

MANDATORY VACCINATION REQUIREMENTS AND THE GREEN COVID-19 CERTIFICATE: A FUNDAMENTAL RIGHTS PERSPECTIVE IN ITALY¹

REQUISITOS OBRIGATÓRIOS DE VACINAÇÃO E CERTIFICADO VERDE COVID-19: UMA PERSPECTIVA DE DIREITOS FUNDAMENTAIS NA ITÁLIA

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Abstract: Since the Covid-19 pandemic outbreak in March 2020, governments worldwide have resorted to various measures to manage and contain the spread of the virus. In Italy, for example, severe restrictions on freedom of movement were enforced from the very beginning, and they lasted until the vaccination campaign picked up in Spring 2021. At that point, the executive started to lift the most severe measures progressively, and, at the same time, it began to use other legal instruments. For instance, besides progressively enforcing a compulsory vaccination requirement for some categories of people only, the executive introduced a novelty in the Italian legal system: the Green Covid-19 Certificate (or ‘Green Pass’), which not only became a condition to access venues and make use of services, but it also became a condition for the enjoyment or exercise of fundamental rights, including the rights to education and work. The aim of this paper is to assess the Italian Government’s decisions through the lenses of liberal democratic constitutionalism, reflecting upon the balance that was struck between public health and individual fundamental rights. This kind of assessment is especially important in times of emergency, as they are typically defined by fast-tracked and temporary decisions which may, nevertheless, “inadvertently” become embedded in the constitutional legal order. Indeed, a critical analysis of the compulsory vaccination and Green Pass requirements will let us reflect upon their implications for fundamental rights and the form of government, ultimately reinforcing our view that even though the mandatory health requirements that were enforced throughout the emergency may be justified on public health grounds, under a liberal democratic constitution characterised by a parliamentary form of government, a transparent, informed, and participatory, deliberative process where Parliament may effectively oversee the law-making powers exercised by Government should be guaranteed.

Keywords: Covid-19. Mandatory health treatment. Vaccination. Covid-19 certificate. Fundamental rights.

Resumo: Desde o surto da pandemia de Covid-19 em março de 2020, os governos em todo o mundo recorreram a várias medidas para gerenciar e conter a propagação do vírus. Na Itália, por exemplo, restrições severas à liberdade de movimento foram impostas desde o início e duraram até a campanha de vacinação ser retomada na primavera de 2021. Nesse ponto, o executivo começou a suspender progressivamente as medidas mais severas e, no momento, ao mesmo tempo, passou a utilizar outros instrumentos jurídicos. Por exemplo, além de impor progressivamente a obrigatoriedade de vacinação obrigatória apenas para algumas categorias de pessoas, o executivo introduziu uma novidade no ordenamento jurídico italiano: o Certificado Verde Covid-19 (ou ‘Green Pass’), que não só se tornou condição de acesso a locais e fazer uso de serviços, mas tornou-se também condição para o gozo ou exercício de direitos fundamentais, incluindo o direito à educação e ao trabalho. O objetivo deste artigo é avaliar as decisões do governo italiano através das lentes do constitucionalismo democrático liberal, refletindo sobre a ponderação que foi alcançada entre a saúde pública e os direitos fundamentais individuais. Esse tipo de avaliação é especialmente importante em tempos de emergência, pois são tipicamente definidos por decisões rápidas e temporárias que podem, no entanto, “inadvertidamente” ser incorporadas ao ordenamento jurídico constitucional. De fato, uma análise crítica dos requisitos obrigatórios de vacinação e *Green Pass* nos permitirá refletir sobre suas implicações para os direitos fundamentais e a forma de governo, reforçando nossa

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visão de que, embora os requisitos obrigatórios de saúde que foram aplicados durante a emergência possam ser justificados por razões de saúde pública, ao abrigo de uma constituição democrática liberal caracterizada por uma forma parlamentar de governo, deve ser garantido um processo deliberativo transparente, informado e participativo, onde o Parlamento possa fiscalizar eficazmente os poderes legislativos exercidos pelo Governo.

Palavras-chave: Covid-19. Tratamento de saúde obrigatório. Vacinação. Certificado Covid-19. Direitos fundamentais.

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Introduction

Since the Covid-19 pandemic outbreak in March 2020, governments worldwide have resorted to various measures to manage and contain the spread of the virus. At the outset, executives primarily enforced hard or soft lockdowns, but as vaccines were gradually distributed among countries, various measures were introduced. In Italy, for example, severe restrictions on freedom of movement were enforced from the beginning of the virus outbreak in March 2020. They lasted until the vaccination campaign picked up, and the number of contagions and deceased consequently decreased (Civitarese Matteucci et al., 2021). At that point, the executive started to lift the most severe measures progressively, and, at the same time, it began to use other legal instruments⁴. For example, besides progressively enforcing a compulsory vaccination requirement for some categories of people only, the executive introduced a novelty in the Italian legal system: the Green Covid-19 Certificate (or ‘Green Pass’), which not only became a condition to access venues and make use of services, but it also became a condition for the enjoyment or exercise of fundamental rights, including the rights to education and work.

As the executive chooses between alternatives and tries to reach a balance between public health and individual fundamental rights, it is essential to assess such choices through the lenses of liberal democratic constitutionalism. This is true especially in times of emergency, as they are typically defined by fast-tracked and temporary decisions which may, nevertheless, “inadvertently” become embedded in the constitutional legal order.

⁴ It is fair to point out that the legal framework providing emergency powers and mandatory vaccination was introduced by resorting to statutory decrees, a type of legislation in which there is a form of cooperation between the Cabinet and the Parliament. They are, indeed, provisional decisions issued by the Government under its responsibility, and they have the ‘force’ of primary law. Immediately after entering into force, they must be presented to one of the Houses to be ratified (transposed) by the Parliament into statute within 60 days from their enactment; otherwise, they will be void from the outset (void *ab initio*). In reviewing a statutory decree, Parliament can amend it. For a broader account, see S Civitarese Matteucci et al. (2021). In this article we refer to policies and decisions on vaccination and the Green Certificate as substantially the Government’s, but it should be borne in mind that they were issued as statutory decrees and subsequently transposed into statute.

A critical analysis of the compulsory vaccination and Green Pass requirements will let us reflect upon their implications for fundamental rights and the form of government. To do so, we will first expose the legal framework introducing the two requirements, which will be illustrated separately in Section 1. In Section 2, we will then explore the right to health as laid out in Art. 32 of the Italian Constitution, which recognises the latter as a fundamental right and collective interest. It empowers the State, on certain conditions, to enforce obligatory medical treatments. This will be necessary to better contextualise mandatory vaccination requirements and, more generally, mandatory health treatments within the Constitution. Against this background, in Section 3, we will discuss whether and to what extent the mandatory vaccination requirements and the Green Covid-19 Certificate are lawful. Finally, in Section 4, we will advance the view that even though the latter requirements may be justified on public health grounds, under a liberal democratic constitution characterised by a parliamentary form of government, a transparent, informed, and participatory, deliberative process where Parliament may effectively oversee the law-making powers exercised by Government should be guaranteed.

