Possible Effects of the Pandemic Emergency on the Perception of EU Law

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1. The coronavirus (COVID-19) is challenging health security and development globally. At the time of writing (April 20, 2020), the pandemic impact has affected all continents and countries in the globe, causing 2.500.000 ascertained cases, 167.000 certified deaths. [1] The fast spread of this transmissible disease has immediately overwhelmed health care structures and prospectively threatened economic growth worldwide. In reaction to this exceptional situation and to prevent the spread to become unbearable, most governments have established confinement, social distancing, school closures, borders controls and moved to impose shutdowns and travel restrictions, affecting various aspects of social, political, and economic lives. These actions did not occur simultaneously: somehow imitating the pandemic wave and its moving from East to West, governments have taken measures only at the moment the disease began to display its deathly effects within national borders. (from 1 to 3 weeks of scaled delay). These belated reactions had an impact on the affected population, causing thousands of (otherwise avoidable) casualties in a short span of time.

2. On a different perspective, the national reactions to the pandemic have also defied some established narratives of our times. The "global village" chronicles of a world where news, capitals, trade decisions were moving instantaneously, have been disproved by the lack of smart communication among the governments, and also between the international (WHO) and the national layers of administration.

3. Some observers found these deficiencies in government's' coordination to be nothing but another proof of the deteriorating spirit of globalization. Others contend that the pandemic wave has triggered an irreversible countdown on the dissolving of the EU. These opinions are quite often biased by political agendas. Rather than playing the game of predicting the unpredictable, in my view the current state of international affairs could incite our professional cultures (I refer in particular to international and comparative lawyers) to measure whether and how the mentioned lack of coordination within Europe have an impact on the wealth of European Law. Rather than pointing at actual and announced legal instruments to support economic recovery in the post-Corona Virus period, I am here focusing on the *role* of the Law in the political dynamics emerging within the EU in times of sanitary emergency.

[1] https://www.worldometers.info/coronavirus/

4. These notes are a first attempt to identify how the emergency situation caused by the pandemic is changing the dynamics of European Law. Further research will be, obviously, needed to verify these suppositions and to understand whether there will be good reasons to take Spring 2020 as the divide between two different ages in the life of the European construction. The European project has been, and remains, a *political* undertaking, originated from an innovative political vision on the economic future of a continent that had been devasted by innumerable national wars. Its territorial progression, however - particularly from the moment of enlargements towards Central and Eastern European Countries[2] (2004-2013)- and the consolidation of the Single Market occurred having the Law as a main instrument for policy making. As a mandatory pre-requisite for accession, all Central Eastern Countries aiming to join the EU had to reframe their legal systems, to make them consistent with the European *Acquis*[3]. Also, demise of some national prerogatives in the management of the single EU market has been affirmed by a pro-active European Court of Justice. Law, then, has been central, even beyond limits originally designed by national representatives, to the making of what we have called until now as a European *Union*.

5. To establish a comparative test between the pre-2020 period and the current time of emergency I propose to identify as a first component of our *tableau comparatif* the following traits, dating from the pre-Corona Virus crisis:

a. During the 1990ies, particularly before the accession of post-socialist Countries, an enlarged European Law (meant as EU law, and also as national legal orders affected by EU law) has been built upon the idea that policy-makers can recognise the 'good', or, comparatively speaking, 'better' state of social and economic conditions in a given space (i.e., a Country).

b. This has provided legitimacy to promote, as a prerequisite for accession the imitation of wide set of rules, such as statutes, codes. Constitutions are also part of the game: fundamental principles such as multipartitism, parliamentary democracy, protection of fundamental rights, to say, the classical themes addressed by constitutional charters, have been perceived as key factors for the proper functioning of the market.

[2] The EU enlargement was grounded on the principles agreed among the States representatives at the Copenhagen European Council in 2003.Those principles and criteria concern:
- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the European Union;
- ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

[3] The body of rights and obligations that are binding on all EU countries.

c. Following a *functionalist* approach, prominent legal researchers, together with law&economics scholars, have eroded from legal theory the concept of "law as a value" and traded it for the understanding of law as a set of "technical tools and principles *needed for a purpose*". This approach bestowed new legitimacy to the law at the same historical moment when the law was losing grip within the local (national, or sub-national) communities. This new kind of legitimacy, however, has a different nature from the one we were used to recognise in a traditional parliamentary State: it is based on a comparative assessment of the "best practices" and on the assumption that a certain regulation has direct effect on economic performance.

d. Spread of functionalist theories has supported the recognition of law (namely, but not only, private law) as inherently indifferent to the social context, while law & economics has reinforced, since the popularization of the Coase theorem, the idea of "indifference" of the law from local contexts.

