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Il danno sociale come nuova tipologia di danno risarcibile*

O dano social como nova tipologia de dano indenizável

Social damage as a new type of compensable damage

El daño social como nueva tipología de daño resarcible

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Riassunto

Il presente lavoro parte dal presupposto della corrispondenza tra esigibilità di diritti e doveri di solidarietà e quindi sulla responsabilizzazione e piena realizzazione della persona quale fondamento dell'ordinamento italiano. Su tale base si propone la configurabilità nel sistema della responsabilità civile italiana dei danni da atti corruttivi e dai casi di disubbidienza delle regole imposte per la contenzione della diffusione del virus SARS-CoV2 come danno sociale laddove entrambe le ipotesi portano a ad una perdita di valore che riflette nel deterioramento del bene comune. Si rinviene il fondamento della proposta nella questione dell'etica del comportamento giacché il non adempimento dei propri doveri determina un irrimediabile pregiudizio verso le esigenze di solidarietà sociale con grave violazione degli artt. 2 e 3 cost., cagionando pertanto un danno alla società.

Parole chiave: responsabilità civile; danno sociale; solidarietà sociale.

Resumo

Este trabalho parte do pressuposto da correspondência entre a exigibilidade dos direitos e dos deveres de solidariedade e, portanto, da responsabilidade e plena realização da pessoa como fundamento do ordenamento jurídico italiano. Nesta base, propõe-se que os danos decorrentes de atos de corrupção e de desobediência às regras impostas, para conter a propagação do vírus SARS-CoV2, possam ser configurados no sistema italiano de responsabilidade civil como danos sociais, na medida em que ambas as hipóteses conduzem a uma perda de valor que se reflete na deterioração do bem comum. A base da proposta encontra-se na questão da ética do comportamento, uma vez que o incumprimento dos deveres provoca, relativamente, um prejuízo irremediável às necessidades de solidariedade social com grave violação dos artigos 2º e 3º da Constituição, causando, assim, um dano à sociedade.

***Palavras-chave**: responsabilidade civil; dano social; solidariedade social.*

Abstract

The present work starts from the assumption of the correspondence between the enforceability of rights and duties of solidarity and therefore on the responsibility and full realisation of the person as the foundation of the Italian legal system. On this basis, it is proposed that damage caused by corrupt acts and cases of disobedience of the rules imposed for the containment of the spread of the SARS-CoV2 virus can be configured in the Italian civil liability system as social damage where both hypotheses lead to a loss of value reflected in the deterioration of the common good. The basis of the proposal is found in the question of the ethics of behaviour, since failure to fulfil one's duties causes irreparable damage to the requirements of social solidarity in serious violation of Articles 2 and 3 of the Constitution, thus causing damage to society.

***Keywords:** civil liability; social damage; social solidarity.*

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Resumen

Este trabajo parte del supuesto de la correspondencia entre la exigibilidad de los derechos y los deberes de solidaridad y, por lo tanto, de la responsabilidad y plena realización de la persona como fundamento del ordenamiento jurídico italiano. Sobre esta base, se propone que los daños derivados de actos de corrupción y del incumplimiento de las normas impuestas para contener la propagación del virus SARS-CoV-2 puedan configurarse en el sistema italiano de responsabilidad civil como daños sociales, en la medida en que ambos supuestos conducen a una pérdida de valor que se refleja en la degradación del bien común. El fundamento de esta propuesta se encuentra en la cuestión de la ética del comportamiento, ya que el incumplimiento de los deberes provoca un daño irreparable en relación con las necesidades de solidaridad social, con grave violación de los artículos 2º y 3º de la Constitución, causando así un perjuicio a la sociedad.

Palabras clave*: responsabilidad civil; daño social; solidaridad social.*

1 Introduction

The interest in this topic started from a study on the civil repercussions of corruption[1] in search of a remedy for the damage caused to society by the phenomenon of corruption. However, the pandemic event that has shocked the world in this year 2020 has highlighted the need to verify the extent and consequences of the not always virtuous behavior of a part of the social structure in the face of the emergency that has resulted.

At the end of the twentieth century there was much discussion about the challenges of Law, in particular Civil Law, in the twenty-first century, but I think it is correct to think that it did not occur to anyone that a global event, such as the pandemic resulting from the Covid-19 virus, could have upset the lives of all of us, forcing everyone to radically and inadvertently change their daily lives. rhythms and habits. The world suddenly stopped where the spread of the virus led almost all states to introduce restrictive measures on individual rights, considered essential to stem the spread of the pandemic. The unusual situation has forced jurists, in order to remain in our sector, to resume and rethink traditional institutions in the light of the new and shocking event. This prompted me to extend the initial proposal to configure corruption as social damage also to the violation by natural and legal persons of the rules prepared by the government, central and peripheral, in order to contain the spread of the virus.

The dilemmas emerging from the current pandemic are transversal [2] involving issues of law, economics, medicine, all linked by the common thread of philosophy and ethics. And it is rightly the question of the ethics of behavior that becomes the foundation, from a moral point of view (in the secular sense), of the problems related to the job proposal that arises here

[1]This text, in fact, resumes, updating it within the space that has been granted to us, the work The impact of corruption on people's rights: first reflections, *In*: **Brazil-Italy corruption: issues compared** edited by M.C. De Cicco, Naples, 2019, p. 53 ff. and is part of a larger study on the subject in progress.

[2] For an analysis of the particular Brazilian situation, see E. Dantas and R. NoGaroli, Em busca das virtudes em tempos de pandemia: reflexos jurídico e ético no distanciamento social, confinement and quarentena domiciliar, *In:* **Coronavirus and responsabilidade civil** edited by C.E. DO RÊGO MONTEIRO Filho, N. Rosenvald and R. Densa, São Paulo, 2020. p. 213 ff.

because, the non-fulfillment of one's duties determines an irremediable prejudice towards the needs of social solidarity with a serious violation of art. 2 and 3 of the Constitution, thus causing damage to society[3].

