



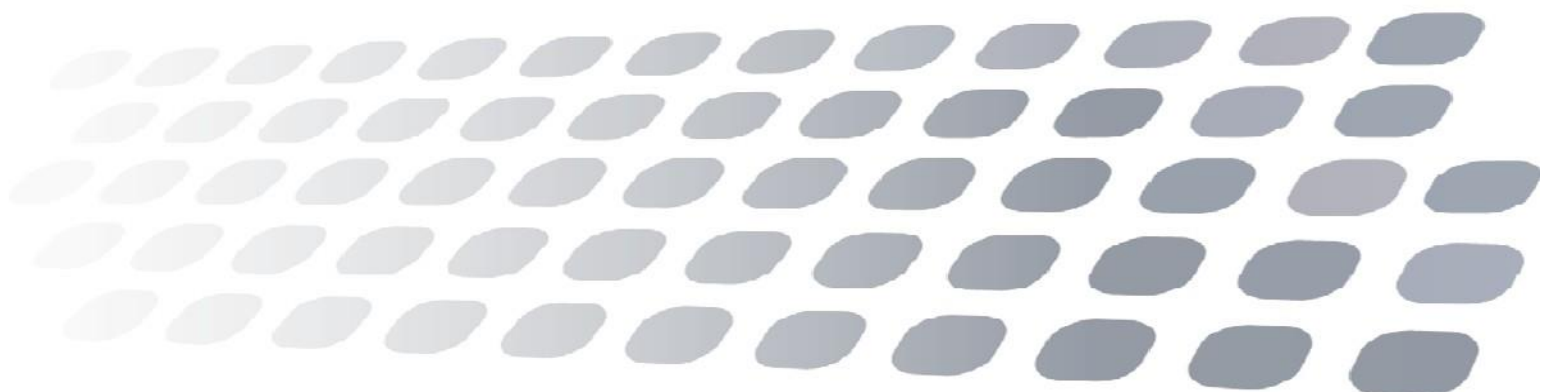
**CENTRO STUDI SUL FEDERALISMO**

**PERSPECTIVES ON FEDERALISM**

**VOLUME 6**

**ISSUE 2**

**2014**





ISSN: 2036-5438

VOL. 6, ISSUE 2, 2014

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ISSN: 2036-5438

## **Crisis, emergency and subnational constitutionalism in the Italian context**

by

Giuseppe Martinico and Leonardo Pierdominici\*

Perspectives on Federalism, Vol. 6, issue 2, 2014





## Abstract

The aim of this article is to offer an account of the centralization and compression of subnational spaces of autonomy triggered by the economic crisis.

Scholars have already produced sound and detailed research on the incidence of the crisis on some specific aspects in the Italian legal context, and especially on the relationships between the coordination of budgetary and financial policies and the welfare state model. We shall limit ourselves to some reflections on the situation of emergency created by the crisis by showing the incremental and sometimes non-linear nature of the latest developments in the Italian regional law.

## Key-words

Crisis, emergency, Italy, European Union, centralization



## 1. On the importance of the Italian case when dealing with Eurocrisis law

As comparative law shows (Wallis & Oates 1998: 156; Loubert 2012), crises have always played a key role in reshaping the relationship between the centre and periphery in regional, federal or quasi-federal contexts. The classical example is given by the New Deal which is still matter for discussion among scholars with regard to its impact over the American federalism, since “(I)t brought with it some fundamental and dramatic changes in the very character of American federalism, changes that would leave a permanent imprint on the intergovernmental system” (Wallis & Oates, 1998, p. 157).

This is true for the current Eurocrisis as well. It has become almost a *cliché* to read the current situation according to the deepest etymological sense of the word *crisis* (from Greek *κρίσις*, judgment, decision, election, choice), understanding it to be at the same time an opportunity and a threat to the constitutional mission of the EU, but ultimately an important moment of reflection over the very nature of the whole integration process.

Indeed, when looking at the relevant legal measures adopted to manage the crisis at supranational level, it is clear that the EU is currently struggling with its own constitutional limits,<sup>I</sup> putting pressure on both supranational and national institutions and actors<sup>II</sup> (in the case of the last point of view the Greek case is emblematic: Lindseth 2012). The repercussions of the management of the Eurocrisis were clearly visible in the Italian case, and having this in mind this article offers a fresh view of the Italian scenario in order to appreciate such an impact and to have an idea of the new equilibria present in the multilevel arena.

The Italian case is a fascinating example of the need, from a methodological point of view, to study the interconnections between constitutional levels - including supranational and subnational - in order to understand what is going on at the national one. It is relevant in this sense for at least three reasons: 1) it clearly demonstrates how factors that are, from a formal point of view, external to the political life of a Member State have actually significantly influenced the fate of the last four governments (Berlusconi IV, Monti, Letta and, eventually, Renzi<sup>III</sup>); 2) the Republic experienced a constitutional reform entirely due to need to comply with a norm included in an international agreement (as we know the



Treaty on Stability, Coordination and Governance- TSCG- does not belong- entirely at least- to the realm of EU law), and in other supranational soft law measures, as we will see; 3) as we will also see, the crisis has induced an evident attempt of centralization, and of compression of subnational spaces of autonomy.<sup>IV</sup>

We are going to focus in particular on the third point. More precisely, if scholars have already produced sound and detailed research on the incidence of the crisis on some specific aspects the Italian legal context, and especially on the relationships between the coordination of budgetary and financial policies and the welfare state model (see, for instance Morrone 2014; Gagliano 2013; Gambino & Nocito 2012; Griglio & Lupo 2012), we shall limit ourselves to some reflections on the situation of emergency created by the crisis by showing the incremental and sometimes non-linear nature of the latest developments in the area of subnational constitutional law.

