence, it is precisely from the comparison between the first and the last judgment that matters can be drawn in support of the considerations expressed so far: the 'political' nature of balancing of interests and the influence that the 'emergency situation' has on it.

Judgment no. 85/2013 confirms these considerations: in particular, one can look at the conditions in which the government has to balance the rights to health and work (indicated in the case as being in conflict with each other).[40] Both the general and the special legislation relevant to the case are applicable within the framework of 'an environmental emergency', given the damage caused to the environment and the health of the inhabitants of the surrounding area, and of 'an occupational emergency', considering that shutting down Ilva could cause the loss of jobs for many thousands of people'[41]. In the Court's opinion, the provisional nature of the adopted measures satisfies one of the conditions imposed by its own jurisprudence – [42] that a special legislation based on emergency may be constitutionally compliant. In this context, the Court found it reasonable for the legislator to identify the new balance point within the framework of the *revised* Integrated Environmental Authorization (IEA), and for it to be identified in terms of acceptability and risk management resulting from the activity subject to the authorization. The IEA constitutes the result of the confluence of multiple technical and administrative contributions in a single procedure, in which the principles of prevention, precaution, correction at source, information, and participation which characterize the entire environmental regulatory system, must find simultaneous application. Therefore, the revised authorization identifies a new point of equilibrium, which allows

40 See Constitutional Court Judgment no 85/2013, IT:COST:2013:85, para 12.2 under 'Considerato in diritto'.

41 See Constitutional Court Judgment no 85/2013, IT:COST:2013:85, para 9 under 'Considerato in diritto'.

42 The Court recalls as precedent Judgment no 418/1992, IT:COST:1992:418.

the continuation of the production activity under different conditions, in the context of which the activity itself (should have) been considered lawful in the maximum time frame (36 months), considered by the legislator to be necessary and sufficient to remove, even with extraordinary investments by the company concerned, the causes of environmental pollution and the consequent dangers to the health of populations.[43]

The Court therefore found it reasonable that an activity detrimental to the right to health – the assumption from which both the legislator and the Court began their judgment is that the productive activity of ILVA was seriously damaging to the health of workers and of populations residing near the plant – [44] can be continued for the time necessary to adapt the plant with technologies that allow production to continue (three years, in the initial prospect), thus reducing the impact on human health within acceptable limits.[45]

Therefore, the compression of a fundamental right – generally not tolerated under ordinary circumstances – becomes reasonable if it is temporary and if it is functional to prevent another emergency such as the loss of employment for thousands of people.

In this case, the privileged interest was the protection of employment. This interest would have returned to an equilibrium with the right to health only in a medium-term perspective, and if the requirements of the IEA had been respected (but history has shown that this did not happen).

It should be noted how the political nature of the balancing of interests operated by the legislator is integrated with the technical discretion of which the IEA is an expression. This, according to Italian administrative procedural law, limits the judicial review on this administrative act. It is worth notice also how the application of the principles of precaution and prevention is left by the legislator to the administration, providing however a timeframe during which the precautionary or even preventive measures prescribed by the revised authorization could be disregarded (i.e. the thirty-six months indicated as necessary to adapt the plants to the IEA prescriptions, during which therefore the production activity would have continued in violation of these prescriptions).

43 cfr Constitutional Court Judgment no 85/2013, IT:COST:2013:85, para 10.2 under 'Considerato in diritto'.

44 See Legislative Decree no 61/2016, art 1: the legislative decrees adopted by the Government in order to allow the prosecution of the ILVA activity always recognize that what happened despite it 'has entailed and objectively entails serious and relevant dangers for the integrity of the environment and health'.

