

The Pandemic Curvature of Democratic Space/Time. A legal perspective¹

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Abstract. The paper outlines if and how the pandemic contributed to the curvature of the democratic space/time. The entire legal toolbox was deployed and shaped to counter the pandemic's many impacts: not only regulatory strategies and decision-making processes, but also governance and even the legal lexicon. The short distance travelled in the journey towards recovery and resilience – which *per se* is a pandemic output – has already revealed the goal-oriented and performative face of the new NRRP/dedicated governance and regulatory framework, which seems able to temper the future and the risks it brings. It also paves the way to longer journeys, including the big transitions of our time – environmental and digital transitions, but also cultural and social ones – together with their transformative potential. Democracy is at a crossroad: it has the opportunity to be fit for the fu-

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ture (future-proof), or simply lost in transition(s). In this respect a few lessons emerge from the pandemic.

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1. *The things we (are) used to say(ing)*⁴. *The anti-pandemic lexicon*

The Covid-19 pandemic is also a terminology pandemic (Ralli, 2020). The lexicon of the pandemic is currently the most frequently used. In 2020, “pandemic” was named word of the year by Merriam-Webster, while the term “lockdown” was chosen as word of the year by Collins; in 2021 the selected words were “vaccine” for Merriam-Webster and “vax” for the Oxford English Dictionary. Talking about masks, social distancing, lockdown, quarantine, risk areas, Covid checks, etc. has become our new normal. New words and expressions have enriched our vocabulary. The very term “Covid-19” is new, the official name attributed to the virus by the World Health Organisation on February 11, 2020⁵. In Italy, the Accademia della Crusca has identified the following new words: “coronavirus, droplet, *distanziamento sociale*, lockdown, *didattica a distanza (DAD)*, termoscanoer, Long Covid, *sindrome post-Covid*, infodemia and green pass”⁶.

⁴ N. Ginzburg, *The Things We Used to Say*, Arcade Publishing, 1999, original version (it.), *Lessico familiare*, Einaudi, 1963.

⁵ See: World Health Organisation (WHO), Naming the coronavirus disease (COVID-19) and the virus that causes it, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it).

⁶ See: <https://accademiadellacrusca.it/it/contenuti/lacruscaacasa-le-parole-della-pandemia/7945>.

Furthermore, Covid-19 has intensified and accelerated the use of anglicisms (Zoppetti, 2020) and the phenomenon of borrowing from English (García, 2020). The Italian case is a prime example in this respect (Cappuzzo, 2020): English words such as lockdown, smart working, cluster, droplet, task force, hub, conference call, COVID hospital, green pass, booster, etc. are not only being commonly used, often without their Italian equivalents, but at times also abused, as Prime Minister Mario Draghi pointed out on March 12, 2021, in reference to the expression “smart working”⁷.

As Tullio De Mauro (De Mauro, 2016) put it (long before the pandemic), there is an ongoing “tsunami anglicus”. The phenomenon is highly problematic, as it impacts the accessibility and clarity of the pandemic-related lexicon. There is a lesson to be learned from history. In 1481 Marsilio Ficino wrote his *Consiglio contro la pestilenza (Advice against the Plague)*⁸ in the vernacular instead of Latin (the official written language at the time), to offer practical guidance for everyone. The use of anglicisms in legal texts could also undermine the intelligibility of legal language, which constitutes an essential need of our society, as acknowledged by the Italian Constitutional Court in its famous Judgment no. 364/1988 on the principle of *ignorantia legis non excusat*⁹. Furthermore, the Italian language is of constitutional significance, including within

⁷ See: <https://video.repubblica.it/dossier/governo-draghi/covid-la-battuta-di-draghi-sullo-smart-working-ma-perche-tutte-queste-parole-inglesi/377842/378451>, March 12, 2021.

⁸ The text is available online via google books: <https://play.google.com/books/reader?id=p9-zf4Pw3NkC&pg=GBS.PP1&hl=en>.

⁹ Italian Constitutional Court, Judgment no. 364/1988, available at www.giurcost.org.

the context of internationalisation and globalisation (It. Constitutional Court, Judgment no. 42/2017)¹⁰.

It is worth mentioning the ambiguity of some of the terms included in legal texts and the decisive role played by soft law to resolve the impasse. A good example is the term “*congiunti*” (“relatives”) used in the Prime Ministerial Decree (DPCM) of April 26, 2020, which permitted necessary travelling to meet relatives. However, given the lack of a legal definition for the term, it was immediately difficult to identify who was a relative, so that specific clarifications were necessary in the form of a public communication by the Prime Minister Giuseppe Conte¹¹ and the publications of FAQs¹² in the days that followed.