A *caveat*: for the purpose of this article, in a special issue on the topic, we do not insist on why we consider the idea of subnational constitutionalism applicable to the Italian case, rather we consider this to have been comprehensively argued elsewhere (Delledonne and Martinico 2012). This is in line with a number of studies that have questioned the possibility of limiting subnational constitutionalism only to fully fledged federal contexts (for instance Popelier 2012).

Our conceptual framing is the following: crisis is one of the factors that can undermine the possibility of a thriving subnational constitutionalism, since it may induce central governments to reduce the contribution of subnational entities in decisions of constitutional significance, degrading their competences and their margins in which to develop autonomous policies.

This has been done in particular by employing an extensive concept of “emergency”, presented as a source able to justify every kind of intervention (Falcon 2012). Only by unpacking such concept of “emergency” in its different dimensions, we argue, can a better comprehension of the recent trends on subnational constitutionalism be grasped.

As for its structure, this article is divided into three parts: in a first moment we shall define the relationship between crisis and emergency, secondly we shall move to a brief overview of the anti-crisis measures taken in Italy to comply with supranational constraints and, finally, we will offer some conclusions trying to trace the Italian case back to a broader set of considerations.





## 2. Crisis and the different dimensions of Emergency in the Current Phase

In the social sciences the term “emergency” (*emergenza*, *urgency*, etc.) is used - not necessarily in a technical sense - to indicate sudden situations of difficulty or danger, which tend to be transient in nature (although not necessarily brief), and which involve a crisis of the institutions operating within a given social structure.<sup>v</sup>

In the same vein, in legal terms, the idea of a “state of emergency” suggests, generally, a) the existence of factual circumstances, of special gravity for a certain community, producing such crisis, and b) consequent legal manifestations in the behaviour of institutions, sometimes as mere distorting epiphenomena of the impact of the crisis, sometimes as formalized recognition of the phenomenon and provision of specific correctional effects to guarantee the maintenance of a given legal system.

Two different, complementary forms of legal manifestations of emergency have in fact been studied by scholars (de Vergottini 2007): a «normalized» concept of emergency, in which a legal system acknowledges, through formal means, the existence of a threat, and prefigures the solutions to be implemented; and an always present «innovative» dimension of emergency, in which legal systems can only chase events, always with a sort of self-preservation instinct, but with an inevitable, distorting dose of unpredictability.<sup>vi</sup>

These two different dimensions of emergency have, nonetheless, some aspects in common. They tend to create derogations (more or less extensive and more or less incisive) to the ordinary allocation of responsibilities, competences, powers between public authorities; moreover, they tend to be explicated, in particular, in a varied/altered use of the relevant sources of law.

It has already been highlighted in the past, in the context of general reflections on the concept of “emergency”, that the variety and the complexity of economic crises (as well as their difficult distinction from political or social ones) make it difficult to indicate what substantial measures can be typically used to address them (see again Pizzorusso 1993: 559). Indeed, when dealing with the current, multifaceted European crisis,<sup>vii</sup> especially given the magnitude of the phenomenon, the observer is in fact faced by a vast congeries





of interventions, of various nature. This difficulty notwithstanding, we see, interestingly, that the clearest signs are for now at the formal level.

We noted first of all that the recognition of a “state of emergency” and the potential outcomes of the consequent legal effects (optimal or not, efficient or not) were in large part centralized at the EU level,<sup>VIII</sup> and could be studied precisely through the lenses of the *extra-ordinem* nature of the measures, their provided derogations, a varied use of sources.<sup>IX</sup>

At the national level, in our view, we can primarily find relevant legal epiphenomena of emergency: the first impression one receives is of the struggle of Member States to comply, in critical situations, with what we generally intend here as Eurocrisis law measures. There is no formal recognition of a “state of emergency”; but there are evident traces of the same idea of exceptionality and of a derogatory nature, and the same distorted use of sources.

In the following, we will explore precisely the impact of these two dimensions of legal manifestations of emergency on one of the most relevant examples for the Italian case in the last years: the much discussed, still ongoing process of reform of the constitutional system of territorial decentralization of the Republic. It is interesting to measure the impact of Eurocrisis law measures against this background.

### **3. The supranational formal recognition of emergency, and its impact on the Italian subnational constitutionalism**

The explosion of the Greek crisis (Louis 2010; Hofmeister 2011; Katsikas 2012) forced the EU to find a solution to keep Greece within the euro. The Greek crisis triggered an escalation of measures that began with a Council Decision dated 10 May 2010<sup>X</sup> and was then followed by a series of more structured but still incremental interventions (Ruffert 2011; Paliouras 2011).

The culmination of this series of measures was the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union – TSCG<sup>XI</sup> signed by 25 European leaders at the beginning of March 2012. This Treaty represents just one of the links of a longer chain of measures adopted to fight the Eurocrisis (we refer to the creation of the European Financial Stability Facility [EFSF], European Financial Stabilisation Mechanism, [EFSM], the Euro Plus Pact, the amendment of Art. 136 of the TFEU, the European Stability Mechanism, [ESM], the so-called six and two packs,<sup>XII</sup> among others<sup>XIII</sup>). With all



these measures the EU intended to deal with very different aspects of the crisis by trying to achieve a new integrated surveillance system for budgetary and economic policies and a new budgetary timeline. The system insists on the establishment of clearer rules and of better coordination of national policies, and moreover has been provided with the power to impose swifter sanctions.

All these measures run in parallel. Some of them are part of the EU legal order (six pack, two pack), some of them external to it, some of them are interdependent (in some aspects the six pack and the TSCG), some of them are not (for instance, quite roughly, while the Euro Plus Pact is more about competitiveness, the TSCG is more about austerity). This explains why some Member States participate in some of these actions without necessarily being part of the others.

The contents of all these measures have been extensively analysed by scholars,<sup>xiv</sup> and our aim here is not to offer a mere description of them. In this respect we focus on their nature in the recognition of a “state of emergency”, and at their interrelationship with subnational entities, with their autonomy, and with their competences.

