
Il diritto e la pandemia

Tragic choices in Covid times: reaping the bitter fruits of social inequality

Scelte tragiche in tempi di Covid: andar cogliendo gli amari frutti della disuguaglianza sociale

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ABSTRACT

The economic analysis made us aware of the fact that all rights have costs. The fulfilment of some rights can easily conflict with that of others and choices between incompatible rights are ubiquitous.

The Covid-19 pandemic dramatically exemplifies this conflict by forcing society to make tragic choices that are unable to fulfil basic rights and to reconcile incompatible yet equally legitimate claims.

This paper argues that both the context of the choice and the way we came to face it matter. The same choice can be more tragic in one situation and less so in another. Social inequality is one of the main factors. In a world of deep inequality, conflicts are not so much between values, as they are between the divergent interests of different social groups. Choices disproportionately impacting poor, vulnerable and marginalized people exacerbate the problems and make the situation more tragic.

Keywords: Covid-19 – tragic choices – social inequality

L'analisi economica del diritto ci ha insegnato che tutti i diritti hanno costi. La soddisfazione di un diritto può facilmente entrare in conflitto con quella di un altro e la necessità di compiere scelte tra diritti incompatibili è diffusissima.

La pandemia provocata dal Covid-19, là dove pone la società di fronte a scelte rese tragiche dall'impossibilità di assicurare soddisfazione ad alcuni diritti fondamentali e di riconciliare legittime ma incompatibili pretese, offre un drammatico esempio di questi conflitti.

Questo lavoro sottolinea l'importanza del contesto in cui la scelta si pone, e del modo in cui ci troviamo ad affrontarla. La stessa scelta può essere più tragica in una situazione e meno in un'altra.

La disuguaglianza sociale è uno dei fattori principali. In un mondo di profonde disuguaglianze i conflitti non coinvolgono tanto i valori, quanto gli interessi contrapposti di differenti gruppi sociali. Il differente impatto che le scelte hanno sui più poveri, sui vulnerabili e sugli emarginati contribuisce ad esacerbare i problemi e a rendere la situazione complessiva più tragica.

Parole chiave: Covid 19 – scelte tragiche – disuguaglianza sociale

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1. *All rights have costs.*

The Covid-19 pandemic is forcing society to make tragic choices. Conflicting yet equally legitimate claims cannot be reconciled, such as survival and freedom of movement or the pursuit of an economic activity¹. During pandemic peaks, basic rights, such as the right not to be left to die, cannot be guaranteed to everyone.

This comes as no surprise for scholars who have studied the cultural implications of decades of dominance (sometimes creeping, sometimes explicit) of the economic analysis of law, which is the hard-core philosophy of neo-liberal legal thought. The economic analysis showed that all rights have costs and that the fulfilment of some rights can easily conflict with that of others². Enforcing rights always implies a certain use of material resources and involves costs that someone has to bear³. Besides, the recognition of rights always im-

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¹ A deep analysis of this topic can be found in J. HABERMAS, K. GÜNTHER, *Kein Grundrecht gilt grenzenlos*, in *Die Zeit*, 20/2020, 7 May 2020; its Italian translation is in *Giustizia Insieme*, 30 May 2020, available on line.

² See F. DENOZZA, *Norme efficienti: l'analisi economica delle regole giuridiche*, Milano, Giuffrè, 2002, 4 ss.

Specific reference to the right to health is in R. EPSTEIN, *Living Dangerously: A Defense of "Mortal Peril"*, in *U. of Illinois L. Rev.*, 1998, 909, 914, challenging the observation that you can't let people die (according to Epstein "The short answer is that you can, and indeed in some cases, you should"). See also E. POSNER, *Human Welfare, Not Human Rights*, in *Columbia L. Rev.*, 2008, 1758, 1771, who underlines some of the possible conflicts: "Governance unavoidably involves tradeoffs: money spent for primary education must be taken from health clinics or police forces".

For critical remarks on this position, see M. MCCLUSKEY, *How Queer Theory Makes Neoliberalism Sexy*, in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, 115 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero, eds., Routledge 2009).

