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THE PRECAUTIONARY PRINCIPLE IN THE ADMINISTRATIVE
MANAGEMENT OF EPIDEMIOLOGICAL EMERGENCIES:
FROM *AD HOC* RESPONSE MEASURES TO ADVANCE
PLANNING POLICIES

*Francesco de Leonardis**

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1. Introduction

The emergency unleashed by the SARS-CoV-2 virus has produced a tsunami-like wave of changes not only on the medical, economic and social levels but on a legal level¹ as well.

Since the end of February 2020, the Italian legal system has been inundated by a veritable flood of resolutions and other types of legal acts. One may consider the resolutions passed by the

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¹ There are numerous journals and websites which have devoted special sections to a discussion of the legal issues related to the Covid-19 pandemic. Among these, we can mention the Covid-19 monitoring group of the University of Urbino; the Covid-19 emergency monitoring group of the online journal *Federalismi.it*; the section "Problemi giuridici dell'emergenza Coronavirus" of the online journal *Nomos: le attualità nel diritto*; various articles from the section "Leggi e istituzioni" of the online journal *Questione giustizia*; the forum on "Diritto, diritti ed emergenza ai tempi del Coronavirus" of the online *BioLaw Journal – Rivistadi Biodiritto*; the section "Diritto ed emergenza sanitaria" of the online journal *Il diritto dell'economia*; the monitoring group Comparative Covid Law; the forum "Emergenza Covid-19" of the monitoring group of the journal *AIC*; the dossier "Covid-19" of *Fondazione Astrid*; several articles from the online journal *Consulta Online*; the section "Speciale Covid-19" of the journal *Giornale di diritto amministrativo*, n. 3/2020.

Council of Ministers (Italian cabinet) that declared a state of emergency and subsequently extended it², the prime ministerial decrees (more than twenty), or the decree-laws³ which are sometimes converted into permanent "confirmed" laws (almost thirty, among which we have the 'Cura Italia' decree, the "Rilancio" decree and the series of 'Ristori' decrees). There have also been ordinances from the extraordinary commissioner for the implementation and coordination of Covid-19 measures (more than thirty) and other civil protection ordinances (more than fifty). Beyond this, there have been ordinances and decrees from a number of ministries, first and foremost from the Ministry of Health (more than forty), but also from the Ministry of the Economy, the Interior, Infrastructure and Transport, Labor, Economic Development, Education, Agricultural Policies, Civil Service, Justice, the Environment, and Foreign Affairs⁴. Looking at different levels of government, we have seen ordinances from the presidents of the various Italian regions⁵, as well as the contingent local ordinances and other urgent ordinances of the municipalities⁶.

² In this context, 31 January 2020 represented the starting point of a chain of regulatory acts which has flooded the Italian legal system. See M. Luciani, *Il sistema delle fonti del diritto alla prova dell'emergenza*, 1 Consulta Online (2020). See also the resolutions of 29 July 2020, 7 October 2020, 13 January 2021 and 21 April 2021 extending the state of emergency.

³ In using the term "decree-law" in this paper, we refer to article 77 of the Italian Constitution, which states that in extraordinary cases of necessity and urgency, the government may adopt "provisional measures having the force of law". These decree-laws "lose effect from their inception if they are not confirmed within 60 days from their publication".

⁴ Very useful in this regard is the review *Covid-19: Documentazione e interventi del Governo* by the Covid-19 emergency monitoring group, edited by M. Malvicini (updated 21 July 2020).

⁵ On this point, see the review *Covid-19: Documentazione e interventi delle Regioni in relazioni alle misure adottate per il contenimento dell'emergenza Covid-19 e relativa giurisprudenza amministrativa* by the Covid-19 emergency monitoring group, edited by S. Mallardo (updated 1 July 2020).

⁶ The ordinances were passed by the municipal governments pursuant to art. 50, paragraph 5 of Legislative Decree n. 267 of 18 August 2000, but also pursuant to art. 32, paragraph 3 of Law n. 32 of 1978. Very useful in this regard is the review *Covid-19: Documentazione e interventi dei Comuni in relazione alle misure adottate per il contenimento dell'emergenza Covid-19* by the Covid-19 emergency monitoring group, edited by F. Severa (updated 7 June 2020).

If we add these to the list of interventions which have already occurred at the level of global law⁷ and European law⁸, it quickly becomes apparent that it comes to a vast amount of legal material. It will be an exceedingly difficult task to integrate these new resolutions, ordinances and laws into the existing legal system in a short period of time.

A large number of the institutions of public and administrative law (but also of labor law - think of "smart working" or layoffs -, contract law, bankruptcy law, tax law, and family law) have, in fact, been subjected to a sort of "stress test" by the pandemic⁹. In this connection we can mention: the relationship between government and parliament¹⁰; the relationship between

⁷ Here we have a great wealth of material, starting with the declaration of a Public Health Emergency of International Concern (PHEIC) on 30 January 2020. In the context of that announcement, on the WHO website (Health Topics), a large amount of advice was published for the public; there were technical guides on some fifteen macro-topics (surveillance, national laboratories, planning, clinical care, research protocols, guidelines for schools, risk communication, etc.), as well as weekly reports and other relevant information.

⁸ See for example the EU Commission Directive 2020/739 on including Covid-19 among the biological agents that can cause infectious diseases. For a more general introduction, see the special issue of the journal *Eurojus* with contributions by: F. Rolando, *La tutela della salute nel diritto dell'Unione europea e la risposta dell'UE all'emergenza Covid-19*; F. Munari, L. Calzolari, *Le regole del mercato interno alla prova del Covid-19: modeste proposte per provare a guarire dall'ennesimo travaglio di un'Unione incompiuta*; A. Arena, *Restrizioni Covid-19, mercato unico, situazioni puramente interne*; F. Rossi Dal Pozzo, *Trasporti e turismo in epoca di emergenza sanitaria Covid-19: il caso dei vouchers in alternativa ai rimborsi in denaro di titoli di viaggio, di soggiorno e di pacchetti turistici*; C. Fiorillo, *La protezione dei dati personali nel diritto UE e Covid-19*; G. Morgese, *Solidarietà di fatto ... e di diritto? L'Unione europea allo specchio della crisi pandemica*; C. D'Ambrosio, *Dal Meccanismo Europeo di Stabilità ai "Corona Bonds": le possibili alternative per fronteggiare la crisi dell'eurozona a seguito dell'emergenza Covid-19*; E. Latorre, *Covid-19 e regole di concorrenza: rilievi nelle risposte della Commissione europea ad una pandemia globale*; C. Massa, *Covid-19 e aiuti di Stato: il Quadro temporaneo introdotto dalla Commissione e le misure di sostegno adottate dagli Stati membri*; T. Cimmino, *Covid-19 e pratiche commerciali sleali: la recente prassi della Commissione europea e dell'Autorità Garante della Concorrenza e del Mercato a tutela del consumatore*; A. Maffeo, *Gli effetti della pandemia da Covid-19 sul contenzioso dell'Unione europea*.

⁹ F. Fracchia, *Coronavirus, senso del limite, deglobalizzazione e diritto amministrativo: nulla sarà più come prima?*, 3 *Dir. econ.* (2019).

¹⁰ Among those who have most bitterly criticized the recourse to prime ministerial decrees (DPCMs), we can recall L.A. Mazzaroli, *"Riserva di legge" e "principio di legalità" in tempo di emergenza nazionale. Di un parlamentarismo che*

the prime minister and individual ministers¹¹; the organization of work in the Italian parliament; the division of responsibilities between the state and the regions with reference to health care¹²; the relationship between nation states and the European Union¹³; the role of local authorities¹⁴; the protection of the citizens' right to health¹⁵; the guidelines pertaining to state aid; the system of the sources of law¹⁶; the freedom of movement, of assembly, of worship, of economic initiative¹⁷; the right to education and the public service that guarantees it; public transport; the environment¹⁸; immigration¹⁹; administrative procedures²⁰ and

*non regge e cede il passo a una sorta di presidenzialismo extra ordinem, con ovvio, conseguente strapotere delle pubbliche amministrazioni: la reiterata e prolungata violazione degli artt. 16, 70 ss., 77 Cost., per tacer d'altri, 1 federalismi.it 23 (2020); G. Silvestri, Covid-19 e Costituzione, in www.unicost.eu, 10 April 2020; M. Calamo Specchia, Principio di legalità e stato di necessità al tempo del "Covid-19", in *Rivista AIC*, n. 3/2020, 142ff. The opposite viewpoint is presented by E. Grosso in *La legalità ed effettività negli spazi e nei tempi del diritto costituzionale dell'emergenza: è proprio vero che "nulla potrà più essere come prima"?*, 1 federalismi.it (2020).*

¹¹ Cf. M. Cavino, *Covid-19: una prima lettura dei provvedimenti adottati dal Governo*, 1 federalismi.it (2020).

