

Western Democracies and Fundamental Freedoms: the Challenges of the Covid-19 Pandemic

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1. Introduction

Western constitutionalism has over the last decades proved its inadequacy in the light of phenomena that profoundly challenged the relationship between the State and the individual.

Globalization, scientific and technological innovation, and, especially, the state of emergency, as emerged and testified following the outbreak of the Covid-19 Pandemic, prompted a new scenario that highly impacted on how States recognize and safeguard fundamental rights, also increasing the average rates of discrimination among individuals and groups.

In my speech, I would like to focus on one of the phenomena that most widely affected our legal systems, focusing on the most challenging effects deriving from these two years of cohabitation with the Covid-19 Pandemic and looking at how the state of emergency impacted on the construction of the relationship between the State and the individual.

In doing so, I will be examining two different scenarios: on the one hand, the new envisioned relationship between the State and the individual from the perspective of the safeguard of fundamental freedoms and, more specifically, traditional civil liberties; on the other, the emblematic example of the Italian State's approach towards vaccination against the Covid-19.

2. A New Relationship between States and Liberties: a Phenomenon in Progress

The classical paradigms of constitutionalism, of the content of fundamental rights, of their system of protection underwent profound transformations in these past two years of cohabitation with the Covid-19 Pandemic.

From a much broader perspective, many factors are held to be responsible, alongside the Covid-19 Pandemic. I refer especially to globalization and scientific and technological innovation that all together quickened ongoing transformations and contributed to unraveling new challenges and unsolved dilemmas.

These three phenomena I believe have severely affected the relationship between the State, that holds the power, and the individual, who is subjected to it, between liberty and authority, ultimately therefore on the relationship which historically shapes how rights are recognized and safeguarded under the law in constitutional law systems.

As already mentioned, among these three phenomena, I will investigate more in-depth the consequences related to the Covid-19 Pandemic by way of examining the Italian case as an emblematic example of the new tensions that emerged between State's powers among one another, but, more specifically, on the inherent traits of fundamental freedoms and their limitations during the health emergency.

3. The State of Emergency at the Time of the Covid-19 Pandemic: a General Overview

The Covid-19 Pandemic highly contributed to exacerbating the fracture between powers, the law and individual freedoms. It unveiled the fragilities of western democracies, forced to react to the health emergency on a national basis, not rarely followed by States governments' attempts to concentrate powers at the national level to the detriment of regional and local levels of government.

Within this context, western States especially showed their inability to coordinate their actions in a globalized scenario, failing to properly tackle and handle coherently the Covid-19 Pandemic, whose impact on fundamental rights has been highly severe.

States had to rely on experts in their decision-making processes but, at the same time, the existing procedures proved their failure to ensure a fruitful dialogue between experts and policymakers. The inadequate functioning of the relationship between science and law resulted in States' attempts to manipulate or falsify scientific evidence or in the exercise of political functions by experts lacking political representation.

Interestingly, many States resorted to *ad hoc* Committees enforced during the Covid-19 Pandemic, whose members were nominated by executive powers. Conversely, only in very few cases, States referred to preexistent Scientific Committees. Even more worrisome, in Italy as well as in other Countries, the dialogue between the State and newly enforced scientific committees has often lacked transparency and publicity.

Another facet worth mentioning encompasses the system of the sources of law. States proved their inability to manage the emergency in a way consistent with the constitutional system of the sources of law. States made widespread use of secondary or atypical sources of law to regulate matters covered by the rule of law and the reservation of jurisdiction in a manner coherent with preexistent trends of exclusion of the Parliament from the safeguard of fundamental rights.

From a constitutional and national perspective, Italian institutions' reaction to the Covid-19 Pandemic resulted in the overturning of the system of the sources of law and the limitation of some fundamental rights.

The emergency related to the Covid-19 Pandemic also intensified an ongoing trend, that I will further examine (see §3.1), in that the constitutional State decided to limit fundamental rights without taking into account the diverse impact of these limitations on already vulnerable groups and individuals, as I will demonstrate later on in more details.