1 A legal framework in continuous evolution: mandatory vaccinations and the Green Covid-19 Certificate

1.1 Mandatory vaccination requirements

Mandatory vaccination requirements were first introduced in April 2021 for front-line healthcare workers: the obligation covered practitioners and anyone working in healthcare structures and alike (including pharmacies), both public and private. The goal enshrined in Art. 4(1) of statutory decree n. 44/2021 was, in general, to protect public health and, more specifically, to assure safety conditions while assisting people during the pandemic. In other words, the most apparent legislative intent was not just that people would not get infected but rather to ensure that healthcare structures, under a phenomenal strain, could deliver their services in the safest possible conditions. Following this obligation, non-compliant healthcare workers could be removed from any position entailing interpersonal contact or any other risk of contagion. Theoretically, they could be redirected to tasks that did not involve social contact, but this was impossible in most cases. Furthermore, even where redeployment was logistically feasible, workers in the public healthcare system had to accept a downgrade in their working position, with a correspondingly lower wage, if they were offered a different job within the healthcare structure. In all other cases, workers were suspended with no salary.

There is room to speculate about the nature of such an array of measures as either a sanction for non-compliance or conditions. For sure, to describe the refusal by a doctor to be vaccinated as a right to opt-out sounds odd. The letter of the law clearly states that healthcare

workers have an obligation to be vaccinated, so we will consider this policy as a case of mandatory vaccination caught by Article 32 of the Italian Constitution (see Section 3).

A slightly different policy concerned schools. By statutory decree n. 111/2021 (see *infra*), until November 2021, school staff was required to hold a Green Covid-19 Certificate. Work was made conditional upon either being vaccinated, having recovered from Covid-19, or taking a molecular or antigen swab test within 48 hours before accessing the premises. Statutory decree n. 172/2021, adopted in November 2021, extended the obligatory vaccination established for healthcare workers to school staff and people working in law and order or public security. The requirement entered into force on 15 December 2021, and the unvaccinated staff was thus suspended without pay. As made clear in the preamble of statutory decrees n. 172/2021 and n. 44/2021, by extending mandatory vaccination to school staff, which was particularly exposed to the risk of contagion, the Government aimed to guarantee the continuation of school activities. Within the same logic, in mid-December 2021, by statutory decree n. 1/2022, the Government decided to extend the vaccination requirement to university staff starting from 1 February 2022. Like school staff, university staff were only required to hold a Green Covid-19 Certificate until that moment.

The decree n. 1/2022 marked a turning point in the Italian Government's vaccination policy far beyond extending to university staff. Whereas the mandatory vaccination enacted before was based on selecting specific categories of activity to preserve the exercise of fundamental rights (e.g., health or education) or general needs (safety), with that decree, vaccination became obligatory for people over the age of 50. In presenting to the House of Deputies the bill to transpose the statutory decree into statute (Bill n. 3434/2022), the Prime Minister, Mr Mario Draghi, and the Minister for healthcare, Mr Roberto Speranza, justified this shift on international and national scientific evidence. They quoted studies and figures in which people over 50 were worse affected by the virus's Omicron variant in terms of mortality and intensive care hospitalisation.

1.2 Green Covid-19 Certificate

The Green Covid-19 Certificate was born as an EU legal instrument aimed at facilitating and guaranteeing free movement within the territory of the European Union. Indeed, the latter freedom was severely impaired from the outset of the pandemic, as the Member States gradually adopted measures to limit the spread of the Covid-19 virus. Such measures included entry restrictions or requirements for cross-border travellers, thus affecting and constraining the exercise by Union citizens of their right to move and reside freely within the territory of the Member States. The European Parliament and the Council of the EU adopted Regulation (EU) 2021/953, which established a common framework for issuing, verifying, and accepting certificates to preserve, guarantee, and

facilitate the freedoms of movement and establishment⁵. Indeed, the EU Commission proposed the creation of the Digital Green Certificate in March 2021, which entered into force on 1 July 2021, portraying it as a means to ensure that EU citizens could benefit from a harmonised tool to support free movement. Some individual Member States, including Italy, picked up on the proposal from the very start and explored ways to introduce this novelty into their legal order. Nevertheless, as the health emergency evolved and vaccines became more accessible, the nature of the Certificate changed, and its scope of application was drastically extended as it was gradually transformed into a *conditio sine qua non* for people to resume ordinary living.

The Certificate was introduced into the Italian legal order by article 9 of statutory decree n. 52/2021 (22 April 2021), which was transposed into an Act of Parliament by statute n. 87/2021. At the outset, the Green Covid-19 Certificate (otherwise known as “Green Pass”) could be released in three cases: (i) if the person received at least the first vaccination doses; (ii) if the person recovered from infection; and (iii) if the person undertook a molecular or rapid test and tested negative. As scientific data was increasingly collected and processed, and the pandemic scenario evolved, so did one of the conditions prescribed under article 9. Condition (i) was changed to provide that the Certificate was released if the person had completed the vaccination cycle or if he/she had received the booster dose.

When the Certificate was first introduced, it was used primarily (if not exclusively) to guarantee people’s freedom of movement within the national territory. People could travel to/from specific country areas only if they fell under particular conditions, including having the said Certificate. The policy rationale changed with statutory decree n. 105/2021, issued on 23 July 2021, after the EU Green Digital Certificate entered into force. The Italian Government decided to extend its scope of application and started to impose restrictions on all unvaccinated persons who did not hold a Green Pass. The alleged aim was to “gently” nudge people to get vaccinated, but this approach increasingly gave way to a different rationale as the months passed. Starting from August 2021, the Green Pass became a necessary condition to access restaurants, bars, gyms, and other services/facilities. Statutory decree n. 111/2021 (issued on 6 August 2021) enforced the Green Pass requirement on all school/university staff (including suppliers and outside workers) and university students.

Anyone who failed to exhibit the Certificate could not enter the school and university premises. The staff’s inability to present the Certificate resulted in an unexcused absence, leading to the employee’s suspension without pay or compensation after the fifth absence. The statutory decree also established that access to specific transport was allowed only to people who held the

⁵ An action was brought before the EU Court of Justice on 30 August 2021, in which the applicants claimed that the Court should annul the Regulation (EU) 2021/953 in its entirety, as its provisions unlawfully discriminated with respect to the exercise of freedom of movement (*Abenante and Others v Parliament and Council*). The claimants applied for an immediate interim measure, which was dismissed by the ECJ on 29 October 2021 (Order of the President of the General Court, Case T-527/21 R).

Green Pass. This requirement applied to national flights, ships and ferries travelling across regions (except those crossing the Messina Channel), high-speed and long-distance trains, coaches travelling across regions, and rental coaches. The Certificate, therefore, was not mandatory for local public transport or transport usually used by everyday commuters.

One of the most disputed decisions, representing a turning point regarding the justification of the policy, was to extend the certificate requirement to all workers from 15 October 2021. Indeed, statutory decree n. 127/2021 (issued on 21 September 2021) enforced this condition for all work environments, in public (including people working in the public administration, constitutional bodies and the judiciary) and private sector. As the statutory decree's preamble specifies, the justification of such measure was dual: to guarantee the full potential and efficacy of the containment measures adopted thus far and protect workers' health and safety. The rationale inspiring this decision seems to show two policy objectives: (i) not so much to contain the spread of the virus, but rather to limit its most severe effects and therefore lower the number of hospitalised patients; (ii) more controversially, to intensify the "moral suasion" on people to get vaccinated⁶.

