Mishandling the pandemic in the initial phase: the WHO and the Italian case

di Giuseppe Franco Ferrari

Abstract: *Gestire male la pandemia nella fase iniziale: l'OMS e il caso italiano* – The article provides an assessment of the management of the pandemic by the WHO, highlighting the delays in the actions taken by supranational institutions and discussing the relationship between the Italian legal system and the WHO. More specifically, an evaluation concerning the compliance with the constitutionally-mandated allocation of competences between the central government and the Regions will be developed in order to come up with conclusive remarks on the handling of the pandemic.

Keywords: Covid-19 Pandemic; WHO; Health; International prophylaxis.

1. The WHO in the midst of the Covid 19 pandemic: uncertainties and delays

The first outburst of the then new virus in China can be approximately dated around the half of December 2019. On the 19th the pneumonia epidemic had already been identified and recognized in its viral dimension, at least in the province of Hubei. On the 27th its genome sequence had been isolated in a Wuhan laboratory, according to an article appeared in The Caixin Global, a local newspaper, soon disappeared from the web though saved in an on-line archive. The sequence was revealed and made public only two weeks later. The WHO Director General, Tedros Adhanom Gebreyesus, apparently ignored the delay in making the information available and publicly congratulated the Chinese Government for the reactiveness in focusing on the problem, isolating the virus and sequencing the genome. The rapidity of China in informing the world was literally defined "very impressive".

On the 1st of January of 2020 several Chinese doctors tried to raise the alarm at the international level: the first was dr. Li Wenliang, who was summoned by the Office of Public Safety, put in state of arrest and obliged to sign a document in which he admitted a mistake and recanted. He will soon catch the disease and will die at the hospital on the 7th of February, at the age of thirty-two, after receiving official excuses: he will be declared a national hero after a couple of months. Meanwhile the Taiwan Government also tried unsuccessfully to alert the WHO.

On the 14th a tweet from Gebreyesus declared that there was no clear

evidence of the capacity of the virus of migrating between human beings, and such circumstance was confirmed in a press conference by the chief of the Emerging Diseases and Zoonostic Unit, dr. Maria D. van de Kerkhove. On the 23rd, the WHO Emergency Committee discussed whether to declare the Covid 19 international emergency: it seems that China opposed such measure and Gebreyesus flied to Beijing to settle the controversy.

At that point, the world press began to ask questions about his past. It turned out that he had been Minister of health in Ethiopia, being Eritrean, that he was in good relationship with the late George Bush, who praised him several times, but that China, being the first trading partner of Ethiopia, played an important part in his May 2017 nomination. Immediately after being nominated, he made an open statement in favor of the representation of one China only at WHO level. The reporters also discovered that as a minister he might have tried to conceal no less than three cholera epidemics in his own country.

On the 28th of January, from Beijing, he praised China "again and again" for its transparency. In the same press conference, although China at that point had put sixty million people in quarantine, he declared that there was no reason to adopt measures, such as limitations on flights to and from China, that would "unnecessarily interfere with international travel and trade". On the 30th of January the WHO finally declared the international emergency, but the infection had already reached at least nineteen countries and infected at least eight thousand persons outside China. On the 31st The Lancet published a report written by Hong-Kong doctors demonstrating that the replication of the virus was exponential, so that the numbers declared by the Chinese Government were unreliable, mainly due to the lack of consideration of asymptomatic subjects, who should be included according to the prescriptions of the WHO itself. Yet, the official report published in mid-February[1] still stated that "the proportion of truly asymptomatic infections is unclear but appears to be relatively rare and does not appear to be a major driver of transmission". Meanwhile, during the same month, the Chinese had found out more than forty thousand asymptomatic persons, quarantining a part of them[2] .

On the 31st of January the WHO Guidance[3] still defined a suspect case as being that of a patient affected by severe respiratory infection with no other etiology and having traveled to China in the prior fourteen days. No word about the asymptomatic cases, following strictly the Chinese practice., Until the full outburst of the infection all over the world, the strategy consisted of following the disease after its manifestation instead of preventing it by looking for asymptomatic subjects and tracing their movements in the previous days in order to quarantine all the possible sources of further infection. Therefore, no recommendation suggested to impose tests on asymptomatic persons; to the contrary tests should be

[1] WHO, *Report of the WHO-China Joint Mission on Coronavirus Disease*, 16-24.02.2020
[2] South China Morning Post, 22.03.2020.
[3] Global Surveillance for human infection with novel Coronavirus (2019n-CoV).

reserved for doctors of medicine and sanitary workers, besides patients with symptoms.