In this respect, it is interesting to note that among the EU anti-crisis measures that drew most attention from constitutional lawyers is the TSCG, probably because of its Art. 3 which establishes a sort of forced constitutionalization of the so called “golden rule” and which triggered a series of constitutional or super-primary reforms at national level (Fabbrini 2013a). The TSCG was the solution chosen to manage the crisis after having evaluated a list of alternatives, amongst which was the revision of the EU Treaties, i.e. the Treaty on the Functioning of the EU (TFEU) and the Treaty on the European Union (TEU), and the use of enhanced cooperation as regulated under the EU Treaties. This is not an exhaustive list; authors like Beukers (Beukers 2013) for instance, identified a more complex scenario but the two options we identify are still at least partly topical, as the last provisions of the TSCG seem to confirm.

From our viewpoint, the most important clauses are represented by:

Art. 1, which is devoted to the aim of the Treaty, namely

“to strengthen the economic pillar of the economic and monetary Union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of economic policies and to improve the governance of the euro area,



thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion",

Art. 2 - which concerns the relationship with EU law and reaffirming the precedence of EU law over the Treaty, a point which is present in many other parts of the Treaty, – and

Art. 3.2 – which provides for the necessity for the States to codify the budget rule in national law “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to”.

Article 3 of the TSCG, in fact, applies to both regional and local governments, as evidenced by the reference made by Article 4 of the TSCG to Protocol number 12, devoted to the procedure in the event of excessive deficit. Indeed, Article 2 of Protocol number 12 clarifies that “government means general government that is central government, regional or local government and social security funds, to the exclusion of commercial operations, as defined in the European System of Integrated Economic Accounts.”

To comply with TSCG, Article 81 of the Italian Constitution was amended to introduce an express mention of the “balanced budget”<sup>xv</sup> principle through constitutional law 1/2012. Article 81 is central in this respect: in the Italian basic law, in the absence of a true “Economic Constitution”<sup>xvi</sup> (according to the German definition of *Wirtschaftsverfassung*), rules of clear fiscal nature can be found in several constitutional dispositions, strictly linked to those protecting social rights, but article 81 was and is the one directly related to the budget process, «budgets and expenditure accounts», and «new taxes and expenditures».

Articles 97, 117 and, above all, the first paragraph of Article 119<sup>xvii</sup> were also amended. Article 97 of the Constitution, the central article of the two related to Public Administration, and in particular with its historic statement of the «efficiency and the impartiality of administration», was changed by introducing the requirement that public administrations (all public administrations), in line with European Union directions, ensure “balanced budgets and public debt sustainability”. Article 117, one of the central articles of the recently reformed *Title V* on «Regions, Provinces, Municipalities», and in particular devoted to the legislative powers of the central State and the regions, was amended in paragraphs 1 and 2, granting the State exclusive legislative power over the “harmonization of public budgets”, whereas it was previously shared between State and regions. Article



119, again in Title V, on matters of regional and local finance, was changed with more stringent constraints on the local authorities. The wording of Article 119<sup>XVIII</sup> clearly limits today the possible recourse to borrowing for Regions and other territorial entities. While with this provision seems to make it feasible for local authorities to finance investment spending, it also adds the necessity to comply “with the concomitant adoption of amortization plans and subject to the condition that budget balance is ensured for all authorities of each region, taken as a whole.”

Passing to the analysis of ordinary law measures, it is to be noted that the Italian government imposed many cuts, and some of these measures have also impacted on the regional structures: the case of law decree 138/2011, converted into law by Act number 148/2011 is emblematic. In fact, its Article 14 has reduced the number of members of Regional Councils (whose internal organization belongs to the exclusive legislative competence of Regions) and established incentives to induce Regions to make choices consistent with what is provided for in the decree (in this respect authors have talked of “financial blackmail.”).<sup>XIX</sup> Indeed this provision was partly declared unconstitutional- by the Italian Constitutional Court in decision n. 198/2012, with regard to matters concerning Regions provided with special status<sup>XX</sup>.

Other legal measures, such as law decree number 78/2010 (“Urgent measures for financial stabilization and economic competitiveness”), converted in to law by Act n. 122/2010, are also based on a dangerous vision of the notion of emergency as a sort of Trojan horse to justify massive interventions in the regional competences.

This discipline has been questioned in front of the Italian Constitutional Court, which, in the judgment 151/2012,<sup>XXI</sup> rejected the very centrist interpretation that the State had given of the measures in law decree n. 78/2010, although the regional challenges against the latter were declared either inadmissible or unfounded in this case.

These are just a few examples showing the risk of centralization in the Italian system induced by *formal* EU anti-crisis measures, intended as structural interventions aimed at a “normalization” of the emergency.<sup>XXII</sup>



#### 4. National epiphenomena of emergency, and their impact on the Italian subnational constitutionalism

Italian subnational constitutionalism was not only threatened by the formal reforms set forth at the supranational level, in which we see, as said, a sort of formal recognition of a “state of emergency” in the continent; the Italian case is also interesting for its less-evident, but still relevant epiphenomena of emergency.

In this respect, the recent saga on the reform of its local authorities is paradigmatic.