The described scenario seems to me to portray one of those key moments of "historical rupture", whose consequences are not yet entirely identified, but that is redesigning the relationships between the State and the individual. From a historical

perspective, such a change has quite always been followed by a change in the system of fundamental rights protection: this happened, in fact, in the passage from the liberal State to the socio-democratic State; from the totalitarian regimes to the aftermath of the constitutional State; and this, likewise, seems to be happening in the XXI century following the outbreak of the Covid-19 Pandemic, even in conjunction with the phenomena recalled at the very beginning of my speech (globalization and scientific and technological innovation).

Such a new conceptualization of the relationship between the State and the individual raises crucial issues that can be summarized as follows: do rights free from State's interferences still exist? Can we still think of States' non-interference in the exercise of fundamental rights? How did the relationship between the State and the individual react before the health emergency generated by the Covid-19 Pandemic?

3.1. Fundamental Freedoms in the Era of the Covid-19 Pandemic

Beyond such a broader picture, one of the core aspects that witnessed a change during the state of emergency related to the Covid-19 Pandemic deals with the redefinition of the classical conception of fundamental rights.

As said already, the new construction of the relationships between the State and the individual boosted by the Covid-19 Pandemic caused the increase in States' interferences with the individuals' spheres of autonomy, reversing the traditional concept of civil liberties as, vice versa, rights that must be always protected against State's interferences.

Measures enacted to ensure social distancing and the containment of the virus have instead caused a suspension of the freedom of liberty, set forth under Article 13 of the Italian Constitution, that departed from being a negative liberty to become the object of the State's detailed limitations and interventions. The same is to say for other classical fundamental freedoms as freedom of movement, safeguarded under Article 16 of the Italian Constitution.

Yet again, during the emergency related to the Covid-19 Pandemic, other fundamental rights have been limited (e.g. the right to privacy through the app aimed at preventing further contagions and controlling the existing ones) for the purpose of safeguarding the right to collective and public health.

Moreover, the transformation of civil liberties not only did it come from the State's interferences in the enjoyment of these same rights. In fact, the interferences were not provided by the law with the consequence that Italy witnessed a violation of the rule of law with fundamental rights progressively limited by way of administrative acts. This was another serious criticism in needs to be highlighted in the perspective of this investigation.

Civil liberties were nevertheless not the only fundamental rights negatively affected during the Covid-19 Pandemic.

Equality and non-discrimination, that the Italian Constitution enshrined under Article 3, were likewise exposed and still are, as a consequence of the measures enacted to contain the spread of the contagion, most of them are still in force during the ongoing state of emergency.

What's more, during the Covid-19 Pandemic, already vulnerable individuals and categories were the first targets of differences and inequalities. Measures to prevent the contagion affected women for example to a larger extent. Women were forced to stay at home, dealing with double workloads, professional and familiar. Moreover, women also have been increasingly victims of domestic violence, which exponentially increased during lockdown months. From the same perspective, the health emergency likewise enhanced the unbalanced presence of women in decision-making bodies, where conversely male presence continues to be significantly predominant.

But the Covid-19 Pandemic not only did negatively impact women. It also contributed to deteriorating situations already at risk of discrimination, as those involving people with disabilities, whose rights have been neglected giving precedence to other emergency-related priorities.

In a nutshell, the Covid-19 Pandemic resulted in: the transformation of the content of the classical fundamental freedoms that moved from being rights to safeguard free from States' interferences to rights almost at the disposal of States' contingent needs; the increase of discriminations especially against women and even of intersectional nature; in the exclusion of social groups already victims of human rights violations from the decision making processes and from the full enjoyment of fundamental rights.

4. Covid-19 Vaccines and Morals: Spotlight on Italy

Another interesting topic to mention covers vaccines and their regulation within the Italian legal context.

As almost widely known, Italy did never resort to compulsory vaccination till more recent times. This means that, at the very beginning, there never was an obligation set forth under Italian law to vaccinate all Italian citizens, whether they wanted to do so or not.

Subsequently, the Italian Government in recent months enacted a more formal obligation of vaccination for more categories: medical doctors and medical staff, who, starting from April 2021 are under the obligation to complete the first cycle of vaccination and, from December 2021, the booster dose. In addition, starting from December 2021, the duty was extended to primary and secondary school staff and teachers, police forces till the provisions enforced in January 2022, that proscribed compulsory vaccination for people over 50 years old and, from February 2022, for Faculty members and university employees.

