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Legal scenarios in the coronavirus time: Medico legal implications in the aspects of governance

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LEGAL SCENARIOS IN THE CORONAVIRUS TIME: MEDICO LEGAL IMPLICATIONS IN THE ASPECTS OF GOVERNANCE

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Abstract:	<p>Along with rising levels of the infection around the world, the state of emergency prompted by the COVID-19 pandemic has also been having a heavy legal impact. The situation is posing important criminal challenges, as well as an ocean of social and public health issues around the world. It has not only directly affected constitutionally-guaranteed rights and individual freedoms, but also brought to the fore certain types of criminal offence that had previously been of little practical importance, such as the crime of 'maliciously or unintentionally causing an epidemic'.</p> <p>Different countries and states have introduced policies to manage the emergency at different times and in different ways. The measures adopted have been the object of much criticism, also raising questions of constitutional legitimacy in countries like Italy. The present contribution begins with a brief outline of the different international scenarios. Then we examine some of the medicolegal aspects of criminal offences previously envisaged and newly introduced since the arrival of the pandemic. We suggest the need for a sort of 'code of public health laws for the time of coronavirus', that could also be applied to other public health emergencies, pandemic or otherwise. The idea is to give operators in the sector and the general population the opportunity to identify clear and simple rules to follow in the current complex global situation. We need a new, appropriate interpretation of the 'boundaries' of our individual rights in relation to the need to safeguard the wider community and its more vulnerable members.</p>
Suggested Reviewers:	

November 5, 2020
Professor T. Kondo
Editor-in-Chief
LEGAL MEDICINE

Dear Editor,

Please find attached the article entitled "LEGAL SCENARIOS IN THE CORONAVIRUS TIME: MEDICO LEGAL IMPLICATIONS IN THE ASPECTS OF GOVERNANCE" which I am submitting for exclusive consideration for publication as a letter in the Journal Legal Medicine.

The contribution shows how different countries and states have introduced policies to manage the emergency at different times and in different ways. The measures adopted have been the object of much criticism, also raising questions of constitutional legitimacy in countries like Italy, where public health laws dating in the 30's have been applied as a means to halt the spread of the viral infection.

The contribution begins with a brief outline of the different international scenarios. Then we examine some of the medicolegal aspects of criminal offences previously envisaged and newly introduced since the arrival of the pandemic. We suggest the need for a sort of 'code of public health laws for the time of coronavirus', that could also be applied to other public health emergencies, pandemic or otherwise. The idea is to give operators in the sector and the general population the opportunity to identify clear and simple rules to follow in the current complex global situation. We need a new, appropriate interpretation of the 'boundaries' of our individual rights in relation to the need to safeguard the wider community and its more vulnerable members. This should also be part of a redefinition of the rules for a 'fair allocation' of the available public resources in a public health emergency with features that are hard to predict.

The required statements are as follows:

- The letter has not been published previously and is not under consideration for publication elsewhere.
- Due care has been exercised by the authors to ensure the integrity of the work.
- There are no conflicts of interest.
- There were no sources of funding.

Thank you for your kind consideration of our letter.

Should you require any further information, please do not hesitate to contact me by email:.

Rossana Cecchi, MD, PhD
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University of Parma

- The state of emergency prompted by the COVID-19 pandemic is having a heavy legal impact
- The situation is posing important criminal challenges, as well as an ocean of social and public health issues around the world
- A 'code of public health laws for the time of coronavirus' is needed
- The operators and the general population need to identify clear and simple rules to follow in the current complex global situation.
- There is a need for a new, appropriate interpretation of the 'boundaries' of our individual rights in relation to the need to safeguard the wider community and its more vulnerable members.

TITLE

**LEGAL SCENARIOS IN THE CORONAVIRUS TIME: MEDICO LEGAL
IMPLICATIONS IN THE ASPECTS OF GOVERNANCE**

SHORT TITLE

LEGAL SCENARIOS IN THE CORONAVIRUS TIME

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Abstract

Along with rising levels of the infection around the world, the state of emergency prompted by the COVID-19 pandemic has also been having a heavy legal impact. The situation is posing important criminal challenges, as well as an ocean of social and public health issues around the world. It has not only directly affected constitutionally-guaranteed rights and individual freedoms, but also brought to the fore certain types of criminal offence that had previously been of little practical importance, such as the crime of ‘maliciously or unintentionally causing an epidemic’.

Different countries and states have introduced policies to manage the emergency at different times and in different ways. The measures adopted have been the object of much criticism, also raising questions of constitutional legitimacy in countries like Italy.