There is a rich literature on the historical heritage of the profound fragmentation of the pre-unified Italian peninsula, and the influence of the French-Napoleonic model of decentralized local administration, which shaped the strong role traditionally attached to Italian municipalities (*Comuni*) and to the Provinces as superordinate territorial authorities.<sup>xxiii</sup> The latter already existed in some pre-unification states, and had already been adopted in their existing model directly from the French system by the Kingdom of Sardinia in 1859,<sup>xxiv</sup> then applied also in the Lombardo-Venetian and, by the interim dictators during the unification process, in the other southern and central territories.<sup>xxv</sup> To cut a very long story short,<sup>xxvi</sup> the coexistence of *Comuni* and *Province* was generally restated by the *Legge sull'amministrazione comunale e provinciale* of the 20<sup>th</sup> March 1865; and confirmed, decades later, by the Republican Constitution of 1948. This latter in fact not only included a cardinal Article 5 on the principles of autonomy and decentralization; but, in its *Titolo quinto* dedicated to the territorial organization of the State, added to *Comuni* and *Province* new entities with legislative and administrative powers, the *Regions*, modelled on the old compartments used for statistical purposes in the Kingdom.<sup>xxvii</sup>

Right from the preliminary debate and the preparatory works of the Constituent Assembly the intention was for the Provinces to disappear with the introduction of the *Regions*:<sup>xxviii</sup> but an inertial solution prevailed in the drafting of the Constitution, then in 1970 when the ordinary *Regions* actually came into existing,<sup>xxix</sup> and later in all the rounds of constitutional reform occurred,<sup>xxx</sup> and left the Provinces alive together with municipalities and *Regions*, despite a general, repeated debate at the political level on the middle layer's substantial futility.<sup>xxxi</sup>

The Eurocrisis law has impacted strongly against this background.





The letter addressed by the then-President of the ECB Jean-Claude Trichet and his designated successor, then a member of the Executive Board of the ECB, Mario Draghi, to the President of the Italian Council of Ministers on 5<sup>th</sup> August 2011 explicitly emphasized, in fact, among the other things, the «need for a strong commitment to abolish or merge some intermediate levels of administration (such as provinces)»<sup>xxxii</sup> - as a precursor of the conditioned application of the Securities Markets Programme (SMP) to Italy in 2011 and 2012 with the purchase of 102,8 billions of euro of Italian bonds.<sup>xxxiii</sup> - As such, the inertia of decades was, in reality, broken by the supranational (co)action.

But this conversion was not the most surprising part of the story. As well known, a “technical” Government of so called “national commitment” led by Professor Mario Monti, with clear pro-European traits and a coherent mandate to solve the critical Italian situation,<sup>xxxiv</sup> replaced in late 2011 the Berlusconi IV government after the latter’s resignation: an adherence to the supranational *desiderata* could, in this situation, be seen as the most likely outcome.

One of its first interventions, the Decree-law n. 201/2011, contained various «(U)rgent measures for growth, fairness and consolidation of public accounts»,<sup>xxxv</sup> with which the new Government tried to comply with these (and other) suggestions of the ECB's letter. It dictated, *inter alia*, the transformation of Provinces into institutions with mere functions of direction and coordination of the municipalities, governed by a council and a president expressed by the municipalities themselves, and devoid of a collegiate executive and ultimately of autonomy.

From our perspective, the most relevant aspect is in the choice of the formal measure used to implement the reform, in which the (worrisome) shadow of an “innovative” emergency is quite visible.

Decree-laws are, in fact, in the Italian legal system, legislative acts of a temporary nature having the force of law, adopted directly by the Government in «extraordinary cases of necessity and urgency» pursuant to Art. 77 of the Constitution of the Italian Republic, with a post-hoc required intervention of the Parliament that must convert them into a formal Law within 60 days from the publication. They are therefore sources of law specifically designed for extraordinary cases, which require immediate action through normative interventions; designed to have a subsequent ratification by the legislature.



However, the worrying, and dubious, tendency has become the Government's greater use of Decree-Laws in a trivial manner, to circumvent the ordinary legislative procedure, with an heterogeneous content, with their reiteration.<sup>xxxvi</sup> For all these cases, the Italian *Corte costituzionale* has often underlined the political discretionary dimension involved in these questionable practices,<sup>xxxvii</sup> and has rarely struck down legislative measures for mere reasons of formal choice and misuse of the source and lack of the relevant criteria.<sup>xxxviii</sup>

The Decree-law n. 201/2011 had a different fate. It was challenged - in its relevant parts, and together with the Decree-law n. 95/2012 (which set the basis for the reorganization of the Provinces' territorial constituencies) – autonomously and directly by a series of Regions before the *Corte costituzionale*. The two Decrees were actually converted into Laws by the legislature; and their norms could surely be considered, as suggested by the various appellants, as running against the various aspects of the concept of autonomy of territorial entities, ranging from the respect of their core competences to the principle of loyal cooperation also in the context of a radical reform.

But the Court's intervention (judgment n. 220/2013) explicitly left untouched the “merits of the choices made by the legislature”. It pointed precisely, and only, to the abnormality of the source of law employed.<sup>xxxix</sup> The urgency invoked by the Government for the employment of a Decree-law was confronted by the judges with the explicit aim of an organic constitutional reform of the territorial organization of the Republic. This latter could be linked to the short-term necessity of immediate revenue savings,<sup>xl</sup> but it inherently requires longer-term implementation processes, with the need of “suspensions of effectiveness, referrals and progressive systematizations”,<sup>xli</sup> all ultimately difficult to reconcile with the immediacy of effects typical of the Decree-law according to the constitutional design. Moreover, the constitutional requirement, in Article 133, of an “initiative” of the interested *Comuni* (municipalities) for the modification of the Provinces' territorial constituencies was found to be radically breached by the same use of a Decree-law as relevant source, with a clear statement of “logical and legal incompatibility”.<sup>xlii</sup>

The distorted use of a specific source was therefore sanctioned with the declaration of constitutional illegitimacy of the norms. The *Corte* highlighted, in doing so, the split between the transient nature of the Decree-laws and the salience of an organic constitutional reform; and, implicitly, the difference between the preordained *urgency*





inherent in the employment of Decree-laws and the extraordinary situation of *emergency* that the reform tried to face.<sup>XLIII</sup>

The story did not end there.

In the meantime, another governmental Decree-Law, n. 188/2012,<sup>XLIV</sup> was issued, to identify the new territorial constituencies of the Provinces: but it was never converted into law by the Parliament, and therefore its effects definitively decayed. A legislative bill to regulate the “second-order” elections of the Provinces' organs was also presented by the Government (in May 2012):<sup>XLV</sup> but, also in this case, the parliamentary approval never came. The annulment of the relevant parts of the Decree-laws n. 201/2011 and n. 95/2012 by the *Corte costituzionale* led to a further stratification and complication of measures on the same matters treated.