Alongside new words, anglicisms and ambiguities, the pandemic narrative is primarily a war narrative, full of metaphors. The pandemic/war comparison is visible at all levels and has been circulated through soft law tools (especially public statements and press releases). At the G-20 summit on the Covid-19 pandemic of March 26, 2020, UN Secretary-General António Guterres defined the virus as a “*war that needs a war plan to fight it*”¹³. The war narrative helped define the new emergency-based legal order and its social and legal (and constitutional) legitimisation. It is precisely in this setting that the state of necessity takes shape, allowing pandemic

¹⁰ Italian Constitutional Court, Judgment no. 42/2017, available at www.giurcost.org.

¹¹ See: <https://www.youtube.com/watch?v=mQ8nzPv5WIM>, April 27, 2020.

¹² Government’s FAQs available at https://www.salute.gov.it/portale/news/p3_2_1_1_1.jsp?lingua=italiano&menu=notizie&p=null&id=4661.

¹³ See: <https://www.un.org/en/coronavirus/war-needs-war-time-plan-fight-it>.

law-making and its decision-making framework to grow rapidly and unhindered (Cantaro, 2021, 20-21).

Alongside military images and allegories used by politicians and soft law makers, the legal literature has often made recourse to Latin maxims such as *salus rei publicae*, *primum vivere, ex facto oritur ius*, and *necessitas non habet legem*” (De Siervo, 2021, 49; Niccolai, 2021, 243). Some authors have also pointed out that principles such as *primum vivere* and *salus rei publicae* can be regarded as inherent values of the legal system and should be treated as constitutional principles (Luciani, 2020, 113). These expressions have of course become additional means of legitimising the extraordinary measures adopted during the pandemic.

Another important feature is the fusion between hard law and soft law languages, since soft law expressions such as “*it is recommended*” and “*it is strongly recommended*” are used in hard law sources, while hard law legal vocabulary such as “*are effective immediately*” and “*come into effect*” can be found in soft law sources (Boschetti, and Poli, 2021, 30).

Last, but not least, there is the binomial “pandemic resilience”. Indeed, the fashionable term “resilience” was catapulted into the pandemic legal narrative by Regulation (EU) 2021/241, which established the Recovery and Resilience Facility and national recovery and resilience plans (NRRP). The regulation expressly defines resilience as “*the ability to face economic, social and environmental shocks or persistent structural changes in a fair, sustainable and inclusive way*” (article 2). However, resilience is not simply a term, but is itself part of a narrative, which projects us towards a present and a future of recovery and reforms. As highlighted by A. Cantaro, “*recovery is*

*the symbol word of the post-pandemic. A password for everyday life*¹⁴. It is also significant that the Italian National Recovery and Resilience Plan (PNRR)¹⁵ not only mentions the word “reform(s)” as many as 606 times, but introduces them as enabling (“*abilitanti*”), accompanying (“*di accompagnamento*”) and context-oriented (“*di contesto*”). Similarly, the European Commission identifies “future-proof” reforms as a key component for the Next Generation EU.

2. “*Adelante Pedro, con juicio, si puedes*”. *The pandemic and the curvature of regulatory space/time*

While the Covid-19 virus has changed the things we (are) used to say(ing), it has also managed to insinuate itself into law sources and deep inside the regulatory apparatus and framework. More precisely, the pandemic has led to a sort of distortion of regulatory space/time, under the pressure of three concurrent factors: promptness, effectiveness and convergence.

Promptness required the creation of regulatory *shortcuts* to bridge the distance between rulemaking and the new pandemic government/governance framework. Due to the lack of a constitutional framework for emergency situations, Italy addressed the pandemic through a combination of decree-laws and Prime Ministerial decrees (known as DPCMs). While the use and/or abuse of decree-laws is not new, the novelty lies precisely in the massive use of DPCMs for the manage-

¹⁴ Translated from the Italian: “Oggi ripartenza è la parola italiana, per eccellenza, della postpandemia. Parola d’ordine del linguaggio di ogni giorno” (Cantaro, 2021, 39).