The recognition of the pandemic was finally adopted by the WHO only on the 11th of March, when 114 countries had been hit by the infection. On the 16th Science published a well-documented study where it affirmed that 79 percent of all the cases are conducive to contagious asymptomatic subjects. Yet on the 3rd of March the General Director Gebreyesus still insisted that only a 1 percent of the total cases of Covid 19 did not have symptoms and that they generally developed symptoms within two or three days. On the 16th of March in a press conference he invoked "tests, tests, tests", while dr. van de Kerkhove mentioned as obvious the Chinese experience of a 75 percent ratio of asymptomatic persons with contagious capacity. Even on the 4th of April, while the pandemic was devastating the world economy and causing hundreds of thousands of deaths, the guidelines of the WHO were not yet suggesting a massive use of half-masks, mainly for asymptomatic subjects.

Finally, on the 30th of April, as the number of deceased people all over the world reached two hundred thousand and many governments were struggling against the lack of ventilators, masks and PPEs in general, Mr. Gebreyesus praised Sweden for its herd immunity policy in one of his periodical press conferences.

2. The WHO and its formal approach

In terms of formal sources, the first action taken by the WHO has been the publication named "National capacities review tool for novel Coronavirus"[4]: working on the experience of former diffusive diseases, the organization wanted to help the States to identify the main gaps, perform risk assessments and plan for additional actions.

In January the only WHO publication was the paper entitled "Disease commodity package", a three-page document summarizing the medical approach to the virus in very general terms.

In February the WHO published five documents[5], all of them being either investigating protocols or disease samplings.

On the 12th of February the Operational Planning Guidelines were published, directing the member-States towards the elaboration of a Strategic Preparedness and Response Plan (SPRP), conceived as a framework for the adaptation of the already existing National Action Plans for Health Security (NAPHS) and Pandemic Influenza Preparedness Plans (PIPP). The documents describe the main steps to be made to collect and provide data, to organize a country-level coordinating machinery, to manage a risk communication policy, to identify surveillance objectives and create rapid response teams above all in States with high risk of imported cases or of local transmission, to suggest the creation of national dedicated

[4] On January the 9th.
[5] Respectively on February the 10th, the 18th, the 23rd and the 28th.

laboratories or the collaboration with international reference laboratories, to explain how to collect and disseminate information about infection prevention and control and case management, and to recommend logistical arrangements. Finally, Annex 1 to this document includes some key performance indicators and describes the rationale for their use.

At the same time a portal was opened to States, partners and donors, apparently more to collect than to disseminate data.

In March the flow of documents becomes non-stop. No less than nineteen papers were published in that month, nineteen in April and more than twenty in May. The rate of preciseness of these documents from now on is increasing. In fact they shift to operational considerations concerning the management of the virus in different contexts, from health facilities to care workers to quarantines, mass gatherings, workplaces, laboratories, businesses, sport events, schools, boats, religious ceremonies, and to concrete instructions regarding specific medical and pharmaceutical treatments, the use of protective equipment, food safety, cleaning and disinfection, contact tracing, and so on. At this point the WHO is trying to offer technical information received by countries widely affected by the virus and to diffuse best practices.

3. The Italian legal system and its relationship with the WHO

From the institutional viewpoint, after the 2001 revision, that affected the whole Title V of its Part II, concerning Regions, Provinces and municipalities, reforming the territorial and intergovernmental structure of the Republic, the Italian Constitution includes a new distribution of powers between State, Regions and local bodies. Art. 117.2.q puts on the state the responsibility for the "protection of the national borders and international prophylaxis", while the "defense of health" as a sector (Art. 117.3) belongs to the concurrent legislative power of State and Regions: the State is supposed to approve the general principles in a sort of framework legislation, while Regions are in charge of implementing such principles within a range of solutions compatible with them.