2 The job proposal

The initial study had as its premise the idea that corruption, especially structural and systemic corruption, configuring an outrageous conduct in relation to the collective conscience, required the search for a strong response for society, on the subject that the imperative derived, on the basis of the constitutional principle of solidarity, from the protected legal good, consisting in social welfare[4].

It was then argued that the State must not and cannot ignore the primary objective which is to ensure every person a dignified existence, without forgetting that dignity *tout court* is not enough given that dignity is a value that must be associated with freedom, equality, psycho-physical integrity and solidarity[5]. Dignity which, as a universal ethical value, must be seen as an instrument for the promotion of the person and not as a weapon of discrimination and arbitrariness.

The justification of the proposal was based on the observation that the Italian legal system is based on the correspondence between the enforceability of rights and duties of solidarity[6] and therefore on the responsibility and full realization of the person. In fact, while individualism consists only in the attribution of rights, personalism involves a set of rights and duties[7] so that freedom is always a source of responsibility. In this context, the pre-eminence of the rights of the person is affirmed by the personalist principle where the principle of

[3] Cf. L. Violante. **The duty to have duties**, Turin, 2014, according to which, in the perspective of a new ethic of citizenship, evading one's duties undermines the dignity of people, erodes social ties and contributes to the growth of cynicism in relation to the process of civilization in the country, leading inexorably to the loss of democracy (p. 99).

[4] In general on the notion of social welfare, see M. InGrosso**, Without social welfare. New risks and quality of life expectation in the planetary era**. Milan: Franco Angeli, 2003. Social well-being is a polysemous and subjective concept that refers to the set of feelings of material and immaterial satisfaction that produce in people and communities a series of material conditions that cannot be traced back only to income, but include other important aspects of human existence such as health, education, services, infrastructure, housing, security, the environment, etc. Although income is an important factor in the level of social well-being, other variables that are equally important for the fulfilment of individuals, such as happiness, health, social relationships and opportunities, must also be taken into account.

[5] V. S. Rodotà. **The revolution of dignity**. Naples: The School of Pythagoras, 2013.

[6] On the link between rights and duties see D. D'Alessandro. **Subsidiarity, solidarity and administrative action**. Milan: Giuffré Editore, 2004. pp. 107 ff.

[7] Cf. on this point the interesting reflection of L. Violante, **The duty to have duties**Cit. *Passim*., who argues "that we must return to the concept of 'duty' in order to fully experience the strength of democracy. Without duties there is no concept of nation: duties specify the overall meaning of citizenship, as a political obligation and as a network of civic relationships. The continuous claim of rights without any reference to duties, moreover, increases social selfishness and loosens the bonds of belonging to the civil community. Rights without duties transform desires into demands, sacrifice merit and end up legitimizing individual selfishness. Promising rights without requiring the fulfillment of duties increases social resentment - because one promises what cannot be kept - and, in the public sphere, gives veto powers, leaving the field open to demagoguery and populism." (quotation marks from the back cover); G. ZaGrebelsky, **Rights by force**, Turin, 2017, sp. p. 93 ff.; P. PerlinGieri. **The human personality in the legal system**. Naples: Jovene, 1972.

solidarity[8] imposes the obligatory nature of the duties that weigh on all associates and aim to ensure the full and harmonious development of individuals. Only in this way will the value of equality be fully implemented, allowing the concrete implementation of the constitutional program for the protection of vulnerable subjects. A program that is seriously compromised by the nefarious phenomenon of corruption widespread in Italy, thus imposing the need to provide for a civil law instrument which, although without acting directly on the phenomenon, can offer a valid deterrent to counter its continuous spread.

As stated elsewhere[9], the compensability of damages resulting from acts of corruption should not concern only the PA. The extent of such damage goes far beyond the damage to the treasury, the damage to the image of the administration where it is implicit that society in general will suffer the consequences of acts of corruption from an economic and value point of view. It is indisputable that acts of corruption generate an imbalance in social well-being, resulting in social and political instability and an obstacle to economic growth. Corruption afflicts all levels of society, starting with the government and reaching the average citizen. The poorest suffer the most, often due to the fact that public money is diverted from vital projects, inevitably reducing the essential services offered. The commercialization of law as a consequence of corruption also leads to social inequality to the extent that it prevents the weakest from competing on the same terms as the most advantaged, because they are corrupt[10].

All this leads to a loss of value that is reflected in the deterioration of the common good[11] causing real social damage.

The same can be said in relation to the current pandemic. The government, faced with a health emergency, as unexpected as it is difficult to manage, has put in place restrictive measures[12] that have unequivocally contributed to a reduction in infections. The rules imposed by the government on social distancing and the mandatory use of protective equipment have therefore proved to be fundamental and in line with the maximum values of the system that

[8] On the essential relationship between solidarity and democracy, see. S. RODOTÀ, Stefano. **Solidarity**: a necessary utopia. Bari: Laterza, 2014. according to which "Only the effective presence of signs of solidarity allows us to continue to define a political system as 'democratic'. Historical experience shows us that, if the times for solidarity become difficult, they also become difficult for democracy" (p. 10).

[9] M.C. De Cicco, *The impact of corruption on people's rights*, cit., p. 53 ff.

[10] Corruption undermines democracy and with it fundamental democratic values such as the principles of transparency and equality. On the circularity of the relationship between equality and solidarity, see A. RuGGeri, *The principle of solidarity to the test of the migratory phenomenon*, in *Consulta online*, 2017, fasc. 3.

[11] On the common good, see the interesting pages of U. Mattei, *Beni comuni. Un manifesto*, Bari, 2011, which theorizes the commons as the reconquest of democratic public spaces, based on the quality of relationships and not on the quantity of accumulation, understands the commons not as a commodity that can be declined in the key of having but as a political and cultural practice that belongs to the horizon of existing together.