¹² See G. Vesperini, *Il diritto del coronavirus*, 3 *Giorn. dir. amm.* 279 (2020).

¹³ F. Gaspari, *Coronavirus, assistenza finanziaria dell'Unione Europea e "sentieri interrotti della legalità" costituzionale: per un ritorno alla Costituzione e alla sovranità nazionale*, 3 *Dir. econ.* (2020).

¹⁴ I. Forgiione, *La gestione locale dell'emergenza da Covid-19: il ruolo delle ordinanze sindacali, tra sussidiarietà e autonomia*, 2 *Dir. econ.* (2020).

¹⁵ M. Nocelli, *La lotta contro il coronavirus e il volto solidaristico del diritto alla salute*, in federalismi.it (2020).

¹⁶ M. Luciani, *Il sistema delle fonti del diritto alla prova dell'emergenza*, in *Consulta Online*, 11 April 2020. See also recently F. Spanicciati, *Covid-19 e l'emersione di un sistema amministrativo parallelo*, 3 *Giorn. Dir. Amm.* 317 (2020), who underlines that "the multiplication of the sources of law is neither efficient nor justified by specific legal needs" (our translation).

¹⁷ B. Raganelli, *Stato di emergenza e tutela dei diritti e delle libertà fondamentali*, 2 *Dir. econ.* (2020) and P. Pantalone, M. Denicolò, *Responsabilità, obblighi e coronavirus: l'ossatura dell'ordinamento nelle emergenze "esistenziali"*, 1 *Dir. econ.* 4 (2020).

¹⁸ Of particular interest were the conferences held by the Association of Professors of Environmental Law (www.aidambiente.it) on the various aspects of the pandemic related to environmental protection.

¹⁹ A. Giuffrida, *Il rinnovo del permesso di soggiorno UE: un "premio" per l'integrazione degli stranieri? Riflessioni anche alla luce dell'emergenza Covid-19*, 1 *Dir. econ.* (2020).

²⁰ G. Strazza, *Il "tempo" del procedimento nell'emergenza Covid-19: considerazioni a prima lettura sulla sospensione dei termini*, 2 *Dir. econ.* (2020).

their simplification; the management of extraordinary powers²¹; digitalization; the civil, criminal and administrative process²²; administrative bodies of a technical-scientific nature; the relationship between science and politics; the right to privacy; the prison system²³; mobility in large urban centers; urban planning²⁴; and public services.

In the current context of the epidemiological emergency, among the principles that have been used by legislators, administrators, lawyers and legal specialists²⁵ - not to mention in the discussions in the court of public opinion - a prominent role is played by the precautionary principle and the related principle of prevention.

Historically speaking, public health emergencies represent the laboratory in which the precautionary principle first emerged and was subsequently refined²⁶. In fact, one of the first cases cited by legal doctrine to explain the essential idea of the precautionary principle refers to a public health emergency at the end of the 19th

²¹ S. Gardini, *Note sui poteri amministrativi straordinari*, 2 *Dir. econ.* (2020).

²² F. Francario, *L'emergenza coronavirus e le misure straordinarie per il processo amministrativo*, 1 *federalismi.it* (2020); Id. (same author), *Diritto dell'emergenza e giustizia nell'amministrazione: no a false semplificazioni e a false riforme*, in *Federalismi.it*, 15 April 2020; Id., *L'emergenza Coronavirus e la "cura" per la giustizia amministrativa: le nuove disposizioni straordinarie per il processo amministrativo*, 1 *federalismi.it* (2020); Id., *Il non-processo amministrativo nel diritto dell'emergenza Covid-19*, 1 *Giustizia insieme* (2020); R. De Nictolis, *Il processo amministrativo ai tempi della pandemia*, in *Federalismi*, 15 April 2020; N. Durante, *Il lockdown del processo amministrativo*, in *giustizia-amministrativa.it*; M. A. Sandulli, *Nei giudizi amministrativi la nuova sospensione dei termini è 'riservata' alle azioni: con postilla per una proposta di possibile soluzione*, 1 *federalismi.it* (2020); Id., *Riflessioni "costruttive" a margine dell'art. 36, co. 3, d.l. n. 23 del 2020: proposta per una possibile soluzione per contemperare il diritto al "pieno" contraddittorio difensivo con le esigenze organizzative nei giudizi amministrativi*, in *giustizia-amministrativa.it*.

²³ G. Chiola, *Il coronavirus e la rivolta nelle carceri italiane*, 1 *federalismi.it* (2020).

²⁴ F. Cintioli, *Le conseguenze della pandemia da Covid-19 sulle concessioni di servizi e sull'equilibrio economico e finanziario*, 3 *Dir. econ.* (2020).

²⁵ F. Scalia, *Principio di precauzione e ragionevole bilanciamento dei diritti nello stato di emergenza*, 3 *federalismi.it* (2020). See recently also V. Di Capua, I. Forgiione, *Salus rei publicae e potere d'ordinanza regionale e sindacale nell'emergenza Covid-19*, 3 *Giorn. Dir. Amm.* 332 (2020), who underline that the precautionary principle has "deeply changed the characters of the emergency administrative function" (our translation).

²⁶ M. P. Chiti, *Il rischio sanitario e l'evoluzione dall'amministrazione dell'emergenza all'amministrazione precauzionale*, 1 *Riv. it. dir. pubbl. com.* 1 (2006).

century in which an administration, faced with scientific uncertainty, found itself using precautionary measures *ante litteram*²⁷ (i.e. before the corresponding legal term had been officially codified.)

The precautionary principle has become the cardinal principle of the pandemic because it provides clear rules of conduct when administrations are faced with risk scenarios in which the outcomes are unknown or difficult to estimate (these are the "potential dangers to health and the environment" referred to in art. 301 paragraph 1 of the Italian Environmental Code, i.e. TUA - *Testo Unico Ambientale* -, Legislative Decree n. 152 of 2006). The current situation undoubtedly meets those criteria as administrations on various levels find themselves managing an emergency caused by a virus about which very little is known (here we can mention the long series of DPCMs, i.e. prime ministerial decrees, but also the regional and local ordinances which will be discussed later).

The proliferation of *ad hoc* technical advisory bodies such as the *Comitato Tecnico Scientifico* (CTS)²⁸, a development which has

²⁷ In 1854, in the London district of St. James, a cholera epidemic broke out that began to claim a large number of victims. The city health authorities found themselves in difficulty, not knowing what measures to take in dealing with an emergency of such magnitude. According to widespread knowledge at the time (studies had been carried out by the Royal College of Physicians), cholera was spread by air and, therefore, the administration should have taken measures to avoid contact between citizens (isolation, prohibition of passage, etc.). It happened, however, that a certain gentleman (Dr. John Snow, a physicist) observed that a number of deaths were linked to the use of a certain water source. Dr. Snow hypothesized that the spread of the disease was linked to the consumption of water coming from that particular fountain. The authorities, despite their uncertainty regarding the scientific arguments of the physicist, decided to prohibit the water supply to that source. Almost immediately, the cases of cholera decreased, and it was soon possible to eradicate the disease completely. Thirty years later, in 1884, the scholar Koch demonstrated that cholera was not spread by air, as previously believed, but rather through a vibrio (a type of bacteria) contained in water. It was therefore confirmed that the intuition of Dr. Snow had been correct. See P. Harremoës & oth., *The Precautionary Principle in the 20th Century: Late Lessons from Early Warnings*, London, Earthscan, 2002, 5.

²⁸ The Italian Technical-Scientific Committee was established on the basis of art. 2, paragraph 1 of ordinance n. 630 of 3 February 2020 from the Head of the Department of Civil Protection (see also the ordinance n. 371 of 5 February 2020). The purpose of the ordinance is to support the coordination of activities

incidentally also occurred in France²⁹, is something with which the Italian public is now familiar. This trend is a clear application of art. 301 of the Italian Environmental Code (TUA), which imposes certain procedural obligations. In accordance with that law, only those risks which can be identified as a result of "an objective scientific evaluation"³⁰ can be used to justify the application of precautionary measures.

As has been pointed out, the application of the precautionary principle legitimizes the use of very wide discretionary powers on the part of the public administration. Based on the criteria outlined in art. 301 of TUA, administrators must define terms like "dangers, even if only potential, for human health and the environment"; "high level of protection"; and "risk", the preliminary assessment of which must not only be "scientific" but also "objective". For the authorities who must apply the law, this leaves considerable room for interpretation, and the same is obviously true for the judges who are called upon to review the relevant acts.