This second objective became even more evident when the Government eventually extended mandatory vaccination to other categories and introduced a new and more robust version of the Green Covid-19 Certificate: the "super Green pass" (statutory decree n.172/2021). Testing negative to a molecular or rapid test certificate was insufficient to obtain the latter. Only completing the vaccination cycle or recovering from Covid-19 gave a person access to more Covid-19-sensitive situations, such as going to theatres, sports events, and restaurants.

Following the trend noted above with regards to the harshening of the first Covid-19 Certificate, the scope of application of the super Green Pass was also noticeably extended, so much so that the latter became mandatory to travel (including local and regional transport, thus affecting everyday commuters too)⁷, and it was enforced upon all workers. Indeed, statutory decree n. 1/2022 (issued on 7 January 2022), besides making vaccination obligatory for people over 50, also made access to work environments conditional upon holding the super Green Pass⁸.

One of the main questions is why the Government decided to gradually expand the scope of the Green Covid-19 Certificate rather than introduce direct compulsory vaccination in the same way it did for the NHS. The extent of basic human activities affected by the condition of proving one's Covid-19 immunity status is such that, from a substantive point of view, one could speculate that what is described above amounts to a *de facto* compulsory vaccination for all workers, regardless of age (see *infra*, Section 3). The likeliest political reason behind this choice was opportunistic: to design a sanction to enforce a formal obligation is far from easy. While extremely

⁶ See on this aspect the discussion in section 3.

⁷ Statutory decree n. 24/2022, art. 6 removed the super Green Pass requirement for transport and re-introduced the basic Green Pass requirement.

⁸ The super Green Pass requirement was removed by statutory decree n. 24/2022.

harsh sanctions (say, prison) are unfeasible, and a fine could become the price ‘to buy’ a vaccine-free status for affluent unwilling persons, a nudging approach towards vaccination was assumed to be more effective than a clear-cut obligation.

The latter assumption seems to be contradicted by the policy shift that imposed a general obligation on people over 50 to face the Omicron variant spread. On the other hand, the line separating obligatory vaccination and Green Pass requirements had become so blurry that they should be treated as different instances of the same mandatory vaccination policy. Hence, we surmise that the super Green Pass and the obligatory Covid-19 vaccination fall within “compulsory treatments”.

2 The right to health in the Italian Constitution

Under Article 32 of the Italian Constitution, “The Republic safeguards health as a fundamental right of the individual and a collective interest and guarantees free medical care to the indigent”⁹. Health is, accordingly, first and foremost a fundamental human right that the Republic as a whole (*i.e.*, all levels of government) must protect. To this individual protection, a collective dimension is added to recognise the general interest that the population is as healthy as possible.

The Italian Constitution reserves the adjective “fundamental” only to the right to health; however, this does not mean giving health a “super right” status which trumps all other constitutional rights¹⁰. The Constitutional Court clarified this point in a landmark decision concerning the relationship between the right to health, a healthy environment, and the right to work. The Court ruled that the Constitution does not envisage a hierarchical order among fundamental rights but rather that they must be constantly balanced against each other to pursue a systematic equilibrium. Indeed, one of the most potent passages of the decision explicitly states that

all fundamental rights protected by the Constitution are mutually related. Thus, it is impossible to identify any of them in isolation as prevailing absolutely over the others. Protection must always be systematic and not fragmented into a series of uncoordinated rules and potentially conflict with one another. If this were not the case, the result would be an unlimited expansion of one of the rights, which would ‘tyrannise’ other legal interests recognised and protected under constitutional law, constituting an expression of human dignity (decision n. 85/2013).

Within this frame, the Italian constitutional discourse on the right to health follows the general (international) understanding of it as an inclusive right not limited to access to healthcare.

⁹ For an understanding of what is meant by “health” under Art. 32 see: Simoncini and Longo (2006, p. 665).

¹⁰ For a recent interpretation of the right to health (declined as the right to life) as a “super right” that lies at the very basis for the enjoyment of all other fundamental rights, see: Habermas (2022). *Proteggere la Vita. I diritti fondamentali alla prova della pandemia. Il Mulino*. His understanding of the right to life, together with the right to health, forms the legal basis to justify the State’s *duty* to use the law to organise solidarity among citizens: “Without the possibility of basing legal coercion on citizens’ solidarity, the democratic rule of law lacks political existence”.

Rather, it comprises many other factors such as food safety, sanitation, working in health environmental conditions, etc. It includes both freedoms – such as the freedom from non-consensual medical treatment – and entitlements, such as access to care, drugs, prevention, and information¹¹.

Regarding the entitlement-freedom conflict, Article 32.2 of the Italian Constitution establishes that nobody can be obliged to undergo any medical treatment unless a statutory rule states so and, the law must, in any case, pay due respect for the human person. The dialectic between the right to be treated and the right to refuse treatment can be interpreted in light of the underlying right to self-determination, which can be limited. The possibility of restricting the same right to self-determination is in harmony with the decision's excerpt mentioned above regarding how the solidarity principle, enshrined in Art. 2 of the Constitution, operates (Ruggeri, 2021, p. 178)¹². Given that health is not only an individual right but also a “collective interest”, the “duty of each individual not to harm or risk harming the health of others” is coherent with the “principle that one’s rights are limited by mutual recognition and by the equal protection of the right of others” (decision n. 218/1994). A compulsory treatment, therefore, is intended not only to improve or maintain the health of the individual that receives, say, the vaccine but also that of others, “as it is precisely this latter purpose, which pertains to health as an interest of society at large, that justifies the restriction on individual self-determination” (decision n. 268/2017). The idea of a community based and guided by a spirit of solidarity that the Italian founding fathers envisioned when they drafted the Constitution resonates here (Ruggeri, 2021, p. 176).

As mentioned above, Art. 32.2 of the Constitution establishes that mandatory treatments may be enforced only through primary sources of law (thus excluding secondary sources such as executive regulations) and that any legislative discretion must be exercised in respect of the person, which has always been interpreted as a reference to “human dignity”. “Mandatory treatments” cover a broad area that comprises remedial treatments, rehabilitation, and preventive treatments, such as vaccines. What is crucial about that is understanding health as a collective interest under the Italian Constitutional Court’s doctrine. First, mandatory treatments should not harm the recipient’s health, the only exception being those minor and temporary consequences that generally derive from the treatment, and as such are tolerable (decision n. 307/1990). This approach shows how the balancing test may prevent an unlimited expansion of the collective interest for health, reinforcing the directive that no right or interest could ever become tyrannous. Indeed, if the negative consequences of a vaccine were to supersede the “tolerability test”, then the importance of health as a collective interest would not suffice, on its own, to justify the sacrifice imposed on the individual right to health as self-determination. The criteria of “tolerability” are thus intertwined

¹¹ See Office of the High Commissioner for Human Rights (2000).

¹² Article 2 provides that “... The Republic expects that the fundamental duties of political, economic, and social solidarity be fulfilled”.

with the explicit limitation posed by Art.32, *i.e.*, the respect for the human person. Indeed, the latter limit cannot be ousted for social solidarity (Cicognani & Severi, 1992, p. 18).

