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THE ROLE OF THE CRIMINAL LAW IN THE STATE OF EMERGENCY AND THE TRUE MEANING OF THE WORD RESPONSIBILITY

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A criminal sanction is the most severe punishment present within any legal system, and for this reason its usage should be limited and proportional, keeping in mind that its creation is intended as a tool of longevity rather than immediacy. In fact, this rather simple principle seems sufficient to explain why this branch of law cannot be the saving grace during a situation of emergency, like the one we are experiencing.

In reasoning on what should be our role during this pandemic, I realized that the Italian language uses one single word to express two different concepts, that are particularly relevant in this time. The Italian word '*responsabilità*' encompasses both the idea of being responsible (in the sense of behaving in a way that is morally and socially responsible) and the legal obligation arising from an action. In my opinion, it is also the apparent interchangeable nature of these two, albeit very different, concepts that could have enhanced the criminal illusion that the sanction could have thaumaturgical effects, and that it is possible to make someone responsible by means of the criminal law.

Starting from a premise that we are all unfortunately familiar with, the level of social alarm created by the pandemic has no equal in modern history: it is enough to think about the spread of the virus at a global level, the highly contagious nature of the virus, its capacity to compromise the functionality of the health and sanitation departments of the most developed Western countries, arriving at the complete disruption of our habitual ways of life, limiting – for an indefinite period of time – our rights and civil liberties. Several countries – Italy unfortunately played the role of the canary in the coal mine – were put in lockdown: more and more restrictions were applied on a day-by-day basis, in order to protect the most precious rights, the life and the health of the people.

During the emergency, the legal expert feels uncomfortable. He or she is supposed to find the proper solution for a situation that is – by definition – boundless. Squeezed between the urgency and seriousness of the pandemic and the attempt to protect other fundamental rights, there is one risk that every country is facing: to lose its civil compass.

In this scenario, which role should criminal law play?

The answer is, as we shall now see, strongly connected to the duo of responsibility and liability. And we shall see that around this matter there has been much debate, in which criminal law has often been summoned as the final solution for every issue. This reduces criminal law to being seen as the parsley in the kitchen. It is everywhere!

A first answer to the question about the role of the criminal law could be that it should take a step forward. All the legal systems, in providing for measures, more or less restrictive, gave health the highest degree of importance, for the protection of which any other right could be sacrificed. In this spirit of thinking, in Italy (as well as in other countries) initially a standpoint has been the punishment of the violation of the restrictive measures – at least on paper – with a criminal sanction.

Therefore, the reaction was to play the card of intimidation (and the resulting potential liability), instead of the one of responsibility. This solution seems to respond to the idea that serving up more punishment (at least in theory) allows the system to function better as a whole.

However, we rapidly realized that the criminal threat alone would not have worked. In a short time, it became clear that it would result in a reaction simultaneously partial, considering the difficulty in the enforcement, and late, due to the fact that the legal consequences of the violation became apparent only after a lengthy judicial proceeding (as it should be). In the emergency legislation, the financial sanctions seem to be more effective: they are immediate and they don't put additional weight on the judicial system. It seems to be a solution that can be agreed upon, which allows the criminal law to remain in the background, to be used as *extrema ratio*.

Plus, a general and undifferentiated use of criminal sanctions could place under the same umbrella violations of different seriousness, which instead should perhaps be treated in a different way.

Moreover, providing for new offences could represent a solution disrespectful of the basic principles of the criminal law, considering that we all see the myriad of differing indications from the authorities and the frequent endless reference to other provisions: quite far from the principles of clarity and definition of the criminal offence. A situation in which the law is evaluated based not on form and guarantees,

rather on assumed criteria of efficiency and effectiveness: it is sufficient that remedies work, even if they cannot clearly distinguish light from shadows.

What could be hidden behind an excessive use of criminal law?

It shows a poor knowledge of the criminal law, that should be used with extreme care, and the limited capacity to face a phenomenon at the same time severe and complex, in respect of which it would be useful to involve the citizens, instead of threatening a sanction which could not be actually imposed.

Today, more than ever, the awareness of the link between rights and duties is recognized: for the complete exercise of rights – inviolable in principle, but fragile in the midst of the pandemic – it is strictly necessary to adhere to non-derogable duties. Under this perspective, mere punishment doesn't work, and on the opposite end the creation – through the law – of a liable subject could inadvertently lead to the search of a scapegoat.

The second reply, to the question about the role of the criminal law, could therefore be that criminal law should take a step back. Again, everything orbits around the concept of responsibility. We, as humans, need to be reassured that someone is responsible in facing the pandemic, someone who has the power to control and to reduce a specific risk.

The number of those responsible for this safeguarding activity is in continuous rise, considering the proliferation of precautionary legislations ever more pervasive. These are the same people that were considered by the media as heroes (as doctors are rightfully depicted) or models (*e.g.* employers, law enforcement authorities, teachers, who took charge of upholding or restarting essential activities for the function of the democratic and economic system).

In relation to these subjects, is it right that they be exposed to a potential criminal risk? Or would it be just to exclude by law the application of the criminal sanction?

In my opinion, the risk is that of creating a chain reaction, during which everyone would feel entitled to such a shield.

Moreover, there is the danger to lower for specific categories the standard of diligence requested or to send a signal of disinterest or abandon towards those not included (and eventually deserving a similar treatment).

In relation to the pandemic, we are aware that the fundamental principles of criminal law can preclude the risk of a wrongful conviction: from the principle of culpability to the one of the proof beyond any reasonable doubt of the illicit conduct and the causal nexus between the omission and the event.

Let us remember that we are in front of a ubiquitous phenomenon, with risk factors not fully and directly manageable by man and whose scientific knowledge regarding its resistance and transmission rate have not reached a sufficient rate of certainty.

Considering all that, we criminal lawyers are aware of the substantial uselessness of a provision, that simply states something obvious, *id est* that an accusation for negligence cannot be brought in respect of someone who was fully respectful of the precautionary provisions aimed at preventing the contagion. Therefore, it mainly could be a provision that doesn't produce any legal effect, and it is more of a repetitive nature rather than an innovative one, responding to the understandable needs of reassurance of certain categories.

If you think about it, what is hidden behind this request of protection raised by certain categories?

It would be hasty – and wrong – to conclude that it could be an attempt to escape from own responsibilities, maybe by who was on the front line from the beginning.

Perhaps this could be due to a lack of knowledge of the function of the criminal system, on which all the operators should communicate more, and more efficiently.

However, in my opinion this request could hide a deep mistrust of the judicial power, which – in this phase as never before – is called for a more prudent and precise action, capable of distinguishing between mistakes without negligence and gross liability, disguised as mere errors.

If a step forward does not seem appropriate, because it would lead to a misuse of the criminal threat, and if at the same time a step back is not recommended, since it could result in a lowering of the standard of diligence or in the creation of areas of impunity, what can we ask of the criminal law in this phase?

I firmly believe that the criminal law must maintain its identity, remaining true to its principles. The fundamental principles of the liberal criminal law, hugely sacrificed in recent times and highly challenged during the emergency, will certainly return to express their civil value.

By taking a different path, there is always the risk that the criminal law itself will become infected by well-known diseases, such as a propaganda-laden use of the law, the devaluing of the criminal sanction (thereby leading to a collective disregard), the risk that punishment is seen merely on paper (due to the ever-pervasive paralysis of the criminal judiciary).

Among the various negative consequences of this virus, let there not also be the one of a loss of civility, a maxim which is strictly and undeniably linked to the criminal justice system.