45 See Constitutional Court Judgment no 85/2013, IT:COST:2013:85, para 10.2 under 'Considerato in diritto'

In 2019, this led to the European Court of Human Rights finding the Italian State in violation of Article 8 of the European Convention of Human Rights.[46] The Court cited the results of various scientific studies that attested to the link between the the harm persons suffered to their health and the emissions deriving from the plant.[47] It is precisely the achieved result asymmetry between the two Courts - one focused on verifying the violation of individual right at stake, and the other concentrated on a systemic assessment of values involved – that confirms how the employment emergency situation has conditioned the Consult's judgment, to the point of inducing it to consider the ascertained infringement of a fundamental right reasonable.

The Italian Constitutional Court's Judgment no. 58/2018 reaffirms the principle expressed in Judgment no. 85/2013.[48] However, in the later ruling the Court considers the balancing in this case by the legislator not meeting the criteria of proportionality and reasonableness, having not taken 'into adequate consideration the needs of protecting the health and safety of workers, in the face of situations that expose the latter at the risk of life itself'. Indeed:

[U]nlike what happened in 2012, the legislator ended up giving excessive priority to the interest in the continuation of production, completely neglecting the requirements of inviolable constitutional rights linked to the protection of health and life itself (Articles 2 and 32 of the Constitution), to which the right to work in a safe and non-dangerous environment must be considered inseparably connected (Articles 4 and 32 of the Constitution).[49]

It is interesting to note how, in the face of the same factual situation (the health emergency had not subsided after six years and the employment emergency remained the same), the balancing criteria judged (and actually also applied) by the Court were no longer the same. In Judgment no 85/2013, the balancing criteria considered had been the right to a healthy environment for an indistinct plurality of people and the right to work for thousands of physically identifiable people. In Judgment no 58/2018 they had been, on one hand, the interest in the continuation of productive activity and, on the other hand, the

46 *Cordella and others v Italy* App no 54414/13 and 54264/15 (ECtHR, 24 January 2019) (French version), para 174.

47 ibid. In particular, the Court cited the Sentieri study. cfr para 164: '[d]*ans ce contexte, il convient de rappeler en particulier le rapport SENTIERI de 2012, attestant l'existence d'un lien de causalité entre l'exposition environnementale aux substances cancérogènes inhalables produites par la société Ilva et le développement de tumeurs des poumons et de la plèvre ainsi que de pathologies du système cardiocirculatoire chez les personnes résidant dans les zones touchées (paragraphes 20 et suivants ci-dessus)*' (emphasis added). See also paras 20-22.

48 See Constitutional Court Judgment no 58/2018, IT:COST:2013:85, para 3.1 under 'Considerato in diritto'..

49 Constitutional Court Judgment no 58/2018, IT:COST:2013:85, para 3.3 under 'Considerato in diritto'

inviolable constitutional rights to protect health and life itself, to which 'the right to work in a safe and non-dangerous environment must be considered inseparably connected'.[50] In essence, the employment emergency disappeared from the Court's horizon, while the right to health – from being an antagonist of the right to work – became an inseparable element as the right to work in a healthy environment. The balancing, therefore, is between requirements linked to fundamental and inviolable rights and the freedom of economic initiative (fn: Article 41 of the Italian Constitution), also due to the constant jurisprudence of the Court compliant with the respect to the safety of the worker.[51]

The fact that the judicial seizure nullified by the censored legislative provision only concerned a part of the plant allowed it to omit the employment emergency in the balancing of rights. The employment emergency, though remaining in the background, was not an immediate consequence of the interim injunction of the magistrate. Consequently it was also not an interest reasonably weighed with the contested decree by the legislator, even if it was indicated in the same decree.[52]

The Court therefore evaluates the balancing carried out by the legislator purging it from the conditioning of the emergency state, which in previous decisions led to privilege the immediately threatened interest, and compares the interest in the continuation of production, even in the part of the seized plant, not only with the right to health of the populations residing near the plant but also – and above all – with the right of employees to work in a safe environment. It is clear that no measure that did not immediately eliminate the causes of risk for workers in the blast furnace could have passed the proportionality test.