[12] See, in chronological order, the Order of the Minister of Health of 30 January 2020; Ministerial Decree of 31 January 2020; Legislative Decree No 6 of 23 February 2020 on urgent measures for the containment and management of the epidemiological emergency from COVID-19'; Presidential Decree of 23 February, 25 February, 1 March; Legislative Decree No 9 of 2 March 2020; Presidential Decree of 4 March, 8 March, 9 March, and 11 March 2020; Legislative Decree no. 14 of 9 March 2020, all with particular attention to the balancing of constitutionally guaranteed assets and the balance of the values involved. These measures were followed by numerous ordinances adopted by the Presidents of the Regions and the Mayors

favors being over having. The consequences of the current pandemic, of abnormal proportions, have not yet been fully revealed but perhaps, wanting to draw a first account, it does not seem far-fetched to say that it has contributed to unmasking the misunderstandings of homo *economicus*[13] and to confirming the centrality of the person and his dignity as the foundation of a free and democratic society[14]. In this perspective, another positive aspect of the pandemic has been the emergence of the principle of collective responsibility[15] that in a democratic society everyone must have towards others[16], confirming that the inseparable binomials duties/rights and freedoms/responsibilities constitute the basis in every democracy. Without the drastic measures adopted, which have certainly in some way compressed some rights and freedoms, albeit fundamental[17], the number of infected and deaths would have been catastrophic.

It should be considered that the reduction of sociality imposed by the pursued containment of the spread of the virus could, in theory, appear to be in contrast with the value of sociality privileged in the general clause for the protection of the person referred to in art. 2 of the Constitution. However, from a more careful analysis it can be verified that the set of containment measures, if on the one hand have compressed fundamental freedoms and rights, on the other hand have found a fair balance in the balance with articles 2, 3, par. 2, and 32 of the Constitution, concretizing the principle of substantial equality where it has contributed to guaranteeing equal opportunities for adequate care to all citizens, in particular to those who, due to socio-economic conditions, find themselves in a more disadvantaged situation at the start[18].

Of this, however, not everyone has been fully aware and convinced, so that there have been countless cases of disobedience on the part of both individuals and legal persons who have put the health and lives of other people at risk, thus constituting social damage.

The disvalue inherent in this behavior is confirmed by the sanctioning regime

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[13] LEONARDO BOFF, *Covid-19 and as falácias do* homo economicus, in https://leonardoboff.org/2020/04/20/covid-19-e-as-falacias-do-homo-economicuscastor-bartolome-ruiz/, according to which "the maxim of the pandemic take care of yourself to take care of others in the best possible way is the inversion of the dogma of homo *economicus*: take care of yourself by taking advantage of others. In the pandemic, no one can think of reaping their own benefits by taking care of themselves alone, because each of us depends a lot on the behavior of others" (translation ns).

[14] See, for example, P. PerlinGieri*, The Human Personality in the Legal Order* (1972), in *The Person and His Rights. Problemi del diritto civile*, Naples, 2005, p. 5 ss.

[15] Collective responsibility which, in compliance with the sovereign principle of solidarity, would impose a more virtuous behavior on those who are concretely able to effectively comply with the measures to contain the virus than others who, unfortunately, are not in a position to maintain isolation or social distancing or to be able to comply with hygiene rules. Just think of the people who live on the streets, in shantytowns or even in the extreme suburbs of large cities, who do not always even have water, sewage or beds in adequate numbers available.

[16] Thus C. LEONARDO BOFF, *o.c.*

[17] This refers in particular to freedom of movement (Article 16 of the Constitution), of assembly (Article 17 of the Constitution), of the exercise of religious worship (Article 19 of the Constitution), of teaching (Article 33 of the Constitution), freedom of private economic initiative (Article 41), right to education (Article 34 of the Constitution), which, however, are not absolute as they may be limited for reasons of health or safety and public safety.

[18] Cf. D. DE A. Dallari, **Elementos da Teoria Geral do Estado.** 25. ed. São Paulo, 2005, p. 309, who warns that the idea of democracy requires the overcoming a mechanical and stratified conception of equality that today must be seen as a right converted into a possibility.

provided for in the various measures issued in this period in support of the containment of the virus[19].

In this perspective and in the face of the blatant and repeated violation of the principles of equality, solidarity and democracy with consequent negative repercussions on society as a whole, we wish to reiterate here the proposal to introduce, in the Italian legal system, the new category of "social damage".

3 Social damage

It therefore seems appropriate to proceed in the present examination with the notion of social damage accepted here. Such damage must be understood as that discredit, prejudice, decrease or loss of social well-being, caused, for the cases considered here, by an act of corruption or civil disobedience that unjustifiably afflicts a plurality of individuals, causing material or immaterial damage to their widespread or collective interests and from which the duty of reparation arises.

Social damage can be considered as a new generation of damage which, in Brazil, has been envisaged by Professor Antônio Junqueira de Azevedo[20]. Alongside the duality of patrimonial/non-pecuniary damage, he has introduced a *tertium genus* that is configured each time as a malicious or grossly negligent act or which, if negatively exemplary, harms not only the material or moral patrimony of the victim but of the whole society, immediately reducing the standard of living of the population. According to Junqueira, "this is particularly evident when it comes to security, which leads to a decrease in social tranquility or a breakdown of trust, in contractual or quasi-contractual situations, with a consequent reduction in the collective quality of life"[21] (translations ns). Security, in its broadest sense, in fact, constitutes a value for any society.

In accordance with this doctrine, the same reasoning must be made in relation to acts that "lead to the conclusion that they must not be repeated, negatively exemplary acts, in the sense that one can say about them 'can you imagine if it were always like this!'"[22] (our

[19] See, in this regard, A. Bernardi, Criminal Law to the Test of Covid-19. **Diritto penale e processo**, no. 4/2020, p. 441 ss.

[20] A. Junqueira DE Azevedo, Por uma nova categoria de dano na responsabilidade civil: o dano social. **Rev. Trim. Dir. Civ**., v. 19, jul./sep. 2004. p. 211 ff., according to which «os danos sociais são lesões à sociedade, no seu nível de vida, tanto por rebaixamento de seu patrimônio moral – principalmente a respeito da segurança – come por diminuição na qualidade de vida. Os danos sociais são causa, pois, de indenização punitiva por dolo ou culpa grave, especialmente, repetimos, se atos que reduzem as condições coletivas de segurança, e de indenização dissuasória, se atos em geral da pessoa jurídica, que trazem uma diminuição do índice de qualidade de vida da população» (p. 216).