On the other hand, the extent to which the right to self-determination may be limited will vary based on the need to satisfy the right to health of others. In other words, there is a proportional relationship between the individual right to health and the collective interest, which finds its point of equilibrium in a balancing judgment carried out by the legislator and, eventually, by the constitutional judge.

With this general outline of Art. 32 in mind, further exploring the constitutional framework regarding mandatory vaccination is possible. In 2018 the Constitutional Court delivered a judgment dealing with mandatory vaccinations centred on balancing the individual right to health and the community's general interest (decision n. 5/2018). In the judgment, the Court reviewed a statutory decree introduced, as a matter of urgency, to increase the number of compulsory vaccinations for children from four to ten. The decree made access to early childhood educational services conditional upon receiving all ten vaccines – moreover, parents who failed to comply incurred an administrative fine¹³. The decree was challenged on several grounds, including the claim that the obligation was an unjustifiable interference with the constitutional guarantee of individual autonomy. The Court underscored that a national law imposing a health-related treatment is not incompatible with the Italian Constitution provided that (cumulatively): (i) the treatment is intended not only to improve or maintain the recipient's health but also to preserve the health of others; (ii) the treatment is not expected to harm the recipient's health, besides the usual and tolerable consequences that generally arise from its administration; and (iii) in the event of further injury, the payment of just compensation to the injured party is provided for, separate and apart from any damages to which they might be entitled.

The last condition outlined by the Court (the right to indemnity) is symptomatic of the principle of solidarity that permeates Art. 32. Indeed, it would not be constitutionally lawful to require the individual to expose his health at risk for the greater good (the collective interest for health) without the community sharing the burden of possible negative consequences. In other words, if the collective interest requires that the individual sacrifices his right to self-determination, then the community must share the burden of any adverse effects that may surge¹⁴. As the Court stated,

the decisive basis for the right to an indemnity ... lies in the requirements of social solidarity that are imposed on society at large where an individual suffers negative consequences for his/her physical and psychological integrity as a result of healthcare treatment carried out also in the interest of society at large. For this reason, the failure to provide for a right to an indemnity concerning irreversible conditions resulting from recommended [besides mandatory] vaccinations amount to a breach of Articles 2, 3 and 32 of the Constitution. The requirements of social solidarity and the

¹³ For further context about this decision, see Tega and Pignataro (2021).

¹⁴ This interpretation had already been adopted by the Constitutional Court in Decision 27 June 1990, n. 307.

protection of the individual's health require that it must be society at large that takes on the burden of the individual harm, whilst it would be unfair to require that the individuals who have been injured should bear the cost of the benefit, which is also collective (decision n. 268/2017, para. 6 point of law).

Since the issue of vaccination involves many constitutional values, *in primis* the right to self-determination and the collective interest for health, their coexistence leaves ample space for legislative discretion in choosing the necessary means to ensure the effective prevention of infectious diseases. In relation to this, what is fascinating is the nuanced distinction between recommendation and obligation that surfaces in the Court's reasoning. Indeed,

the legislator may, at a given time, select the technique of recommendation and, at others, that of obligation, and in the latter case may calibrate the measures (including those imposing sanctions) that are intended to guarantee the effectiveness of the requirement (decision n. 5/2018, para. 8.2.1 point of law).

Nevertheless, for the decision to be considered reasonable, the legislator must balance the different constitutional values at stake, show due regard for the proportionality of the sanctions imposed, and take into account the indications that stem from medical research. As the Court specifies, the legislator must exercise its discretion following the most recent health and epidemiological conditions, as ascertained by the responsible authorities and the constantly evolving discoveries of medical research, to which the legislature must turn for guidance when making its choices. In light of these considerations, some have observed that besides being an example of balancing rights and interests in a constitutional order, decision n. 5/2018 also exemplifies how these principles may support a data-driven judicial review of epidemiological legislation (Massa, 2021). In the next section, we will return to this aspect while assessing the reasonableness/proportionality of the Covid-19 measures.

3 Assessing the constitutional lawfulness of the Covid-19 mandatory vaccination requirement and the Green Pass

We are now in condition to consider whether the mandatory vaccination requirements and the Green Covid-19 Certificate are constitutionally lawful. As we mentioned at the end of Section 1, the two measures will be assessed together because they both fall under the health treatment category and were made *de facto* mandatory, although to different extents and in different stages of the emergency.

Health treatments include any measure that requires an individual to make his/her body available for remedial treatments, rehabilitation, or preventive treatments (Amato, 1976). The Green Pass can also fall under this category if vaccines are a straightforward example of health

treatments. Although the option of recovering from Covid-19 falls outside the category's scope, undergoing vaccination or a swab test are examples of making one's body available for preventive purposes. Indeed, the aim of the Green Pass (as implemented in the Italian legal order) was to prevent the spread of the virus as well as severe illnesses that need intensive care treatments, ultimately protecting both individuals and the community.

As regards the mandatory aspect of the Green Covid-19 Certificate, when the measure was first introduced, the extent to which it was caught by the notion of "mandatory health treatments" was disputable (Civitarese Matteucci, 2021), but, as mentioned in Section 1, statutory decree n. 127/2021 unambiguously turned them into a legally sanctioned obligation by making the fundamental right to work conditional upon holding the Green Covid-19 Certificate. That the law left individuals the possibility to decide between undergoing vaccination or a swab test (or to undergo neither of the two, thereby waiving their claim to wage after five consecutive days of unjustified work absence) does not seem sufficient to downgrade the measure as conditional rather than mandatory¹⁵. Consider also that if the worker accessed any premises without the said document, he/she incurred an administrative fine (Caruso, 2021). The *super* Green Pass, on the other hand, made vaccination the only way to access work.

Hence, given that the two measures fall within the mandatory health treatment category, one must assess them against Art. 32 of the Constitution. We will therefore verify whether they comply with the conditions that the Constitutional Court set up: (i) the mandatory requirement is provided for by the law; (ii) the measures protect the individual's and the community's health and are proportionate to this end; (iii) the measures respect the human person.

As for the first requirement, Art. 32 of the Constitution prescribes that any mandatory health treatment must be enforced by law, which has been interpreted extensively to include both statutory and delegated decrees¹⁶. The requirement is, therefore, more generally, that mandatory health treatment is imposed by a primary source of law. In the case at hand, this requirement has been respected.

Regarding the second and third requirements, the letter of the decrees makes it clear that the two measures aim to protect both the recipient's and others' health (see Section 1). More challenging is to determine whether the measures are proportionate. We need to stress that the Italian Constitutional Court only rarely uses a proper proportionality test (Falorni, 2020). It rather treats "reasonableness" and "proportionality" as coextensive terms to indicate that a reasoning entailing the balancing of rights may be necessary to decide a case. In a seminal decision, the Court

¹⁵ According to Douglas (2021, April 29). "vaccine passport schemes differ from vaccine mandates in that they do not actively penalize those who refuse vaccination. Rather, they simply require those individuals to submit to social restrictions of the kind that are currently imposed on everyone in many countries". However, as we argued in Section 1, we cannot take the distinction between obligations and conditions too literally. When the exercise of fundamental rights is made conditional upon certain treatments, it is more plausible to account for such a situation as an obligation rather than a choice.