The present contribution begins with a brief outline of the different international scenarios. Then we examine some of the medicolegal aspects of criminal offences previously envisaged and newly introduced since the arrival of the pandemic. We suggest the need for a sort of ‘code of public health laws for the time of coronavirus’, that could also be applied to other public health emergencies, pandemic or otherwise. The idea is to give operators in the sector and the general population the opportunity to identify clear and simple rules to follow in the current complex global situation. We need a new, appropriate interpretation of the ‘boundaries’ of our individual rights in relation to the need to safeguard the wider community and its more vulnerable members.

Introduction

The second coronavirus responsible for severe acute respiratory syndrome (SARS-CoV-2), which causes the disease now known as COVID-19, was first reported to have been identified in mid-December 2019 by the Municipal Commission of the Chinese city of Wuhan. The virus then spread rapidly all over the planet, and has come to affect the lives of the majority of the world's population. According to data published by the World Health Organisation (WHO Health Emergency Dashboard, October 27th, 2020, at the time of writing there were more than 43 million confirmed cases of COVID-19, and more than one million had died of the disease around the world. The mortality rate varies from one country to another, probably influenced by their demographics, available public health services, and different policies for containing the spread of the virus (1).

In the European Union, for instance, Member States have taken steps to control the diffusion of the virus at different times. In the United Kingdom, a Coronavirus Act 2020 went through parliament on March 25th, 2020 (2), giving the government special powers to respond effectively to the emergency, also by limiting individual freedoms. Meanwhile, other countries have adopted a 'wait-and-see' policy. In many places, there have also been plenty of 'deniers', who see the pandemic as a hoax, and often dispute and obstruct any restrictive measures. In Kosovo, for instance (a Balkan state with a population of just under two million), one in three people reportedly believe that COVID-19 is *fake news*, even though this region is among the most severely affected. A survey conducted by Oxford University in Great Britain found that, already in May, one in five people were skeptical about the real existence of the virus, and judged information on the matter of COVID-19 being issued by the government in Westminster to be unreliable. In Italy, a somewhat folkloristic fringe has even advanced the hypothesis of a 'public health dictatorship', claiming that the state of emergency is 'a lie used for political purposes, to prolong the life of the current government'.

While Europe is experiencing a 'second wave' of the pandemic, which has prompted the introduction of new restrictive measures, governments all over the world are having to deal with

rising discontent regarding the effects of their various public health policies on human rights. In Britain, where emergency powers have been granted for testing, isolating and detaining people if there is reason to believe they may be infected, a major civil rights group has been campaigning to have the Coronavirus Act repealed, especially since the Prime Minister introduced the possibility of arrest for anyone violating the new rules governing people's social lives (3). In France, more than thirty jurists examined the recent decisions made by the French *Conseil d'Etat* relating to measures that restrict personal and collective freedoms. After a careful analysis of the data, on COVID-related mortality rates in particular, they judged that the threat to health was being persistently exaggerated and, in their opinion, does not reflect the real picture. The situation in Germany is similar (where efforts to control the spread of the virus have been managed both by federal authorities like the Robert Koch Institute, and by the single German states, based on a national plan). Much the same can also be said of Spain, where the armed forces have called on NATO for help, voicing the need for “*international support*” to deal with the pandemic, especially in the Madrid area.

Discussion

Ever since a state of pandemic was declared early in 2020 (in Italy on March 11th), numerous steps have been taken not only to contain the diffusion of the coronavirus, but also to establish ad hoc public health functions and reorganize the way hospitals operate. Public health systems have had to implement new measures to manage the clinical risks involved, as they are increasingly struggling with a catastrophic scenario that has seriously undermined their stability.

The Italian government has reacted with several legislative decrees and Prime Minister's decrees that aim to contain the spread of the virus and the fallout of the disease it causes. This response has also affected constitutionally-guaranteed rights, including the right to reside and travel freely within the country, or leave the country (Constitution of the Italian Republic, article 16), to assemble

(article 17), to celebrate religious rites (article 19), to teach (article 33), and to receive compulsory education (article 34), as well as freedom in private economic enterprise (article 41, first section). Some claim that the suspension of such rights, which are fundamental elements of the country's democratic order, is legitimized by the fact that it has the purpose of safeguarding public health (article 32). This is envisaged in the Constitution not only as a right of the individual, but also as a collective interest (especially relevant in the case of COVID-19), to be protected even if this involves limitations on temporarily irreconcilable competing rights.