The problems posed by the application of the precautionary principle are many: how should existing dangers to human health and the environment be assessed, especially if they are only "potential dangers"? What level of public authority is responsible for making the precautionary decisions? How can a "high" level of protection be adequately defined? What are the differences between the various levels of protection? And at what point does a possible risk become a probable risk? When can a technical evaluation be categorized as scientific, thus legitimizing precautionary measures? Does the scientific nature of the evaluation depend on the excellence of the person making the assessment? Is an isolated scientific opinion sufficient in justifying

in overcoming the epidemiological emergency resulting from Covid-19. The CTS is made up of experts and qualified representatives of the state administration and other governmental bodies. Its composition was redefined by ordinance n. 663 (18 April 2020) from the Head of the Department of Civil Protection, and by the subsequent ordinances n. 673 of 15 May 2020 and n. 706 of 7 October 2020.

²⁹ President Macron set up a committee of experts for analysis and research (known as CARE) in order to obtain professional scientific advice on the Covid-19 emergency.

³⁰ One could discuss why there was a need to set up an *ad hoc* body instead of using existing technical bodies.

precautionary measures, or is it necessary to have a certain number of research institutes that share a particular thesis? When can a technical scientific evaluation be considered objective? Can such evaluations be based on experimental data?

As we can see, these are undefined concepts which careful legal doctrine has long invited us to reflect upon³¹. Consequently, we must now address the problem of compatibility between administrative actions inspired by precaution – which are therefore very indeterminate in nature – and respect for the principle of legality³².

On the other hand, it is precisely in moments when legislators fail to promptly intervene that the precautionary principle is applied; it acts as a closing rule in the legal system when administrations are left without the necessary network of protections foreseen by the law in times of crisis characterized by technical and scientific uncertainty. Under truly unfortunate circumstances, this pandemic has provided us with ideal, almost laboratory-like conditions under which the functioning of the precautionary principle can be extensively examined.

In the course of this brief analysis, we will not dwell on the characteristics of the precautionary principle or on the principle of prevention, as a substantial body of literature³³ already exists on

³¹ See A. Barone, *Brevi riflessioni su valutazione scientifica del rischio e collaborazione pubblico-privato*, 1 federalismi.it (2020).

³² G. Manfredi, *Note sull'attuazione del principio di precauzione in diritto pubblico*, 4 Dir. pubbl. 1074 (2004).; see also M. Cecchetti, *Principi costituzionali per la tutela dell'ambiente* (2000).

³³In this regard, we may refer to F. de Leonardis, *Il principio di precauzione nell'amministrazione di rischio* (2005); Id., *Tra precauzione e ragionevolezza*, in *Federalismi*, 2006; Id., *Articolo 301 TUA (applicazione del principio di precauzione)*, in *Codice dell'ambiente*, edited by Bottino et al., Milan, 2008; Id., *Il principio di precauzione nella recente codificazione*, in *Studi sul codice dell'ambiente* (2009), 77; Id., *L'evoluzione del principio di precauzione tra diritto positivo e giurisprudenza*, in *Principio di precauzione e impianti petroliferi costieri*, in V. Giomi (ed.) (2011); Id., *Principio di prevenzione e novità normative in materia di rifiuti*, in *Studi in onore di A. Romano*, vol. III (2011), 2079. Among the other authors who have dealt with these principles we can mention: I. M. Marino, *Aspetti propedeutici del principio giuridico di precauzione*, in *Studi in onore di Alberto Romano*, quoted, vol. III, 2177 ff.; N. Olivetti Rason, *Il principio di precauzione tra sicurezza e libertà*, in *Liber amicorum per Vittorio Domenichelli* (2018), 341; S. Cognetti, *Precauzione nell'applicazione del principio di precauzione*, in *Scritti in memoria di Giuseppe Abbamonte* (2019), I, 387; R. Ferrara, *I principi comunitari per la tutela dell'ambiente*,

those topics. Instead, we shall focus our attention on the application of those principles to the management of the current health emergency.

Moving forward, it is generally anticipated that the proposed solution will be to apply the precautionary principle in a different manner. If the use of the precautionary principle has so far been limited to the management of day-to-day government administrative business and the initial response to the crisis, the new suggestion will likely be that, henceforth, the principle should be increasingly applied to the spheres of planning and organizational activity³⁴.

In other words – and as will be discussed in the concluding paragraphs of this paper –, advance planning is an absolutely

in *Diritto amministrativo*, 2005, 509 ff.; S. Spuntarelli, *Normatività del principio di precauzione nel processo decisionale dell'amministrazione e legittimazione procedurale*, in F. Lorenzotti, B. Fenni (eds.), *I principi del diritto dell'ambiente e la loro applicazione* (2015), 21; S. Puddu, *Amministrazione precauzionale e principio di proporzionalità*, 4 *Diritto e processo amministrativo* 1155 (2015); P. Dell'Anno, *Principi del diritto ambientale europeo e nazionale* (2004) 90-91; F. Merusi, *Dal fatto incerto alla precauzione: la legge sull'elettrosmog*, 2 *Foro amm.* 221 (2001); M. Antonioli, *Precauzionalità, gestione del rischio e azione amministrativa*, 1 *Riv. it. dir. pubbl. com.* 45 (2017). The international literature is also extensive, therefore we shall limit ourselves to cite U. Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne* (1986); H.M. Beyer, *Das Vorsorgeprinzip in der Umweltpolitik* (1992); D. Bodanski, *The Precautionary Principle in US Environmental Law*, in T. O'Riordan, J. Cameron, *Interpreting the Precautionary Principle* (1994) 203 ff.; J. Tickner, C. Raffensperger, *Protecting Public Health and the Environment: Implementing the Precautionary Principle* (1999); D. Bourg, *Parer aux risques de demain: le principe de précaution* (2001); G. Corcelle, *La perspective communautaire du principe de precaution*, 450 *Revue du Marché commun et de l'Union Européenne* 447 (2001); J.P. Cot, *Le principe de precaution en droit européen et international*, in B. Guardiola, et al., *La prevention et la protection dans la société du risque: le principe de précaution*, Paris, 2001, 41 ff.; N. De Sadeleer, *Environmental Principles. From Political Slogans to Legal Rules* (2002); A. Trouwborst, *Evolution and status of the precautionary principle in International Law* (2002); J. Esteve Pardo, *El principio de precaución. El derecho ante la incerteza científica*, in *Rev. jur. Catalunya* (2002) 41 ff.; P. Nanda, G. Pring, *International Environmental Law and Policy* (2003); M. Rebollo Puig, M. Izquierdo Carrasco, *El principio de precaución y la defensa de consumidores*, in *Doc. Administrativa*, nn. 265-266 (2003); B. Beer, *Das Vorsorgeprinzip in der internationalen Verwaltung der biologischen Vielfalt; Aufnahme und praktische Umsetzung* (2004).

³⁴ In this sense, see insights of R. Cavallo Perin, *Il diritto amministrativo dell'emergenza per fattori esterni all'amministrazione pubblica*, 4 *Dir. amm.* 775 (2005)

essential part of any responsible protection plan in responding to possible new challenges generated by the pandemic. This requires better-structured organizations which are prepared to take administrative action on short notice, rather than making *ad hoc* administrative decisions once the emergency has already gotten out of hand. If a large and important institution such as the World Health Organization (WHO) defines the pandemic as "the most feared potential emergency at the international level in the field of public health", it would certainly be reasonable from an organizational and regulatory standpoint to prepare for it in good time.

For the remainder of this paper, we intend to proceed as follows: after briefly taking stock of the evolution of the epidemic, the analysis will be divided into three fundamental parts. First, we will look at prevention/precaution before the current pandemic, examining "if" and "how" planning or organizational activities were inspired by notions of precaution and prevention. Secondly, we will examine prevention/precaution during the pandemic; here we will see how the precautionary principle has been applied to day-to-day administrative activities using certain tools of administrative jurisprudence. Finally, we will speak about prevention/precaution after the pandemic, i.e. about those measures that could be put in place in light of the lessons we hope to have learned.

2. The evolution of the epidemic

On 9 January 2020, the World Health Organization announced that Chinese health authorities had detected a new strain of coronavirus³⁵ never identified before in humans,

³⁵ Coronaviruses (CoV) are a large family of respiratory viruses. To date, there are seven known human coronaviruses including MERS-CoV (which causes Middle East Respiratory Syndrome, first identified in Saudi Arabia in 2012, and which is thought to be transmitted from camels and dromedaries to humans), SARS-CoV (causing Severe Acute Respiratory Syndrome, first identified in China in 2002, and which is thought to originate from bats), and now also SARS-CoV-2 (also thought to originate from bats).

tentatively named 2019-nCoV and later officially classified as SARS-CoV-2³⁶.

