Searching for a vaccine.
Rethinking the paradigm of (private) law in times of pandemic crisis.

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The epidemic emergency brings a period of extraordinary circumstances affecting social, economic, juridical context. These are truly unimaginable times. On a daily basis, we are challenged in ways most of us have never experienced before. To preserve itself, the world as we used to know it is trying to react, to rethink, to absorb unknown situations: revolutions, as Werner Gephart suggests, "are defined by breaking from given normative orders and replacing them with new ones". And we were very attached to the given normative order. Faced with such a threat of a pandemic crisis, which means the threat of a normative crisis, the big family of jurists closes ranks and comes back to the origins.

The current western legal culture is basically grounded on the idea of the law, as a tool that allows individuals to live in common. Such a sense of community is what distinguishes our modern democracies. It is not a case if this term knows a successful revival in these difficult times. "*Communitas"* originates from *cum-munus*, that is, it reminds us of the idea of "obligation" (*onus, officium*) and, at the same time, of the notion of "gift" (*donum*), but a particular kind of gift, "distinguished by its obligatory character" (Esposito). The root of the word "*munus*" (*mei-*), as its suffix (*-ties*), has a strong social connotation: *communitas* is an aggregation of individuals sharing duties toward each other. The authentic dimension of the community is such a sense of mutual compulsoriness: in modern constitutional democracies, the deep meaning of social relationships belongs to the respect of reciprocal obligations, especially of the fundamental duties of solidarity. Such a cohesive side does not affect only a purely legal aspect: "the *communalization* of social relationships occurs if and insofar as the orientation of social behaviour…is based on a sense of solidarity: the result of emotional or traditional attachments of participants" (Weber, *Basic Concepts in Sociology*, trans. H.P. Secher, New York, Philosophical Library, 1962, p. 91). Thus, the various elements of the normative order (notably shared value-commitments but also reciprocal obligations and duties of solidarity) operate to secure social order.

In this perspective, *shared* and *effective* rules are the last defence against the Virus. By this way, it is possible to obtain two results, at least:

- to recall the founding pact of our societies, that is, the respect of common rules
- to present the rule itself as the condition for the survival of humanity.

Within this framework, even a not so careful observer can easily retrace the broad outlines of the social contract theories. Hobbes is widely invoked: the normative order at the societal level contains a solution to the problem of preventing human relations from degenerating into a "war of all against all". It is not surprising if the "state of war" is the most often invoked analogy to justify drastic economic or political choices, as much as emergency governmental powers. The acceptance of rules is fundamentally based on the fear of death. It is the fear of death that will ensure that rules are obeyed. The main consequence is known. In order to escape a "solitary, poor, nasty, brutish, and short" life, a common power must be established by a mutual transference of (natural) right, to protect the individuals not only from foreign invaders, but also from each other. Such a "mutual transferring of right" builds modern societies and justifies political power and, to some extent, ensures (or should ensure) the effectiveness of norms.

Public law scholars can easily move within such a perimeter. Faced with the coronavirus pandemic, they are called to answer essentially three questions:

- hierarchy of norms, that is, the problem of an effective and efficient structure of sources of laws. The crisis in the already endemically compromised system of legal sources is further aggravated. The issue involves the relationship between State and different levels of Local institutions, as much as the relationship between Government and Parliament. The ambiguous definition of competences and powers becomes a way to contrast strategic and political choices of the central Government; the law-making process seems complex and confused, thus entailing serious consequences for legal certainty;

- constitutional democracy and state of exception, that is, the long debate on the constitutionalisation of the emergency. To be effective, emergency legislation would need to empower the Government. In such a situation, democracy is openly challenged, above all in legal systems that do not contain specific rules governing the "state of emergency". This is the case of the Italian constitution, which notably do not provide for the "state of emergency", by reason of the historical moment, in which it was approved (art. 78 of the Italian Constitution disciplines the "state of war", but it is questioned if it can be applied to the current situation). However, constitutional democracies have legal tools to prevent risks of authoritarianism: temporariness, proportionality, transparency and respect of procedural safeguards ensure the respect of the rule of law;