[21] A. Junqueira de Azevedo, cited above., p. 215

[22] A. Junqueira DE Azevedo, cited above., p. 215, who gives as an example, among others, an air transport company that systematically delays its flights when with such behavior it significantly decreases "the expectations of well-being of the entire population". For the passenger, in fact, it is not the same thing to leave the house sure of being able to fulfill his commitments at the established times and "in the same conditions, to go out in the anguish of the

translation), where they cause a lowering of the collective standard of living.

Society is increasingly showing sensitivity and less tolerance to acts that affect their quality of life. In this perspective, public authorities must guarantee the rational use of all resources, in order to protect and improve the quality of life of their inhabitants and must remove obstacles that prevent or hinder the free development of the personality or attack human dignity (art. 3, par. 2, constitution). The quality of life, inherent in the notion of well-being, constitutes a particular demand that must be recognized for each individual, being perceptible not only at the individual level of each subject, but also at the social level, applicable against public authorities and even against individuals. If, as stated[23], well-being includes the important aspects of human existence, the environment must necessarily be included. The right to a healthy environment has a broad content that is equivalent to the aspiration to improve the living environment of the human being, in such a way that it goes beyond the criteria of natural conservation and in such a way that it is within any sphere in which the person develops, be it family, work or the environment in which he or she lives. It is therefore a transversal law, which moves throughout the legal system, shaping and reinterpreting its institutions. This is confirmed by the very definition of environment: "A complex of social, cultural and moral conditions in which a person finds himself and develops his personality, or in which, more generally, he finds himself living"[24].

Considered in this way, the alteration *in pejus* of the quality of life of a society can produce damages that must be compensated.

In a nutshell, social damage as it has been outlined, consists of injuries to the level of life of society both for the lowering of its moral heritage, especially in relation to safety - thus giving rise to punitive compensation for intent or gross negligence - and for a decrease in its quality of life which in this way would entail a dissuasive compensation.

Specifically, social damage is the damage suffered by society as a whole due to corruption, misuse of public money or wrongdoing or, in the other case, due to the irresponsible behavior of some associates - natural or legal persons - or of the State itself. Social damage includes both stolen goods, wasted money that could be spent in a different form by society, increased public spending to cope with the worsening emergency, in particular the overload of the national public service and consequent impairment of its function, and ethical dimensions, such as moral damage or violation of trust in relation to public values (of the legal system).

The most problematic issues concern the legitimacy to claim compensation and its destination. These profiles will be addressed here in relation to the Italian experience only in summary form so as not to abuse the space that has been granted to us[25].

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unpredictable" (p. 216).

[23] See footnote 4.

[24] Treccani Dictionary, lemma *Environment* 2. Fig., available in http://www.treccani.it/vocabolario/ambiente/

[25] There is no claim to exhaust the problem. The main objective of the work is to present a proposal, which is being

4 The compatibility of social damage with the Italian legal system

The use of the category of social damage as a means of guaranteeing the effectiveness of fundamental rights finds its legal basis in the constitutional principle of solidarity *pursuant to* art. 2 and 3 of the Constitution, being closely linked to the observance of the binomial freedom-responsibility which, together with the other binomial rights-duties, is the basis of a democratic society based on solidarity[26]. In particular, as regards corruption, this category of damage would also be in consonance with the objectives and contents established by international treaties on the fight against corruption[27]. In fact, for a civil life, the principle of *neminem laedere*[28] *applies in the Italian legal system*, according to which everyone must behave in such a way as not to cause prejudice to others, otherwise, on the basis of the general clause of liability for tort referred to in art. 2043 of the Italian Civil Code, they will be called upon to compensate for damages.

Without delving into the meanders of the evolution of civil liability[29] and unjust damage, it is possible to say that the dignity of the person, social solidarity and distributive justice profoundly influence the systematic nature of the duty to compensate. In particular, "the limit of solidarity is operative in all situations for which any form of legislative protection is provided"[30] The Italian system is a complex one in which individuals and social formations perceive solidarity as a guarantee of a personalist and pluralistic society, so that the principle of solidarity of constitutional rank supports the social function in private institutions in general and in civil liability in general. particular. The social function that supports the duty to compensate thus assumes the broad meaning of a functional category that is based on art. 2 of the Constitution.

The evolution of civil liability has also been structural where there has been a shift from exclusive attention to the perpetrator of the damage to concern for the victim of unjust damage. If at the beginning of the twentieth century the general principle on the subject was "no responsibility without fault", at the present time the principle applies that the victim cannot remain

studied in depth and the subject of a broader investigation, to be submitted to the reader's attention.

[26] Cf. M.C. De Cicco, *The role of duties in the construction of constitutional legality*, in *Duties in the era of rights between ethics and the market*, edited by M.C. De Cicco, Naples, in press.

[27] United Nations Convention against Corruption, adopted by the General Assembly on 31 October 2003, articles 34 and 35, according to which "[...] each State Party shall take the necessary measures, in accordance with the principles of its domestic law, to ensure that entities or persons affected as a result of an act of corruption have the right to take legal action against those responsible for such damage in order to obtain compensation.'

[28] The importance of this principle in a democratic society is confirmed by the statement of N. Bobbio**, Studi por una teoria generale del diritto**, Turin, 1955, that if it were possible for a system to exist with a single rule, it would be: *neminem laedere*.

[29] For which see, among others, S. Rodotà, **Il problema della responsabilità civile**, Milan, 1964; P. PerlinGieri, *Le funzioni della responsabilità civile*, *in Rass. dir. civ*., 2011, 1, p. 116 ff.; A. Flamini, *Responsabilità civile e Costituzione*, in *Annali della Facoltà Giuridica dell'Università di Camerino*, n.2, 2013, p. 3 ff.

[30] Thus, S. Rodotà, *o.u.c.*, p. 113.

without compensation[31].

This shift, also linked to the relationship between damage and injustice, is also due to the need to respond "to the broader needs that the welfare state has brought with it. So much so that damages in the past suffered without protest by the victim and ignored by the law, today arouse the reaction of the juridical system"[32].