Following the declaration of a Public Health Emergency of International Concern (PHEIC) by the WHO Safety Committee on 30 January 2020 in accordance with existing International Health Regulations (IHR 2005)³⁷, the Italian Minister of Health ordered a three-month ban on air traffic from China. Then, on 31 January 2020, by resolution of the Council of Ministers, a nationwide state of emergency was declared in Italy for a period of six months (this has subsequently been extended, first to 15 October 2020 then to 31 January 2021, then again to 30 April 2021 and finally until 31 July 2021).

On 21 February 2020, the first official Covid-19 case in Italy was confirmed, followed by the first outbreaks mainly in northern regions, including Lombardy and Veneto.

The rapid circulation of the virus throughout the country necessitated the implementation of restrictive measures to ensure the containment of the spread of Covid-19. This included the prohibition of movement between municipalities – whether by public or private transport – for all individuals except in cases of proven business needs, absolute urgency or legitimate health concerns. The new measures also mandated the closure of non-essential commercial activities and all non-essential production activities³⁸.

As pointed out in the introduction, from the beginning of the pandemic and throughout the course of 2020 (with a pause during the summer months), a series of legislative interventions were announced and carried out. These measures have been aimed at compensating businesses for the financial losses resulting from the limitations placed on the freedom of economic

³⁶ The virus was associated with an outbreak of pneumonia cases which began to be recorded starting 31 December 2019 in the city of Wuhan, central China.

³⁷ In declaring a public health emergency of international concern (pandemic), the WHO issues recommendations of significant measures that states should implement from both a practical and policy perspective (travel, trade, quarantine, screening, treatment, etc.).

³⁸ In this sense, we can especially mention Decree-Law n. 6 of 23 February 2020, converted into Law n. 13 of 5 March 2020; Decree-Law n. 19 of 25 March 2020, converted into Law n. 35 of 22 May 2020.

initiatives³⁹; at supporting initiatives in the field of justice⁴⁰; at strengthening the health care system⁴¹ and, in general, they have been aimed at protecting the right to health⁴². The measures have also been aimed at instituting new rules regarding the education system⁴³; at electoral consultations⁴⁴; at supporting new epidemiological and statistical studies⁴⁵; and at digitalization⁴⁶.

Starting in May 2020, in light of epidemiological developments, a series of prime ministerial decrees (DPCMs) were issued which began to relax the restrictive measures until a gradual reopening of all activities became possible as Italy entered the summer period (this was done in compliance with the measures and provisions contained in the aforementioned decrees). As the restrictions were eased, ports and airports were gradually reopened to domestic and international passenger traffic and, during the summer months, there was a sort of return to normality. Immediately after the summer, however, against the backdrop of a national epidemiological situation which was clearly worsening (this situation has been referred to as the second

³⁹ See for example Decree-Law n. 9 of 2 March 2020; Decree-Law n. 23 of 8 April 2020, converted into Law n. 40 of 5 June 2020 (the so-called *decreto liquidità*); Decree-Law n. 34 of 19 May 2020, converted into Law n. 77 of 17 July 2020 (the so-called *decreto rilancio*); Decree-Law n. 104 of 14 August 2020, converted into Law n. 126 of 13 October 2020; Decree-Law n. 137 of 28 October 2020 (the so-called *decreto ristori*); Decree-Law n. 149 of 9 November 2020 (the so-called *decreto ristori bis*); Decree-Law n. 154 of 23 November 2020 (the so-called *decreto ristori ter*); Decree-Law n. 157 of 30 November 2020 (the so-called *decreto ristori quater*).

⁴⁰ See for example Decree-Law n. 11 of 8 March 2020; Decree-Law n. 28 of 30 April 2020, converted into Law n. 70 of 25 June 2020; Decree-Law n. 29 of 10 May 2020.

⁴¹ See for example Decree-Law n. 14 of 9 March 2020; Decree-Law n. 18 of 17 March 2020, converted into Law n. 27 of 24 April 2020 (the so-called *decreto cura Italia*).

⁴² See for example Decree-Law n. 33 of 16 May 2020, converted into Law n. 74 of 14 July 2020; Decree-Law n. 83 of 30 July 2020, converted into Law n. 124 of 25 September 2020.

⁴³ See for example Decree-Law n. 22 of 8 April 2020, converted into Law n. 41 of 6 June 2020; Decree-Law n. 111 of 8 September 2020.

⁴⁴ See for example Decree-Law n. 26 of 20 April 2020; Decree-Law n. 117 of 11 September 2020; Decree-Law n. 148 of 7 November 2020.

⁴⁵ See Decree-Law n. 30 of 10 May 2020, converted into Law n. 72 of 2 July 2020.

⁴⁶ See Decree-Law n. 76 of 16 July 2020.

wave⁴⁷), a new set of restrictive measures was rolled out. The new system called for a differentiated response according to the level of risk in each individual Italian region (the regions were categorized using one of three colors – yellow, orange or red – based on a scale of progressively increasing danger).

In this context, we have recently seen new rounds of DPCMs containing limitations to various rights and freedoms. The practice of issuing decree-laws to manage the compensation of economic losses has also continued.

3. The precautionary principle before the pandemic: the pandemic plan

After briefly reviewing the essential phases in the development of the epidemiological crisis, a number of questions naturally arises. First of all, in a situation that could be characterized as pre-pandemic, we should ask ourselves if regulations related to an implementation of the precautionary principle – applied to administrative organization, planning, and above all to the organization of health care – had been thought out in advance. And if so, we should ask ourselves whether or not those regulations were ever implemented.

As is known, the very principles of prevention and precaution involve the idea of *ex ante* protection with respect to future events, postulating a series of actions which should take place at the level of administration and organization in chronological order prior to the onset of a given problem.

As has been correctly pointed out, "the precautionary approach is (...) not only linked to the "extraordinary" handling of emergencies and to the exercise of *extra ordinem* powers which, since the administrative unification of the Kingdom of Italy, are legitimized by the emergency itself. Rather, it is first and foremost a responsibility of the ordinary administration, which must evaluate, plan and put into action all the functional measures to prevent the appearance of emergencies. And if an emergency

⁴⁷ See Decree-Law n. 125 of 7 October 2020, which extended the state of emergency.

nonetheless appears, the ordinary administration is responsible for responding to it as effectively as possible⁴⁸.

With regard to planning, it is necessary to verify whether any action plans had been created for the eventuality of a pandemic (such as the creation of new organizations which would be capable of responding in case of need) and whether any of them were actually carried out⁴⁹.

It should be noted that the law establishing the National Health Service, i.e. the cornerstone of our Italian health system, appears to be deficient; the references to prevention found in it are mostly related to the prevention of diseases and to the prevention of accidents at the workplace⁵⁰. A general section related to the prevention of health emergencies is completely absent.

In 1999, the World Health Organization was among the first to point out the need for a pandemic plan with the publication of its "Influenza pandemic preparedness plan: the role of WHO and guidelines for national and regional planning".

Following those guidelines in 2002, Italy – for the first time in its history – formulated an action plan to face a possible pandemic⁵¹.

The European Union also subsequently intervened and, with its 2005 publication "Communication on Pandemic Influenza Preparedness and Response Planning in the European

⁴⁸ F. Scalia, *Principio di precauzione e ragionevole bilanciamento dei diritti nello stato di emergenza*, 3 federalismi.it (2020).

⁴⁹ About that and for an historical perspective of the instruments of the Italian legal system to face pandemics see also the reflections of M. Gnes, *Le misure nazionali di contenimento dell'epidemia da Covid-19*, 3 Giorn. Dir. Amm. 384 (2020).

⁵⁰ There has been an evident relationship between prevention and the right to health since the law regulating the Italian National Health Service was passed (Law n. 833 of 23 December 1978). This holds true despite the fact that, in the scope of that law, the term 'prevention' was largely used in reference to diseases and to accidents at the workplace. In art. 2 of that law, speaking about the objectives, the legislator establishes that the achievement of health protection is to be ensured through "the prevention of illnesses and accidents in every work environment". In establishing the National Health Council (whose duties since 1993 have passed to the State-Regions Conference), art. 8 of the same law states that the Council would have to be consulted regarding any "global prevention programs".

⁵¹ This was the Italian multi-phase emergency plan for an influenza pandemic, published 26 March 2002 in issue 72 of the *Gazzetta Ufficiale* (the official source which publishes the laws currently in effect in Italy).

Community"⁵², it outlined the main responsibilities of member states, the Commission, and other European Community agencies in the event of a pandemic, also including information about the various phases of a possible pandemic.