In fact, in the same week of the hearing of the *Corte*, whose results were anticipated by a press release, the Council of Ministers deliberated on the approval of a constitutional bill, consisting of only three articles, intended to radically eliminate the Provinces from the Italian constitutional architecture.<sup>XLVI</sup>

Moreover, new *interim* measures were considered necessary to consolidate, after the *Corte's* intervention, the effects of the other, non-annulled parts of the Decree-laws n. 201/2011 and n. 95/2012. Thus, the Decree-law n. 93/2013 (devoted to “Urgent provisions for civil security and to combat gender-based violence, as well as on the subject of civil protection and commissioned administration of the Provinces”:<sup>XLVII</sup> a good case study of a heterogeneous Decree) confirmed the intervention in the dissolution of the organs of the (still existing) Provinces, the nomination of Government's Commissioners, and the efficacy of these latter's acts. The Law n. 147/2013 provided the same effects for those Provinces whose organs had natural expiration or early termination between 1<sup>st</sup> January and 30<sup>th</sup> June 2014.

A new Law n. 56/2014 has recently been approved, establishing the new *Città metropolitane* already envisioned in the constitutional reform of 2001 and dictating the discipline of the new *Unioni di Comuni* (“unions of municipalities”). There is a clear overlapping of competences between these new layers of territorial government and the Provinces; in fact, the Law n. 56/2014 also aims to establish a legal framework of the Provinces, whilst they remain in force, by transforming them in second-level authorities,



with no directly elected organs but composed of representatives of the relative municipalities.

There is a clear, and commendable, tendency towards optimization and expenditure restraint, for instance with regard of the emoluments of a whole layer of local representatives (Article 1, paragraph 84 of the Law explicitly provides for the non-remunerated nature of the political appointments at the Provinces' level).

Critical formal issues are nonetheless evident, again.

There are continuing doubts of the constitutionality on the merits of the reform as interpreted as an intrusion in the space of autonomy of a local authority, doubts not addressed or solved by the *Corte Costituzionale* n. 220/2013. Apart from these, there is a first, tangible aspect in the structure of the Law n. 56/2014, composed of a single Article 1, 151 (*si*) internal paragraphs and an attachment; in this sense, emergency is visible here in the paroxysmic use of an already infamous Italian drafting technique, aimed at a streamlining of the time of approval in the Parliament, but surely detrimental for the legislative quality.<sup>XLVIII</sup>

Moreover, perplexity comes from the technique of the Law n. 56/2014 to rule with continuous reference to the «(P)ending» nature of the «reform of Title V of Part II of the Constitution and of its implementing rules (...)» (Article 1, paragraphs 5 and 51), and therefore also to the aforementioned constitutional bill of radical suppression of the Provinces. The approval of such reform is not only uncertain on both a legal and political plane at the current stage, but it has also been argued that the entire Law becomes, in this way, a disproportionate intervention - in the form of an organic reform - simply to make a new round of elections of Provinces' representatives impossible, again with no contextually clear fundamental choices about the overall structure of local government (Gigliani 2014).

To conclude briefly, in this episode we can see how a reform of evident constitutional significance for the Italian Republic has been undertaken with clear distortions of the relevant sources of law, and therefore with a pronounced use of an “innovative” concept of emergency.

A whole range of pathologies in the employment of sources is detectable, all of which intervene, suddenly, in matters which historically have been difficult to amend:<sup>XLIX</sup> the patent misuse of Decree-laws, not converted or heterogeneous ones, withdrawn governmental bills, repeated *interim* measures to block elections, unconstitutional drafting



style of organic reforms, with dubious formal *renvoi* to uncertain constitutional amendments still to be approved.

The origin of all this in a letter by central bankers to the head of a national executive – a soft law measure<sup>L</sup> or a precursor of the future «Partnerships for Growth, Jobs and Competitiveness», in form of contractual arrangements, discussed at the European Council of 19-20 December 2013 in Brussels?<sup>LI</sup> - is just a detail, but which lets us further wonder on a multilevel phenomenology of emergency measures, of different origins, some traceable back to a formal recognition and a tentative normalization through consequent formal reforms, some alarmingly linked to secondary distorting manifestations produced by an inherently innovative dimension.

Additionally, it is to be noted that if there is a temptation to see in the Provinces' episode, at least, the symbol of a strong judicial opposition of the Constitutional Court to national legislative reforms prompted by the financial crisis, a comprehensive reading of the recent jurisprudence tells us, in fact, the opposite.<sup>LII</sup>

It is for instance relevant to note that, in the same months of the judgment 220/2013 based on somewhat formal grounds, the Italian Constitutional Court started to strike down sections of regional laws that infringe Art. 81.4 of the Constitution on the balance between revenue and expenditure (see for instance the cases for Campania and Friuli-Venezia Giulia in the decisions n. 70/2012<sup>LIII</sup> and 115/2012<sup>LIV</sup>). Moreover, the Court rejected in the case n. 8/2013<sup>LIV</sup> the complaint of two Regions against the provisions of a Decree-law of the State according to which the local authorities are divided into two classes based the parameters of proficiency, so that they participate in different degrees to the consolidation of public finances, stating that it is reasonable and legitimate to allow for "an evaluation of the adaptation of each local authority to the principles of rationalization of regulation".

Comparable judgments by the Italian Constitutional Court upholding national reforms came also in the fields of the redefinition (and optimization) of the geographical allocation of courts and tribunals (n. 237/2013<sup>LVI</sup>), of the regional financial contributions to the 'spending review measures' (n.205/2013<sup>LVII</sup>), or on the powers of control of the Court of Auditors on the local entities of the five Italian 'regions with special status' (n. 60/2013<sup>LVIII</sup>). Moreover, and in the same vein, several judgments stroke down regional legislative measures considered as conflicting with the new national reforms: for instance the decision n. 28/2013<sup>LIX</sup>, n.78/2013<sup>LX</sup>, n. 138/2013<sup>LXI</sup>, n. 180/2013<sup>LXII</sup> n. 221/2013<sup>LXIII</sup>.