Decisions made by the Italian government in the time of a viral pandemic are also formally sanctioned by the Constitution. It explicitly establishes, for instance, that an individual's freedom to reside and travel within the territory of the State may be restricted for "*reasons of health or security*", just as meetings in public places may be prohibited only for "*proven reasons of security or public safety*".

The statement made by the Italian Council of Ministers on January 31th, 2020, regarding the "*state of emergency as a consequence of the public health risk relating to the onset of diseases deriving from transmissible viral agents*" created the objective conditions for justifying the total or partial limitation of individual freedoms. It gives legislators the power to intervene promptly in the case of a "*public emergency threatening the life of the nation*", in accordance with the obligations deriving from international law (European Convention on Human Rights [ECHR], art. 15), without the need for any preliminary approval of its legitimacy by the Italian Audit Court (in accordance with art. 24 of Legislative Decree n. 5, January, 2018).

Along with emergency restrictions on personal freedoms, the country's citizens have been asked to take an active part in the response to the pandemic. With a call for 'individual responsibility', as outlined in article 5 of the "*General measures*", the Prime Minister's Decree of March 8th, 2020 specifies that the population "*must be fully aware of the risk, and must actively participate in the protective measures established by the Government. In particular, it is important to understand the*

significance of the switch from identifying and treating severe cases to identifying and treating everyone, and to accept the preventive measures as a social norm”.

This raises an issue of criminal law because (in accordance with the sanctions established by the Legislative Decree of March 24th, 2020) violating the imposed constraints amounts to the crime of “*noncompliance with the provisions of the Authorities*” (article 650 of the Italian Penal Code). This is punishable by arrest for up to 3 months or a fine of up to €206, unless the action constitutes a more serious offence. It applies to “*anyone who fails to comply with a provision legally issued by the Authorities for reasons of justice or public safety, or public order or hygiene*”. Typically, individuals could commit this offence by violating the provisions of the above-mentioned decree during lockdown for reasons other than those envisaged by the decree (demonstrable work- or health-related reasons, special needs, etc.). Another example concerns people who leave their homes while under compulsory quarantine (a measure that cannot be waived, not even for the above-mentioned reasons).

Of course, such newly-introduced sanctions have to be added to those already envisaged by Italian law, such as the crime of “*misrepresentation by a private individual in a public action*” (article 483 of the Penal Code), punishable by imprisonment for up to 2 years. This can and does apply to anyone providing false information in the self-declarations that people needed to carry with them in order to go anywhere legally during lockdown (On this issue, it is worth mentioning that the succession of increasingly detailed and complicated self-declaration forms prepared by the government made the obligation to be truthful particularly clear - to such a degree that people sometimes found it objectively difficult when asked to self-certify to things they themselves could not be absolutely sure about. For instance, how could people who had been ill and recovered certify to “not having been found positive to Covid-19”? Should we assume that anyone who had contracted the disease was not to leave their home, even if they had subsequently tested negative for the virus?). Then there is the socially more alarming crime of “*causing an epidemic*” (article 438 of

the Italian Penal Code), punishable by life imprisonment, which applies to anyone found guilty of “*spreading pathogenic germs*” or microorganisms capable of causing infectious diseases.

On the international scene, this question drove the United States Deputy Attorney General, Jeffrey Rosen, to say that federal terrorism laws could apply to the “*purposeful exposure and infection of others with COVID-19*”. These laws establish that “*whoever knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin, or delivery system for use as a weapon, or knowingly assists a foreign state or any organization to do so, or attempts, threatens, or conspires to do the same, shall be fined under this title or imprisoned for life or any term of years, or both*”. So, in theory, anyone who is aware of having contracted COVID-19 and whose irresponsible behavior risks spreading it to others could be guilty of terrorism and face a life sentence (4).

Such a hypothesis has also been advanced regarding the medical profession. After initially being praised to the point of adoration by the whole community for its dedication in dealing with the public health emergency, it has increasingly become the object of action in the criminal and civil law courts. Public health operators have been attributed such a variety of presumed professional responsibilities that we risk seeing a sort of “*legal pandemic*” (5), despite their professional associations’ efforts to safeguard the public health system. The Italian government even sanctions in its so-called “*Relaunching*” decree the suspension of “*all claims for compensation relating to professional responsibility*” (6). This decision is thought to be hardly applicable to the public health setting, bearing in mind that the legislators have limited the punishability of the above-mentioned crimes to types of behavior that cause an epidemic by deliberately spreading pathogenic germs (as in the historical case of plague spreaders, individuals who were aware of carrying a transmissible virus when they engaged in relationships with others). The Supreme Court in Italy recently ruled out the existence of the crime *de quo* in the case of person-to-person contagion of HIV, though it specified that there may be dissemination when the parties involved know they carry the pathogenic germs: “*The incriminating norm does not select which disseminating behavior is relevant. It*