³ Even rights to negative liberties have implementation costs. R. POSNER, *The costs of enforcing legal rights*, in *E. Eur. Const. Rev.*, 1995, 71, 72: "... it is difficult to believe that the

plies the imposition of duties that can be very unwelcome⁴ (as in the case of freedom of speech, which sometimes imposes the duty to endure hate speech or fake news).

The foregoing reminds us that societies often lack the material and social resources to guarantee acceptable levels of protection even of fundamental rights. Scarcity makes painful choices necessary. Some of them are even tragic⁵.

The point I wish to discuss in this paper is that both the context of a choice and the way we came to make it matter. Albeit obvious, this point is often ignored by law and economics scholars, who tend to focus on specific cases without adequately considering the context in which they occur and the factors shaping them. The same choice can be more tragic in one situation and less so in another.

2. *Tragic choices in Covid times.*

What characterizes the tragic choices that Covid is forcing society to make?

A first aspect has to do with the peculiarities of the right to health, meant not as the right to be kept healthy, but as the right to have access to the most adequate treatments available⁶. While the costs that must be borne for the fulfilment of other fundamental rights (to food, protection, education, etc.) are usually limited (in a certain sense even physically), the right to be treated entails costs that could tend to infinity if the extremely costly therapies produced by research guided mostly by patent incentives⁷, were applied to the entire population⁸.

negative liberties could be made meaningful without intervention by the public sector". See also S. HOLMES, C. SUNSTEIN, *The cost of rights: why liberty depends on taxes*. WW Norton & Company, 2000.

⁴ All rights impose duties: they require us to do or to abstain from doing things, thus imposing costs. J. NARVESON, *Why Care about Liberty?*, in *Philosophic Exchange*, Vol. 38, No. 1, 2008, Article 1, 9.

⁵ G. CALABRESI, P. BOBBITT, *Tragic Choices*, New York, W.W. Norton & Company, 1978.

⁶ Office of the High Commissioner for Human Rights, CESCR General Comment No.14, *The right to the highest attainable standard of health*, E/C.12/2000/4, Para 8.

⁷ People, myself among them, who believe in the need for a radical reform of policies that have greatly reduced healthcare spending in general, and public spending in particular, should

In addition, while for many rights a partial fulfilment may be sufficient, the right to be treated often knows no “sufficiency” for the simple fact that any solution that accepts death when it is technically avoidable is not perceived as sufficient. Many people would be content if a certain level of education were guaranteed to all, but not as many would be satisfied if healthcare were universally provided only for diseases up to a certain threshold of severity, while for the others everyone had to fend for themselves.

From another viewpoint, the pandemic brings to light conflicts over the assignment of fundamental rights that are endemic, and usually concealed in various ways. Many of the problems compounded by Covid have the same nature as problems arising almost daily. A continuous “tragic choice” is made by the public health system, which is unable to ensure the required amount or timeliness of medical tests and treatments even in non-pandemic times. In a worldwide perspective, the fact that people who technically could be saved are left to die is very frequent and, from a moral point of view, it seems to me that there is no reason to worry only when it becomes evident that this could affect our fellow citizens and ourselves.

This point must be emphasized not to add to the emotionality of the problem, but to analyze it rationally. In medical terms, this problem is ubiquitous

address the question of what determines healthcare costs. From this viewpoint (nature and amount of the costs), the assignment of rights matters.

Focusing again on the relationship between rights and costs, if it is true that “all rights have a cost”, it is also true that many costs originate from rights (M. McCLUSKEY, “*All Costs Have a Right*”, in F. PASQUALE, L. PALLADINO, M. McCLUSKEY, J. HASKELL, J. KRONCKE, J. MOUDUD, R. CARRILLO, R. GRAY, J. VARELLAS, R. DIBADI, *Eleven things they don't tell you about law & economics: An informal introduction to political economy and law*, in *Law and Inequality: A Journal of Theory and Practice*, 2019, 97-148).

The point is that the way a system is organized (by distributing legal titles, limiting freedoms, creating institutions, etc.) determines the costs that will then be invoked against the possibility of recognizing rights. Behind the costs preventing the attribution of a right to someone, there is often not a law of nature, but a right recognized to others.