Partially in response to the avian influenza outbreak in 2003, the WHO decided to update its International Health Regulations (IHR) which had been adopted by the General Assembly in 1969 (and later updated in 1973 and 1981). That project concluded with the approval of the so-called "IHR (2005)" which came into effect in 2007. In a more recent update in 2014, it was suggested that each member state should have its own pandemic plan.

It was precisely on the basis of such recommendations that the Italian Ministry of Health developed the "National plan for preparedness and response to an influenza pandemic" in 2006, which was then approved by the State-Regions Conference⁵³. This is the plan with which our administration faced the 2020 pandemic.

The goal of this plan was to strengthen pandemic preparedness at the national and local levels so that cases of influenza caused by new viral subtypes could be rapidly identified, confirmed, and described in order to recognize the onset of a pandemic in a timely manner. Other goals of the plan included minimizing the risk of transmission; limiting pandemic-related morbidity and mortality; reducing the impact of the pandemic on health and social services while ensuring the maintenance of essential services; ensuring adequate training of personnel involved in the pandemic response; guaranteeing the availability of up-to-date and timely information for decision makers, health care professionals, the media, and the public; and monitoring the effectiveness of the interventions undertaken.

With those objectives in mind, a series of actions were also envisaged, including improving epidemiological and virological surveillance; implementing measures to prevent and control infections (public health measures, prophylaxis with antivirals, vaccination); ensuring treatment and care of active cases; developing contingency plans to maintain the functionality of health services and other essential services; developing a training

⁵² COM(2005) 607 final, 28 November 2005.

⁵³ In *Gazzetta Ufficiale* n. 77 of 1 April 2006.

plan; developing appropriate communication strategies; and monitoring the implementation of planned actions based on the risk phase, the existing capacity/resources for the response, the additional resources needed, and the effectiveness of the interventions undertaken.

It is worth remembering some of the statements which were made in that plan back in 2006. For example, the authors stated that "the effectiveness of the plan will be evaluated with national and regional simulation exercises in which all institutions potentially involved in the event of a pandemic will participate". They also asserted that the plan would be "subject to periodic revisions as the epidemiological situation changes."

On the basis of the 2006 plan, the respective regional operational plans should have been developed.

Unfortunately, regardless of whether the plan was revised or not, and regardless of the responsibilities related to that process - which are beyond the scope of this paper -, it appears that the pandemic plan has not been taken into account by the administrations involved in the management of the current health emergency. It is sufficient to observe that it has not been mentioned or considered in the prime ministerial decrees and decree-laws that have appeared in great numbers over the last year.

The 2006 plan was a document full of statements and ideas which were worth sharing and implementing. The main principle of that plan was that "global emergencies require coordinated global responses in which the planning process must be shared by the decision makers, and in which the action steps must already be clear before the events occur so that everyone is able to 'play' their role and manage their responsibilities".

From an organizational standpoint, the main institution responsible for overseeing and implementing this plan should have been the National Centre for Disease Prevention and Control (henceforth abbreviated as CCM using the Italian acronym), which was established by Law n. 138 of 26 May 2004, with the aim of addressing public health emergencies. The CCM operates "in cooperation with regional structures through its agreements with the Italian National Institute of Health (ISS), the National Institute for Occupational Safety and Prevention (ISPESL), the Experimental Zooprophyllactic Institutes (IZS), several Italian

universities, the Institute for Treatment and Research (IRCCS), a number of public and private assistance and research structures, as well as with military health organs". It also operates "on the basis of annual programs approved by decrees issued by the Minister of Health".

The activity of the CCM formally began on 27 October 2004⁵⁴ and the institution remains operational today⁵⁵. The activities that it is called upon to carry out are: the analysis of health risks; the approval of surveillance plans and active prevention plans in cooperation with the Italian regions; the support of national alert and rapid response systems, also in connection with bioterrorism; the design of prevention programs – also of experimental nature – regarding primary, secondary and tertiary prevention; the promotion of programs used to evaluate performance in the health care system; the updating of existing systems and the training of personnel concerning the implementation of the annual program of activities; the maintenance of dialogue with other Italian institutions and with similar European and international institutions; the dissemination of information⁵⁶.

⁵⁴ Initially, the functioning of the CCM was regulated by the Ministerial Decree of 1 July 2004. Subsequently, the terms of its operation were better specified by the Ministerial Decree of 18 September 2008. Pursuant to Decree-Law n. 223 of 4 July 2006, which was converted, with amendments, by Law n. 248 of 4 August 2006. On the basis of that, Presidential Decree n. 86 of 14 May 2007 extended the CCM's operations until 21 July 2010 and – pending the formalization of its further three-year renewal – in any case extended it by another two years, pursuant to point 4.2 of the DPCM of 4 August 2010.

⁵⁵ Presidential Decree n. 44 of 28 March 2013 contained "Regulations on the reorganization of collegiate bodies and other bodies operating at the Ministry of Health, pursuant to article 2, paragraph 4 of Law n. 183 of 4 November 2010". Article 9 of that same Presidential Decree regulated the composition and the responsibilities of those bodies.

⁵⁶ In the context of these activities, the CCM supports the Ministry of Health, among other things, in analyzing the epidemiological situation; in identifying and assessing the risks to human health arising from infectious agents, environmental conditions and behavioral factors; in identifying prevention measures and continuity-of-care pathways; in encouraging social health integration; in verifying that national monitoring and prevention plans are being implemented.

The CCM, located within the Directorate General of Preventative Health Care of the Ministry of Health⁵⁷ - the offices of which provide operational support in the implementation of its projects - is, in part, a collective body composed of the following committees: the Strategic Committee and the Scientific Committee⁵⁸.

The CCM operates on the basis of an annual program which is prepared in conformity with the priorities identified by the Strategic Committee. Each year, the program is typically approved by June 30 with a specific decree from the Minister of Health. The execution of the program takes place through the implementation of projects and in collaboration with the regions and various institutional partners. The projects are planned in a standardized manner so that the objectives, procedures, responsibilities, resources and timeframes are clearly defined.

The CCM's annual program of activities for 2020 was approved by ministerial decree on 20 October 2020 and it is currently being implemented at the relevant levels. In the current emergency scenario, it was considered appropriate to direct the program's entire focus towards the containment of the SARS-CoV-2 virus. This included an increase in useful activities such as monitoring and testing.

The 2020 program intends to support the regions by strengthening their capacity to respond not only to the current pandemic, but also to other future pandemics. This entails the implementation of risk prevention measures and the promotion of

⁵⁷ The operations directorate of the CCM develops a proposed annual program of activities and makes proposals for projects which will implement that program. It also supports committees and subcommittees in reviewing the implementation and the results of the projects. The director general of Preventive Health Care is also the chief operating officer of the CCM, and serves in that capacity until the expiration of the CCM's term.

⁵⁸ With the aim of initiating a simplification process for certain procedures, including project approvals, and in agreement with the regions, the Ministerial Decree of 18 September 2008 sanctioned the cancellation of the Scientific Committee. The decree did, however, envision a number of ways for regional representatives to meet and compare notes. It also formalized the longstanding practice of consulting the bodies identified by the Conference of Presidents of the Regions, including on matters regarding the interregional coordination of preventative measures. The CCM, in fact, carries out its own projects in coordination with the regions.

a generally healthy lifestyle, including the use of information campaigns to involve the population. These activities and initiatives will be supported by the integrated networks of social services and health services.

Another important planning tool was the national prevention plan: the plan in place at the time of the pandemic was the National Prevention Plan 2014-2018 (which had been extended). It was only in August 2020 that the new Italian National Prevention Plan (*Piano Nazionale della Prevenzione*, abbreviated as PNP) 2020-2025 was adopted with an agreement being signed between the state and the regions.

These brief reminders are sufficient to reach a first conclusion: that Italy would have been more adequately prepared for the impact of the pandemic if it had implemented the necessary precautionary and preventive principles before the event occurred.

4. The three tests of legitimacy: science-based inquiry, proportionality, and temporary duration

In one of the countless precautionary rulings that have come down to us this year, the Council of State significantly affirmed that, "although all the measures approved up to this point by national, local and technical governmental political authorities are somehow different in nature and serve various purposes, the common thrust of those measures has demonstrably been that of ensuring, according to the principle of maximum precaution, the health of citizens as a primary and non-negotiable constitutional value. The primacy of protecting citizens' health has even compelled authorities to suppress – within limits and in the manner deemed necessary from time to time – the exercise of different rights or freedoms, chief among which is the right to the freedom of movement"⁵⁹.