The fundamental statute governing this subject is L. 23 December 1978, no. 833, that created the National Health Service, several times modified but still in force. Its implementation has followed different patterns. Some Regions, such as Emilia-Romagna and Tuscany, have stuck to the original institutional model[6], which imposed a strong public sector attracting almost all the public resources available. Others have been developing a different approach over the years, reducing the role of public hospitals and devolving a substantial part of the resources to the private sector on the basis of the system called Diagnosis Related Groups, which

[6] The reference here is to the classification of the blueprints of welfare state according to P. Flora, A.J. Heidenheimer, *The Development of Welfare States in Europe and America*New York (NY), 1981 and J. Alber, *Vom armenhaus zum wolfahrstaat. Analysen zur entiwcklung der sozialversicherung in westeuropa*, Frankfurt, 1982.

implies payments by hospital treatment of individual diseases within a total amount to be calculated a priori, usually defined 'roof'. Lombardy and, to a lesser extent, Veneto have followed this line. In such Regions the number of intensive therapy beds, therefore, has been decreasing in the last ten years, due both to personnel reduction in the public hospitals and to the tendency of private hospitals to concentrate on highly remunerative specializations, much better rewarded by the Region. At the end of 2019, the total number of I.T. beds amounted only to 5,179, that is 12.5 per one hundred thousand inhabitants, in comparison to 15.9 in Belgium, 21.8 in Austria, 29.2 in Germany. The ratio of private versus public T.I. beds was about 1:12. The territorial distribution was also unsatisfactory, some Regions being totally lacking.

The second relevant statute is legislative decree 2 January 2018, no. 1, Code of civil protection, which incorporates a previous statute of 1992[7] and authorizes the Council of Ministers, on the ground of information and data available, to adopt a deliberation of state of emergency implying specific consequences in terms of extra ordinem acts, in temporary derogation to all statute provisions and being bound only to the general principles of the legal systems and to EU norms[8]. The enormous width of such powers, however, is not exempted from judicial control of administrative action, according to the case law of the Constitutional Court[9]: the scrutiny by the administrative judges may concern the existence of the facts supporting the deliberation, the proportionality of the governmental action, its objectives, and the precise definition of the public authorities empowered.

The legislative ground of the emergency powers is peculiarly important in the Italian context because the Constitution of 1948 does not regulate any state of emergency, but simply mentions the state of war[10]. Constitutional scholars believe that the state of emergency can be justified by the fundamental principle of unity and invisibility of the Republic (Art.5), the perpetuity clause of Art.139 that covers the intangible principles of republicanism, democracy, equality and protection of rights, which form the core value content of the Constitution and need to be protected even in circumstances of emergency[11].

The first Italian Region to be seriously affected by the Covid 19 was Lombardy, after the 21st of February. The reasons were several, cooperating towards one of the first and most severe concentration of cases in Europe:

[7] L. 24.02.1992, no. 225, Creation of the national service of civil protection, which was almost immediately after on successfully scrutinized by the Constitutional Court (decision no. 418 of 1992). On that occasion the Court stated that "in case of so serious emergencies, when the environment, the life and goods of the people are at danger and an extraordinary and urgent rescue actions are needed, exceptional measures are fully justified".
[8] Arts. 7 and 24.
[9] Decisions nos. 127 of 1995, 83 of 2010, 81 of 2012 and 195 of 2019. See also Council of State, decision of 26 March 2020, no. 2099.
[10] Art. 78.
[11] Constitutional Court, decision no. 1146 of 1988.

first of all, it is believed that patient zero might have been a German citizen coming back from China and having contacts in the Codogno area; second, in the same place there had been a serious train derailment on the 6th of February, and both the victims and the rescuers had been in continuous contact with the local hospital, possibly generating the diffusion of cases. The regional authorities followed the WHO instructions strictly, imposing tests only on workers of the NHS and persons having at least one symptom and having visited China or having had contacts with such persons in the last two weeks. That choice had been strongly recommended by the WHO, adhering to the Chinese experience.

Another hotbed of the virus was localized in the next few days in a small village in Veneto, Vho Euganeo, with about 3.300 inhabitants. In this case the Veneto Region decided to leave out of consideration the WHO guidelines and to opt for a completely different solution, isolating the entire area, testing the whole population of the township and quarantining all the persons positive to the test, both symptomatic and asymptomatic. Tests were immediately thereafter massively imposed on the largest possible number of subjects, looking for asymptomatic persons in prevention, instead of following the manifestation of the virus.