¹⁵ Available at <https://www.governo.it/sites/governo.it/files/PNRR.pdf>.

ment of the pandemic (39 by Prime Minister Conte and 12 by Prime Minister Draghi)¹⁶. Although this emergency-proof regulatory scheme was not found to be unconstitutional (Italian Constitutional Court, Judgment no. 198/2021)¹⁷, it is not without consequences as regards both law sources and checks and balances (their purely governmental nature allows them to avoid parliamentary oversight), moving the needle of the scale to favour the Government at the expense of Parliament (Poli, 2022). Furthermore, the constitutional reasoning is weak and the Constitutional Court seems to be acting more for political reasons, i.e. to avoid calling into question the Government's pandemic policy, than for legal/judicial ones.

The emergency-proof shortcuts can also be regarded as a way of ensuring effectiveness precisely because they also guaranteed a closer connection and continuity between the pandemic laws and executive/operational dimensions, at all levels of government and even across the public/private divide. A good example is the original shortcut aimed at bridging the gap between hard and soft law sources through both a structured (insofar regulated by pandemic decree-laws) and original (if compared to the pre-pandemic era) interplay between hard and soft law sources, and the combination of different soft law tools (*soft law loops*) generated at different levels by a vast number of soft law makers, both public and private (Boschetti, and Poli, 2021). In this ever-changing and tentative regulatory scenario, soft law has augmented the legal system's potential to shape and direct behaviours, activities and needs, far beyond the reach of hard law. Within this expand-

¹⁶ See <https://www.openpolis.it/coronavirus-lelenco-completo-degli-atti/>.

¹⁷ Italian Constitutional Court, Judgment no. 198/2021, available at <https://www.cortecostituzionale.it>.

ed regulatory dimension, instrumental to regulation and governance goals, not only has the traditional formulation of hard and soft law as opposites become inadequate, but the existence and importance of a social normativity encompassing the legal one has emerged (Boschetti, and Poli, 2021, 34; Luciani, 2020; Bobbio, 1994). A sign of the new interdependence generated by the pandemic, as we will see below.

Last but not least: as soon as the recovery and resilience narrative emerged, complementing the state of exception from its very beginning (May 2020 onwards), it also justified shortcuts aimed at simplifying the legal framework and derogating from (the ineffectiveness of) normal normativity to the extent that the exceptional normativity has merged with normal normativity and vice versa.

As an aside, the urgency for effectiveness required more than *shortcuts*. Regulatory strategies had to *experience the pandemic* throughout its course in order to constantly adapt responses to changes in the pandemic itself, in scientific knowledge and achievements, in society and the economy. This need determined a clear regulatory shift towards an experimental and “learn by doing approach”. This was embodied in the ceaseless and extremely dynamic sequence (and combination) of decree-laws, Prime Ministerial decrees (paragraph II above), Health Ministry decrees, special commissioners’ orders, and regional and local orders. It also underpinned the traffic-light system and its varying restrictions, dependent on many factors such as hospital capacity and infec-

tion rates, as well as the organisation of the vaccination campaign¹⁸.

Moreover, the experimental and ‘learn by doing’ approach forced regulators and decision-makers to deploy the entire regulatory toolbox and to make large use of *soft law strategies*, due to their informality, flexibility and ability to cross boundaries and permeate the entire system. This created a sort of *informal regulatory continuum* that supported institutions’ regulatory efforts at all stages of the regulatory process. Thanks to soft law, many regulators (independent agencies, but also unions, trade associations, research centres and non-profit organisations) played an important *supporting/accompanying role* to help individuals, businesses and other public and private entities overcome the complex abnormality of the pandemic (Boschetti, and Poli, 2021; Zito, 2021). Here again we see the urgent need for regulators to accelerate processes and find a way to be in touch with society not merely from a legal perspective, but focused on the reactivity and performance of individuals and entities. It goes without saying that the pandemic tested the malleability of human behaviour to a point that could hardly have been imagined before (except in war time). At the same time, it deprived normativity of the kind of normality it requires to operate (Cantaro, 2021, 23), and this still appears suspended/to be diminishing in the new regulatory path towards recovery and resilience and its futuristic vision.