- balancing political power and individual rights, and comparing individual rights and pubic health, that is, the new dimension of the relationship between public power and subjective rights. The pandemic affects people's daily life, posing a collective challenge not only to the right to life and to health, but also to other fundamental rights, as the freedom of movement. We come back to first-generation rights, to the primary need to protect individuals *against* the excesses of the State. The answer could be to understand that human rights and public health are not an "either/or" choice. In this case also, public

responses need to be assessed in terms of their necessity, proportionality and respect for the principle of non-discrimination.

All the above-mentioned questions are not easy to solve, but can easily be inserted in the well-known conceptual frame, which I rapidly described before. The sense of *munus*, the network of reciprocal duties founding democracies, is well interpreted in modern Constitutions. Within the juridical paradigm of modernity, public law scholars rediscover the same theoretical background of their own discipline. They have scientific tools to respond to unexpected situations. Against pandemic, they are vaccinated.

Could we say the same about private law?

- the COVID-19 emergency forces us to recognise that our populations are not homogeneous. Certain individuals and groups are particularly vulnerable, because of their health, their age, or their socio-economic situation (employment, gender, actual conditions where confinement takes place, access to digital communication and so forth). New types of *de facto* discrimination appear. Faced with that all, civil law remedies reveal their complete inadequacy. Incapacitation is not a sufficient tool, as it focuses almost exclusively on the patrimonial side of private relationships. Private law does not offer sustain, nor assistance, leaving individuals alone, with their own weakness;

- the epidemic state also means a period of extraordinary circumstances affecting many contractual relationships. Civil law provides for certain constructs that will enhance the content of contracts in exceptional circumstances, but only to a limited extent. Faced with the pandemic, many contractual obligations do not qualify for the use of mechanisms such as *rebus sic stantibus* or *force majeure* or *imprévision*. And yet it seems axiologically inappropriate to be indifferent to such cases. History surely offers some examples of creative use of traditional remedies, i.e., the use of general clauses by German judges after the war. However, structural solutions still do not exist.

- the liability system is structurally based on a patrimonialistic dimension. The question of how to measure the impact of illegal conducts on environment, economy and human health has long been posed by prominent scholars. However, the monetization of damages still is the most widely spread solution. Moreover, during the last 40/50 years tort law was been inspired by EAL logics of efficiency, forgetting both cultural contexts and social consequences of legal and jurisprudential solutions.

Within such a context, private law offers neither solutions nor a valid theoretical frame. As is known, since the XIX century the civilian law theory centred on the paradigm of propertied male bourgeoisie. Its centrepiece was the egoistic approach. Property right is affirmed *erga omnes* and *contra omnes*: toward the other and against the other. The private contractual logic requires antagonistic relationship, presupposes conflictual interests and assumes the illusion of an (inexistent) equal bargaining power. There are no reasons why individuals should have

universal legal duties toward each other. The only universal duty, *nemo neminem laedere*, gives way to the possibility to counterbalance potential damages with money, though. The idea of emphasizing duties rather than, or in a manner complementary to, rights is completely stranger to private law. It is the perfect opposite to the idea of *munus*, to the sense of reciprocal duties, which founds the community: the current pandemic is revealing the structural weakness of the traditional approach to private law.

Does a vaccine exist to safe private law?

The way is suggested by the constitution itself. It should be useful to open property to its *social* function (art. 42 it. Cost.), to emphasize the communitarian and solidaristic dimension of individual relationships, to address economic initiative to social utility and to the respect of human dignity (art. 41 it. Cost). Put to the pandemic test, we discover that legal paradigm, which found modern democratic societies, can resist. But the condition for its survival is the constitutionalization of the given normative order.

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