⁵⁹ The Council of State, with its court order n. 4323, III, 17 July 2020, confirmed the monocratic decree n. 3769, III, 26 June 2020. The latter decision overturned the order of the Lazio Regional Administrative Court, III, n. 4350/2020, which had allowed precautionary protection for a number of private analysis laboratories that had requested permission to carry out swab testing. The ordinance of the President of the Lazio Region, n. Z00003 of 6 March 2020, had reserved the exclusive right to carry out swabs to public laboratories belonging

And in fact, as far as administrative jurisprudence is concerned, it was precisely the application of the precautionary principle in protecting the citizens' right to health which has justified the suppression of a number of constitutionally guaranteed rights and freedoms.

An analysis of art. 301 of the Italian Environmental Code (TUA) provides us with general indications that are useful for systematizing these numerous rulings, above all concerning rulings of a precautionary nature which have been approved by administrative judges in applying this principle⁶⁰. It is worth noting that the pandemic has led to a veritable explosion of precautionary monocratic protection, reopening a debate about the possibility of challenging decrees⁶¹.

In accordance with paragraph 1 of art. 301 TUA, precautionary measures must be based on preliminary, objective scientific assessments. Beyond this, as provided for in paragraph 4 of the same article, such measures must be: proportional with respect to the level of protection that is being proposed; non-discriminatory in their application and consistent with similar measures which have already been adopted; based on a careful examination of the potential benefits and burdens; updatable with regard to the emergence of new scientific data.

to the Coronet Lazio network. In the end, only public laboratories were allowed to test.

⁶⁰ To get an idea of the order of magnitude of these numbers, consider that there have been approximately two hundred rulings directly linked to the management of the health emergency (until the beginning of the summer period in 2020, there had been just over a hundred). Some of these rulings are well known among the general public, such as the initial rulings of the Marche Regional Administrative Court (TAR Marche) that suspended regional ordinances which were more restrictive than the state ones (TAR Marche, monocratic decree n. 55 of 27 February 2020, later reconfirmed by the collegial court order n. 63 of 5 March 2020). Another example, among others, is the Campania Regional Administrative Court that confirmed regional precautionary ordinances (TAR Campania, monocratic decree n. 416 of 18 March 2020; monocratic decree n. 424 of 19 March 2020).

⁶¹ On this point, see the critical remarks of M.A. Sandulli, *Sugli effetti pratici dell'applicazione dell'art. 84 d.l. n. 18 of 2020 in tema di tutela cautelare: l'incertezza del Consiglio di Stato sull'appellabilità dei decreti monocratici*, 1 federalismi.it (2020), in which the author reviews the few precedents that have led to this possibility of challenging the rulings.

The following are what we may call the "three tests" to which pandemic precautionary measures should be subjected in order to verify their legitimacy: the test of adequate scientific inquiry, the test of proportionality (which also includes a cost/benefit analysis), and the test of temporary duration (the test of non-discrimination appears to be the least frequently used with reference to the current epidemiological context)⁶².

Regarding both the test of proportionality and the test of short duration, we can take the example of a municipal ordinance (from a municipality in Campania) with which a more restrictive suspension of teaching activities was ordered than the one ordered at the state level. The municipal ordinance was deemed legitimate since, in the balancing of interests, the importance of limiting the contagion prevailed over the personal interest of the plaintiff, i.e. the ordinary conduct of his professional activity. In reaching the decision, the limited temporal validity of the suspension was also taken into account⁶³.

On the other hand, a regional ordinance (in the Lazio region) was considered illegitimate when it provided for a sort of centralization of the Covid-19 swab testing system in the network of public laboratories. The result, in this alleged application of the precautionary principle, was that private laboratories were excluded from conducting testing.

⁶² A significant contribution on this point is the article by G. Azzariti, *Coronavirus: le misure sono costituzionali a patto che siano a tempo determinato*, in *Repubblica*, 8 March 2020.

⁶³ TAR Campania, monocratic decree n. 2205, V, 27 November 2020. Issuing monocratic precautionary protection, the administrative judge commented that the municipal order "is motivated, not unreasonably, and in the context of an unpredictable situation, by the express need to contain the contagion on a local scale, given the alarming estimated infection rate (1 in 50 inhabitants, for a total of 2.166 cases according to the last check, as stated in the documentation attached by the respondent). Such circumstances obviously can not have been taken into account either by state measures or by regional ones, which were planned and mediated on a much different, and larger, territorial scale. As provided for by the relevant regional ordinances, the measures being taken by the region are based on the primacy of the principle of precaution, which is now being invoked while waiting to consolidate the results of the screening process among the school population, teachers and support staff".

The administrative judge, after several rulings for interim relief⁶⁴, and in the context of a cost/benefit analysis, finally ruled that the regional ordinance was illegitimate, thus opening the system to private laboratories.

The Lazio Regional Administrative Court, which restated the scope of application of the precautionary principle, communicated that "it is not true that the trend of infections is decreasing; on the contrary, we are faced with a surge of infections. One of the reasons for this increase in the infection rate has been the increased number of tests being carried out ascertaining positivity". The court therefore concluded that "the desired participation of private testing centers is of decisive use, since if the national interest is to maximize testing capacity in order to proceed with tracking (...), increasing the number of centers able to carry out such tests is a clear means to that end"⁶⁵.

The test of adequate preliminary inquiry was used in another case to confirm the legitimacy of a regional ordinance (in the Sardinia region) when the region's Technical Committee, "inspired by a principle of utmost caution", expressed itself in favor of maintaining the closure of book retailing activities in a more restrictive manner than that provided for by the national ordinance⁶⁶.

In a similar manner, the legitimacy of a regional ordinance (in the Campania region) that suspended teaching activities was confirmed. The reasoning was that "the region seems to have exhaustively documented the preliminary investigation", in particular taking into account "the correlation between the increase in positive cases of Covid-19 and school attendance" and "the exponential diffusion of the infection itself"⁶⁷. The

⁶⁴ The case saw a series of conflicting rulings in the interim phase. The court of first instance, the Lazio Regional Administrative Court, declared that it was in favor of opening up the system to private providers (TAR Lazio, court order no. 4350/2020). The Council of State, on the other hand, defended the public system as sole providers of the service in question (Council of State, monocratic decree n. 3769 of 26 June 2020, and Council of State, court order n. 4323 of 17 July 2020).

⁶⁵ TAR Lazio, III quater, n. 10933 of 26 October 2020.

⁶⁶ TAR Sardegna, I, monocratic decree n. 141 of 20 April 2020.

⁶⁷ This is the order of the Campania Regional Administrative Court, Naples section, n. 1921 of 19 October 2020, with which the administrative judge confirmed the suspension of in-school teaching activities operated by the

administrative judge also noted that the regional ordinance restricting school activity seemed to be proportionate with reference to "the increasingly alarming situation in regional health care structures which have become overburdened as a result of the virus". In the judge's view, the ordinance was therefore "very relevant in view of preventing the emerging health risk".

There was also a case in which the legitimacy of a regional ordinance (in the Piedmont region) was confirmed. In this instance, parents were ordered to provide declarations that they had measured the body temperature of their children before sending them to school⁶⁸.

In the cases just mentioned, administrative courts have allowed regional needs to prevail over those of the state. In other cases, however – and again using the test of adequate scientific inquiry –, judges have made rulings in the opposite sense, favoring the needs of the state. This fact should not be surprising; on the contrary, it confirms that judicial review is a non-partisan activity (i.e. neither pro-state nor pro-region) focused exclusively on the outcome of the tests. The rulings will therefore vary from case to case, depending in each instance on the specific context and on the interests that are being considered.

And so, after starting as a monocratic measure for interim relief, with later confirmation in the collegial phase, and in the face of legal challenges by private citizens, the state ordinance necessitating a period of distance education was deemed legitimate. The court made its decision "taking into account that the disputed measures are the result of objective and technical-

Campania Region. The suspension had first been ordered by the Campania Regional Council with ordinance n. 79 of 15 October 2020. In defending the legitimacy of the regional measure, TAR Campania noted that it had to "give precedence to the public interest underlying the contested measure, taking into account that the public interest is expressly based on the need to protect the primary right to health, which is presently endangered by a scarcity of resources".

⁶⁸ TAR Piemonte, monocratic decree n. 446, I, 17 September 2020. The appeal was eventually declared inadmissible as the contested measure (Decree n. 95 of the President of the Piedmont Regional Council, 9 September 2020) lost effect on 7 October 2020. In its place, a new measure (Decree n. 105 of 7 October 2020) regulating similar cases was adopted.

scientific evaluations which are rationally justified by the fundamental principle of precaution"⁶⁹.