envisages in the broadest possible terms that the acting party may cause an epidemic by disseminating pathogenic germs, without identifying how this dissemination might come about. At the same time, however, there obviously needs to be a dissemination capable of causing an epidemic. We are therefore not persuaded by the appeal court judges' stance that it is wrong to speak of a dissemination relevant to the offence of causing an epidemic unless there is a possession of the pathogenic germs attributed to the actor characterized by a physical separation between the object (what is being disseminated) and the subject (the person disseminating it). The norm does not require this relationship of otherness, and does not exclude the occurrence of a dissemination even when the acting party is him- or herself the carrier of the pathogenic germs (...)" (7).

In Italy, the offence of causing an epidemic can also be envisaged as unintentional (article 452 of the Penal Code) when the event - although it was to be expected - was not wanted by the acting party, but occurs as a result of negligence, inexperience, recklessness, and/or failure to comply with laws, regulations, orders or disciplinary measures.

Since “*the psychological element in the crime of unintentionally causing an epidemic (...) consists in the acting party spreading (...) germs that he or she knows are pathogenic, but with no intention of causing an epidemic*”, the crime can only be envisaged for a deliberate action. There can be no room for accusing someone of unintentionally causing an epidemic by omission - as exemplified by the ‘classic case’ of in-hospital dissemination due to shortcomings in the steps taken to control and monitor the environment, provide the necessary equipment, and organize the healthcare activities.

The question of unintentional crimes relating to health operators’ medical responsibilities for something they failed to do also raises a number of questions on the topic of *causality*. Such crimes would be difficult to configure because of the need for a ‘strong’ degree of causality, only allowable on the strength of a criterion of ‘high likelihood – near certainty’, or ‘beyond all reasonable doubt’. The author of a recent legal paper (8) analyzed the accusation of criminal behavior brought against the health operators working at a hospital near Milan for their “delay” in testing Italy’s so-called “Patient 1” for COVID-19 infection, and their consequent failure to take appropriate precautions to

avoid other people at the hospital being infected. After opening a criminal procedure on the matter, the Public Prosecutor's Office at the Lodi law courts concluded that the accused could not be held responsible. They could not be accused of the crime of unintentionally causing an epidemic because: (i) the case lacked a necessary "*typical feature inasmuch as it did not consist in the unintentional dissemination of pathogenic agents in the accused's possession*"; and (ii) at the time when the event occurred, nobody knew that the germs were pathogenic, and there were no specific guidelines for managing the disease *de qua*. The event could therefore be described as unpredictable "*in the practical circumstances*".

Similar hypotheses of a criminal offence were advanced by other public prosecutors' offices. For instance, the one in South Italy (Foggia) opened a preliminary investigation on a potentially new "*epidemic cluster*" concerning the death of a 75-year-old testing positive for the coronavirus, whose body was apparently released by the physician at the public health facility before they had received the test result. This posed a public safety risk due to the possible infection of dozens of people, many of whom apparently also attended the funeral despite having been quarantined.

Most people in the legal world agree that the behavior of health operators working in these particular times lacks the features of the crime of unintentionally causing an epidemic. It would be difficult, not to say impossible to establish a causal link between their behavior and single episodes of contamination harming someone's health, or even causing their death. That said, future legislators may expand their interpretation of 'dissemination', and be induced to endorse the concept of the crime of unintentionally causing an epidemic even by omission, which would shift the responsibility to the public health organizations.

So, as regards the dissemination of the coronavirus in Italy (which rapidly became one of the worst-hit countries in terms of the number of people infected in the first half of 2020), certain omissions on the part of those actively involved in ensuring public health and safety - in the public health sector and on a political and legal level - may be relevant under criminal law. Of course, there are other possible profiles of criminal responsibility for the public health professionals who were

struggling with the COVID-19 emergency, such as unintentional homicide (article 590 sexies of the Italian Penal Code), or personal injury in the event of an individual suffering lasting psychological or physical impairments.

When distinguishing between diagnostic responsibility (and exposure to legal consequences for harm caused as a result of a diagnosis lacking or being wrong) and therapeutic responsibility (for the wrong care being provided as a result of said diagnosis), we will need to consider the different significance of the guidelines. This is because the guidelines (which can serve as structural elements for delineating any criminal offence - in terms of the health operator's culpability) rely on current medical and scientific evidence on the matter of COVID-19, which has reached different levels of stability and reliability. In the sphere of diagnostics, hospital protocols have already been established, while the treatment of patients suffering from COVID-19 is still in an experimental phase.

