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Abstract	<p>This chapter deals with the impact of the COVID-19 pandemic on the European democracies. The pandemic hit whilst European democracies were living a profound crisis. The Euro crisis of 2012 and the migrant crisis of 2015 have indeed put into question the founding values of the European Union as well as of its Member States. Further, where processes of democratic erosion were ongoing, the pandemic has accelerated them. Nevertheless, this chapter argues that the pandemic can be seen as an opportunity to strengthen constitutional democracy vis-à-vis its enemies, first of all populists. In European democracies, the rediscovery of the importance of the free public health system, the strong reaction coming from the European Union and the vindication of the value of competence and expertise have evidenced how the founding principles of constitutionalism are more resilient than they may look.</p>
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Might COVID-19 Help Strengthening European Democracies?

Tania Groppi

1 PRE-PANDEMIC DEMOCRATIC REGRESSION

The COVID-19 pandemic, which ravaged the world in 2020 and continued in 2021, occupies a prominent place among the “new challenges” for contemporary democracy. This unexpected and most undesirable event hit Europe at a very delicate moment, when many of the fragilities of its democracies and of the European construction itself have been apparent since at least the last 15 years. Perhaps, we can consider as a turning point the French and Dutch referendums of 2005, which rejected the proposal for a European Constitution. After this date—which followed shortly after the EU enlargement to the East, with the entry, in 2004, of ten new Member States—a crisis began that affected both the Member States and the European Union (EU), and which is not only specific to the European regional area. On the contrary, we can say that it is a global crisis, in the

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17 double sense that it affects democracies all over the world and that it is a
18 consequence of global phenomena, such as economic globalisation and
19 new communication technologies.

20 Many indicators confirm that, since 2005, a “democratic regression”
21 has begun in the world (Repucci and Slipowitz 2021). The V-Democracy
22 report shows that, in 2020 (based on data of 2019), “[f]or the first time
23 since 2001, autocracies are in the majority: 92 countries—home to 54% of
24 the global population” (V-DEM, 2020).

25 In Europe, we find specific aspects, such as the economic-financial crisis
26 of the Eurozone and the waves of migration, especially in 2015, which
27 have brought more than 1 million migrants and refugees to the European
28 continent in one year. Faced with these phenomena, we have witnessed, in
29 many countries, the growing electoral success of anti-European or xeno-
30 phobic movements that have called into question the founding values of
31 the European states and of the Union itself, in one country, the United
32 Kingdom, even leading to its exit, with Brexit.

33 It is in this already weakened political economic and social economic
34 that COVID-19 arrives. Indicators examining the “state of health” of
35 democracies have shown that COVID-19, or, to be more precise, the
36 measures taken by the public authorities to react to it have generally had a
37 negative impact on democracies.

38 For example, almost 70% of the countries covered by the Democracy
39 Index developed by the Economist Intelligence Unit registered a decline
40 in their overall score, “as country after country blocked to protect lives
41 from the new coronavirus. The global average score fell to its lowest level
42 since the index began in 2006.” The new EIU Democracy Index report,
43 the latest in a series of assessments from a variety of democracy assessment
44 organisations, paints a rather bleak picture.¹

45 Also on the European continent, though less than in other parts of the
46 world, there are reports showing a return of democracies, as noted in a
47 report by Idea International. According to this report, the four non-
48 democratic regimes in the region (the authoritarian regimes of Azerbaijan
49 and Belarus and the hybrid regimes of Russia and Turkey) implemented
50 measures to curb the pandemic that raise concerns from a democracy and
51 human rights perspective, as did 8 out of 40 democracies (or 20% of
52 them). Democracies with worrying developments were mainly those that

¹Available at: <https://www.eiu.com/n/campaigns/democracy-index-2020/>, last accessed 30 September 2021.

were regressing or eroding also before the pandemic. Bulgaria, Hungary and Serbia stand out in this respect, but also, to a lesser extent, Poland, Slovenia and Ukraine. The remaining two countries—Israel (which this chapter takes into account, although geographically not in Europe) and Slovakia—were the only democracies that had not registered democratic declines in the five years before the pandemic, but have still implemented measures to curb the pandemic that present concerns from a democracy and human rights perspective.

In the following pages, I will try to reflect on the challenges that COVID-19 poses for European democracies, in the sense of the elements of negativity, in order to identify, in line with the title of this chapter, whether there are some positive aspects that are emerging in some national experiences and in the European Union itself.

2 THE CHALLENGES OF EMERGENCY SITUATIONS FOR CONSTITUTIONAL DEMOCRACY

The starting point here is the notion of constitutional democracy. In a nutshell it is a system, or a form of state, in which the sovereign popular will is combined with the rule of law to guarantee pluralism and fundamental rights. All this with the aim of maintaining peace, social cohesion, stability and unity in pluralist societies, without denying complexity and differences. And, therefore, by rejecting the identity belonging on the basis of ethnicity, the small close and barbaric homelands, through the option in favour of a “great solidarity,” based on the “daily plebiscite” and on the nation-demos. The European model, sometimes also called the “post-war paradigm,” unlike the US model, provides also for the constitutionalisation of social policies and is characterised by its openness towards international law. It is an open constitutional state: in the sense that accepted a weak external sovereignty, integrated in a multilevel system of decision-making.