¹⁶ Decisions 86/1965, 126/1969, 39/1971, 184/1974, 243/1974, 173/1987. See also Rescigno (1984), Zanichelli and Crisafulli (1984). For an opposite view, Carlassare (1984).

observed that a reasonableness review, far from applying abstractly prefixed and absolute criteria, is based upon pondering the *proportionality* of the discretionary chosen means with the objective needs to satisfy the pursued goals.

Notwithstanding, we will analyse the legislation at stake by applying the four limbs of a proportionality test¹⁷. On the one hand, it makes the discourse clearer to the reader. On the other hand, in several cases, a proportionality approach may better explain the same Court's reasoning and outcomes.

The first point concerns whether the aim is legitimate, *i.e.*, if there is a pressing social need or compelling state interest. As King et al. (2021) underline, the primary justification for mandatory vaccination requirements should be the protection of public health. The latter includes reducing transmission, protecting healthcare services for the treatment of others, and securing essential services from disruption due to the consequences of the pandemic. It is hard to deny that these are legitimate aims because of the international accord that "immunisation is and should be recognised as a core component of the human right to health and an individual, community and governmental responsibility" (WHO, 2013). This observation absorbs the second limb of the test, as there is strong evidence that vaccines are among the most suitable means to reduce virus transmission and protect health services.

The third limb regards the measure's necessity to achieve the aim, meaning there cannot be any less onerous way of doing it. This is often a contentious point and a complex judgement to make, as it may involve a strong review of fact. According to Aharon Barak's (2012, p. 321) influential account, "the necessity test compares two rational means that equally realise the law's purpose. In this situation, the legislature should select the means whose limitation of the constitutional right is smallest". Then, the precondition for triggering this limb of the test is that there are several alternative rational means to fulfil the legislative purpose. However, it seems inappropriate for a Court to dictate such an onerous burden of proof in dire straits and emergencies. In addition, even that two rational means equally realise the law's purpose is a disputable assumption when one deals with technical, scientific knowledge.

One could assume that an alternative rational means to achieve the goal is a lockdown-style set of restrictions prolonged over time. Is it an alternative that a court has the "right" to balance against the individual right to refuse medical treatment? It would sound like unduly interfering in sensitive political issues on the Court's behalf. Hence, the "necessity" requirement must be limited, in our view, to assessing if the mandatory vaccination scheme is based clearly on sound public health advice (King et al., 2021).

In the 2018 Constitutional Court judgment, there are valuable references regarding the latter point, particularly when justifying the harshening of a vaccine obligation in light of the current

¹⁷ For a canonical presentation of the set of questions that a proportionality analysis includes, see Huscroft et al. (2014, p. 2). The four questions concern: legitimate objective; suitability of the means; necessity of the means; fair balance between the public interest and the private right.

state of epidemiological conditions and scientific knowledge. The Court argued that “nothing prevents this choice from being reevaluated and reconsidered should conditions change”. The Court appreciated the legislator’s decision to include in that policy a monitoring system that could lift the compulsoriness of certain vaccines, therefore showing an appreciation for “the evolving dynamic of the medical and scientific knowledge that must shore up regulatory choices in the healthcare field” (decision n.5/2018, para. 8.2.5 point of law).

The fourth stage, *stricto sensu* proportionality, is where balancing comes to the fore. It requires a “just”¹⁸ relationship between the benefit gained by the law limiting the right to self-determination and the harm caused by it. It requires congruence between the benefits that the law’s policy achieves and the harm it may cause to constitutional rights. Notoriously, this is the most disputed aspect of constitutional review, which the Italian Constitutional Court usually calls reasonableness review. Given the moral stance such balancing requires, this point is almost intractable *in abstracto*. We think that the compass for this balancing exercise remains the solidarity principle that underpins mandatory treatment policies. The gain seems immediately related to a public (as the sum of many individuals rather than an indistinct mass) good, which, in the context of an emergency, is not easy to gauge against liberty rights.

However, according to some commentators¹⁹, the Italian Green Pass policy would fail the reasonableness test for harming the principle of non-discrimination. The discriminatory aspect regards two aspects.

First, the requirements to obtain the Certificate were enforced on specific categories, not the general population. Does it amount to unlawful discrimination? One should recognise that the Constitution admits “targeted” mandatory treatments because of the activity that some people carry out or due to particular circumstances (Simoncini & Longo, 2006, p. 668). The decision to enforce the mandatory requirement on the general population or certain groups is grounded on assessing the contingency to face (Amato, 1976, p. 187). They must nevertheless be reasonable, *i.e.*, in conformity with Art. 3(1) of the Constitution. The latter provision establishes that “all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions”. This clause has always been interpreted in such a way as to entail that like cases must be treated alike and that unlike cases must be treated differently. So, there may well be cases in which a specific “discrimination” is unreasonable, but the discrimination *per se* is not.

An example of such a case could be the one provided for in statutory decree n. 127/2021. It made the Green Pass mandatory for all public and private workers but excluded barristers from its scope of application to safeguard the right to a fair trial and the right to defence (Art. 24 and 111

¹⁸ It is barely deniable that this part of the test entails a moral evaluation, as Barak (2012, p. 342) surmises.

¹⁹ See, for example, Calvano (2021).

Constitution). Indeed, it was unclear why the right to defence should be treated differently from other fundamental rights, including the rights to education and work. The decision's reasonableness was dubious, but, ultimately, statutory decree n. 1/2022 extended the mandatory requirement to barristers as well.

The second aspect concerns the different range of activities allowed, respectively, to those holding a standard Green Pass or a Super Green Pass as well as to those possessing or not a Green Pass at all. This second way of discriminating may appear more problematic to justify. According to some commentators, the existence of many different regimes descending from a combination of the type of Certificate, the epidemiological situation of each Region (based on the "traffic-light" system)²⁰, and the range of activities permitted or not would amount to an intrinsically unreasonable policy (Morelli & Salmoni, 2021). It would appear to be so, for such a complex weave of rules would make it impossible to grasp the policy's rationale as a whole. For example, a drink in a bar with outdoor seating was permitted to people holding a simple Green Pass in white and yellow zones, while a super Green Pass was necessary for the orange zones. Were such differences based on sound scientific advice and an objective justification? It is a tricky question. However, even finding that specific discrimination was unjustified does not imply that the green pass policy was unlawful overall. The latter, though, is the conclusion that some authors reach by arguing that the only way to make the green pass regulation constitutionally sound would be to impose a general vaccine obligation on everybody (Morelli & Salmoni, 2021).

There seems to be a logical leap between advocating a hard fact review and the claim that the only way forward would be to impose a general vaccine obligation to avoid differentiated regimes. Our impression is that this kind of criticism aims at a bigger target than the principle of non-discrimination. The underlying idea is that governments must use a fair play approach in dealing with such sensitive issues and that by mixing nudging (the super Green Pass to access places) and commanding (obligatory vaccination for over 50), they do not comply with such a fairness requirement.