The last factor that has contributed to the curvature of regulatory space/time is convergence. The pandemic has had systemic impacts. As a consequence, fair cooperation between

¹⁸ For information about decree-laws and Prime Ministerial decrees see <https://www.openpolis.it/coronavirus-lelenco-completo-degli-atti/>. For information about soft law in the pandemic, see Boschetti, and Poli, 2021.

all actors, both public and private, institutions (at all levels), individuals and businesses has proven key to the success of the regulatory response to the pandemic and its many impacts on society and the economy. Significantly, the former President of the Italian Constitutional Court referred to loyal cooperation as the constitutional way out of the pandemic crisis (Cartabia, 2020; Giurato, 2020; Della Giustina, 2020). Even if the constitutional principle of loyal cooperation pertains mainly, at least constitutionally speaking, to institutional relationships, the pandemic raised and emphasised the importance of loyal cooperation in two different sets of relationships: i) public-private relationships, meaning relationships between public institutions and individuals/businesses/other legal entities such non-profit organisations; and ii) private-private relationships, meaning business to business, business to individual, individual to individual, individuals to communities and many other relationships. Acknowledgement of the necessary engagement of all parties created a new regulatory task: that of ensuring the convergence of all players in the fight against the Covid-19 pandemic and, later, in addressing recovery and resilience strategies and the major transitions to which they contribute and which they accelerate (Zamagni, 2020, 33). Here again, soft law strategies gave the system enough flexibility to set up a pandemic governance framework capable of ensuring cooperation and convergence without jeopardising the Constitution (especially with respect to the constitutional guarantees of the Regions and local authorities). These included new informal networks, working groups and steering committees, sometimes even mentioned in pandemic hard law. As stated above, soft law also promoted solidarity and socially responsible behaviours at a time marked by the ethics of responsibility – as well as its converse, as testified by the no-vax fringe and social aggressivity we are experienc-

ing today (Zagrebelsky, 2020; Carnevale, 2019; Caporale, and Pirni, 2020, 20). Workplaces, shops, public outdoor spaces, means of transport and homes can be described as the places where the horizontal dimension of loyal cooperation developed. For example, distancing and preventive measures such as wearing masks, voluntary surveillance, self-testing, even vaccination. These are all “responsible” behaviours that relied mainly on individual acceptance, promoted and nudged along by the Prime Minister and our Head of State in their speeches and official messages, but also by public service announcements from leading actors, singers and athletes, and even by a carrot and stick approach aimed at rewarding certain behaviours believed to be “responsible” (which operates through the interplay between hard and soft law sources). Besides this, there is the state of necessity and the desire to return to normality (in this respect, the decision to end the state of emergency is not, *per se*, the turning point)¹⁹.

3. To vaccinate or not to vaccinate. The dribbling strategy of the Covid-19 vaccination campaign

To vaccinate or not to vaccinate: this is the question of the pandemic! While at the beginning everyone was hoping that a vaccine would be found as soon as possible, once this happened, the problem was, and still is, to convince everyone to get vaccinated in order to achieve herd immunity.

¹⁹ On the difference between the state of necessity (of constitutional relevance) and the state of emergency (not mentioned in the Italian Constitution), S. Niccolai, 2021; see also Bobbio, 1994. The end of the state of emergency is now scheduled for March 31, 2022.

The Italian strategy in this respect can be summarised as follows: a vaccination campaign and progressive roadmap towards mandatory vaccination.

The campaign vaccination, which has played a pivotal role and also has the great, unique merit of stimulating a sense of civic duty, was mainly built using soft law (Boschetti, and Poli, 2021, 28). Recommendations for vaccination abound at all levels and come from both the public and the private sectors. One example *über alles* can be found in the New Year's messages from the President of the Republic Sergio Mattarella. On December 31, 2020, his invitation to get vaccinated and recognition of the vaccination as an out-and-out duty resonated strongly in all Italian households: “*To be vaccinated is a responsible choice, a duty. [...] The vaccine and EU initiatives are two decisive vectors of our rebirth*”²⁰. Similarly, on December 31, 2021 the value of the vaccine and its fundamental role in preserving human lives and reducing the spread of the virus²¹ were key topics of his speech, which was an admonishment, if not a reprimand, for the anti-vaxxers.

Furthermore, despite the constitutionality of introducing a mandatory requirement right from the start (Italian Constitutional Court decisions no. 5/2018 and no. 118/2020), this would have increased tensions. The approach taken was instead to skirt around the problem; in other words, engage in a sort of football-style dribbling. The result was an oxymoron: “*a non-mandatory obligation*” (Ainis, 2021).

Italians have been led step by step towards vaccination: (i) the basic Green Pass required to access and exercise many rights (*in primis* the right to work) has been progressively ex-

²⁰ Available at <https://www.quirinale.it/elementi/51474>.

²¹ Available at <https://www.quirinale.it/elementi/61831>.

tended; ii) at a later stage, the Super Green Pass no longer offered the option of a rapid antigen or molecular test with a negative result as an alternative to vaccination; and iii) finally, Decree-Law No. 1 of January 7, 2022 made vaccination mandatory for all Italian residents who will be over 50 by June 2022, including European citizens and foreigners, who are required to present a Super Green Pass in order to access the workplace.

