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the virtues of privacy

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# The democracy of emergency at the time of the coronavirus: the virtues of privacy

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The emergency of the Coronavirus imposes a cultural debate on the balancing of rights, freedoms and social responsibilities, finalized to the protection of individual and collective health.

So much and rightly has been written in these days about strategic errors of the past, and authoritarian and social control risks exploiting the fear of contagion to further compress individual freedoms. A lot has been said about the futility of privacy as well.

But is there a democratic way that respects fundamental rights in an emergency? Is there a model that can turn respect for democratic freedoms into a tool for effective common struggle in an emergency?

Of course, there is one! It is an ethical duty to raise this issue here, now and publicly to strengthen the fundamentals of democracies at this very time of their stress. This will provide a suitable basis for a different and stronger return to normality.

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To do so, the emphasis on the democracy of emergency must be distinguished from the criticism directed against abuses (in non-democratic systems), past mistakes (the economic undermining of health care as a public service), and the failure to consider certain components of production as strategic national assets, which were instead abandoned to a delocalization based only on cost reduction for the benefit of profits rather than on risk management.

Let's make this straight: the often denounced risks of a surveillance capitalism, incubated in our open societies by certain uses of information technology and other collective fears (e.g. terrorism), remain in all their brutality today during the coronavirus emergency. However, precisely for this reason we must understand if and how our balancing instruments allow us not to give in to positions as extreme as trivializing: the so-called privacy is now seen as a "faddishness"; criticized for being a totem higher than human life itself.

Our illustrative example of what democracy of emergency should mean, however divisive it may seem, will be precisely the much criticized privacy, not a useless ornament but a suitable instrument of democratic strength and efficiency, the starting point and not the end point for a democracy of emergency able to stand as a model against all dictatorships. In a democracy, emergency time unfolds within a framework of clear and shared values; it is a temporarily different "normality", different from the state of emergency with which dictatorships "justify" the compression of freedoms.

From the outset, an entirely Italian preamble, suitable for many sister democracies. The Italian Republican Constitution, the offspring of extreme moments and struggles against totalitarianism, is well aware of the need to protect democracy, to balance individual liberties and social needs (Articles 2, 3, 4, 13-24 Cost.), and to balance the fundamental right to health as an individual and a collective interest. These are the bases on which every concrete action moves, these are the foundations with which every emergency provision must reckon.

The first constraint of an emergency is the temporariness of measures that limit or distort the ordinary course of rights and freedoms; the second is its founding reason that permeates like a red thread all principles of our Constitution: namely solidarity, common good, sharing with those in need.

On the first constraint, the lexical and phenomenological twisting of the original concept of dictatorship is illuminating. The term was born in Roman law as an emergency institution that concentrated, while maintaining some safeguards of checks and balances, in a single individual many powers otherwise divided among many. This power ceased once the emergency objective of the appointment was achieved and, in any case, it could only last for six months. What made these extraordinary limitations acceptable was the certainty that they would not last more than six months and that they were necessary for the common good: if you want, their impermanence and their solidarity nature. A solidarity based on the awareness that a community stands with mutual support, especially at extreme times. A model of extraordinary stewardship that is legitimate precisely because it is provided for by the normal regime to which it returns.

Against this background, let us see the impact of the collective fight against the spread of the epidemic from the point of view of the democracy of emergency, through the eyes of the fundamental right to the protection of personal data.

**The digital transition of everyday life.** The most evident impact is the limitation of the freedom of movement which, however, seems to be mitigated by the possibility of conducting a “smart life” that hinges on a series of activities that can be “remote-conducted”: some working activities, communications, recreational and educational activities. This means changing our own habits and sacrificing individual freedoms in view of a common mobilization of responsibility (and in light of infrastructures that were not prepared for a sudden “remotization” of activities). Nevertheless, already at the very first level of the social structure, things are getting complicated. Family status and cohabitation are increasingly not coinciding and even where they do coincide, solutions must be sought for those who cannot operate remotely and have their children at home (for example, health care workers or those who must ensure that there are supplies or electricity in all homes).

Leaving aside these issues, as they deserve specific attention, let us focus on the protection of personal data in a massive, sudden and intensive use of digital technology. Infrastructures are overloaded and the technical-organizational measures to ensure data protection in terms of availability, confidentiality and security may not meet immediate needs, also taking into account the different levels of digital literacy of users. These factors ideally put at risk the “substitutive” effect of a smart life for the exercise of freedom of circulation, of information, of assembly, and of expression, making it necessary to increase vigilance against possible discrimination already during the emergency!

The safeguards corresponding to the impermanence and the reasons of solidarity (common good) mentioned above can be found in the protection of people in the processing of their personal data under the ordinary and extraordinary regulatory regimes.

An open and rigorous application of the rules and principles of personal data protection is the founding reason for the smooth – but vigilant – acceptance of the restrictions on freedoms.

Let us give concrete examples to illustrate that the democratic path to emergency is not weak but uses the strength of the rule of law and the primacy of rights to maximise the use of data by promoting adhesion rather than coercion.

