Chapter 12
The Decree-Law in the Pandemic Period

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ABSTRACT

The decree-law was introduced and evolved in the previous statutory system by means of a pure practice, due to the absence of any positive provision in this regard. This, however, determined a deep contrast in the doctrine of the time between those who considered decree-laws as illegitimate acts and those who justified their existence based on necessity as a source of law or based on a customary rule. The Constitution defines decree-laws as "provisional measures having force of law" adopted by Government, under its own responsibility, in extraordinary cases of necessity and urgency. Therefore, the fundamental prerequisite for the Government to adopt the acts in question is represented by the existence of extraordinary cases of necessity and urgency. In essence, the constitutional legislator anchored the adoption of decree-laws to the existence of the requirements of extraordinary necessity and urgency and established that the conversion law must be approved by Parliament within sixty days of the publication of the decree, under penalty of loss of effectiveness thereof from the beginning.

INTRODUCTION

The decree-law was introduced and evolved in the previous statutory system by means of a pure practice, due to the absence of any positive provision in this regard. This, however, determined a deep contrast in the doctrine of the time between those who considered decree-laws as illegitimate acts and those who justified their existence based on necessity as a source of law or based on a customary rule. This opposition was significantly mitigated by the approval of Law no. 100 of 1926, which gave formal legitimacy to decree-laws, also providing for the obligation to submit them to Parliament to be possibly converted into law and establishing their *ex nunc* ineffectiveness in case they were not converted into law (Ciconnetti, 2017, p.287).

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With the Republican Constitution, (Although not expressly provided for by the Albertine Statute and being opposed by doctrine, based on contrast with Articles 3, 6 and 82, the decree-law appeared and evolved in practice as a legislative act of Government from the early beginning of the statutory experience (according to some scholars, the first decree-law was Royal Decree no. 1603/1853), even if its *nomen iuris* appeared only in the first decade of the following century. It is from the so-called end-of-century crisis that decree-laws became a more important instrument: just think of Royal Decree no. 227/1899, submitted by the Pelloux Government, whose provisions were opposed by the same Court of Cassation, which considered them to be ineffective as they had not yet been converted into law. The first legislative discipline of the decree-law came only with Law no. 100/1926, empowering Government to adopt rules having the force of law in extraordinary cases, based on urgent and absolute necessity. Moreover, decree-laws were to be submitted to the Chambers to be converted into law no later than the third session after their publication and they would cease to be effective if they were not converted into law within two years of their publication. If one of the Chambers expressly refused the conversion, decree-laws ceased to have effect immediately.) the decree-law was expressly sanctioned, but at the same time it was to be governed by a stricter discipline: article 77 of the Constitution established that the Government, under its responsibility, may adopt provisional measures having the force of law in extraordinary cases of necessity and urgency. The Constitution therefore recognized "a source of law which in the "statutory system" had evolved outside any express regulations and had generally been justified by referring to necessity as a source of law. Necessity justified the exceptional use of legislative power by Government, notwithstanding the principle of legislative function being entrusted with Parliament" (Bin & Pitruzzella, 2013, p.140).

In the legal system in force, both doctrine and case law recognized that Article 77 of the Constitution grants to Government the specific power to approve acts having the force of law, of immediate force – albeit provisional – and as such binding for any private or public entity. In this sense, the relationship between Government and Parliament is inverted with respect to the hypothesis of legislative delegation (Indeed, while with regard to the legislative delegation, Parliament's delegation law was preventive and the subsequent legislative decree of the Government was definitive, in the case provided for and governed by art. 77 the intervention of Parliament approving or denying conversion is subsequent to the decree-law which, in turn, is only provisional as its maximum duration is limited to sixty days; Cicconetti, 2017, p. 289) .

The Constitution has established the rules of the decree-law, which is no longer based on necessity but on the norm on production contained and envisaged by the current constitutional wording, limiting it at a substantive and procedural level. The decree-law is immediately effective, but it must be submitted to the Chambers on the same day to be converted into law. Furthermore, the Chambers are specifically convened even if dissolved and must meet within five days. Decree-laws, like legislative decrees, are acts having "the force of law" i.e., they are regulatory acts of Government equivalent to laws, in terms of both their ability to innovate within the legal system (so-called *vis abrogans*) and their resistance to be abrogated by subordinate sources. Decree-laws are the expression of a primary normative power. As for legislative decrees, in the case of decree-laws we first have a Government provision to be adopted in extraordinary cases of necessity and urgency, pursuant to Article 77, paragraph 2, of the Constitution, and thereafter its possible conversion into law (The conversion of decree-laws into laws takes place through the approval by Parliament of a draft bill submitted on the initiative of the Government, usually containing one single article, which opens as follows "Decree-law … is converted into law …", while the relevant decree is enclosed as an annex. Article 15, paragraph 5, of Law no. 400/88 has positively