Therefore, not only the evidence of what happened in the days of the pandemic, but also the analysis of the aforementioned decisions of the Court confirm the initial assumption of these pages: that the state of emergency affects the balancing of rights and interests operated by the legislator and the administration. This makes reasonable the compression of rights and interests in conflict to safeguard of those interests most directly threatened, sometimes also drawing on their essential nucleus.

Using the categories of Peter Häberle, it seems possible to affirm that, on the 'pluralistic thinking of alternatives' (pluralistisches Alternativendenken, which is typical of 'ordinary' time), necessity (Notwendigkeitsdenken, which is

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50 See Constitutional Court Judgment no 58/2018, IT:COST:2013:85, para 3.1 under 'Considerato in diritto'

51 Constitutional Court Judgment no 405/1999, IT:COST:1999:405 and Constitutional Court Judgment no 399/1996, IT:COST:1996:399.

52 Article 3 of Legislative Decree no 92/2015, declared unconstitutional, opens by indicating as rights to be balanced 'the needs of continuity of production, safeguarding employment, safety in the workplace, health and a healthy environment', as well as the purposes of justice.

typical of instrumental conceptions of the law) is thought about and conceived as a necessary means to an end.[53]

4. The precautionary approach in the prevention and emergency planning

The doctrine tends to distinguish the principles of prevention and precaution by reason of the distinction between certainty and scientific uncertainty regarding the occurrence of future damage. This is equivalent to the distinction between 'danger' – a situation in which there is a causal link to a damage, i.e. cause and effect – and 'risk' – a situation characterized by uncertainty about the possibility that harm will occur.[54]

The boundary between certainty and scientific uncertainty is, however, becoming increasingly blurred and changeable – [55] so much so that Italian jurisprudence (having a practical sense) tends to refer to the two principles as a couple, and to qualify the prevention principle as a 'specific fallout of the broader principle of precaution'.[56]

It seems to me that the relationship between precaution and prevention can be qualified in terms of the relationship between means and end, where the precautionary approach is the one decision-makers (both the legislator and the public administration) must use in terms of prevention. Prevention is understood, in accordance with Luhmann, as a preparation for uncertain futures, aimed at reducing both the probability of damage occurring and its quantity.[57]

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53 P Häberle, 'Demokratische Verfassungstheorie im Lichte des Möglichkeitsdenkens' (1977) 102 Archiv des öffentlichen Rechts 27 – now in P Häberle, *Die Verfassung des Pluralismus. Studien zur Verfassungstheorie der offenen Gesellschaft* (Athenäum 1980).

54 See E Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Springer 2006) 161. The two categories echo the distinction, typical of German dogmatics, between danger (Gefahr) – as a situation to which, in a cause and effect relationship, a damage (which is highly probable to occur if not remedied) is connected – and risk (Risk) – a situation in which the probability of the harmful event occurring cannot be assessed. The prevention principle (Gefahrenabwehr) corresponds to the concept of danger, while the precautionary principle (Vorsorge) corresponds to that of risk.

55 Karl Popper, in *Logik der forschung* (Julius Springer 1934), overturns the evidence that science is identified with the certainty it brings, and affirms that it reconnects to its hypothetical character; a theory is scientific not because it is not refutable, but because it offers the possibility of being refuted.

56 Consiglio di Stato (Section II) Ruling of 20 February 2020 no 1275 (*Antonio Zonna v Regione Puglia*) available to search on <www.giustizia-amministrativa.it/dcsnprr> accessed 15 December 2020.

57 N Luhmann, *Soziologie des Risikos* (Walter de Gruyter & Co 1991) 4.

Thus set up, the relationship between precaution and prevention makes it possible to anticipate as much as possible how public authorities' will intervene in response to citizens' security requests.[58]

This is possible to the point of considering only the unpredictability of the occurrence of a given risk as a qualifier for a factual situation as an emergency – a qualifier which is able to justify the exercise of *extra ordinem* powers.