The example of medical patents is very clear in this sense. In a system where public research is replaced by the expensive patent system with its monopoly prices, duplications and consequent waste typical of competitive research, healthcare will incur unforeseeable and often unbearable costs. Underlining the need to strengthen public health is a step in the right direction but it is not enough. A reform of the entire “private” system is needed, because it determines to a great extent the costs of healthcare.

⁸ K. ARROW, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, in *Journal of Philosophy*, 1973, 245, 251, criticizing the Rawlsian criterion of maximin “... there can easily exist medical procedures which serve to keep people barely alive but with little satisfaction and which are yet so expensive as to reduce the rest of the population to poverty.”

because every resource invested in research rather than in immediate treatment sacrifices current lives to save future ones, and every resource invested in the pursuit of certain goals (reducing infant mortality) instead of others (reducing health inequalities), saves some lives and not others. The fact that in these examples the sacrifice does not concern present and identified people, but statistical and possibly future subjects, does not eliminate the rational profiles of the tragic nature of the choice⁹.

3. The context of the choice: conflicts of values and conflicts of interests.

Having established that tragic choices are inevitable because they originate from the finitude of human existence, it is perhaps appropriate to divert attention from the most rhetorically desperate formulations of the conflict and to look for a more rational framing of the problem.

A first noteworthy point is that presenting the problem in terms of conflict of values¹⁰ is misleading. Most tragic choices do not entail an abstract conflict between values, but a concrete conflict between people with different inter-

⁹ Another feature peculiar to Covid times is the curious presence of large groups of people (and even of distinguished thinkers, see G. AGAMBEN, *A che punto siamo? L'epidemia come politica*, Quodlibet, 2020) who deny that the current situation requires tragic choices.

The reasons behind this opinion are not entirely clear but seem to belong to two categories. According to the first category, reality is different from how it is represented (the virus does not exist, there is no significant increase in mortality or the mortality increase is not caused by the virus, etc.). The second category claims that the situation is not serious (the prospect of millions of premature deaths worldwide is not so serious as to justify restrictions of personal freedom, given that a much higher number of people die from causes other than Covid).

In the first category, doubting the real situation seems to reflect a general lack of confidence. Official documents certifying the increase in mortality caused by the virus exist, but evidently, some people do not trust them.

As to the second category denying the seriousness of the situation, it is obviously a matter of evaluation. I personally find unacceptable that practically inevitable deaths (caused by cancer, heart attacks, etc.) are equated to the deaths caused by Covid that can be prevented by shared sacrifices.

The focus should be not on the number of deaths that have occurred, but on the deaths that could occur in the event of a collapse of the national health systems. Arguments ignoring that if Covid-19 were left unchecked, it would select its victims among the world's poorest and weakest are unacceptable.

¹⁰ As often happens. See, for example, the dialogue between Habermas and Günther, no. 1.

ests. The type of conflict that most often arises is not comparable to the “intra-personal” conflict in which one or a homogeneous group of individuals must choose whether to give up profitable or pleasant activities (e.g. going to theaters or museums in times of pandemic) that can put their health at risk. Nor is it comparable to the conflicts that sometimes arise when all citizens have similar opportunities to be involved (e.g. in criminal proceedings a conflict may arise between protecting the victim and ensuring the accused the right to a complete defense).

Conflicts of values can be one-person conflicts or two- (or more) party conflicts¹¹. A conflict of values generating from the need to balance claims based on opposing rights is radically different from a one-person conflict. It involves different subjects who bear different interests and preferences that cannot be satisfied separately. The clash of the interests involved determines the intensity and the features of the conflict of values.

At present we face situations in which “a possible ... state of affairs valued by a person or group is incompatible with one that is valued by another”¹². The value of freedom does not conflict with an abstract aspiration for health supposedly common to all human beings, but with the aspirations of people who, for personal reasons, consider the defense of health a priority, and cannot achieve their goal unless the freedom of others – in addition to their own – is limited.