During the appeal proceedings, the decision that had been established in the court of first instance was upheld, both in the monocratic court and in the collegial court, and the Council of State significantly stated: "the current resurgence of the epidemiological spread objectively demonstrates the opposite of what was claimed by the applicants. Most likely, the containment of the infection within a certain threshold was causally linked to the preventative measures adopted, which included the measures applied in the school system. Moreover, the fact that there were no cases of death among the school population is neither relevant nor significant; in this context, students must be considered not only as potential victims, but also and above all as possible agents of viral diffusion within families. As for the alleged violation of the constitutional precepts regarding personal freedom and the right to education, we can only refer – in the context of this interim measure – to the principles established by the relevant Section of the Regional Administrative Court concerning the proper application of the precautionary principle. The court also reaffirms the primacy of the right to health; in protecting that right, preventive measures are scientifically based and limited to the strict minimum necessary to achieve the objective"⁷⁰.

More recently, the administrative courts have had to deal again with the legitimacy of state measures which imposed a period of distance education. Specifically, students and parents of minors that were enrolled in schools located in "red zone" regions requested the Lazio Regional Administrative Court to suspend the effectiveness of DPCM 2 March 2021, which provided until 6 April 2021 an automatic mechanism of full suspension of face-to-face teaching at all school levels in the whole territory of these regions⁷¹. The court of first instance highlighted the lack of a preliminary investigation, accepted the request of interim measures and ordered the government to review such provisions

⁶⁹ TAR Lazio, monocratic decree n. 6030, III bis, 29 September 2020, later re-confirmed by TAR Lazio with court order n. 6569, 21 October 2020, and also confirmed by the Council of State via court order n. 6832, III, 27 November 2020.

⁷⁰ Council of State, order n. 6832, III, 27 November 2020.

⁷¹ See artt. 43 and 57 of d.P.C.M. 2 March 2021.

before 2 April 2021⁷². The government appealed against that judgement and the Council of State in monocratic court firstly upheld it, stating that “it would not appear a rational motivation of the priority assigned to the sanitary precaution, given the serious restriction to the right of education also protected by the Constitution”⁷³. The statement, however, was overruled in the collegial court, given the fact that the decree-law n. 44/2021 turned the DPCM measures related to face-to-face education into law. Therefore, the Council of State declared not admissible the interim measures requested in the proceedings at first instance, due to the fact that the effects of the DPCM had ceased⁷⁴.

Similarly, the administrative judge of the court of first instance, this time with a judgment, annulled a regional ordinance (in the Calabria region) which was less precautionary than the national ordinance as it extended the freedom of economic initiative⁷⁵. For the judges in Calabria, “there were no special conditions on the sole territory of the Calabria region that could justify the abandonment of the precautionary principle”. The judges also stated that “a valid scientific method was not being used in the evaluation of the epidemiological risk”, asserting that the regional ordinance was “compromising the consistent management of the epidemiological crisis by the government”.

The Calabria Regional Administrative Court makes an important statement in terms of the relationship between health risks and health care organization: “epidemiological risks do not only depend on current infection rates in a defined territorial space such as that of the Calabria region; they are also based on other factors such as the efficiency and responsiveness of the regional health care system. Containment measures, which can either be gradually adopted or gradually revoked, also have an impact on the spread of the virus (one thinks, in this regard, of the relaxation of interregional travel restrictions)”.

It is worth remembering some of the basic features which make the precautionary principle an attractive choice for

⁷² TAR Lazio, court order n. 1946, I, 26 March 2021.

⁷³ Council of State, monocratic decree n. 1776, III, 1 April 2021.

⁷⁴ Council of State, court order n. 2179, III, 23 April 2021.

⁷⁵ TAR Calabria, n. 841, I, 9 May 2020, on which see also the considerations of G. Piperata, *Emergenza pandemica e distribuzione del potere amministrativo tra centro e periferia*, 3 Giorn. dir. amm. 327 (2020).

administrators. For the Calabria Regional Administrative Court "the precautionary principle is a sort of *modus operandi* which can guide the work of public authorities in the context of a health emergency such as the one currently in progress (in this case, the emergency is due to the circulation of a virus, and there are no absolute certainties about the behaviour of that virus in the scientific community). According to the precautionary principle, each time the risks associated with a potentially dangerous activity are not clear, public authorities are advised to pursue a strategy of prevention based on existing information while further scientific knowledge on the topic is being consolidated⁷⁶. It is absolutely necessary to use such cautious preventative strategies when dealing with delicate matters like public health which can potentially have an impact on all citizens"⁷⁷.

The administrative courts, as we have seen, have shown great balance and discretion in applying the precautionary principle – sometimes considering it applicable and sometimes not – depending on whether or not the situations of danger were adequately demonstrated⁷⁸.

The cost/benefit analysis test, although not mentioned in the ruling, was later used in another case to justify the state measure of closing gaming halls⁷⁹.

⁷⁶ Here the citation is from the Council of State, Sec. III, n. 6655, 3 Oct 2019.

⁷⁷ Constitutional Court, n. 5, 18 January 2018.

⁷⁸ Consider the case in TAR Lazio, II bis, n. 8736 of 24 July 2020, which concerned the suspension of activities at a power plant operated by a municipality. The plant in question was producing electricity from biogas. Under those circumstances, the court commented that "not even the consideration of the precautionary principle is likely to be relevant in this case in order to reach different conclusions; this is because that principle cannot legitimize an interpretation of the regulatory, technical and administrative provisions in force in a particular sector, expanding their meaning to include events not significantly related to the context concerned. For the precautionary principle to apply, the situation of danger in question must be potential or latent, not merely assumed, and it must significantly affect the environment and human health".

⁷⁹ See TAR Lazio, I, no. 7191 of 19 November 2020, which explains that "the precautionary principle may reasonably be used in identifying – at least for a limited period of time – the economic activities which will be subject to total suspension. Beyond this, the precautionary principle is useful in ensuring compliance with safety protocols and in evaluating the ability of economic activities to meet the primary needs of users, while attempting to treat identical

The test of proportionality was also used in a case in which a region, acting on the advice of a technical body, had decided to adopt more restrictive rules on vaccinations than the state. In this case, on the appeal of a group of private individuals, the administrative judge of the court of first instance⁸⁰ deemed those regional rules illegitimate. The region, in deference to what had been recommended by the technical body⁸¹, had ordered the mandatory vaccination of individuals over 65 years of age. This had been done based on the need to reduce the pressure on hospital facilities during the fall and winter through the use of differential diagnoses⁸².

The test of temporary duration was used in another instance to confirm – as monocratically ordered interim relief – the legitimacy of a state measure which suspended activity in the food service industry. The court made its decision "in light of the brief duration of the contested measure, and in consideration of the fact that the precautionary principle, even if unexpressed, must cover

situations in the same manner. As a result, the owners of activities like amusement arcades and gambling shops – which are businesses of a purely economic nature, objectively not directed at meeting the primary needs of individuals – are likely to be less interested in the use of the precautionary principle".

⁸⁰ TAR Lazio, III quater, judgment n. 10081, 5 October 2020. In this case, the court considered order n. Z00030 of 17 April 2020 by the President of the Lazio Region, which contained "further measures for the prevention and management of the Covid-19 epidemiological emergency", to be illegitimate. In the court's opinion, the competence to impose mandatory vaccinations belongs to the state and not, conversely, to the regions. The court went on to specify that, "while the emergency Covid-19 legislation does authorize the regions to introduce more restrictive measures than those established by the state, this may only be done within very specific limits which are established by the state legislature itself".

⁸¹ This had been the advice of the CTS as it appeared in the minutes (n. 95) of the committee's meetings on 16 July and 20 July 2020.

⁸² The Lazio Regional Administrative Court, however, argued that "there are also other ways to avoid the congestion of health facilities, all of which potentially fall within the scope of constitutionally granted regional competencies (e.g. the enhancement of tracing activities, the intensification of swab testing, or the concrete development of mobile and in-house health care alternatives). It seems rather evident that the measures listed above would most likely involve greater expenditures and an increased use of organizational resources, but in any case, the logic of saving public funds cannot justify such a large displacement of normative competencies, i.e. it cannot justify the regions making decisions on matters which are normally decided by the state".

all administrative activity in the present epidemic emergency, therefore assuming a value and importance prevailing over other interests at stake"⁸³.

In another case, the same test of short duration was used in legitimizing the closure of a nursing home by a local health authority. The administrative judge, issuing the collegial precautionary measure, deemed this order to be legitimate, noting that the principle of proportionality invoked by the applicant could be considered respected in the case in point, particularly with regard to the temporary duration of the ordered closure of the structure, as the closure was instrumental to the complete disinfection of the home"⁸⁴.