Based on the foregoing, we can say without any shadow of doubt that the Government chose a “soft” route. It was soft from two different perspectives. On the one hand, as already mentioned, it was dominated by soft law in different shapes and from different sources. At the same time, it played anticipatory, supporting and accompanying roles *vis-à-vis* hard law (Boschetti, and Poli, 2021). On the other hand, hard law measures took on a soft nature for two reasons. Firstly, they developed gradually. In fact, in the first stage they affected specific groups, in the second stage they were extended, and in the third stage they were rolled out even further. Secondly, they implicitly and indirectly pushed or, even forced, people to get vaccinated, progressively reducing or eliminating the range of options open to them (Spadaro, 2021). Notwithstanding this, it is worth mentioning that the constitutional legitimacy of the Green Pass cannot be questioned²², as it is based on the need to safeguard people’s fundamental right to health (Azzariti, 2020; Bin, 2021; Della Cananea, 2021; Poggi, 2021; Romboli, 2021). Former constitutional judge Professor Sabino Cassese even suggested that the Green Pass should be

²² See also French Constitutional Council, Decision no. 2021-824 DC of 5 August 2021. Available at <https://www.conseil-constitutionnel.fr/decision/2021/2021824DC.htm>.

treated like a driving licence (Bisozzi, 2021). For the sake of accuracy, it should also be noted that indirect vaccination obligation is not something new, as the case of the exclusion of unvaccinated students in the United States and in the autonomous Spanish Communities show from a comparative perspective (Spadaro, 2021, 74). Thus, the overall strategy passes “from persuasion to induction and from induction to coercion” (Ainis, 2021).

The last phase (Decree-Law No. 1/2022) is by definition a logical part of this framework. Indeed, it is no coincidence that the current vaccination obligation applies only to the over-50s. The decision is of course based on the fact that older people are more vulnerable, but it can surely also be regarded as a preliminary step towards a more widespread obligation. In addition, the paltry fine (100 Euro) for non-compliance means that it is only a “polite obligation.” (Giorgi, 2022).

In this context, another important aspect is that the vaccination campaign has led to a general reflection on the fact that “health is a systemic process that includes the well-being of nature and the animal world (One Health)” (Caporale, and Pirni, 2020, 14), also in light of the climate issues we are facing. The very recent approval of the constitutional law that amended the Italian Constitution (February 8, 2022) by adding the safeguarding of the environment, biodiversity and the ecosystem also in the interest of future generations²³ is a product of such reflection.

²³ The reference to the future generations echoes the judgment of the Bundesverfassungsgericht, which ruled that Germany’s Climate Protection Act was unconstitutional: BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18, available at <https://www.bundesverfassungsgericht>.

4. Back to the future? The journey towards recovery and resilience

In the midst of the health and economic crisis, the first wave of the pandemic over but still a burning memory, Italy set out on a journey towards recovery and resilience. Giving names to laws is in itself a sign of a political narrative. In the person of Prime Minister Conte, the Italian Government significantly named the Decree-Law of May 19, 2020 the “*Decreto Rilancio*” (Recovery Decree), and the word “*rilancio*” (recovery) showed up soon after in a decree passed in mid-August 2020, also known as the “*Decreto Agosto*” (August Decree). This was just the beginning of the recovery and resilience narrative which, surprisingly, took its place alongside the catastrophic and “*we are at war*” narrative (Cantaro, 2021, 5-8; Draghi, 2020), until the latter was replaced by a more relaxed “*stay vigilant*”: from ‘hope and fear’ to ‘hope with caution’.

To gain an understanding of this change of direction in Italian domestic politics and legislation, we have to take into consideration two series of events.

In the late spring of 2020, the Next Generation EU negotiations were underway, and the European Council of June 17-21, 2021 defined the main features of the new financial tool known as the Recovery Fund, based on the European Commission’s proposal at the end of May (Santini, 2021). This important decision gave way to the Recovery and Resilience Facility (RRF), which is the key (including financial) compo-

de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html. On the consideration of the future generations in constitutional law with a focus on the inclusion of future generations in article 9 of the Italian Constitution and on the aforementioned German decision on climate change: L. Bartolucci, 2021. See also: Fraenkel-Haberle, 2021.

ment of the NGEU programme. Within this framework, later detailed in the guidelines published by the Commission in January 2021 and by EU Regulation 241/2021 on the RRF, Italy submitted its National Recovery and Resilience plan (April 30, 2021). From this moment on, the recovery and resilience narrative began to dominate the domestic political arena and law, shaping the institutional apparatus and regulatory strategies. The how is precisely the topic discussed here.