It is an important issue, but it is barely translatable into a legal principle that lawmakers cannot deploy the means they have to tackle an emergency in a manner that appears to be the most effective in protecting lives. Interestingly, the Italian Prime Minister, Mr. Mario Draghi, openly declared on various occasions that the Cabinet considered a strong recommendation to get the vaccine – buttressed by progressive limitations for non-vaccinated persons – more efficacious than a direct obligation. So, he was sincere on his part with regards to the relationship between the Green Pass and the vaccination campaign. The 2018 Italian Constitutional Court's ruling definitely seems to resonate here, especially in the part in which the decision specifies that the border between

²⁰ For an overview of the "traffic-light" system that was adopted in Italy in different phases of the emergency, please see Civitarese Matteucci et al., 2021.

recommendation and obligation is blurred and that it is ultimately a matter of political evaluation to move from one to another.

4 A comparative survey of relevant constitutional case-law

By referring to some judgments regarding mandatory health treatments, looking at other legal systems helps putting the Italian case in context. A brief survey of the few rulings that were delivered since the pandemic broke out will show a common trend in the legal reasoning that guides constitutional adjudicators as well as the European Court on Human Rights (ECtHR)²¹.

Indeed, as judges verify whether the measures are proportionate regarding the aim of protecting the health and rights of others, the decisions ultimately emphasise the value of social solidarity and the role of scientific advice. At the time of writing, constitutional case law is still minimal, as most cases concerning Covid-19 mandatory vaccinations and the Green Pass are either still pending or have been dealt with by administrative courts. This paper will focus only on decisions delivered by “superior” Courts.

Although not directly related to a Covid-19 vaccination scheme, in April 2021, the Court of Strasbourg delivered a judgment (*Vavříčka and Others v. the Czech Republic*, 2021, applications nos. 47621/13 and 5 others) about the compatibility with the European Convention on Human Rights (ECHR) of the Czech legislation enforcing a general legal duty to vaccinate children against nine diseases. The law provides that parents who fail to comply without good reason can be fined and that non-vaccinated children will not be able to attend nursery schools. The applicants lodged a claim arguing that this form of State interference violated their Convention rights, in particular Articles 8 and 9 (respectively, the right to private life and the freedom of thought, conscience, and religion)²². In its judgment, the Court emphasised that the right to private life enshrined in Art. 8 is a qualified right in that it may be limited to protecting health. If one follows this view, any limitations are legitimate if they reduce harm to others (*King et al.*, 2021); indeed, para. 2 of Art. 8 provides that

there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary for a democratic society in the interests of national security, ... for the protection of health or morals, or the protection of the rights and freedoms of others.

²¹ The ECHR is an international human rights treaty currently signed by 46 States in Europe. The agreement was ratified by Italy with law n. 848/1955 and it holds a particular normative status. Two landmark decisions of the Constitutional Court held that the ECHR is a “sub-constitutional” source of law, in the sense that it is directly beneath the Constitution, but above primary sources of law (Decisions n. 348 and 349 of 2007).

²² In this part, we focus mainly on Article 8 ECHR, but the ECtHR also considered the issue of whether vaccine hesitancy could be protected under Article 9. For further insight see *Tega and Pignataro* (2021, pp. 18-23).

Nevertheless, we see that the right to self-determination may be limited (by law) as long as any limitations are proportionate. The Court found that the Czech legislation pursued the legitimate aims of protecting health as well as the rights of others since vaccination protects those who receive it and those who cannot be vaccinated for medical reasons. It also noted that the relevant medical authorities strongly supported the duty. The importance of scientific data and advice is thus emphasised also by the Court of Strasbourg, especially as the legislator exercises its political discretion to strike a proper balance between different rights and interests.

Very similar reasoning was adopted by the Bundesverfassungsgericht (BVerfG) in a judgment (First Senate, 1 BvR 2649/21) delivered towards the end of April 2022, in which it rejected a constitutional complaint that challenged the obligation introduced by section 20a of the Protection Against Infection Act, whereby staff in the health and care sector have to provide proof of vaccination or recovery from Covid-19. The claimants argued that the Act violated a set of fundamental rights, including their rights to physical integrity and to exercise a profession. The Federal Tribunal rejected the claims, ruling that the State's interference to protect the most vulnerable groups in society was legitimate. As the German constitutional adjudicator observed, the encroachment on physical integrity must be weighed against other exceptionally high-ranking constitutional interests. Nonetheless, in the case at hand, the legislator decided to give precedence to the protection of vulnerable groups over the individual's ability to reach an entirely free vaccination decision, and this decision was based on a balancing of interests which, according to the judge, was "not objectionable under constitutional law". Indeed, vulnerable people can often neither protect themselves effectively through vaccination nor avoid encountering staff working in the health and care sector, as they are typically dependent on their services. Furthermore, as the judge reviewed the legitimacy of the balance struck by the legislator, it considered that the very low probability of severe consequences resulting from vaccination should be weighed against the significantly higher probability of harm to the physical integrity of vulnerable persons. This reasoning resonates with the principle of solidarity enshrined in the Italian Constitution discussed in Section 2.

Another interesting aspect of the German decision is the relevance of scientific advice, the extent to which the latter may direct political decision-making, and the exercise of political discretion. Indeed, the Court held, on the one hand, that the legislator's decision was grounded on "sufficiently reliable factual knowledge" and, on the other hand, that the political decisions and the available scientific advice are both contingent on a precise moment in time. For the Court, "the decisive point in time for the review of constitutionality" is the moment the law is adopted; therefore, the proportionality of the measures must be reviewed against the information available at that time. In this case, the Court considered that the pandemic had just entered the fourth wave, characterised by high transmissibility and high case numbers. These facts could reasonably lead the legislator to assume that the most vulnerable would have been particularly at risk, guiding its political decision in a specific direction. It is fitting to observe that despite the Court considered

the time the law is adopted as the crucial point for judicial review, it nevertheless assessed whether the measure's proportionality and legitimacy also stood at the time of the judgment. Indeed, it considered that the course the pandemic took since the law was adopted did not call for a different assessment, as there had not been new developments nor had new understandings emerged that could potentially rebut the initial assumptions made by the legislator.

The Constitutional Chamber of the Supreme Court of Justice of Costa Rica also judged the constitutional lawfulness of the mandatory vaccination requirement imposed on public officials (decision n. 274/2022). Concerning fundamental rights, the claimant argued that the obligation violated his right to equal treatment, self-determination, and "conscientious objection". The Court used its well-consolidated case-law²³ to underline the constitutionally recognised importance of vaccinations for public health and guarantee everyone's fundamental right to health. It balanced the right to self-determination and the right to conscientious objection against the legitimate aim of protecting public health through the vaccine mandate. Since the State has a duty to guarantee all people's fundamental right to health, safeguarding public health and preventing diseases constitute a constitutionally legitimate aim that can validly justify the mandatory nature of vaccines. Indeed, the mandate was considered a proportionate, suitable, and necessary measure.

In January 2022, the U.S. Supreme Court issued two rulings regarding the federal government's power to mandate Covid-19 vaccinations. Although the judgments do not have a bearing on the exercise of fundamental rights, they shed light on the extent to which authorities may exercise their discretion and the relevance of the principle of legality and the rule of law. In *National Federation of Independent Businesses v Department of Labor* (595 U.S., 2022), the Court blocked an Occupational Safety and Health Administration (OSHA) emergency temporary standard that required vaccination or weekly testing and masking in businesses with 100 or more employees. In particular, it held that OSHA lacked statutory authority to issue the mandate. As the judges specified, "administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided". If, on the one hand, the Occupational Safety and Health Act empowers the Secretary to set workplace safety standards, it does not attribute the power to enforce broad public health measures.