## 5. Conclusion

In this article we tried to present an account of the Italian case by stressing the trends that have emerged in this context, the position of the different institutional actors that were asked to deal with the implementation of the relevant EU anti-measures crisis and their impact on the relationship between the centre and periphery. The cases reported here are just a few examples, though particularly significant, showing the risk of centralization in the Italian system induced by the EU/international anti-crisis measures.<sup>LXIV</sup> Other similar examples come from Spain, although, as Ruiz Almendral pointed out, this centralization is only partly connected to what is happening at European level, as it has its roots in previous events, since the “Spanish State of Autonomies was already in a changing course of re-centralization”, so the new rules “may serve to accelerate the process.” (Ruiz Almendral, 2012)<sup>LXV</sup>. These observations could apply to Italy as well, where despite the bombast of federalism and constitutional reforms employed by all recent Italian governments, the crucial issue of “fiscal federalism”<sup>LXVI</sup> has not been realized completely, more than 10 years after the constitutional reform of 2001. This seems to reveal a more complex mosaic, where the EU is just one piece of a broader set of factors to be taken into account. Other possible evidence of the fact that this centralization is imputable to each State and cannot be automatically traced back to the EU’s intervention might be given by a recent Opinion of the Committee of Regions, where the Committee expresses “serious concerns about a contrary trend in some Member States in which the financial autonomy of local and regional authorities or the right to self-government at local level has been substantially curtailed”.<sup>LXVII</sup> The “inappropriate” contents of the letter sent by the ECB to the Italian government<sup>LXVIII</sup> might question this conclusion but as Fasone pointed out “it remains unclear to what extent the content of this letter was binding for Italy or rather made explicit previous commitment undertaken by the state in its relationship with the European Central Bank” (Fasone, 2014).

There is another factor that should be taken into account: as we saw the Italian Constitutional Court did not renounce its intervention in some of the most problematic conflicts created by the national measures taken to respond to the EU/international constraints, taking in any case a rather pro-centralistic position, and without nevertheless



questioning the consistency of the EU/international measures with its Constitution. This might be seen as a further evidence of the possibility of distinguishing the responsibility of the different levels on the reduction of subnational margins.

In any case, as scholars have pointed out (Russo 2013) the Italian reaction to crisis seems to see the institutional pluralism that is a product of a Regional State as a kind of unbearable cost to be limited or radically avoided. At the same time this attention paid to the *pars destruens* (liming, reducing and even abolishing territorial entities) does not seem to be accompanied by a real *pars construens* or, at least, this “negative strategy” is not always compensated by a real design aimed at re-discussing the functions concretely attributed to these entities. Indeed so far rationalization has been understood only in terms of cutback (Russo 2013).

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\* Giuseppe Martinico is Professor of Comparative Public Law at the Scuola Sant’Anna, Pisa. Leonardo Pierdominici is Researcher at the European University Institute, Florence, and Italian Rapporteur within the project *Constitutional Change through Euro Crisis Law. Country Reports on the impact of crisis Instruments on the legal structures of the EU Member States*, run at the EUI (<http://eurocrisislaw.eui.eu/>). This article is the product of a joint effort, however Giuseppe Martinico wrote sections: 1, 3 and 6 while Leonardo Pierdominici wrote sections 2, 4 and 5. We would like to thank Giacomo DelleDonne and the anonymous reviewers for their comments.

<sup>I</sup> See Menéndez 2013.

<sup>II</sup> Chiti and Teixeira 2013.

<sup>III</sup> See Pierdominici 2014

<sup>IV</sup> Morrone 2014a): 10, writes about a “centripetal twist” in the public budgets laws.

<sup>V</sup> According to the definition by Pizzorusso 1993.

<sup>VI</sup> de Vergottini 2007: 476.

<sup>VII</sup> See Menéndez, 2013:453: “the European Union is not undergoing one crisis, but is instead suffering several simultaneous, interrelated, and intertwined crises - crises, which are global, not exclusively European. Put differently, the subprime crisis turned the economic, financial, fiscal, macroeconomic, and political structure weaknesses of the Western socio-economic order into at least five major crises”.

<sup>VIII</sup> See for a similar reflection Beck 2013: 27: “In dealing with the threat to the euro and the European Union, the relevant players are effectively *negotiating about an exceptional situation whose ramifications are no longer confined to individual nation-states. Instead we are facing a 'transnational emergency'*, which can be exploited in various ways (legitimated by either democratic or technocratic means) by a variety of players, including national politicians, the unelected representatives of European institutions such as the ECB, social movements, or even the managers of powerful financial organizations” (emphasis added).

<sup>IX</sup> For space constraints, we can only refer here to the interesting analysis by Chiti and Teixeira 2013 and on the formal point in particular, by Kilpatrick 2014.

<sup>X</sup> Council Decision (2010/320/EU) of 10 May 2010.

<sup>XI</sup> Peers 2012a; Besselink and Reestman 2012; Craig 2012a; Louis 2012; House of Commons European Scrutiny Committee 2012. Pernice 2012; Tuori 2012.

<sup>XII</sup> The so-called six pack is composed of five Regulations (Regulations n. 1173/2011, n. 1174/2011, 1175/2011, 1176/2011 and 1177/2011) and one Directive (Directive n. 2011/85). The two pack is composed of the following regulations: Regulation n. 472/2013 and 473/2013; Kocharov 2012.

<sup>XIII</sup> On this “jungle” of measures see: Bianco 2012.