This notwithstanding, the first clues of the recovery narrative (resilience not yet having become part of the legal vocabulary) date back to the pre-pandemic era. Here again the names of laws – mainly decree-laws, as in the pandemic era – tell us something about our permanent need for urgent reforms, to unlock the economic system, and to simplify the public sector and administration (Zamagni, 2020, 35). Earlier still there were the “*Sblocca cantieri*” decree, aimed at speeding up public works (Decree-Law No. 32, March 19, 2019); the “*Sblocca Italia*” (Decree-Law No. 133, June 15, 2014), aimed at speeding up the Italian economic system; the Decree “*del fare*” (Decree-Law No. 69, June 21, 2013), aimed at making effective a set of uncompleted reforms; and the “*Sviluppo*” decree (Decree-Law No. 83, June 15, 2012) aimed at boosting the economy. In short, it is apparent that Italy has been in search of recovery for a very long time, due to its endemic inability to reform and carry out reforms and its falling back on derogations and exceptions. The (post-)pandemic recovery and resilience narrative therefore somehow brings us back to the future. The pandemic itself takes on a sort of chronic emergency status.

In light of the above, one question emerges. What changes has the Italian NRRP brought about within the framework of the NGEU and the new recovery and resilience narrative?

To answer this question, we can start by saying that it is not easy to define what the NRRP is from a merely legal perspective (Clarich, 2021; Lupo, 2022, 3-5). The plan has a two-fold nature. It sits between politics and the law. It is a massive and future-oriented political action programme subject to an approval procedure regulated by the law (EU law) but inherently political (the plan is approved by the European Council on the EC's advice²⁴ and its content must be consistent with the (six) pillars and the general and specific objectives set out at EU level²⁵).

The implementation and monitoring cycle is also two-pronged, and also falls between politics and the law. Planned law reforms are treated as investments, as goals to accomplish, under the penalty of losing EU funds. New laws are needed to set up the governance framework, procedures, tools and rules necessary to implement the plan (missions/goals/funds²⁶) according to the schedule (milestones). A new regulatory space/time to benefit the NRRP and its "missions". This notwithstanding, in the implementation and monitoring phase there is also plenty of space for politics. In spite of the widespread use of decree-laws to pass NRRP-related reforms (confirmation of the Government's role in triggering the NRRP), the legislature remains in charge and at liberty – politically speaking – to decide the what, the how and the when (within the natural constraints of our form of government, impacted by the fragility of the current political parties and by the

²⁴ According to the parameters set out in EU Regulation 240/2021.

²⁵ Articles 3 and 4 of EU Regulation 241/2021. EC Guidance for implementation of the Recovery and Resilience Facility, 22.01.21, available online.

²⁶ The strict correlation between goals and financial resources can be found also in the "*do no significant harm*" principle under the Taxonomy Regulation.

NRRP itself)²⁷. In this respect, it is important to note that in mapping reforms for the NRRP, the Italian Government under Prime Minister Draghi made a careful selection, taking into account both the political calendar (2023 being the physiological end of the current legislature) and the political risk inherent in each reform (some have a 2026 end date). In addition, and significantly, the EU RRF Regulation (241/2021) allows politics a certain amount of room for manoeuvre, in that it gives Member States the option of amending their NRRP (article 21). That said, it is interesting to note that, precisely due to its concurrent political nature, a (political/legal) failure to make the promised (*rectius*, planned) reforms and investments could turn into a critical democratic issue. It could, among other things, lead to a request for technical support using the Instrument established by EU Regulation 2021/240 and it is no coincidence that the Regulation recommends Member States consult the relevant stakeholders – communities and local authorities – prior to requesting technical support, “*in order for the reforms pursued by Member States to gather wide support and ownership*” (article 9).

We can clearly see that the new regulatory space/time triggered by the NRRP is more than just an interesting package of reforms. It is a key component of the recovery and resilience strategies outlined at EU level, and nationally in the NRRP.

²⁷ La Stampa, *I partiti e le lobby all’assalto. 90 audizioni e 50 audizioni per colpire il cuore del PNRR*, February 11, 2022. Art. 9bis, co. 2, decree-law n.152/2021, converted into law n. 223/2021, caters for a Parliament’s early warning mechanism in case proposals for amending or renovating the NRRP are made by the Government.