The Italian Government reacted promptly enough, at least in comparison with the delay in the action of the WHO, although with possibly inadequate measures. For instance, two ordonnances of the Minister of health dated 25 and 30 of January respectively forbade directs flights from countries where the outburst of the virus had already taken place, mainly China, without excluding flights via London, Frankfurt, Paris and Zurich carrying persons returning to Italy from the same areas. Anyway, the declaration of emergency was deliberated by the Council of Ministers the day after the proclamation of pandemic by the WHO, which occurred on the 31st of January. The legal basis of the proclamation was obviously represented by the two aforementioned statutes.

After that, for more than three weeks, the Government resorted only to administrative acts, decrees of the President of the Council of Ministers (dPCMs), adopted after an understanding with the Regions. Such legal sources cut off Parliament completely from all decisional processes. Many scholars have harshly criticized the use of this instrument, suggesting a more frequent utilization of law-decrees, still Government acts, but having primary force and therefore being subject to approval by Parliament in the next sixty days, at risk of being otherwise automatically abrogated[12]. Strong restrictions on freedoms of movement and assembly and even on personal freedom, according to these critics, could and should be dictated only by statutory provisions, because the pertinent Arts. 16, 17 and 13 respectively carefully prescribe a law reserve. Other authors objected that a quarantine is no sanction of personal nature nor a compulsory health treatment, but a sanitary measure, imposed not in the interest of the confined person but of

[12] Art. 77 of the Constitution.

the community, according to the WHO International Sanitary Regulation of 1969, amended and integrated in 1973 and 2005, introduced into the Italian legal system through a statute of ratification[13].

The first law decree, finally adopted on the 23rd of February[14], put a legislative shelter on the several administrative ordonnances published in the three previous weeks. Many of them were signed directly by the President of the Council of Ministers, some others by the Chief of the Civil Protection service, according to Art. 24 of the Code. One of the most serious problems was the introduction by way of ordonnance of criminal sanctions for the violation of confinement and quarantine obligations, that can hardly be included in the powers of civil protection, albeit extra ordinem. The first law decree changed the nature of such sanctions into an administrative one, repealing the initial definition and putting an end to all problems concerning the appeals filed against the fines imposed in the meanwhile or the criminal procedures to be started later on. Since then a chain of law decrees has been approved by the Government and submitted to Parliament for the necessary conversion into law[15].

A supplementary problem, important at the constitutional level but not so relevant in terms of fact, has been the difficulty of the Chambers to meet in normal sessions, due to the anti-virus measures. The delay of the Government in resorting to law decrees rather than to administrative decrees of the President of the Council of Ministers or to Civil Protection ordonnances has been aggravated by the difficulty in managing the parliamentary assemblies. On some occasions the leaders of the parliamentary groups agreed to guarantee the presence of a limited number of deputies and senators, the minimum for the quorum, with a proportional representation of the groups. Such agreements, however, were impossible to reach as soon as the political clash reached its climax: the turning point was easily attained when the Minister of health first and then the Minister of justice came under attack by the minority parties and occasionally by one of the groups composing the majority, Renzi's Italia Viva[16]. The main debate among public law scholars concerned the lawfulness of a distance vote, considering that the relevant article of the Constitution (Art. 72) requires the presence of MPs in a number amounting to the quorum. The Standing Orders of both Chambers obviously use the same language with reference to all sittings. The question of the admissibility of a distance vote, therefore, is

[13] L. 9.02.1982, no. 106.
[14] D.L. 23.02.2020, no. 6, converted into L. 5 March 2020, no. 13.
[15] D.L.2.03.2020, no. 9; D.L. 8.03.2020, no. 11; D.L. 9.03.2020, no. 14; D.L. 17.03.2020, no. 18; D.L. 25.03.2020, no. 19; D.L. 8.04.2020, no. 22; D.L. 8.04.2020, no. 23; D.L. 16.05.2020, no.32.
[16] On the 7th of May a motion of no-confidence has been filed by the three parties of the right wing against Alfonso Bonafede, minister of justice, criticized for having chosen as chief of the penitentiary administration Department a judge accused of being too permissive in the scrutiny of the requests of house arrest by a certain number of prisoners under strict surveillance, members of mafia associations, suffering from the virus or affected by other pathologies.

not simply a matter of originalist or evolutionary interpretation and should require careful consideration of all the matters involved, keeping into account also the approaches of other democratic legal systems. At the moment, electronic forms of participation of MPs have been admitted limitedly, for instance during question time or in committee on non-legislative occasions.