The unfortunately very topical, dramatic scenarios described thus far are partly due to the recently increasing pace in the spread of the virus. The state of epidemiological emergency due to COVID-19 in Italy, declared on January 31th, 2020, has been extended to January 31th, 2021. As the Prime Minister, Giuseppe Conte, said in parliament, *“Sadly, the pandemic has not entirely exhausted its effects as yet, although – and this has not escaped the country’s population or the government – these effects are now more limited and territorially circumscribed”*.

The situation has evolved and the latest epidemiological data bear witness to the contagion regaining in strength around the world in recent weeks. A decree approved by Italy's government on October 7th, 2020, establishes new *“Urgent measures to contain and manage the public health emergency”*. The use of personal protective equipment has been made compulsory in all public places (even out of doors) and activities considered at risk have been suspended. Once again, the country's population has been urged to comply strictly with the new rules. The increasing numbers of people testing positive for the coronavirus have dramatically turned the spotlight on the problem of how to enforce the mandatory self-isolation of the many people found infected. This has been

entrusted almost entirely to the sense of responsibility of the individuals concerned, which has not always proved sufficient. The resulting problems of public safety have made buzz words of such terms as ‘involuntary medical commitment’ and public health laws have been suggested as a “*very useful tool for keeping the epidemic under control*”. Some have voiced their opposition to such measures, however, claiming that coercive action of this kind in the present situation would represent an “*assault on our constitutional freedoms*”.

There are cases where the compulsory nature of the treatment is understandable: to avoid the transmission of a pathogen (as in the case of venereal diseases, that are difficult to contain unless the patient is treated appropriately); or because an individual’s worsening state of health would add to the related costs to the public purse (accidents in the workplace, disabilities, etc.). Then there is the crucial aspect of whether individuals testing positive to COVID-19 have been adequately informed, and are fully aware of the harm they can cause other people they meet. So where do we place the boundary between ignorance and *denial* of the problem (as on the issue of compulsory vaccinations), when the problem is further aggravated by the effectiveness of the infection deriving from such behavior?

In the case of infectious diseases like COVID-19, the unreliability of the proposed use of involuntary medical commitment or similar solutions (in terms of reducing the risk of the virus spreading) has led to these options being judged unconstitutional, given the shortcomings in the current legislation on the topic. This hypothesis is frankly hard to share. Apart from ridding the patient of the virus more quickly, the aim of admission to hospital and quarantine is to contain the uncontrolled spread of the infection and consequent risk of more or less severe, or even fatal harm to a plurality of individuals.

Now that the priority seems to be to contain the spread of the virus, there has also been mention of applying the laws on public safety, which date back to the years when Italy was under fascist rule. Prefects (local representatives of the central government) have ample powers on matters of public

safety and public health, but the methods envisaged for using them are anachronistic and no longer in line with how political sensitivities have developed over the years.

Unfortunately, there are still no well-laid plans for dealing with single crucial aspects of the public health emergency in the coming months, now that people have returned to work, schools and universities have reopened their doors, and the virus is bound to spread further. There is also the problem of the relationship between denial, poor awareness and misinformation, and the consequences for community health, which could be the object of a long and interesting debate.

One proposal advanced is that we introduce a sort of ‘involuntary medical commitment’ that is not strictly coercive for everyone infected with COVID-19. This could resemble the approach taken to compulsory vaccinations, possibly increasing the fines for noncompliance, or recording it on an individual’s police record in order to induce citizens to pay more attention to complying with the rules.

In conclusion, we would recommend the creation of a sort of ‘code of public health legislation in the time of coronavirus’, and a shared set of regulations for Europe (if not the world, through the UN or the WHO). This could give operators in the sector and the general public a clear and simple set of rules governing the present situation. The currently-available ocean of public health advice still suffers from numerous gaps in our understanding of the biology of COVID-19 infection and the critical issue of people who are infected but symptom-free. We hope that, as they learn from the COVID-19 pandemic, the various local governments will also be able to predict the consequences of certain types of behavior on the spread of the infection. When we know what behavior is most harmful to public and personal health, we will be better able to justify limitations on certain freedoms a priori. We will also be able to prosecute or, better still, prevent people’s inappropriate behavior (however minor), which is difficult to track and trace “a posteriori” - such as the incongruent management of COVID-safe environments at work, at school, on public transport, and so on.

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