For this reason, the Court found that the Secretary lacked the authority to impose the mandate. On the other hand, in *Biden v Missouri* (595 U.S., 2022), the Court upheld a regulation that imposed mandatory vaccinations for health workers. The issue was whether the Secretary exceeded his statutory authority in requiring that, to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule had to ensure that their employees be vaccinated against Covid-19. In deciding the case, the Court recognised that unvaccinated healthcare workers pose a risk to staff and patients. Therefore, the vaccine was necessary, and the measure was lawful

²³ See, for example, decision of 9 October 2020, n. 19433/2020.

in light of the unprecedented health emergency. As the federal judge stated in the *per curiam* decision, it would be the “very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with Covid-19”.

It is worth observing, however, that in his dissenting opinion, Justice Alito does not appear to be convinced that the Federal Government possesses the authority to enact such measures, and even if it did, he argues, “it did not have the authority to impose that requirement in the way it did”. Indeed, Alito draws attention to the undermining role of Congress and to the frailty of the procedural tools that should guarantee that those who are subject to the law are involved in the deliberative phase; ultimately, he highlights that the ruling may have “a lasting effect on Executive Branch behavior”. The concerns that Justice Alito airs regarding the role of the legislature during a crisis allows us to move to the final part of our analysis concerning the oversight function of the Italian Parliament (see *infra*, section 5).

5 The (lacking) oversight function of the Parliament

The moral stance implied in balancing constitutional rights and interests makes assessing the Green Covid-19 Certificate policy on procedural grounds essential. The LAC19 Principles²⁴ recommend that mandatory vaccination schemes must be prescribed by law that is clear and preferably adopted after a period of consultation of at least 4-6 weeks, involving subnational governments, opposition parties, trade unions, experts, the public, and others. These consultations, and the government’s response, should be published before the passage of any bill to allow for debates and amendments. As we will examine in this section, the extent to which the decision-making and legislative processes leading up to the mandatory requirements were transparent, informed, and participative does not fare well with those recommendations. Indeed, despite a heated, sometimes virulent, public discussion, often over-emphasised by traditional and social media, the official response failed to structure and frame this debate into institutional channels.

Our intuition is that the overarching issue regarding implementing such a participatory framework resides in the inability of representative institutions (the Parliament) to hold the executive accountable. Before we explore this point any further, it is worth providing a sketch of the Italian parliamentary system, characterised by the confidence of the two individual Chambers in the Government²⁵. Hence, confidence must be voted by each House (art. 94 of the Constitution), reflecting the “perfectly bicameral” structure of the Italian Parliament. This entails that the two

²⁴ Lex-Atlas Covid-19, Legal, constitutional, and ethical principles for mandatory vaccination requirements for Covid-19. <https://lexatlas-c19.org/vaccination-principles/>. These principles were adopted in October 2021 by 50 jurists within the Lex-Atlas: Covid-19 (LAC19) project, a worldwide network of jurists that is producing and curating the open-access Oxford Compendium of National Legal Responses to Covid-19.

²⁵ We will focus only on the fiduciary relationship that runs between the two Chambers and Government, leaving aside the role of the President of the Republic, which is nevertheless a key figure of the Italian parliamentary form of government. For further references, see Elia (1985).

Houses are independent not only in choosing whether or not to vote the confidence but also in deciding what political content they want to give to the relationship with the executive (Ciaurro, 1989). Parliament's confidence must be permanent: it is a condition without which Government may not exist. The latter is accountable to the former to realise its political agenda (*Indirizzo politico*), which the three bodies (the two Chambers and Government) concur to determine. The legislative body continuously verifies the government's responsibility through oversight and scrutiny, among its most fundamental functions (Ciaurro, 1989). The Constitutional Court highlighted this view by ruling that the relationship between Parliament and Government in a parliamentary system revolves around the idea that political direction (*Indirizzo politico*) entails accountability, which is in turn rooted in Parliamentary confidence (decision n.7/1996).

Nevertheless, the Founding fathers did not specify in any greater detail how the relationship of confidence should unfold. One must look for it in the Chambers' Rules of Procedure and, above all, in the institutional practice. Furthermore, as some have observed, such a relationship is moulded by the party system and the existence (or, at times, the absence) of a solid political majority (Barbera, 2015, p. 652).

A glimpse at the legal framework (Section 1) through which the mandatory vaccine requirements and the Green Covid-19 Certificate (and its gradual expansion) were enforced makes it clear that these measures were introduced exclusively through statutory decrees. Statutory decrees are primary sources of law that the executive may issue in cases of necessity and urgency, and their validity is limited in time. They must be ratified (transposed) into statute by Parliament within 60 days from their enactment, failing which they lapse, and all their legal effects are voided *ex tunc* (art. 77 of the Constitution)²⁶. The Founding fathers had conceived these sources of law as extraordinary instruments²⁷, but over the years, they have become everything but exceptional (Paladin, 1979, p. 46; Celotto & Di Benedetto, 2006, p. 1508). Indeed, given the “weakly rationalised form of government” laid out by the Constitution, statutory decrees, alongside an ever-growing instrumental use of the question of confidence by the Cabinet, have become one of the main instruments through which the Government has managed to impose its political agenda (Barbera, 2010, p. 78; Barbera, 2015, p. 660). The Parliament, unable to counter-balance the growing abuse of statutory decrees, has been increasingly marginalised over the years. Both trends (the increasing role of executive law-making and the receding role of Parliament) have been exacerbated by the pandemic (Lupo, 2020, p. 145).

By looking at the conversion process of the said statutory decrees, one notices that only one of the two Houses was effectively involved, the other dispatching the bill in only one or two days (see

²⁶ Art. 77 provides that “... When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of such introduction. Such a measure shall lose effect from the beginning if it is not transposed into law by Parliament within sixty days of its publication. Parliament may regulate the legal relations arisen from the rejected measure”.

²⁷ In decision n. 3/1957, the Constitutional Court held that delegated statutory decrees and statutory decrees are the two exceptional forms through which the executive may exercise its normative power.

Table 1). The legal framework regarding the enactment of statutory decrees and their over-production – which is taking over almost all of Parliament’s agenda – is an easy explanation for it²⁸. Indeed, part of the literature argues that this asymmetry is pushing the Italian parliamentary system towards a “*de facto* mono-cameralism” or an “alternating bicameralism” (Longo, 2018; Lupo, 2020, p. 153; Manzella, 2020, p. 65; Barbieri, 2019; Vernata, 2020, p. 55). Another peculiarity is that the demands of legislation by decrees favour the practice whereby most amendments are introduced, examined, and approved by the standing committee that carries out the initial stages of the legislative process. This is made evident in Table 2, which also highlights that, especially in 2020, most of the work was carried out at the committee stage, whilst only an average of 3 days were spent on the Chamber’s Floor. This ultimately strengthens the trend according to which the House’s role was limited to ratifying the decisions taken at a decentralised level (Fasone, 2020, p. 68).