There was also a case concerning the transparency of the minutes of the Technical Scientific Committee that leads us to examine the decision-making process behind the precautionary principle and to review how that information is shared. A private individual had contacted the Department of Civil Protection requesting access to five sets of minutes from the meetings of the Technical Scientific committee (it was on the basis of these minutes that certain containment measures and prevention strategies had been implemented in managing the spread of the pandemic). The administrative court of first instance⁸⁵ granted that access, referring to the regular practice of allowing public

⁸³ Tar Lazio, III quater, monocratic decree n. 6970, 13 November 2020. Considering that the collegiate panel is planning to issue a simplified ruling pursuant to art. 60 of the Code of Administrative Trial, and deeming it necessary to give an appointment to the parties which would enable them to specify their defense, the court confirmed the monocratic decree which had rejected the precautionary petition and set the council chamber for 22 December 2020.

⁸⁴ TAR Campania, V, court order n. 826 of 22 April 2020, which significantly states that "the preventive and precautionary functions underlying all the measures taken - and with regard to the ten positive cases of Covid-19 so far ascertained - must be considered of primary importance. In particular, they must find adequate reflection in the actions the health authority (...); it will therefore not be sufficient to simply close the department in which most of the positive cases occurred". In making this decision, the court also considered the importance of the fact "that clear and solid scientific knowledge about the mode of transmission of the coronavirus is not yet available, and that many of the available studies confirm the possibility that the virus can remain active on certain surfaces for longer periods of time (...)".

⁸⁵ Tar Lazio, I quater, n. 8615 of 22 July 2020.

access, and commenting that "if the legal system guarantees broad access to all the preparatory work and decision-making processes involved in the adoption of individual measures or of acts characterized by a much smaller social impact, then we must certainly allow access to documentation such as the minutes in question, which lay the groundwork for the adoption of the described Prime Ministerial Decree, i.e. of legal acts characterized by a particularly large impact on the social, local and community levels". The Council of State, however, ruling for interim relief, eventually overturned the decision of first instance, denying access to the minutes⁸⁶. The Technical Scientific Committee later independently decided to publish its minutes, making them publicly available 45 days from the dates of the meetings, and the matter was thus concluded.

5. The post-pandemic agenda

At this point, we must look to the future and ask ourselves what lessons we will have learned after the pandemic has ended. To that end, we can already summarize three conclusions.

The first suggestion concerns the system of the sources: it would be useful to provide a regulatory model (for example, a decree-law) which could be implemented in the scenario of a future pandemic. We believe it is important to be equipped with a single clear model, one which is well defined in advance in order to avoid the disorganized, flood-like mass of regulatory acts that have affected the lives of citizens in the last year⁸⁷. In such a model, decision-making centers should be clearly identified, interference between competencies (i.e. who does what) should be avoided, and the organizations in charge should be provided with the necessary powers to carry out their work.

The second suggestion concerns planning: it will be necessary to create a pandemic plan that will be well known and

⁸⁶ This ruling by the Lazio Regional Administrative Court was followed by the Council of State's monocratic decree n. 4574, section III, of 31 July 2020, which effectively suspended the enforceability of the Lazio Regional Administrative Court's ruling.

⁸⁷ On this point, see F.S. Marini, *Le deroghe costituzionali da parte dei decreti-legge*, 1 federalismi.it (2020).

well understood by public institutions, in schools, and by citizens. Frequent updates to the plan will also be necessary.

In the new pandemic plan, hospital networks and intensive care units⁸⁸ will have to be strengthened and personal protective equipment will need to be stockpiled in sufficient quantities. In addition, a fundamental space in the plan should be reserved for the improvement and restructuring of basic medical services in our local health care systems (e.g. the number of family doctors, their equipment and supplies, and an improvement in their working conditions). Indeed, it does not seem that the downsizing of hospital services, especially in some regions, has been matched by a sufficient strengthening of local health care structures in Italy, and the coordination between existing structures seems to be lacking.

In making a new start, we need to provide local health services with the capability to operate a reliable monitoring system and to effectively implement public health measures. To achieve that goal, it will be necessary to recruit doctors specialized in public health who will do their work not in offices, but in a mobile capacity at the local level. Deployed in sufficient numbers and equipped with the necessary resources, these specialists will work in coordination with general practitioners to conduct epidemiological analyses: they will carry out systematic contact

⁸⁸ Here we can mention interesting data reported by A. Pioggia, *Coronavirus e sistema sanitario nazionale*, in *Ridiam*, 2020. The author states that "the total number of hospital beds in Italy is below average compared to other OECD countries and has declined by 30% from 2000 to 2017. In total, the health expenditure incurred by the Italian State in 2017 was equal to 6.6% of GDP. That is about three percentage points lower than Germany (9.6%) and France (9.5%), and about one percentage point lower than the United Kingdom. Italy ranks slightly higher than Spain (6.3%), Portugal (6.0%) and the Czech Republic (5.8%)".

With reference to intensive care and staffing, and not counting this year's increases, Pioggia reports that "in the last two decades, hospital beds in Italian intensive care departments have gone from 575 per 100 thousand inhabitants to the current figure of 275. A cut of 51% was gradually made from 1997 to 2015, which puts Italy at the bottom of the European ranking (Germany is the leader in this category with 621 hospital beds, more than double the Italian figure). Staffing levels have also dropped proportionally. Overall, the Italian national public health system lost more than 46,000 employees between 2009 and 2017. More than 8,000 doctors and more than 13,000 nurses were lost, according to the State General Accounting Office."

searches, test and monitor cases in isolation and quarantine, assist with the in-home treatment of asymptomatic cases, conduct home testing, and ensure that safety distances are being maintained in the workplace and other public places using the prescribed protective equipment⁸⁹.

In short, the proposal is to deliver an increasing number of health care services with mobile units outside of hospitals. This will make it easier to guarantee that hospital services will be available for individuals who cannot do without them.

A third suggestion concerns the implementation of new technologies in our health care system. In this connection, the use of artificial intelligence could be broadly encouraged (think of applications that can carry out diagnostic tests on the basis of mere x-rays); the Electronic Health File (*Fascicolo Sanitario Elettronico*, abbreviated as FSE)⁹⁰ should be made bindingly operational; a mandatory tracking system should be developed – with proper regard for the protection of privacy – which could be employed in the event of an epidemic (in particular with reference to travel)⁹¹; the use of new technologies such as thermo scanners or drive-through tests should be envisaged; the police or the army should be deployed to carry out contact tracing within 24 hours if necessary; remote medical monitoring and diagnostic tools should be utilized in order to treat patients in their own homes.

Generally speaking, to achieve these objectives, it is not enough to simply announce that funding has been earmarked for *ad hoc* preventative measures; instead, the money must actually be invested and the measures must be fully implemented⁹². Relevant

⁸⁹ See F. Curtale, *C'era una volta il piano pandemico*, www.internationalhealth.it (2020).

⁹⁰ A. Sorrentino, A.F. Spagnolo, *La sanità digitale in emergenza Covid-19: uno sguardo al fascicolo sanitario elettronico*, 1 federalismi.it (2020).

⁹¹ On this point see D. De Falco, M. L. Maddalena, *La politica del tracciamento dei contatti e dei test per Covid-19 alla luce delle ultime direttive OMS: nessun ostacolo giuridico impedisce di utilizzare il "modello coreano" anche in Italia*, 1 federalismi.it (2020).

⁹² Five percent of the Italian National Health Fund is allocated to each region to be spent on prevention activities related to communicable and non-communicable diseases. In recent years, the total expenditures for preventive health care have been stable and in fact lower than the anticipated 5% in all but three Italian regions. According to the criteria adopted by the OECD, only 2.9% of the allocated 5% is normally spent.

research has also shown that we need to put a stop to the downward trend in public health spending which has been evident in recent years (that trend is probably due to the fact that health care requires more personnel than other sectors)⁹³.

These issues will be of central importance in the coming years. Will we succeed in developing a proper regulatory model? Will we be able to formulate a pandemic plan and will we be capable of executing it? Will the use of new technologies be adequately incentivized? Will we create mobile health units that can be deployed, in a manner similar to mobile emergency task forces (e.g. in the event of earthquakes), when the need arises? And will we carefully monitor the need for personal protective equipment, ensuring that a certain supply is always available and that production can be increased on short notice?

As we have seen, drafting a new pandemic plan is only the first step in preventing future health emergencies. Once the details have been decided, the complete implementation of that plan, down to the last detail, is equally important. In Italy, it seems that the real challenge to our system is in applying the principles of precaution and prevention to planning and organizational activities. Only the future will tell if we have learned our lesson.

⁹³ It turns out that the Italian regions have been much more interested in spending on hospitals and medicine than on prevention, a phenomenon that is all the more pronounced in the regions that have favored private health care. Between 2008 and 2013, while the percentage of regional funds spent on prevention remained almost constant, there was a substantial decrease in spending in the areas of veterinary public health (-3.8%) and public health and hygiene (-5.7%).