The precautionary approach is proper of the ordinary administration, so it is not solely related to the 'extraordinary' administration of emergency and to the exercise of *extra ordinem* powers (which have been legitimated for 'emergency situations' ever since the administrative unification of the Italian Kingdom).

Primarily, it is the ordinary administration that is entitled to assess, plan and adopt all functional measures to prevent the emergency onset and, in case, to make the response as effective as possible.

Furthermore, as a general principle of the European legal system, the precautionary principle shapes the national legislation itself. This is due to the primacy of European law over domestic laws, and to the consideration that the precautionary principle – without being in conflict with the constitutional identity of the Italian State – favours the fullest explanation of the Italian Constitution, thus contributing to the implementation of the constitutional program.

On these assumptions, it seems useful – not for the purposes of a judgement on the past, given that the pandemic has found the whole world unprepared, but for a pro-future perspective – to verify whether the legal system imposes precautionary actions on the Italian legislator and administration aimed at the very least to contain the damage of Covid-19.

Article 2(1) of Legislative Decree no. 1/2018 (but already Article 3 of Law no. 225/1992) defines 'civil protection activities' as those aimed at 'forecasting, preventing and mitigating risks, managing emergencies and overcoming them'. Therefore, even before the management of the emergency, Civil Protection's

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58 See Consiglio di Stato, Adunanza Plenaria, Ruling of 25 September 2013 no 21 (*Ministero dell'Ambiente e della Tutela del Territorio e del Mare et al v Fipa Group s.r.l.*) available to search on <www.giustizia-amministrativa.it/dcsnprr> accessed 15 December 2020. The Council of State (Consiglio di Stato), while reaffirming the consolidated distinction between prevention and precaution affirms that: '*the research for ever higher levels of safety leads to a substantial retraction of the threshold of the Authorities' intervention in defence of the man health and his environment: the protection becomes "anticipated protection", and prevention and reparation's object activities become not only known risks, but also those whose existence is simply suspected. The prevention principle has common features with the precautionary principle, as both share the anticipatory nature of the occurrence of damage to the environment. The principle of prevention differs from that of precaution because it deals with the prevention of damage with respect to risks already known and scientifically proven related to behaviours or products for which there is full certainty about their danger to the environment*' (emphasis added).

task is to predict 'possible'[59] risk scenarios and the prevent[60] consequential damage.

Furthermore, the new civil protection code includes activities of a non-structural (Article 1(4) of Legislative Decree no. 1/2018) and structural (Article 1(5) of Legislative Decree no. 1/2018) nature as much as Law no. 225/1992 contained in the synthetic formula 'emergency planning'.

With particular regard to the risk of pandemics occurring, the International Health Regulation[61] was amended by the 58th World Health Assembly in May 2005[62] precisely to extend its application to the prevention of the influenza pandemic, recommending that Member States keep their own pandemic plan – to be constantly updated – on the basis of the guidelines drawn up by the World Health Organization (WHO).

Article 4(2) of Decision No 1082/2013[63] on serious cross-border threats to health provided that 'Member States [should] by 7 November 2014 and every three years thereafter provide the Commission with an update on the latest situation with regard to their preparedness and response planning at national level'.[64]

In 2005, the European Commission warned that '(t)he progression of a highly pathogenic avian influenza (HPAI) epidemic from China and Southeast Asia has given rise to concerns that an influenza virus might arise, fully adopted to human-to-human transmission and capable of causing millions of deaths and huge economic damage'.[65] The Commission indicated the responsibilities and actions for the Commission, the European Center for Disease Prevention and Control (ECDC) and the Member States, and it further adopted – with the Communication itself – the revised EU pandemic influenza preparedness and response plan.[66]

The plan, among the various measures it indicated for the various levels of alarm, highlighted to the States as a priority 'the need and specifications for masks and other device such as respirators' and that 'adequate laboratory capacity

59 Legislative Decree no 1/2018, art 2(2). cfr Legislative Decree no 225/1992, art 3(2), which spoke instead of 'likely risk scenarios'.