6. Moreover, a wide recourse to functionalist arguments, has:

   a. Affected the value-contents of the Rule of Law principle, slightly transforming this standard in a vague, multi-tasked concept, conditioned by economic/commercial considerations of efficiency;

   b. Reaffirmed a positivist understanding of the law (law as a tool rather than law as a value);

   c. Favoured the use of *vagueness* and indeterminacy[4] in normative terminology (indeterminacy opens the way to legal reforms without irritating local cultures);

   d. Favoured the transfer of law-making capacities form Parliaments to Governments;

   e. Privileged the status of the "citizen as consumer";

   f. Classified individuals' freedom of movement on economic basis.

7. As a second set of comparison I propose to consider, looking at the current state of the EU by Spring 2020, the following:

   a. Law plays an essential role in overcoming pandemics. It determines the institutional structures and the processes that provide the best protection to individuals and communities during epidemics and sets time limits and modes for the exercise of extraordinary powers over natural and legal persons. This has also been the case in the Spring 2020. Restrictions are lawful when imposed proportionately with the aim

[4] The recourse to vague terminology (f.i.:"good governance", "due process" "transparency") detached as it is from specific social and cultural contexts, is instrumental to finding a multi-governmental agreement on some issues without confronting the details of regulation, where lack of consensus could resurge.

of protecting public health. To this end, they should not be discriminatory, indefinite, or give room for arbitrary controls by authorities.

b. Article 12 of the International Covenant on Economic, Social and Cultural Rights and Article 35 of the EU Charter of Fundamental Rights recognise the fundamental right to obtain preventive health care and to benefit from medical treatment. However, the high number of people hit by COVID-19 has, in some Countries, overwhelmed medical services. As a result, patients have been turned away for treatment, or replaced in secondary unfit institutions. Country and their governments have an obligation to respect, protect, and satisfy fundamental right to health. When needs cannot be met due to a breakdown in undertaking these commitments, many people are deprived from the enjoyment of this right.

c. An unprecedented massive quarantine falls over individuals with differentiated effects. This depends on the nature of the employment, on the actual conditions where confinement takes place, on the access to digital communication and so forth. New types of *de facto* discrimination appear and must be added to the ones already present before 2020 (such as, f.i. the right to health in prisons or in refugees and migrants hotspots). As several countries have suspended refugee status determination processes and resettlement programs, asylum seekers also face unsettling and uncertain situations.

d. Emergency, any kind of it, goes along with urgency in adopting regulations. This favours a wide recourse to governmental powers to enact decrees and other administrative measures (remembering that in many countries administrative enactments are not under supervision from constitutional courts)

8. More elements can be listed on both sides of the *tableau comparative*. The ones I have listed here already show the methodology we can follow by crossing the different elements (pts. *sub* 5 and 6 from one side, with points sub 7.) in the perspective of a forthcoming post-COVID-19 phase.

9. A matrix could therefore be developed, based on comparative contrasts, highlighting diversities in the functioning of the law before and during\after the COVID-19 crisis, or showing similarities in the instrumental recourse to the law. The matrix could provide answers to questions like:

    a. Is the status of "individuals as consumers" touched by a sanitary crisis that has mortified consumption?

    b. Is the instrumental recourse to concepts like "good governance", "rule of law" subject to a reconsideration, in terms of refilling it with fundamental values?

c. Is the trend from *formal* towards *actual* consideration of anti-discrimination policies positively affected by discrimination in healthcare experienced during the pandemic?

d. Has the COVID-19 emergency hyperactivated national trepidations towards "citizens as nationals" already winding before the crisis?

e. Is the meandering sentiment of national competition, already activated as a response to the 2008 financial crisis fortified by the health emergency situation (cases are the ban to export within the EU market pharmaceuticals and other devices considered to be vital for nationals)?

10. In the course of next weeks EU and national institutions will have made clear the nature and size of normative responses to the dramatic fall-out of the COVID-19 emergency, namely the prospected EU-wide economic distress. The comparative methodology proposal I have here sketched out represents preliminary exercise on the attempt to understand how EU law will be transformed and whether it will regain its course.

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