Perhaps decades of dominance of utilitarian attitudes (such as those underlying the economic analysis of law) have accustomed many people to not taking the separateness of persons seriously – as the utilitarian philosophy does in Rawls’s¹³ reproach. If separateness of persons is taken seriously, one soon discovers that most of the conflicts created by the pandemic are not between abstract values, but between people with divergent interests.

This is not a pedantic clarification. Discussing conflicts of interest between people rather than conflicts between abstract values gives us an important indication. While a conflict of values seems to be always equal to itself, a conflict between people may take radically different forms in accordance with the diversity of the contexts in which it occurs. The conflict created by the pandemic between various freedoms and the need for public health protection, far from having a transcendent ontological significance (as may seem in some

¹¹ B. WILLIAMS, *Conflicts of values*, in *Moral Luck*, Philosophical Papers 1973-1980, Cambridge Univ. Press, 72.

¹² N. RESCHER, *Delphi and values*, Rand Corp Santa Monica Calif, 1969, 7.

¹³ J. RAWLS, *A Theory of Justice*, 1971, 27.

dramatized contrasts), is actually shaped by the features of the society in which it arises.

Obviously, in times of pandemic, problems of choice can arise in any society. However, the terms of the conflict between health protection, requiring limitation of freedoms, and economic interests, intolerant of any limitation, vary based on the society where the conflict takes place.

Just think about the difference between societies able to assure everyone equal probability of physical and economic survival and societies where some people can survive without working, and therefore can avoid putting their health at risk, while others cannot. Or consider the pressure exerted on the terms of the conflict if some people can isolate themselves in comfortable places while others cannot; or some people can acquire sophisticated means of communication and intellectual development, while others cannot; or some people have the ability and time to personally provide for their children's education, while others do not, and so on¹⁴.

All these inequalities contribute to making the inevitable choice more tragic and to exacerbating the conflict between people willing to accept restrictions on freedom in exchange for better health protection, and people to whom these restrictions, and the consequent economic and relational damage, appear unbearable.

Legal reasoning (akin, from this viewpoint, to a superficial way of reasoning increasingly widespread) tends by its nature (and even more so, if inspired by the economic analysis of law) to focus on specific cases (a specific problem, a specific choice, etc.), leaving aside a critical discussion on the context in which the cases arise. In my opinion, this is a wrong perspective. From both a pragmatic and a justice point of view, a choice made in a context of substantial equality is different from the same choice made in a context of harsh inequalities.

4. *Why do we have to face this?*

Another aspect that law and economics scholars tend to overlook concerns the events from which the situation imposing the tragic choice originates.

¹⁴For a vivid description of the situation in the US, see N. SCHEIBER, N. SCHWARTZ, T. HSU, ‘“White-Collar Quarantine” Over Virus Spotlights Class Divide’, in *NYT*, 27 March 2020. See also J. LYNCH, *How Does Social Inequality Affect Government’s Ability to Deal with Covid-19?*, Social Science Research Council, June 18, 2020.

Sometimes the need to make tragic choices is the result of circumstances largely beyond human control. In many cases, however, the choice is wholly or partly the result of previous human choices and of how society is organized as a whole.

As Martha Nussbaum reminds us in various works¹⁵, Hegel had already pointed out that in the face of tragic situations it is important to ask ourselves: why do we have to face this situation, and what institutional and political change can contribute to ensuring that we do not face it again? She comments: “Sometimes a tragic choice is caused by brute necessity; but more often the causes lie squarely on the human side, where stupidity, obtuseness, and malice are amply to be found”¹⁶.

Answering the questions posed by Hegel does not eliminate the need to make the choice but it still is a very important step. The first question (how did we get here?) matters because we are talking about choices that involve suffering, and how we got to a situation that generates suffering is not irrelevant either to those who suffer directly or to those who are forced to witness suffering they cannot alleviate. Suffering due to causes that are, and are perceived as, consequences of an incontestable fate is different from suffering perceived as the consequence of someone else’s selfishness or greed. The reasons that led to the tragic situation matter.