Even more perplexing is the Government’s practice of submitting a so-called last-minute maxi-amendment – close to the deadline for passing the law – to force Parliament’s ratification by placing a question of confidence on it. A maxi-amendment is an amendment that entirely substitutes the text undergoing examination, sometimes even integrating provisions that were not included in the original document. When the government places a question of confidence on the maxi-amendment, any discussion regarding the amendment is completely ruled out. The fact that Parliament has fewer chances to debate means that an essential part of the “continuous parliamentary scrutiny” of Cabinet policy is seriously compromised. Questions of confidence placed on maxi-amendments may be described as “all or nothing” deliberations that have significant implications in political terms. As Table 1 illustrates, the executive has resorted to both practices to guarantee the conversion of almost all of the statutory decrees that enforced mandatory health treatments. The latter practice, together with *de-facto* mono-cameralism, determines that the second Chamber receives the bill at the end of the transposition time limit, forcing it to either refrain from ratifying the decree or willingly submit itself to the question of confidence that the Government will pose at some stage (Vernata, 2020, p. 69).

This practice is barely compatible with how the Constitution envisages the legislative process, which hinges on two underpinning principles. The first is the “perfect” bicameral structure of the Italian Parliament, epitomised by Article 70 of the Constitution, under which the legislative function is exercised collectively (jointly) and equally by both Houses, meaning that neither House can prevail over the other (Lupo, 2006)²⁹. The second is that, under Article 72 of the Constitution, the whole House shall consider a bill section by section and then put it to the final vote. Referring the consideration and approval of bills to Standing committees is possible but not the rule; indeed,

²⁸ See the latest Reports on Legislation from the Observatory on Legislation of the Chamber of Deputies (2019-2020 Report and 2020-2021 Report).

²⁹ For an overview of the Constituent Assembly’s debate leading up to the decision concerning Parliament’s bicameral structure see Paladin (1988).

it must be stressed that under the Rules of procedure of both Houses, the ratification of statutory decrees is reserved for the Assembly.

The Italian Constitutional Court has recently ruled that the legislative process is intended to enable all political forces, both majority and opposition, as well as the individual members of Parliament, to cooperate in an informed manner in drafting the law. During the committee stage, discussions and the proposal of alternative texts and amendments serve this purpose (order n. 17/2019). Thereby, the procedure set out by Article 72 of the Constitution should always be observed in principle (order n. 17/2019, para. 4.1 point of law). In practice, the same Constitutional Court is reluctant to encroach upon Parliament's autonomy in regulating its own business³⁰. One could ironise that Parliament is ultimately a victim of its own doings, further reinforcing the view that in a "weakly rationalised form of government", the way the relationship between the legislature and the Government concretely unfolds mostly depends on the practices that the two foster. As the Constitutional Court recently noted, Parliament's inability to exercise effective scrutiny is indeed a pathological element of a parliamentary form of government (orders n. 17/2019 and 60/2020).

The oversight function becomes especially important for mandatory health treatments, a field prone to disagreement and scientific controversies. The metaphor of rights balancing cannot disguise the considerable margin of discretion in choosing the necessary means to ensure the effective prevention of infectious diseases. The Constitutional Court mandates that such a discretion must be exercised in accordance with the most recent health and epidemiological conditions, as ascertained by the responsible authorities and the constantly evolving discoveries of medical research, to which the decision-maker must turn for guidance when making its choices (decision n. 5/2018).

Scientific advice is therefore essential for rulemaking and the balancing exercise. However, scientifically oriented decisions are not necessarily democratic, nor are scientists held accountable. In turn, Government's decision-making process is not entirely transparent or accessible to the public. For all these reasons, it is fundamental that Parliament finds a way to properly oversee and scrutinise how the executive exercises its discretion as it introduces and enforces measures (including mandatory health treatments) that affect fundamental rights, ultimately reintegrating one of the intrinsic elements of confidence in the executive, which is its accountability. Only parliamentary institutions can effectively build that informed and open participatory framework to which we alluded at the beginning of this section.

6 Final remarks

By discussing compulsory and quasi-compulsory vaccination, we have highlighted throughout this article that the executive has not only consolidated its role as the primary legislative

³⁰ This view has been consolidated by the Court's case-law, starting from the notorious decision n. 154/1985.

actor but has increasingly come to regulate sensitive matters impacting fundamental rights during the pandemic. Although this executive primacy may be a global trend, we think that the extent to which Italian Parliamentary institutions could intervene in ratifying the statutory decrees that enforced mandatory health treatments was remarkably modest. Confidence was never questioned, but we cannot ignore that the practices sketched in the last section are path-dependent on a broader trajectory of Parliament's self-inflicted marginalisation. To avoid these complaints from becoming sterile, one should shift the focus from the symptoms to the causes and reflect on how to reform Parliament's organisation and functioning (Barbera, 2010, p. 78).

In other words, Parliamentary institutions, which inevitably struggle to regain centrality in legislating even more when facing emergencies, need to boost their declining legitimacy on effective scrutiny over executive law-making. The advantages of parliamentary methods are well-known and still unparalleled. They provide an arena for the representation of opposing interests, thus preserving the right of the minority to be heard and reinforcing the majority's decision through a democratic deliberative process, thereby making the decision-making process more public and transparent (Lupo, 2010, p. 134). Parliamentary procedures ensure two fundamental elements that strengthen the legitimacy of political decisions to the public's eyes: they are consultative and transparent (public), which Government law-making is not (Rizzoni, 2020, p. 37). The formal and informal inquiries with experts, hearings and consultations, the possibility to amend the bill, the debates that take place both within and without the halls, the live streaming of parliamentary sittings, and the *verbatim* transcripts that are made accessible to the public are elements that reinforce the decision that the Chambers adopt, help clarify the political choice, and ensure that public opinion (and, therefore, the electoral body that is represented in the Chambers) holds the decision-makers to account (Habermas, 1971, p. 79). In the longer term, the value of a *transparent, informed, and participative legislative process* underpinning the decision to enforce mandatory health treatments would leave less room for controversy by facilitating a self-motivated and well-informed population that may be ultimately guided by a shared acknowledgement of the principle of solidarity.

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Tables

Table 1

Conversion process of the statutory decrees enforcing mandatory health treatments during the Covid-19 emergency

Statutory decree	Day it was issued	Approval First chamber	Approval Second chamber	Was a Question of confidence placed in at least one Chamber?
44/2021	1 April 2021	13 May 2021	25 May 2021	No
52/2021	22 April 2021	9 June 2021	16 June 2021	Yes
105/2021	23 July 2021	9 September 2021	15 September 2021	Yes
111/2021	6 August 2021	22 September 2021	23 September 2021	Yes
127/2021	21 September 2021	10 November 2021	17 November 2021	Yes
172/2021	26 November 2021	12 January 2022	20 January 2022	Yes
1/2022	7 January 2022	24 February 2022	2 March 2022	Yes

Table 2

Days spent at the Committee stage and the Chamber's floor (First Chamber only)

Statutory decree	Committee stage (Days)	Chamber floor (Days)
44/2021	36	8
52/2021	30	5
105/2021	37	3
111/2021	9	2
127/2021	49	2
172/2021	43	1
1/2022	34	3