At the level of institutional mechanisms, this form of state is based on the separation between two decision-making circuits: the one where popular sovereignty operates (and the representative principle) and the one where the institutions of guarantee operate, first and foremost, constitutional justice, which is a necessary institution in this form of state.

The emergency always implies—regardless of the events that generate it, and of the specific legal regulation—an increase in the power of

89 governments, due to the timeliness of the necessary measures and the
90 need for intervention by the public authorities through public administra-
91 tion. The emergency also implies a limitation of rights that does not follow
92 the rules foreseen for “normal times,” implying the prevalence of some of
93 them. All this for a limited period of time, related to the permanence of
94 the factual elements that justify it.

95 Here we find the first challenge: how to strengthen the powers of gov-
96 ernments without undermining the rule of law, in the sense of the separa-
97 tion and balance of powers. In other words, how to involve parliament,
98 allowing it to develop its oversight over decisions taken by the majority,
99 and how to ensure judicial review of measures. This has been further com-
100 plicated by the characteristics of this emergency, where “social distancing”
101 has implied a reduction in the activities of parliaments and the judiciary.

102 Without wishing to further elaborate on this point, we can say that the
103 key here is the principle of “loyal cooperation between institutions,”²
104 which does not mean the abandonment of, but the complement to the
105 separation of powers, and which is particularly important especially in the
106 face of the emergency, as the Italian Constitutional Court has emphasised.³

107 The second challenge is more directly related to the guarantee of fun-
108 damental rights. Rights in “normal conditions” can be limited, in order to
109 protect other rights and public interests, but according to a balance in
110 which neither becomes a “tyrant,” as, for example, the Italian Constitutional
111 Court has shown in a decision on the balance between the right to a
112 healthy environment and the right to work.⁴

² See: Italian Constitutional Court judgement no. 379/1992. Also the principle is affirmed in Article 13(2) of the Treaty on the European Union concerning EU Institutions and in Article 4(3) of the same Treaty concerning Member States.

³ As the former president of the Italian Constitutional Court held: “The full implementation of the Constitution requires a choral commitment, with the active, loyal cooperation of all institutions, including Parliament, Government, Regions, Judges. This cooperation is also the key to dealing with the emergency. The Constitution, in fact, does not contemplate a special right for exceptional times, and this for a conscious choice, but it also offers the compass to ‘navigate the high seas’ in times of crisis, starting from the loyal cooperation between institutions, which is the institutional projection of solidarity among citizens.” See: Constitutional Court, press release of 28 April 2020, presenting the report of President Marta Cartabia on the activities of the Constitutional Court in 2019. Available at: https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20200428_Relazione_Annuale_2019_Cartabia.pdf, last accessed 30 September 2021.

⁴ See Constitutional Court judgement no. 85/2013.

Here again, in general, the emergency may require, for some time, that one right or public interest must prevail, overriding the others. In the case of COVID-19, it was the right to health and, finally, the right to life, at least for some, since the pandemic implies a concrete risk to life, which was brought to the fore. The measures to prevent and contain the spread of the disease—involving the so-called lockdown of economic and social activities, with the few exceptions in the food sector—have led to a major restriction, a near-hollowing out, of many rights, such as freedom of movement, freedom of assembly, freedom of worship, the right to education, family life, freedom of enterprise and political rights.

The key here is the principle of proportionality, between the actual situation and restrictive measures, although if it is not easy to clarify the factual circumstances, due to a lack of scientific knowledge and homogeneous statistical data, it is also very difficult to assess the proportionality of the measures.

It should be noted that authoritarian regimes do not encounter such challenges. In authoritarian states there is no difference between normality and emergency: we can say that emergency is their natural situation (Groppi 2020). This is why the solutions adopted in countries like China or Iran are of no interest to us.

3 LESSONS FOR THE FUTURE

A year and a half into the pandemic, we can begin by assessing what has happened. It is perhaps too early to speak of lessons, but something can already be said.

The first analyses of the indicators focus on the word “resilience,” underlining that in established democracies institutions have adapted quite well and that the limitation of rights has been reasonable. Different is the discourse for democracies that were already in crisis: in Europe, for example, Hungary’s further regression seems of particular concern.