Let’s take the example of intensive care beds. Allocating resources to critical care to an extent beyond the demands of normal times has an obvious cost. In exceptional situations this can lead to a scarcity that no reasonable policy can prevent. A situation where scarcity depends on a policy that, for example, preferred investing in basic medicine (thus saving the lives of many) is very different from a situation where scarcity depends on a philosophy whereby efficiency consists in obtusely following the law of supply and demand. A philosophy according to which intensive care beds are to be arranged, fast and expensively, only when a demand exists and enough peo-

¹⁵ M. NUSSBAUM *Tragedy and human capabilities: a response to Vivian Walsh*, in *Review of Political Economy*, 2003, 15.3: 413, 415; EAD., *Flawed foundations: the philosophical critique of (a particular type of) economics*, in *The University of Chicago Law Review*, 1997, 64.4: 1197, 1203, n. 17.

¹⁶ M. NUSSBAUM, *Tragedy*, (n. 14); see also *Flawed foundations*, (n. 14): “We notice, for example, that although women and men in our own world face many painful conflicts between the demands of child care and the demands of work, this conflict is not intrinsic to the goods involved, and could be either reduced or removed in a world with more public support for parental leave and child care, and less hostility to parenthood in the established structure of careers”.

ple are ready to pay for them (an arrangement which, by the way, is often hardly feasible, given the impossibility to train the needed personnel in a short time).

This example confirms that Hegel's questions are important because they run counter to the attitudes that give priority to impersonal market mechanisms and ignore the peculiarities (and even the possibility) of tragic situations. Market philosophy is based on the idea that markets are always able to immediately provide everything for which a demand willing to pay exists. In some sense market philosophy does not conceive or contemplate situations requiring tragic choices (except for that where people cannot pay for what they need, which is normal in every market).

The diffusion of this philosophy in recent times probably explains the naive astonishment shown by many commentators at the fact that the state is unable to immediately provide all the resources that were needed, from medical masks to ventilators. Few seem to have realized that this inability is the inevitable result of decades of dominance of a mercantile logic that led to the transfer of the entire production of medical masks abroad, just to mention one example.

5. Conclusion: how to make tragic choices less tragic.

Having established that some tragic choices can be prevented, or at least numerically reduced, and that at times we can try to avoid the coincidence of tragic choices and other specific injustices, it is certainly very difficult to imagine a society not forced to take a large number of decisions fraught with potentially tragic consequences. The foregoing reflections do not indicate solutions to this problem and probably no substantial criterion to tackle all tragic choices can be shared by every reasonable person¹⁷. Wide margins of dissent, and therefore of conflict, will always remain.

However, a final observation can be made concerning, once again, the social context in which the need for choices arises. A context characterized by deep-rooted individualism will end up exasperating the conflicts behind any choice. A context in which a sense of reasonableness and solidarity dominates, where people who have to endure the worst do not feel that this happens be-

¹⁷This is the conclusion reached by an author who dedicated important works to this problem. See the synthesis of the evolution of his thought in N. DANIELS, *Health justice, equality and fairness: Perspectives from health policy and human rights law*, in *The Equal Rights Review*, 2011, 6: 127-138.

cause somebody has taken advantage of their weakness, can help bear events perceived as inevitable.

In this perspective, decisions must be judged not only by the relationship between the costs and benefits they generate but, above all, by the way they distribute them. If we assume that the people who have not been economically affected by the pandemic containment measures (or even benefited from them) should keep what they have while the state provides for the others, every choice becomes highly dramatic, given that the state is not, as some seem to think, an abstract entity with a bag full of money which can always be asked for more.

If we had made clear from the beginning that sacrifices must be equally shared (if necessary, even by means of a special tax with rebalancing purposes), we would have created a completely different context to frame the inevitable disagreements. If we share the fundamental assumption that the costs of whatever happens (a long and extensive lockdown or a short and less extensive one) must be shared equally, the perspective changes radically, and a possibly calm discussion on the reasons in favor of one or the other option can replace the clash between incompatible interests.

A clash of interests which, as recently witnessed, easily leads to a senseless opposition between those who constantly ask for more (more lockdown, more money, more freedom, etc.), those who defend their privileges to endure, more or less calmly, every alternative, and those who claim the closures and the openings that each time seem more favorable to their interests.