Since art. 2043 of the Italian Civil Code is a general clause[33], it is important to underline the role of the case law on the subject, called upon to concretely identify the cases falling within the rule. This is especially in relation to social damage that still lacks regulation, which is why judges have the duty to act to prevent unlawful conduct, such as those that, due to socially reprehensible conduct, reach widespread rights, thus subjecting themselves to compensation whether compensatory, punitive, dissuasive or didactic. This is not hindered by the recurrent recognition of the restorative basis of civil liability - and not a sanctioning one as in criminal liability - and therefore not necessarily related to the disvalue of a conduct[34]. The very notion of unjust damage requires it, in its current conception according to which unjust damage is caused by the injury of an interest worthy of being protected by the legal system regardless of its formal classification[35]. It should also be considered that art. 32 of the Constitution establishes that health is protected not only as a 'fundamental right of the individual' but also as 'public interest', which authorises measures to protect this collective interest.

Even if the situations are not equal, the principles that have been formed in the past on the subject of HIV and AIDS are helpful in this regard, where the complex problems faced by the legislator and the jurisprudence on the subject derive in part from the conflict between the protection of the health of the individual and the protection of the health of the community and therefore from the opposition between the individual good and the social good. Both situations are centered on the epidemic phenomenon whose core lies in the uncontrollable spread and the indeterminacy of the possible subjects infected[36], the main characteristic of Covid-19. It cannot be denied, from this point of view, that non-compliance with the containment measures entails in itself insecurity in the associates, contributing to the

[31] Cf. Supreme Court, Chamber One, 22 July 1999, no. 500, according to which "the damage that the legal system cannot tolerate remaining at the expense of the victim is unjust".
[32] S. Rodotà*, Il problema*, cit., p. 23 s.
[33] See, on this point, M. Franzoni, *Unjust damage and compensable damage in civil liability*, available in http://www.aci.it/fileadmin/documenti/studi_e_ ricerche/monografie_ricerche/franzoni.pdf: 'When there are rules that contain general clauses or elastic concepts, the power of the interpreter, precisely by the will of the legislature, is so wide as to allow him to reconstruct the system in the light of changing times. We are in the presence of a phenomenon of this type, since in art. 2043 of the Italian Civil Code, we have a general clause (the "unjust damage"), but we also have an elastic rule in the second part of the rule ("damage")"; A. Procida Mirabelli DI LAURO AND M. FEOLA, *La responsabilità civile. Contratto e torto*, orino, 2014, sp. p. 107 ff.
[34] See, for all, G. Annunziata, Civil Liability and Compensation for Damage, Padua, 2010, p. 4.
[35] Thus, Cass., Sec. un., 22 July 1999, no. 500 which for the first time recognized the compensability of legitimate interests; Cass., 17 May 2004, no. 9345. In doctrine, see P. SchlesinGer, L'ingiustizia del danno, in Jus, 1960, p. 336 ff.; R. Sacco, L'ingiustizia di cui all'art. 2043, in Foro pad., 1960, I, p. 1420 ff., S. Rodotà, *Il problema della responsabilità civile*, Milan, 1964.
[36] See, for all, S. Ardizzone, entry *Epidemia*, in *Dig. Pen*., IV, Turin, 1990, p. 254.

lowering of the standard of quality of life, as well as affecting aspects of public health, as has been tried to demonstrate. In this regard, the Supreme Court, recently[37], has identified the essential element of the crime of epidemic "in the ability of the agent to further expand and easily propagate" capable of producing "the danger of contaminating an even larger portion of the population".

Although not yet expressly acknowledged, contrary to the Brazilian experience that has been discussing and applying this new category of damage for some time[38], the idea of social damage cannot be said to be totally unknown to Italian jurisprudence. In fact, albeit under different names, we find it in some judgments of administrative and accounting judges, such as when time is qualified as a "good of life" to sentence to compensation for damage due to disservice the corrupt official who has intentionally altered "the 'natural' order of handling the files"[39], or in the orientation of the Court of Cassation[40] when it confirmed what was stated by the Court of Appeal regarding the negative impact that corruption can have on the population, inducing distrust in the proper functioning of the Administration, with the consequent injury to it.

At the regulatory level, then, it is provided for in art. 96, paragraph 3 of the Code of Civil Procedure, for the hypothesis of reckless litigation, an aggravated procedural liability that provides for a sanction of a public nature, devoid of a compensatory nature[41], intended to affect the party who has abused the procedural tool[42]. In this case, as highlighted by the Court of Cassation, the sanction aims to discourage initiatives that take the form of an unscrupulous use of civil proceedings and that are not merely aimed at protecting citizens' rights; initiatives

[37] Court of Cassation, sec. I, 30 October-26 November 2016, no. 48014, which on the basis of this argument excluded the extremes of the crime of epidemic in the conduct of the defendant who had knowingly transmitted the HIV virus to several partners, considering the methods of single transmission, not constituting an "epidemic phenomenon".

[38] In legal literature, see, in addition to the work of Junqueira de Azevedo cited in footnote 19, see, B. CasaGrande e Silva, *Novas Tendências da Responsabilidade Civil. A expansão dos danos indenizáveis*, Curitiba, 2019, p. 214 ff.; In case law, see, for example, TRT da 2ª Região, Dissídio coletivo de greve, Acórdão 2007001568, Rel. Sonia Maria Prince Franzini, Auditor(a): Marcelo Freire Gonçalves, Processo 20288-2007-000-02-00-2, julgado em 28.06.2007, Data de Publicação: 10.07.2007; TJSP - Apel.: 0027158-41.2010.8.26.0564, Relator: Teixeira Leite; Comarca: São Bernardo do Campo; Órgão julgador: 4th Câmara de Direito Privado; Date of July: 18/07/2013; Registration Date: 19/07/2013. In the V Days of Civil Law of the *Conselho da Justiça Federal* (2011) the enunciation no. 456 was approved, which reads as follows: "The expression "damage" in art. 944 [of the Italian Civil Code] includes not only individual, material or immaterial damages, but also social, widespread, collective and individual homogeneous damages that can be claimed by those who are entitled to bring collective actions." (our translation).