Besides the above-mentioned provisions, which formally impose a vaccine obligation, the Italian Government strongly encouraged all citizens to get vaccinated by way of other normative measures, with the consequence that a *de facto* obligation was progressively imposed on almost all individuals even beyond the above mentioned categories.

In particular, the Italian Government resorted to a more significant instrument to favor the vaccination campaign represented by the so-called "Green Pass" rule.

The “Green Pass” was released only to those who accepted under their will to be vaccinated, allowing solely these individuals to have access to a vast series of public and private services.

At the very beginning, the “Green Pass” rule was narrower in scope, but in more recent months the choice of the Italian Government resorted to stricter regulation. The so-called “reinforced Green Pass” rule significantly enlarged the variety of services not accessible for non-vaccinated individuals. Examples are represented by the general prohibition to access to places open to the public with the only exception of open-air spaces. Public transportation was also included among the services limited to vaccinated individuals as well as schools of every level and university just to mention some cases of interest.

Alongside the details regarding the services non-vaccinated people were prohibited and still are prohibited to enjoy, these two years of Pandemic condition saw the emergence of the No Vax movement, which started gaining greater attention in the public debate.

The juxtaposition between vaccinated and non-vaccinated people in some cases even resulted in violent episodes during non-authorized public meetings with attacks on journalists and the media at large.

At the same time, certainly condemning the more radical and violent forms of dissent, it is also worth highlighting the Italian State’s attempt to persuade all citizens to get the vaccine by demonizing those who refused to comply with vaccination procedures.

Such a moral approach endorsed by the Italian State requires a closer look and an examination in light of one of the core and fundamental principle of the Italian Constitution, which is the principle of secularism.

Despite the Italian Constitution does not explicitly safeguard the principle of secularism, it is nevertheless recognized and, more significantly, it has been included by the Constitutional Court among one of the fundamental principles of the constitutional State that cannot undergo constitutional revision.

In line with this, the proactive moral suasion put in place by the Italian State in its vaccination campaigns and the consequential normative regulation seem hard to comply with the secularity of the State, which vice versa should feature the nature and the functioning of the entire legal system and its institutions.

The moral and ethical choice endorsed by the Italian State eventually resulted in social conflicts and oppositions that only the weakening of the virus in the last weeks has somehow slowly silenced. Moreover, it is worth noting that there is no sufficient scientific evidence on the preventative effect of the vaccine in spreading the virus.

The issue nevertheless remains and it has not been solved. On the contrary, it has only been placed aside taking advantage of the non-centrality in the most recent public debate on the Covid-19 Pandemic due to the outbreak of the armed conflict in Ukraine.

In light of the above, it has to be underlined that the Italian legal system offers an interesting and challenging example of how a State can try to morally persuade its citizens even somehow in some ways neglecting their right to self-determination in their health choices.

There's also another final element to consider when discussing the "Green Pass" rule.

As said already, almost all the measures enacted to contain the spread of the virus were enforced through administrative acts that nevertheless resulted in the limitation of constitutional rights.

The same happened with the "Green Pass" rule in that, without a compulsory vaccination provided under the law for the purpose of safeguarding public health, was implemented throughout governmental acts in plain violation of the rule of law that, conversely, allows limitations of constitutional rights only by the law with the exclusion of any subordinate source of law.

5. Concluding Remarks

To conclude, I do believe that the Covid-19 Pandemic had a severe impact on the inherent structure and content of the traditional fundamental liberties of the constitutional State, of which Italy might serve as a prominent and emblematic example.

From a constitutional law perspective, therefore, the major challenge I see ahead of us is the restoration of the nature of fundamental freedoms as liberties thought and applied free from States' interferences in order to preserve individual autonomy.

A second note, only mentioned above but worth recalling, revolves around the complex relationship between law and science. I cannot delve much into it right now, but from my experience the fracture we witnessed among scientists and the late responses put forward by the WHO at the early stage of the outbreak of the Pandemic certainly testifies of the need for a more effective connection and collaboration between science and the law as well as between their respective institutions and organizations.