**Personal data flows to handle the emergency.** The most striking example is the relationship between health protection and privacy. Mapping the spread of the virus appears to be the most effective organizational measure for containment purposes. The price is our privacy: collective health is a common good and justifies the processing of personal data, even sensitive ones through simplified procedures that, in any case, do not threaten democratic values (the protection of fundamental rights). Recital 46 of the General Regu-

lation on Data Protection (EU Reg. No 2016/679, so-called GDPR), in illustrating what is meant by “*an interest which is essential for the life of the data subject or that of another natural person*” and “*important grounds of public interest*” quotes “*for instance when processing is necessary for humanitarian purposes, including for monitoring epidemics and their spread*”.

Accordingly and for example, the Italian emergency statute describes the cases in which it is justified to process personal data – regulated in Articles 6, 9, 10 of the GDPR – but does not provide for any derogation from the technical and organizational measures to be adopted for its processing. In other words, the state of emergency does not justify the non-application of the GDPR rules. It does not justify anarchy of processing but allows for the provision of highly exceptional situations. It is no coincidence that the Italian emergency statute of March 9th 2020 dedicates the entire article 14 to the processing of personal data, invoking the legal basis for processing and identifying the persons expressly authorized to implement, or to discontinue, data flows in execution of the emergency plan. The article provides the following, illustrating why keeping fundamental rights protected increases the flow of data and preserves democratic values:

The processing of “sensitive” and judicial personal data may be carried out by medical and health care personnel or by persons authorized by the statute on the COVID-19 emergency (D.L. 9 March 2020 n. 14): civil protection, public and private structures operating in the health sector, entities appointed to ensure the implementation of emergency measures. All who need to process them but only them!

The communication and sharing of data between the entities referred to in the previous point must respect the principles of minimisation, proportionality and purpose limitation: it must be “necessary for the performance of the functions assigned to it in the context of the emergency caused by the spread of COVID”. Emergency is not an excuse to crash fundamental rights.

The exchange of sensitive and judicial data with public and private entities other than those mentioned in the point a., or of general data referred to in art. 6 GDPR, is justified only if “essential for the performance of activities related to the handling of the health emergency in progress”. In other words, all the public and/or private bodies that contribute to the handling of the emergency could well be recipients of the flows of personal data collected in the implementation of the tasks aimed at limiting the diffusion of the COVID, but this does not mean creating an indiscriminate access to them.

Pending the emergency, the collection and storage of information must take place in a lawful and transparent manner: the statute does not encourage information asymmetries or the generation of privileged positions. Only emergency medical personnel are exempted, pursuant to article 23, paragraph 1, letter e) GDPR, from providing notice or are authorized to formulate a simplified one. In any case, it is required to communicate the limitations to the person orally: the patient today is not interested in “useless privacy”, but will be interested tomorrow to avoid discrimination, for example; it is the task of a mature and supportive democracy to think about it for him, already today.

Access to information must be arranged in a granularly way, data storage must be instrumental to the policies of anonymisation and destruction, sharing must be only with public and private entities that pursue the specific purpose of handling the health emergency.

The internal authorizations to delegate processing within organizations (art. 2-*quaterdecies* of Legislative Decree no. 196/2003) can be given orally only by the persons “in the front line” listed in article 1 of the same statute. The state of emergency enables the temporary suspension of ordinary procedural paths thanks to the certainty that there is a time limit to it and, in any case, there are further safeguards in the system (such as, for example, general duties of confidentiality, data flows are stored through secure channels specifically designed for the particular nature of the data,...).

From this perspective, it is right to map the prior movements of the subject who tested positive to the swab, perhaps even using 007 technologies. Nevertheless, once the “quarantine time” has elapsed, it is equally right to destroy unnecessary information. This way once the emergency is over democratic values are not compromised. A word of warning: destroying superfluous information does not mean destroying valuable epidemiological data, it means ensuring that this information cannot be used to violate the fundamental rights and freedoms of the individual concerned. Let us not forget that the GDPR has twofold aims (Art. 1) ruling both “*the protection of natural persons with regard to the processing of personal data*” and “*the free movement of personal data*”. It is the protection of fundamental rights of individuals that ensures greater and better flow of data.

The sharing of the information flow outside the ordinary schemes moves on the footsteps of the exceptionality of the functions attributed by legislation. It can do it, and can do so without turning into a (further?) instrument of (undue) social control precisely because it is inserted in a context of principles that safeguards rights and freedoms even when they are limited and, at the same time, reassures on the reasons of solidarity and temporariness of such limits. These possibilities are by definition lacking in undemocratic societies. To renounce them or to trivialise them means to renounce the democratic characteristic of our societies, to renounce to the difference between democratic and non-democratic civilisations.

**Emergency technology: risks and opportunities.** It is again the balancing between fundamental human rights and the balance between individual and collective freedoms as a symbol of democracy.

In the COVID-19 containment task force, personal data is an invaluable resource to allow the coordination of the work of the emergency: portability, interoperability, reuse are the characteristics that allow the front line operators to dialogue with those on the second line.