[39] Court of Auditors, Lombardy Section, 31 July 2015 no. 139, which identified liability for damage caused by disservice, as a subcategory of tax damage, as suitable to include the various hypotheses of "alteration" of administrative activity that may also occur as a consequence of episodes of "proper" corruption (Article 319 of the Criminal Code), or "improper" (Article 318 of the Criminal Code). It was highlighted that the choice by the private sector often depends on the time factor which, due to the delay in the response from the PA, can see the achievement of a certain utility irreparably blurred.

[40] Cass. Civ sec. III, 24 April 2015, no. 8394, available in http://www.avvocatocivilista.net. Accessed on: 20 Aug. 2024.

[41] Thus Cass., 21 November 2017, no. 27623; Cass. Civ., sec. III, Ord. 12 June 2018, no. 15209.

[42] According to an orientation of the Civil Court of Cassation (Section III, Order no. 15209, cit.) the case provided for in paragraph 3 disregards the subjective element which remains necessary in any case in the cases provided for in art. 96, paragraphs 1 and 2. See, however, Cass., Sec. un., 13 September 2018, 22405, for which, although the case does not require a party's claim or proof of damage, it is still necessary, on a subjective level, the bad faith or gross negligence of the losing party.

that undermine the good performance of the jurisdiction, with the consequent dispersion of the resources allocated to the jurisdiction and the lengthening of trials[43]. Such conduct cannot fail to be recognised as a consequence of producing detrimental effects on society as a whole, in other words, social damage.

First of all, and in summary, it should be clarified that social damage should not be confused with *punitive damages*[44], which most often concern an offence committed in the context of a commercial activity and aim to punish the gains obtained through one's own illegal activity[45], nor with *societal compensatory damages*[46]. In both cases, for the hypothesis that interests us here, the victims of the specific harmful conduct are various while the victim of the social damage is always the society seen as a whole. In the same way, social damage must be distinguished from collective moral damage, which is very recurrent in Brazil, both in relation to the identification of the victim, which in collective moral damage corresponds to a specific or determinable collectivity, while in social damage the victims are indeterminate and indeterminable, both as regards the destination of compensation and in collective moral damage it is intended for the victim, while in social damage it is allocated to an ad hoc fund, as will be explained later[47].

Nevertheless, it is still an afflictive instrument of civil pecuniary sanctions, with both repressive purposes, given the conduct of the injuring party, and preventive, because it is intended to discourage the nefarious practice of corruption in all its forms, avoiding the aggravation of social degradation arising from the perverse and illicit practice of the market, which ends up corrupting its own democratic state of law. The same applies in relation to the current pandemic crisis where the conviction for social damage would also act as a deterrent to those incorrect and antisocial behaviors we are talking about, even more evident when implemented by legal persons. Just think of bars, gyms, shops or even production plants that, despite the bans, continued their activities, exposing patrons to risks and sending the wrong message to society, namely that there was no need to comply with the measures to contain the spread of the virus[48].

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[43] Cass. Civ., sec. III, Ord. 18 July-11 October 2018, no. 25176.

[44] *Punitive (*or *exemplary) damages* consist of a legal institution typical of *common law systems*, specifically in the United States, which provides for the recognition to the injured party of an additional autonomous compensation in addition to that necessary to compensate for the damage suffered (*compensatory damages*) in the event that the injured party has acted with intent (*malice*) or gross negligence.

[45] Such as the cases relating to, just to mention the most striking, the damage caused by smoking or the marketing of defective products.

[46] On this point, analytically, see F. Quarta, Azioni di classe e mass torts, in **Rass. Dir. Civ**., 2013, p. 1211 ss.

[47] Thus, B. CasaGrande and Silva. **Novas Tendências da Responsabilidade Civil**: a expansão dos danos indenizáveis. Curitiba: Juruá, 2019. cit., p. 215, which recalls that both figures have the same normative basis: art. 1, inc. IV, l. 7347, 24 July 1985 (*Lei de ação civil pública*) and art. 6, inc. IV, *Código de Defesa do Consumidor*. On collective moral damage, see also N. Rosenvald, *A responsabilidade civil pelo ilícito lucrativo. O* disgorgement *e a indenização restitutória*, Salvador, 2019, p. 486 ss.

[48] In the sense of the text and for an analysis of the situation in Brazil, see C. Reis, G. AlberGe Reis and R. NoGaroli, *Danos sociais na desobediência aos decretos de suspensão das atividades empresariais em razão da covid-19*, in *Coronavirus e responsabilidade civil: impactos contratuais e extracontratuais*, cit., p. 457 et seq.

With the opening made by the United Sections of the Supreme Court towards punitive compensations[49], the time has become ripe for the transposition of this new category of damage into our legal system as well. Although the category of social damage has not been thought of as a remedy against corruption and even more so for the hypothesis of pandemics, we believe that its application in these cases is more than justified. The unlawful fact of corruption and the conduct of those who, although aware of being infected or of being able to infect unknown third parties, go around heedless of the prescriptions and prohibitions assumes importance in and of itself as it is detrimental to the rights and freedoms of persons in the sense that we have tried to demonstrate in this work, so that the offensive character of the conduct is concretized at the very moment in which the act is carried out.

In this regard, it has been stated that solidarity is specified with reference to the time of damage[50]. From this point of view, the behavior of entrepreneurs and traders who violate the restrictive measures moved only by the search for profit, without taking due account of the health of employees, customers and those who come into contact with them, also constitutes an illegal act. In the same way, the rulers at several levels who, for evidently political reasons, have adopted a denialist position in relation to the epidemic, regardless of the tragic consequences that have resulted for the population.

It is undeniable that such behaviour harms the constitutionally guaranteed right to public health and life, taking the form of unjust damage[51] which, as such, it is reiterated, cannot remain at the expense of the victim.