Setting aside the problem of the capacity of Parliament of keeping governmental action under control, another series of controversies has taken place between the President of the Council of Ministers and the Presidents of several Regions, often surnamed Governors by the media. The concurrent legislation in the areas of health protection, civil protection and welfare (Art. 117.3) has given way to tensions and conflicts, which have often been circumscribed to the sphere of political turbulence, but in several case have led to real quarrels and lawsuits. The delay in resorting to primary legal sources and the lingering of administrative decrees, whether of the President of the Council of Ministers or of the Civil Protection, has contributed to open space to quite different interpretations of the respective powers of State and regional administrative authorities.

Both statute no. 833 of 1978, creating the NHS[17], and the Code of Civil Protection of 2018[18] do attribute significant powers to the Presidents of the Regions in the areas of health, hygiene, pharmaceutical service, veterinary police and civil protection to the Presidents of Regions. Such powers refer to the supervision of the pertinent activities in their territory. The Constitutional Court has occasionally recognized the importance of the regional role[19], although remarking the need of a unitary State intervention in cases of emergency events[20], invoking the principle of subsidiarity[21] as a vehicle of upwards attraction of the civil protection functions and reminding that the levels of health protection, which find their definition in the LEAs (Essential levels of assistance)[22], must be uniform all over the nation[23]. According to the constitutional jurisprudence, summing up, uniformity must prevail over a possible fragmentation of competences, and the Regions cannot introduce local limitations on productive activities invoking better standards of health protection, such as measures of reduction of the contamination by electromagnetic sources, while they can add their own resources on top of the national health fund in order to achieve a higher level of hospital or home care services.

Furthermore, contributing to create even more confusion, the first law decree of the 23rd of February, repealed by a later one, explicitly authorized further measures to be adopted by regional authorities in the time needed

[17] Art. 32.
[18] Arts. 3 and 25.
[19] E.g. decisions nos. 8 of 2016 and 246 of 2019.
[20] E.g. decisions nos. 303 of 2003, 284 of 2006.
[21] Included in the art. 118 by the constitutional revision of 2001.
[22] See d.P.C.M. 29 November 2001 and lately d.P.C.M. 12 January 2017.
[23] See e.g. decisions nos. 32 of 1991 and 307 of 2003.

("nelle more") for the proclamation of Civil Protection ordonnances, so stimulating discussion about the span of time of operation of the individual regional ordonnances and about the relationship between regional and State sources: many scholars wondered whether regional ordonnances could overlap with State emergency regulation or were allowed only to fill up spaces left free of State rules, respecting the balance between principles and rights operated at national level and responding to specific local exigencies[24]. Law decree no. 19 was far from clearing up the situation, when it stated that regional ordonnances could be adopted only in case of local increase of health risks needing more restrictive interventions, excluding all interference with production and national economic strategy[25]: the same provisions also preserved the effects of acts and ordonnances adopted on the basis of the first law decree, whatever their content, or better still prorogued their effects for other ten days.

In such an uncertain legal framework it is not surprising that in several cases the Government filed successful claims against regional ordonnances substantially contrasting with State regulations in the administrative tribunals. In the first phase of the emergency, some Regions tried to introduce more severe measures. The "Governor" of the Region Marche, for instance, ordered a preventive closing of the schools before the proclamation of the national emergency and the local administrative tribunal granted an injunction against the ordonnance[26], with a motivation applying an ends/means test and concluding for the absence of adequate ground, although the national government itself applied the same measure a few days later, immediately after the pandemic hit the Region. At the beginning of the second phase, on the contrary, some Regions less affected by the diffusion of the virus strived to anticipate the events by opening their bars, restaurants and shops without waiting for the national definition of the steps of the end of the lockdown. Again, the Calabria administrative tribunal granted the State an injunction against the regional government[27]. The Province of Bolzano, in an effort towards promoting the local economy, approved a local statute[28], against which the national Government had to file a claim in the Constitutional Court, since the force of such a source excluded the competence of the administrative tribunal. The injunctive procedure is quite rare in the Court's practice, so that the statute could survive: however, the concrete matter of the controversy was all about a difference of ten days, since the State deadline for the lockdown was scheduled for the 18th of May.