60 Referring to the activities aimed at avoiding or reducing the possibility of damages: see Legislative Decree no 1/2018, art 2(3).

61 International legal instrument approved by WHO in 1966 and ratified in Italy with Law no 106/1982.

62 The new regulation entered into force on 15 June 2015.

63 Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC [2013] OJ L293/1.

64 ibid, art 4(2) (emphasis added).

65 Commission, 'on Pandemic Influenza Preparedness and Response Planning in the European Community' (Communication) COM(2005) 607 final.

66 ibid.

and enhanced diagnostic capabilities [needed] to be in place to ensure effective surveillance and prompt identification of strains of influenza virus'.[67]

Another cornerstone of the plan was the preparation of the health system response. In particular, hospitals should have 'well established emergency plans to handle numerous cases and ensure continuity and resilience' and should have ready clinical guidelines, available supplies and a staff that is aware of the admission criteria; this was to ensure that health services were adapted to the conditions prevailing during a pandemic and that basic care for citizens was maintained.[68]

Italy adopted its pandemic plan in 2006, structuring it based on the indications of the European Commission and the WHO. However, Italy did not update its 2006 pandemic plan to the guidelines formulated by the WHO in 2017 and 2018 and disregarded Article 4(2) of Decision No 1082/2013.

In any case, according to the documents mentioned above, it cannot be said that there was no forecast of what had a high probability of occurring, or that there were no indications on the priority of the measures to be taken in order to contain both the spread of the infection and the enormous consequent damage. What was missing was the actual implementation of these measures.

The implementation of measures was missing to the extent that Italy – like most countries – found itself facing the pandemic and lacking both basic medical devices (e.g. face masks), which were already insufficient for the health personnel themselves, and an efficient diagnostic network (lacking also the reagents) to isolate outbreaks and limit the spread of the infection. Furthermore, the health system in Italy is organized on a regional basis, with different models and highly unequal response capacities, and it has not been able to react promptly to the pandemic threat by implementing 'well established emergency plans' – plans which the European Commission had prescribed its Member States to adopt since 2005. What finally happened was exactly what the European and national plans had set out to avoid at all costs: the suspension of ordinary care in order to concentrate the entire health response on the pandemic front. This led to the paradox that the right to health of individuals was sacrificed for the protection of public health, with a dramatic split between the two dimensions of the constitutional guarantee of health: the individual and the community.[69]

67 ibid, ss 2 and 3.2.
68 ibid, ss 3.4.
69 Article 32 of the Italian Constitution provides that the Republic protects health as a fundamental right of the individual and as a public interest.

5. Conclusion

From the above considerations, the conclusion to be drawn is that an emergency situation affects the balance of rights and interests, making reasonable and proportionate something that under ordinary conditions would be indisputably and greatly unreasonable and disproportionate.

In fact, it has been shown that proportionality – which is necessarily inherent to the precautionary approach – finds a different balancing point depending on the context in which the precautionary measures are adopted. In addition, the precautionary principle must not only shape the response to the state of emergency, but also its planning and prevention.

Therefore, leaving aside any judgement on the reasonableness and legitimacy of the various measures adopted during the Covid-19 pandemic, it can certainly be said that – in the long term (the temporal dimension in which public policies must be evaluated) – the measures adopted in the Italian legislation and by the public administration have been totally unreasonable. The implementation of measures already envisaged fifteen years ago would have, in fact, not only allowed the authorities to limit the compression of other freedoms and rights which have come into conflict with the right to health in the times of the pandemic: above all, implementing those measures would have avoided the paradoxical confinement of the right to health as an 'individual fundamental right' (meaning that of health care workers who are being sent to work in a state of disarray without basic protective devices and of citizens suffering from 'ordinary' diseases, whose treatment has been suspended) to affirm the protection of the same right as 'interest of the community'.