First of all, the NRRP requires a dedicated governance framework as well as simplified procedures and rules, aimed at its implementation and monitoring and capable of working alongside, and in dialogue with, those established at the EU level and regulated by the RRF Regulation²⁸. Soon after the NRRP was presented, and prior to its approval, Decree-Law No. 77/2021 set out the new mechanisms and structures required to make the NRRP possible, which significantly reinforce the role of central Government and the Prime Minister. A number of other decree-laws followed to complete the restructuring of the public administration, on which the success of the NRRP very much depends (Boschetti, 2021b).

NRRP-dedicated governance co-exists with ordinary institutional architecture, creating a new equilibrium and even impacting the form of government (Lupo, 2022, 3). Moreover, the overall impact is somehow amplified by the parallel transformations of governance generated by the major transitions, first and foremost ecological and digital transitions (Boschetti, 2021a and 2021b). Similarly, the NRRP-dedicated procedures and simplified rules, which apply to all investments, activities and projects financed under the NRRP and complementary funds, create a performative parallel normativity. However, it must be said that, assuming they are instituted timeously, the reforms carried out under the NRRP will progressively and systematically change and innovate the overall regulatory framework in many key areas (the first of which are the public sector, taxation and the judicial system) so as to align, at least to a certain extent, these binary systems (Cantaro, 2021, 53).

²⁸ Part IV of the Italian NRRP is dedicated to Governance.

The main novelty here is the emergence of a goal-oriented and performative governance and regulatory framework, which forces politics into streamlined pipelines and (digital) meta-cycles (EC 2021c) and seems able to temper the future and the risks it brings. Timeframes have been shortened (the future is nothing but the day after tomorrow), resilience is showing the way to turn shocks into opportunities, reforms are the pledge for a *future-proof* tomorrow (EC 2021a), and the journey – the movement – towards recovery and resilience, by means of the major transitions, suggest that we can plan the future and that the future – at least the one we planned (in the NRRP and other documents) – is already/nearly here, in our (resilient) hands.

This is a two-fold challenge for our country. On the one hand we must show we are capable of the future the NRRP is offering us (Clarich, 2022; Camera dei deputati, 2022); on the other, we must show we are capable of designing and making our near future. To this end the NRRP does not give all the answers we need to cure our endemic ills. On the contrary, it may give us the illusion that they no longer exist.

5. Lost in Transition(s)? Lessons from the pandemic

The journey towards recovery and resilience (2021-2026) paves the way to longer journeys. It brings us towards the big transitions of our time: environmental and digital transitions, but also cultural and social ones. Unsurprisingly (but surprisingly for the pre-pandemic world), EC President Ursula von der Leyen launched the *European Bauhaus*, a cultural and innovative design built on inclusion, sustainability and beauty. The newly re-elected President of the Italian Republic Sergio Mattarella has announced a post-pandemic *New Deal*. The ma-

jour transitions are part of this innovative cultural project, but they transcend its boundaries, time limits, targets and even its funding.

Transitions do not just define our (indefinite) future (Cantaro, 2020, Pessina, 2016). They are a way of being – not simply in transit, on a journey, but projected onto meta-goals, driven by the image of a better world (resilient, sustainable, digital, inclusive) – various stages in an approach to assessing progress and reassuring society and the economy. The ancient paradigm of promise (and salvation) is today translated into (that of) promises and transitions (Cantaro 2021, 5-8; Walzer, 1986). A kind of new therapy for our humane, societal, economic and institutional ecosystems.

Indeed, the ecosystemic impact of transitions, together with their progressive performance cycle, provides information about and measures their radical transformative potential or, at least, their force of acceleration: both of which go far beyond the reach of public institutions alone (Boschetti, 2021b; Floridi, 2022). Convergence is the key, as in the pandemic era (Caporale, and Pirni, 2020; EC, 2021d). It is no coincidence that they are explicitly and officially called “*revolutions*”. The transformative potential of transitions must be taken seriously. Indeed, some of the transitions have such a short-term horizon that we cannot simply ignore them (both the UN SDGs and digital transition are to be completed by 2030). Still, the most relevant aspect is that transitions change the ontology and epistemology of things, of reality, of what is “human”.