Social damage can be configured as an event-damage so that in the hypothesis considered here, the mere non-compliance with the restraint measures determined by the government is compensable in itself, regardless of the consequent contamination of other people. Although there are no rules in the legal system expressly in favour of damages *in re ipsa*, in the face of proof of the infringement of a constitutionally guaranteed right of the person, the jurisprudence is accustomed to accept the presumption until proven otherwise that the plaintiff has suffered non-pecuniary damage resulting from it[52].

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[49] Cass., sec. un., 5 July 2017, no. 16601, which expressed the following principle of law: *"In the current legal system, civil liability is not only assigned the task of restoring the patrimonial sphere of the person who has* suffered the injury, since the deterrence and sanctioning functions of the civil liability are internal to the system. Therefore, the institution of punitive compensation of punitive compensation of the United States is not ontologically incompatible with the Italian legal system. However, the recognition of a foreign judgment containing such a judgment must correspond to the condition that it has been rendered in the foreign legal system on a normative basis that guarantees the typicality of the cases of conviction, the foreseeability of the same and the quantitative limits, since only the effects of the foreign act and their compatibility with public policy must be taken into account at the time of the deliberation.'

[50] S. Rodotà, **The Problem of Civil Liability**, cit. p. 25, according to which "what is grasped [...] in the constitutional norm it is the extreme breadth of the situations in relation to which it is possible to speak of damage in the legal sense".

[51] On the evolution of unjust damage, see Antonio, Flamini. **Il danno alla persona**, Naples: Edizioni Scientifiche Italiane, 2009.

[52] Thus, SIRENA, Pietro. The concept of "damage" in the Italian and French rules on civil liability. **Rassegna di diritto civile**, [*s. l.*], n. 2, p. 544-565, 2019. Available in: https://hdl.handle.net/11565/4025603. Accessed on: 20

The hypotheses of applicability of this category are different and of a clear lack of effective protection. To remain in the field of corruption, a hypothesis of more immediate evidence, it is sufficient to mention the collapse of houses, buildings, schools at every earthquake, due to excess sand and too little cement in their construction by flawed contracts[53]; the umpteenth tragedy/scandal of the collapse of the Morandi bridge, in Genoa[54] which is linked to another case[55] relating to a company in Castellamare di Stabia, specialized in metal carpentry, denounced by a former carabiniere who officially worked there as a security agent, but in reality as a *factotum*. In this capacity he had the opportunity to witness a series of offences related to corrupt acts that culminated in the collapse of a motorway toll booth. A fact that convinced him to resign and collaborate with the judiciary.

A hypothesis, also quite frequent, arises when a person has lost his job because the company where he worked was forced to close by virtue of the unfair competition of another company, prosperous because it was corrupt[56]. In this case, the worker has the right to claim compensation from the latter for the damage suffered. And since the damage that the corrupt company has caused is not limited only to that particular worker but concerns at least all the workers of the company and the community as a whole, it is not far-fetched to argue that this damage can be configured as "social damage".

Again, in another scandal concerning the purchase of defective heart valves in the Molinette Hospital in Turin, then implanted in several patients, who died or were seriously injured as a result. Even in this hypothesis, the social damage is easily demonstrable where the investigations that followed showed "that at the root of those purchases there was no evaluation of the quality of the product for the benefit of the sick, but only the expectation of bribes on the part of the chief physicians"[57].

These examples make it clear that corruption is a good idea, where the profits are concentrated in the hands of a few beneficiaries while the costs fall on a large audience of victims, most of whom are unaware and who deserve effective protection of their injured rights.

Aug. 2024. p. 552. For case law, see Cass. 5 March 2015,
no. 4443; Cass. 23 January 2014 no. 1361; 3 October 2013, no. 22585; 20292 of 20 November 2012, all available online.

[53] Cf. DELL'OLIO, Tonio. Corruption and human rights. **Mosaic of Peace,** Bisceglie, Italy, 11 Dec. 2014. Available on: https://old.mosaicodipace.it/ mosaico/a/41073.html. Accessed on: 20 Aug. 2024.

[54] Happened on August 14, 2018.

[55] Reported and commented by A. Vannucci. **Atlas of corruption**. Turin: Einaudi, 2014. p. 191.

[56] As pointed out by A. Vannucci, *o.C.*, p. 35, note 39, "private corruption is similar to public corruption also in terms of the negative repercussions on the community. The practice of bribes directed to private agents, in fact, makes market processes opaque, harms consumers; it induces the consumption of useless goods and services; the outlay paid by consumers increases, given that a mark-up weighs on the final prices; distorts competition: by introducing as a criterion of success the unscrupulousness in managing hidden relationships, violating contractual agreements and laws, rather than the quality and efficiency of production processes".

[57] On this point, A. Vannucci, *o.c.*, p. 189 s.

5 The legitimacy to request social damage and the destination of the compensation

On the legitimacy of requesting social damage, in order to avoid that, as happens with art. 96. paragraphs 1 and 2 of the Code of Civil Procedure, the instrument of liability for social damage is in practice unusable due to the difficulty of proving damage, especially with regard to the quantum, it does not seem unreasonable to argue that, in the same way as the hypothesis of art. 96, paragraph 3, of the Code of Civil Procedure, the judge in his capacity as a public official may pay the losing party (in this case the injuring party), even ex officio, an additional sum by way of social damage. On the other hand, as is well known, ex officio detection is triggered when the offence goes beyond the individual level, as is the case now under consideration. The social damage must be fixed in accordance with the extent of the damage according to criteria of proportionality and reasonableness. Closely linked to the 'who' can make the request is the 'who' can/must benefit from it: in other words, in relation to the long-standing question of the destination of compensation, it is reasonable to say that the principle of solidarity, combined with distributive justice, the constitutional basis of social damage, would require that the sum paid on this basis be attributed not to the individual injured party who has worked to see the damaging party condemned[58], but to the associates. Such a solution, in addition to responding to requests of a solidarity nature, would avoid the aggravation of discrimination and inequality already violated by the act of corruption where it would prevent the entire sum paid from being attributed to the first injured party who, more diligent than the others, or more economically capable, was the first to bring the legal action[59].