Looking more specifically at the situation in Italy, it seems to me that the strong point has been the very orderly response of the population especially in the first phase and the rapid reorganisation of the parliament and the judiciary, albeit with different decisions (the parliament in presence with distancing, the judiciary with remote hearings). In general, we cannot speak of real democratic problems in the management of the emergency, although there were dysfunctionalities and there is room for improvement, especially in the relationship between the government and

150 the regions, as evidenced by the Constitutional Court's decision recognis-
 151 ing the state's competence for anti-pandemic measures, taking into
 152 account "international prophylaxis" as a competence title.⁵

153 If we rely on these initial data, we can agree with those who emphasises
 154 that the emergency does not radically change things, but acts as an acceler-
 155 ate of already ongoing trends. This corresponds to the etymology of the
 156 word in all romance languages, from the Latin *emergere*, composed of *e*
 157 (out) + *mergere* (to sink, to submerge), and shows us that emergence is
 158 something that not only comes to the surface, but also brings something
 159 to the surface (Groppi 2020). Of course, it is a subject that would need a
 160 lot of research, not only legal, but also political, and there are already
 161 many projects underway.⁶

162 In any case, it seems to me that we can put forward at least three ele-
 163 ments that may help having a more positive outlook for the future. The
 164 emergency has brought to the surface some elements of the institutional
 165 system that were somewhat forgotten, and which can, if developed with
 166 appropriate policies, strengthen constitutional democracy:

- 167 (a) Public health systems are an important part of the European iden-
 168 tity and the guarantee of a high level of public health is enshrined
 169 also in Article 35 of the EU Charter of Fundamental Rights. The
 170 reforms implemented during the sovereign debt crisis with the
 171 objective of reducing public spending on health, have reduced
 172 their effectiveness. The pandemic made clear that a functioning
 173 and well-financed public health system is of vital importance. In
 174 Italy, for instance, Lombardy was not able to stop the contagion
 175 also because of its health care model, which was largely privatised
 176 and lacked a network of territorial proximity.
- 177 (b) The emergency has highlighted the need for competent politicians
 178 and a close relationship between them and technicians, in our case
 179 scientists. This has determined a pause in the tendencies towards
 180 the devaluation of knowledge that have characterised populist gov-

⁵ Constitutional Court judgement no. 37/2021. The Court held that the regional legisla-
 ture, even if endowed with special autonomy, may not encroach by its own rules upon a
 matter concerning the COVID-19 pandemic, a globally spread disease, and whose manage-
 ment therefore lies entirely within the exclusive legislative competence of the state, by way of
 international prophylaxis.

⁶ See, for instance: <https://www.democratic-decay.org/research>, last accessed 30
 September 2021.

- ernments and seems to have an impact on the populist parties themselves, which are evolving towards a different attitude towards the institutions, which they want to be a part of.
- (c) Within this framework, a central role is being played by the European Union, with its new policies, which can be synthesised in the Next-Generation EU. The EU seems to have abandoned the failed neoliberal approach of the last decade, in favour of one aimed at regaining credibility by delivering tangible benefits to its citizens, investing on the health system, maintaining high-quality social services and high environmental standards.

Finally, we cannot fail to underline an important element of weakness of the entire post-war democratic system that the pandemic has highlighted: we live in what Ulrich Beck called “the global risk society,” but we do not have institutions that can provide global responses. Financial and economic risks related to migratory flows, global terrorism, global warming and epidemics. It is emblematic that a small event involving bats and pangolins in a remote Chinese province becomes the biggest catastrophe since the post-war period. While these phenomena, these events, happen, the law has difficulty providing answers. Even more than in other fields, such as environmental protection, the impact of globalisation on health has been underestimated at the legal level. However, scientists, virologists, who have now suddenly become stars, after having worked for years in the obscurity of their laboratories, have been saying this for some time: to the extent that “Global Health” studies are widespread. Instead, despite the dizzying developments in the free movement of people and goods over the last thirty years, the legal response is entrusted to “old” or, if we want to be more benevolent, ancient instruments, that is, to the international organisations built in the aftermath of World War II, in particular the World Health Organisation, its constitution dates 22 July 1946, which moves with all the limits inherent in such institutions. That is to say, its acts are not binding on states; they are generally located in that grey area that jurists call soft law. The same limits apply to other types of more recent interventions, such as the United Nations Sustainable Development Goals, political objectives that are achieved by the United Nations.

In particular, Goal 3, ensuring healthy lives and promote well-being for all at all ages, among its objectives, that of “[s]trengthening the capacity of all countries, in particular developing countries, for early warning, risk reduction and risk management for global health,” to be assessed on the

219 basis of “International Health Regulations (IHR) capacity and prepared-
 220 ness for health emergencies.” A fine objective, but at this stage it remains
 221 only an aspiration that clashes with the unwillingness of states to begin
 222 more intensive collaboration, leading to the transfer of some of their skills
 223 to a global level of decision-making.

224 In short, although globalisation has emphasised the “territorial” nature
 225 of viruses, the geography of power, which is still based on borders, is
 226 totally inadequate to guarantee the right to health in the face of a pan-
 227 demic, if not through emergency containment measures, which essentially
 228 consist of limiting other fundamental rights. In this field too, we are called
 229 upon to make a leap, that is, to move away from the territorial scale of
 230 responses. This is a perspective to work on. At the moment, the huge
 231 vacuum in which the old states continue to move is striking, being the
 232 only points of reference, albeit limited and almost impotent, in the face of
 233 the very small and very agile virus.

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