The digital transition – the *fourth revolution* Luciano Floridi talks about (Floridi, 2012) – implies such a radical change that it requires the resetting of our cardinal points and a new compass (EC, 2021b). The circular economy paradigm rooted in the ecological transition should radically change the way

we use and manage natural resources, production cycles, consumption patterns, urban transformation, and their codes (legally speaking). Thanks to the holistic dimension of sustainability, the circularity paradigm has crossed the environmental fence and may contribute to re-shaping value creation and distribution (Caporale, and Pirni, 2020, 20), approaches to inclusion and subsidiarity, together with the digital transformation (Ferraris, 2021; Benanti, Darnis, and Sciarrone Alibrandi, 2020; Casilli, 2020). A new space/time perspective that brings the future dimension into our everyday life. In other words, the duty towards future generations that has recently been incorporated into our Constitution (article 9) may radically change the options available to law-makers and decision-makers (Pope Francis, 2015; Fracchia, 2005 and 2010; Cantaro, 2021, 53; Cuocolo, 2022)²⁹. Similar considerations can be applied to the cultural transition, which is required to open the doors of the future to all. It has the power to regenerate our mindset, competence and skills on an ongoing basis and across the generations. It could be described as a cultural and educational vaccination campaign.

These transformations have already started to take place. Yet the duty towards the Next Generation EU has already revealed its transformative potential, by re-shaping our current existence and that of our democratic environment. It has touched on the legal system, government and governance, the role the public sector plays, how institutions interact with one another and with society, the regulatory framework and its style. The short distance travelled in the journey towards recovery and resili-

²⁹ See also German Constitutional Court, Order of the first Senate, March 24th 2021, Neubauer et al. v. Germany, cit., based on artt. 2 and 20a of the German Basic Law.

ence has already revealed the goal-oriented and performative face of the new NRRP/dedicated governance and regulatory framework. The NRRP's mission/targets/funds/milestones approach aims to create efficient core units (*capsules*, if we want to linger in the comfort zone of anti-pandemic lexicon), in which politics and law, resources and time – the four dimensions that define (and condition) executive action – are pre-set and combined: a kind of public policy *pret-a-porter* – a pre-packaged product ready to go.

What we have experienced since the recovery and resilience journey began is just a taste, a first bite, of what being in transition(s) means. Indeed, transitions imply something more than recovery, were it for no other reason that they imply a rather conservative perspective: the return to our pre-pandemic past, together with its neoliberal paradigms and laws (Cantaro, 2021, 11). The crucial point now is to understand what makes it possible to go beyond a “simple” recovery from the pandemic and take transitions seriously. This is precisely where the restorative and transformative potential of resilience comes into play (Cantaro, 2021, 53; Caporale, and Pirni, 2020, 16). Resilience is transformative in nature (to a point that it appears at odds with recovery), in that it forces us to look at a future open to plans, the only certainty being the need to turn our past weaknesses into an opportunity for real change (Marramao, 2020). This is the first lesson of the pandemic: we do not have to settle for the transformative potential of transitions, lingering in a goal-oriented and performative approach only repeated on a larger scale. Instead, we can save room for the transformative potential of resilience within, and in spite of, transitions, and be able to see the hidden emergencies (Zabala, 2021) and even the contradictions the major transitions embody (i.e. the sustainability side-effects of the digital transition and the electricity transition); free up

human and societal creativity; and orient individual and collective behaviours towards a new generativity (Caporale, and Pirni, 2020, 13; Bartolini, and Demichelis, 2021; Alpa, 2021; Pessina, 2022). This non-deterministic (but rather experimental), non-top-down (but rather distributed and inclusive), non-technocratic and only apparently non-performative form of sovereignty – if compared to many that crowd the post pandemic world, including vaccine, digital, data and energy sovereignty – is what we should most care about. It marks the distance between the *Europe First* paradigm and the *European Bauhaus*.

For these reasons, resilience can be chosen as the main theme for the major transitions, the true game changer – the new event horizon, to borrow from the language of astrophysics. In this respect, the recognition of resilience as a core legal principle for the Next Generation EU must be interpreted as a call to take the transformative potential of resilience seriously also within the legal environment. As during the pandemic, when the entire legal toolbox was deployed and shaped to meet the pandemic's many challenges (see paragraph II), the entire legal toolbox now needs to be rethought and shaped to meet the real opportunities for change – an open regulatory sandbox to preserve resilience in transitions. This is the challenge, which we cannot de-constitutionalise (Cantaro, 2020, 44), which our democracy has to embrace, and which is the most difficult task for politics and the law. It is the most important legacy of the pandemic. Either way, we have the opportunity to be fit for the future (future-proof), or simply lost in transition(s).

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