Consider the services offered by public and private companies that, through the analytical extractions of data “owned by them”, provide or enhance the supply of services and products to replace the “physical lockdown” of the cities or allow to track the spread of the epidemic, as already happened in Africa for Ebola. Also, consider scientific and experimental research: the use of Machine Learning technologies to process large amounts of

data and meet the needs of diagnosis and therapy more effectively and efficiently become the added value of the task force, as the announced Google app in San Francisco.

For the massive use of personal data, including health data, to remain an opportunity, the risks arising from improper processing must be assessed and mitigated. Likewise, developed technologies cannot fail to respond to the values shared in the relevant system.

The legal framework allows, through the appropriate technical and organizational measures, to ensure the correct balance between the values, also in emergency, keeping personal data flows and automated decision-making processes within the limits of lawfulness, correctness and robustness.

The cultural challenge is to consider the preservation of technical and organizational measures for personal data processing as an integral part of the wider process of managing emergencies in order to protect democratic values.

Exceptions to the system of checks and balances must be instrumental and proportionate to the protection of the common good. This is the contribution that experts in the field can give to the COVID-19 task force: availability and promptness in evaluating protocols, experiments involving personal data especially of health data.

The streamlining of procedures revolves around the availability of the various parties involved (the issue of smart activities returns) and the timeframe for the evaluation of proposals, but it cannot affect the substance of the evaluation because this would compromise democratic values, and it would also affect the adherence to the emergency plan.

If I trust that the system protects me both in the ordinary regime and in the extraordinary one, I will not be afraid of adhering to it, and I adhere to the limitations, considering them only temporary and necessary for the pursuit of the common objective of solidarity.

An example to test the meaning of our discourse is the facial recognition system for faces with masks. It was implemented in China for monitoring and surveillance purposes, including the detection of body temperature. In our system, its use could successfully be considered lawful at hospitals (if accompanied by a positive Data Protection Impact Assessment, for example), and perhaps at people transport hubs in an effort to reduce the involvement of health personnel in intensive care or to track possible infected people to warn them. Here the aim would be to protect individuals' right to health and, at the same time, to reduce the epidemic spread pursuing the collective interest in an environment with limited access, such as boarding areas. However, such a system could hardly be accepted in other contexts and circumstances without compromising the values on which society is based.

Similarly worrying, in absence of the above-mentioned safeguards, it appears the hypothesis of "tracking infected people", as imprudently suggested on social networks.

Who should track them in addition to the health personnel who care for them and who of course "tracks" them in the medical files and shares these data with those who should do so by law? What is meant by tracking the infected person? With a bracelet? By intercepting their private and family life through IoT-connected devices? What further information would be collected? And for how long? Above all, how to avoid the use of this information

for lynching, even verbally, and summary justice as during the plagues described in novels? Awareness on democracy in emergency is needed to answer these questions.

We are going through a culturally dark age when populism and fear of those different from us constantly challenge fundamental rights. In recent weeks, in Italy and elsewhere, we have witnessed anti-Semitic or homophobic inscriptions on doors of private homes; do we really want the inscription “here infected”?

The step to discrimination is short if privacy is considered a “*physima*”: limits and boundaries to the use of personal data must be mapped out by design and applied by default so that – once the emergency is over and it does not require anymore to balance confidentiality and protection of personal data with collective protection in emergency – the relationship between freedom and responsibility can be rebalanced. The same duty of solidarity that allows the limitation of rights and freedoms requires ensuring that such limitations have no further adverse effect.

All this is possible if one believes in democracy even in emergencies, if one is aware that holding firm to the cornerstones of the protection of rights and freedoms means not giving in to the easy assertion that its protection is a futile ornament in emergency.

Our system of values and regulations allows us not to block the efficient use of personal data precisely because we can confidently entrust them to the broadest safeguards of the system.

In other words, “the mere suspension of privacy law” in emergency weakens the use of personal data itself and undermines democratic values. To the contrary, it is the same personal data protection law that already provides for the right to life and health to prevail. However, in order to avoid compromising tomorrow’s democratic life, individual and collective freedoms, it is sufficient to follow those solutions suggested by the law itself today, including the law on handling the COVID emergency. In a democracy, the extraordinary is managed and provided for already by the ordinary!

Let us therefore seize the opportunity to speed up the digital transition of our daily life, to exploit artificial intelligence and technology for the service of the common good, without undermining human dignity and democratic values.

The legal instruments to do so are available. It is enough to interpret them in light of fundamental rights, being aware that privacy will never limit in our legal systems the use of every resource aimed at protecting individual and collective life and health, but on the contrary, it makes it possible, legal and ethical.

This is the difference between the use of a state of emergency in a democratic and in a non-democratic system. In the former, the protection of fundamental rights and freedoms allows a wider processing of personal data also in emergencies, precisely because it preserves values by building a basis of trust and legitimacy. In the latter, the emergency becomes an excuse to further compress rights and freedoms by concentrating even more the power of data outside any guarantee.