<sup>XIV</sup> See for instance the contributions included in de Witte- Heritier and Trechsel 2013. See also the first comments on the Pringle case of the CJEU: (Case C-370/12 Pringle, not yet reported); Craig 2013a; de Witte-Beukers, 2013; Kokott 2013





<sup>XV</sup> Art. 81 It. Const. ("The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle.").

<sup>XVI</sup> On this debate see: Bognetti 1993 and Luciani 1990

<sup>XVII</sup> Art. 97 It. Const. ("General government entities, in accordance with European Union law, shall ensure the balance of their budgets and the sustainability of the public debt."). The Italian Constitution goes on to limit the margin of Regions and Local Authorities in the field of matters of regional and local finance, by introducing new constraints on the local authorities. Art. 119 It. Const. For a discussion of these reforms, see 2012.

<sup>XVIII</sup> Art. 119 It. Const. ('Municipalities, provinces, metropolitan cities and regions shall have revenue and expenditure autonomy, subject to the obligation to balance their budgets, and shall contribute to ensuring compliance with the economic and financial constraints imposed under European Union law. Municipalities, provinces, metropolitan cities and regions shall have independent financial resources. They set and levy taxes and collect revenues of their own, in compliance with the Constitution and according to the principles of co-ordination of public finance and the tax system. They share in the revenues from State taxes related to their respective territories. State legislation shall provide for an equalization fund - with no allocation constraints - for the territories having lower per-capita tax-raising capacity. Revenues raised from the above-mentioned sources shall enable municipalities, provinces, metropolitan cities and regions to fully finance the public functions attributed to them. The State shall allocate supplementary resources and adopt special measures in favor of specific municipalities, provinces, metropolitan cities and regions to promote economic development along with social cohesion and solidarity, to eliminate economic and social imbalances, to foster the exercise of the rights of the person or to achieve goals other than those pursued in the ordinary implementation of their functions. Municipalities, provinces, metropolitan cities and regions have their own assets, which are allocated to them pursuant to general principles laid down in State legislation. They may have recourse to borrowing only as a means of financing investment expenditure, with the concomitant adoption of amortization plans and subject to the condition that budget balance is ensured for all authorities of each region, taken as a whole. State guarantees on loans contracted by such authorities are not admissible').

<sup>XIX</sup> Mazzola 2012. See also Law Decree 10 October 2012, n. 174 (It.), which, among other things, has extended some of the controls that in a first instance were applicable to State only performed by the Corte dei conti, 'an Institution with the role of safeguarding public finance and guaranteeing the respect of jurisdictional order.' CORTE DEI CONTI, [http://www.corteconti.it/english\\_corner/chi\\_siamo/](http://www.corteconti.it/english_corner/chi_siamo/) (last visited May 21, 2013).

<sup>XX</sup> In Italy the Constitution distinguishes between Regions with special and ordinary status. According to Art. 116 "Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d'Aosta/Vallée d'Aoste have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law. The Trentino-Alto Adige/Südtirol Region is composed of the autonomous provinces of Trento and Bolzano".

<sup>XXI</sup> Italian Constitutional Court, decision n. 151, 2012, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>XXII</sup> See also Falcon 2012:11.

<sup>XXIII</sup> See the comparative analysis by Vandelli 1990, and recently Mazza 2012.

<sup>XXIV</sup> With the so called "Decreto Rattazzi", Law 3 October 1859 n. 3702 del Regno di Sardegna.

<sup>XXV</sup> For details see Sandulli, and Vesperini 2011: 58.

<sup>XXVI</sup> For a comprehensive study see Fabrizzi 2012.

<sup>XXVII</sup> For several reasons, both theoretical and contingent: for comprehensive accounts see, *ex multis*, the pioneering studies of Amorth 1945, and Ambrosini 1957, and the recent summary by D'Atena 2013. In the literature in English, see now Mangiameli 2014.

<sup>XXVIII</sup> Both the discussions in the context of the *Ministero per la Costituente* and in the *Commissione dei settantacinque* within the Constituent Assembly were in this sense: see Fabrizzi 2008.

<sup>XXIX</sup> See for instance the rejected proposal of the Partito Repubblicano Italiano in 1977 "Soppressione dell'ente autonomo territoriale provincia: modifica degli articoli 114, 118, 119, 128, 132, 133 e della VIII disposizione di attuazione della Costituzione; abrogazione dell'articolo 129 della Costituzione", based explicitly on «a chain of negative findings on the institutional and administrative role of the province».

<sup>XXX</sup> For instance, all the bicameral committees convened to draft organic reforms of the Italian Constitution (the Commissione Bozzi of 1983, the Commissione De Mita/Iotti of 1992, and the Commissione D'Alema of 1997) critically discussed the actual role and the very existence of the Provinces, but with no results: see Fabrizzi 2008.



XXXI Again at the end of June 2010, a proposal to abolish the Provinces with less than 220.000 inhabitants made its way in a draft of the Decree-Law n. 78/2010, but then disappeared from the official text; in July 2011, a new constitutional bill for their suppression (XVI Legislatura, AC n. 1990-1836-1989-2264-2579-A/R) was rejected.

XXXII See the full text, as revealed at the time by the Italian main newspaper, the Corriere della Sera, at the webpage [http://www.corriere.it/economia/11\\_settembre\\_29/trichet\\_draghi\\_italiano\\_405e2be2-ca59-11e0-ae06-4da866778017.shtml](http://www.corriere.it/economia/11_settembre_29/trichet_draghi_italiano_405e2be2-ca59-11e0-ae06-4da866778017.shtml).

XXXIII The largest quota among all the Eurozone members: see the details provided by the European Central Bank at its webpage [http://www.ecb.europa.eu/press/pr/date/2013/html/pr130221\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2013/html/pr130221_1.en.html).

XXXIV In itself seen by some observers as evidence of a state of exception, given the particularly active role of the President of the Republic in such appointment: see for an early reflection on the point Ruggeri 2011.