Another remarkable problem was generated by the plethora of hundreds of ordonnances adopted by mayors of towns of different dimension

[24] See e.g. M. Borgato, D. Trabucco, *Brevi note sulle ordinanze contingibili ed urgenti: tra problemi di competenza e cortocircuiti istituzionali*, in Dirittifondamentali.it, 24.03.2020.
[25] Arts. 2.3 and 3.1.
[26] Decision of the 27th of February 2020, suspending a presidential ordonnance of the 25th.
[27] Decision of the 9th of May 2020, no. 00841/2020, concerning a presidential order of the 29th of April .
[28] Provincial Statute of 8.05.2020, no. 4.

and economic and social structure. The power of a mayor to resort to urgent ordonnances due to reasons of public health mounts back to the unification in 1861 and is confirmed by statutes currently in force[29]. Yet, one of the emergency law decrees[30] took the trouble of stating that all municipal orders in contrast with State regulations were precluded and, if adopted, were null and void. Nevertheless, mayors' orders came out in thousands, some of them with the genuine intent of detailing State or regional regulations; a number of them, however, boldly contradicting or derogating superior legal sources. The most sensational and talked-about has been the order of the mayor of Messina, the city were all ferry-boats coming to Sicily from the mainland dock, which without any legal basis forbade all ships to reach the local port during the pandemic. The order was promptly annulled, after an opinion of the Council of State[31] on ground of complete lack of competence and violation of the constitutional rights to personal freedom and liberty of movement inside the national territory.

It can be stated that the virus pandemic has put not only the national health service but also the whole system of legal sources to a severe test. At least, there is no doubt that Constitutional Court and administrative tribunals had an exceptional chance of policing the boundaries of some important sources and did not miss the occasion.

The transition from a dramatic sanitary emergency, which has taken away the lives of tens of thousands persons, to an even more serious economic tragedy is likely to soften the conflicts between different government levels, because all the macroeconomic measures, at least after the beginning of phase two and the opening of shops and businesses, irrefutably belong to the competence of the national Government.

4. A (non-final) summary

Having to venture a general statement about the management of the unprecedented crisis, an impartial commentator should assess a certain number of factors. First, there have probably been negligence and carelessness on the side of the Government in hoarding stock of the materials needed in case of diffusive disease, such as masks, ventilators, white coats, and so on, and in prescribing adequate numbers of intensive therapy beds in proportion of the population. Such functions were unquestionably conducive to the exclusive competence of the State according to express constitutional provisions. No blame, however, can be put on the Government in terms of capacity of responding to WHO directives, since the declaration of state of emergency was adopted only the day after the proclamation of world emergency. It is regrettable that the Minister of health limited his prohibition on the flights coming from China to the direct ones, nevertheless incurring in a diplomatic protest by the Chinese Republic.

[29] Such as the aforementioned statute no. 833 of 1978, art. 32.
[30] No. 9 of 2020, art. 35.
[31] Sez. I, 7.04.2020, aff. no. 260/2020.

It can be said that, in comparison with other European States, such as Hungary and Poland, there has been no attempt to take advantage of the emergency to build or reinforce a trend towards illiberal democracy or towards a dictatorship of the kind that Carl Schmitt defined *dictatura rei gerendae causa*[32]. However, the number of press conferences by the Premier during prime time on unified television networks has been intolerably excessive, arousing suspicion of a hidden search for popularity. Furthermore, in one of his speeches to the nation he availed of the circumstance in order to openly criticize the minority parties.

As far as the Regions are concerned, those who had the heaviest problems had strictly followed the WHO directives, limiting the number of tests and running after the disease instead of hunting for the asymptomatic persons. A relevant factor may have been, at least in the case of Lombardy, the overwhelming reliance on the private sector funded with public funds but spurred to develop the most profitable field branches. Other Regions, such as Veneto, simply ignored WHO instructions and immediately started to test massively, looking precociously for possible asymptomatic subjects in workplaces or positions where contacts with contagious people were more likely.

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[32] C. Schmitt, *Die diktatur. von der anfängen des modernen souveränitätsgedankens bis zum proletarischen klassenkampf*, Berlin, 1921, 2015.

DPCE online
ISSN: 2037-6677