XXXV Law Decree 6 December 2011, n. 201 - Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici. (11G0247) (GU n.284 del 6-12-2011 - Suppl. Ordinario n. 251).

XXXVI For recent general reconstructions see, *ex multis*, Celotto1997; Simoncini 2006; on the most recent trends Calvano 2014; Simoncini and Longo 2014.

XXXVII See for instance Italian Constitutional Court, decision n 171/2007, at par. 4 of the *Considerato in diritto* available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it).

XXXVIII This created a paradoxical convergence with the practice of the Fascist period, when a formal law, Law 31 January 1926, n. 100, explicitly provided for the exclusion of judicial review on the criteria of necessity and urgency, as “political questions”: see Benvenuti 2013.

XXXIX See Italian Constitutional Court, decision n. 220/2013, at par. 12.1 of the *Considerato in diritto*: “This ambiguity confirms the obvious inadequacy of the instrument of the decree-law to carry out a comprehensive and systemic reform, which (...) requires implementation processes necessarily of long term nature, with the need of suspensions of effectiveness, referrals and progressive systematizations, which are difficult to reconcile with the immediacy of effects inherent to the decree-law, in accordance with the constitutional design” (translation by the authors). Available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it).

XL Doubts were in any case raised by local scholars, like Massa 2014 and by the national Court of Auditors: see Corte dei Conti - 2013.

XL.I See Italian Constitutional Court, decision n. 220/2013, at par. 12.1 of the *Considerato in diritto, supra*: “The above considerations do not intrude into the merits of the choices made by the legislature and do not imply the conclusion that a reform of local authorities can be done only by constitutional laws” (translation by the authors).

XL.II *Ibidem*, at par. 12.2: “It is clear from the previous reasoning that there is a logical and legal incompatibility - which goes beyond the specific subject of today's constitutional scrutiny - between the decree-law, which assumes the existence of extraordinary cases of necessity and urgency, and the necessary initiative of the municipalities” (translation by the authors). Available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it).

XL.III See for an analysis of the two dimensions Bin 2013; Di Cosimo 2013.

XL.IV Law Decree 5 November 2012, n. 188. Disposizioni urgenti in materia di Province e Città metropolitane (12G0210) (GU n.259 del 6-11-2012).

XL.V Disegno di legge “Modalità di elezione del Consiglio provinciale e del Presidente della Provincia, a norma dell'articolo 23, commi 16 e 17, del Law Decree 6 December 2011, n. 201, convertito, con modificazioni, dalla legge 22 dicembre 2011, n. 214” (5210).

XL.VI Disegno di legge costituzionale: “Abolizione delle province” (1543), presented on the 20th August 2013 at the Camera dei Deputati: see the text at the webpage of the lower house of the Parliament [http://www.camera.it/\\_dati/leg17/lavori/stampati/pdf/17PDL0009060.pdf](http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0009060.pdf)

XL.VII Law Decree 14 August 2013, n. 93 Disposizioni urgenti in materia di sicurezza e per il contrasto della violenza di genere, nonché in tema di protezione civile e di commissariamento delle province (13G00141) (Gazzetta Ufficiale n.191 del 16-8-2013), convertito con modificazioni dalla L. 15 ottobre 2013, n. 119 (in G.U. 15/10/2013, n. 242).

XL.VIII And therefore for the prerogatives of the Parliament and for the certainty of the law: see on these points, *ex multis*, Pisaneschi 1988; Ainis 1997; Rescigno1998; Lupo 2007; Piccirilli 2009.

XL.IX See also Fabrizzi 2014.

<sup>L</sup> As always existed in European integration history, also in rather relevant sectors: see, also for theoretical reconstructions on the concept and reflections on the transformation of soft into hard law, the classic studies of Wellens, and Borchardt 1989; Snyder 1994; Trubek, Cottrell and Nance2006.





<sup>LI</sup> See the conclusions of the Council available at the webpage [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/140245.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/140245.pdf)

<sup>LII</sup> See the reflections by Morrone 2014 and Tega 2014.

<sup>LIII</sup> Italian Constitutional Court, decision No. 70/12 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LIV</sup> Italian Constitutional Court, decision No. 115/12 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LV</sup> Italian Constitutional Court, decision No. 8/13 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LVI</sup> Italian Constitutional Court, decision No. 237/13 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LVII</sup> Italian Constitutional Court, decision No. 205/13 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LVIII</sup> Italian Constitutional Court, decision No. 60/13 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LIX</sup> Italian Constitutional Court, decision No. 28/13 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LX</sup> Italian Constitutional Court, decision No. 78/13 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LXI</sup> Italian Constitutional Court, decision No. 70/12 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LXII</sup> Italian Constitutional Court, decision No. 138/13 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LXIII</sup> Italian Constitutional Court, decision No. 221/13 available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>LXIV</sup> Falcon 2012.

<sup>LXV</sup> Ruiz Almendral 2013: 201. On Spain see also: Albertí Rovira 2013; Gordillo Pérez- Canedo Arrillaga 2013.

<sup>LXVI</sup> See Scuto 2010 (discussing how this discipline is governed by law number 42/2009, which has been implemented through several legislative acts).

<sup>LXVII</sup> Opinion of the Committee of the Regions on “Devolution in the European Union and the place for local and regional self-government in EU policy making and delivery”, (2013/C 139/08).

<sup>LXVIII</sup> In that letter the ECB wrote that: “There is a need for a strong commitment to abolish or consolidate some intermediary administrative layers (such as the provinces). Actions aimed at exploiting economies of scale in local public services should be strengthened”. The text of the letter was also published by *Il Corriere della Sera* ([http://www.corriere.it/economia/11\\_settembre\\_29/trichet\\_draghi\\_inglese\\_304a5f1e-ca59-11e0-ae06-4da866778017.shtml](http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ca59-11e0-ae06-4da866778017.shtml)): On this see Olivito 2014.

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