In support of the proposed solution, one could cite, *a contrario*, art. 96, para. 3 c.p.c., a sanctioning rule[60] which provides for an ex officio sanction and excludes the need for damage to the other party, despite the fact that the sum paid as a penalty is intended for the counterparty and not for the Treasury[61]. Doctrine and jurisprudence believe that the choice of

[58] As A. Junqueira DE AZEVEDO, *o.c.*, p. 217 proposes, according to which "the private individual, in his individual action for civil liability, also acts as a defender of society. He exercises a *public munus* [...] he also acts as a 'private public prosecutor' and for this he deserves the reward" (our translation).
[59] Thus, although in relation to punitive damages in class actions, F. Quarta, *o.c.*, spec. p. 1238.
[60] Constitutional Court, 23 June 2016, no. 152, seized of a question relating to art. 96 of the Code of Civil Procedure, established the "non-compensatory (or, in any case, not exclusively) nature of the and, more properly, a sanction, with deflationary purposes" of this provision.
[61] The Constitutional Court has declared the question of constitutional legitimacy of art. 96, paragraph 3 unfounded, arguing on the basis that "The institution thus modulated is also capable of responding, moreover, to a concurrent purpose of indemnity towards the victorious party (also prejudiced by a reckless, or in any case unjustified, summons to court) in the not infrequent cases in which it is difficult for it to prove the *quantum* of the damage suffered, which may be the subject of the compensation referred to in the first two paragraphs of Article 96 of the Code of Civil Procedure. Furthermore, it reflects one of the possible choices of the legislature, not constitutionally bound in its discretion, in identifying the beneficiary party of a measure that penalizes abusive procedural conduct and that acts as a deterrent to the recurrence of such conduct".

the legislator is in the sense of making the recovery of the sum effective even if this justification, as formulated, would not seem to have a value on the basis of the principles. The case envisaged in the law, reckless litigation[62], is different from the one considered in the present work in various aspects, from the method of implementation to the type of victim it reaps. In fact, while in the case of aggravated liability the victim is the counterparty and only indirectly the company, in the cases considered here, the injured party is the company as a whole since, as already stated, the unlawful act of corruption and the reckless conduct of those who, by violating the rules, have endangered the life and safety of third parties take on importance in and of themselves as they are detrimental to the rights of persons.

Nevertheless, one could also hypothesize the configurability of the abuse in the trial[63] as a social damage, consisting in an unjustified misuse of the judicial system, since the activity carried out is not already aimed at protecting rights and responding to requests for justice, but intended only to increase the volume of litigation and, consequently, to hinder the reasonable duration of pending trials and the correct use of the resources necessary for the good functioning of the jurisdiction.

In social damage, therefore, the *ratio* will consist in the primordial preventive-precautionary function that is undeniably inherent in punishment. In these cases, however, the institution, as we have seen, cannot be equated with that of punitive damages of the North American type, also because the extra value of the compensation to be paid as a sanction will not benefit a single person but the associates through the deposit of the sentence on previously determined funds. It is imposed, it is reiterated, by the principle of solidarity, combined with distributive justice, the constitutional foundation of social damage.

Since corruption diverts funds intended to provide essential services, such as health, education, housing, transport, with a consequent reduction in the services offered, we believe that the sum paid in a punitive/deterrent function should be allocated to the reference sectors in relation to the violated right. Thus, by way of example, in the case of the scandal of the heart valves of the Molinette Hospital in Turin, the sum should be allocated to the public health sector[64]. Still in the health sector, the compensation paid as social damage could be intended to obviate, at least in part, the difficulty of access to essential health services, as in the case of financially conditioned social rights, thus avoiding compressing the irreducible core

[62] On which, recently, see Cass., Civil Section. II, order no. 595, 14 January 2019, available in http://www.italgiure.giustizia.it/sncass/. Accessed on: 20 Aug. 2024.

[63] For an analysis of the figure of abuse in the process, see M.P. Gasperini, Diritto di azione ed etica processuale, *In:* **I doveri nell'era dei diritti**, cit..

[64] To that effect, the 4. *Câmara de Direito Privado* of the Court of Justice of São Paulo, in a case concerning the repeated misconduct of a private health care company, which in Brazil almost always replaces the National Health Service, allocated the sum paid as social damage to the Hospital das Clínicas of the Faculty of Medicine of the University of São Paulo, expressly prohibiting the company from passing on this cost to customers in any form: TJSP, Ap. 00271584412010826056 4 SP 0027158-41.2010.8.26.0564. Rel. Teixeira Leite, 18 July 2013.

of the right to health protected by the Constitution as an inviolable profile of human dignity[65].

Social damage obviously goes beyond the hypotheses of damage from corrupt acts, but in order to avoid its immeasurable extension and consequently the commercialization of existential relations, a painstaking work of doctrine and jurisprudence is necessary that can stem its scope of operation[66] with the identification of valid criteria anchored to the values of the legal system such as the person, human dignity and freedom of economic initiative, recognized as worthy of protection only when it achieves a social utility.

In consideration of the warning of the United Sections of the Supreme Court[67] in the sense that "any imposition of personal service requires a "legislative intermediation", by virtue of the principle referred to in art. 23 of the Constitution. […] which places a legal reservation as to new patrimonial benefits and precludes an *uncontrolled* judicial subjectivism" (italics ns.), it would be appropriate for the legislator to manifest itself to outline the institution by establishing methods, size and limits. However, in order to overcome the risk that any inertia by the legislator will result in (further) prejudice to the community, the intervention of the judge called upon to restore effectiveness and full protection to the injured right becomes fundamental.

6 Concluding remarks

Social damage can prove to be an important means of making effective the protection of the fundamental rights of members. In fact, it responds to the values of the legal

[65] As is well known, it was constitutional jurisprudence that initiated the season of rights "conditional" to the evaluation put in place by the legislator with regard to the balancing of constitutional interests and objective requirements for the rationalization of resources: cf. Constitutional Court of 16 October 1990, no. 455, in *Rass. Avv. Stato*, 1990, I, p. 418, where it is stated that the right to health takes place "taking into account the objective limits that the legislator itself encounters in its implementation work in relation to the organizational and financial resources at its disposal at the moment". However, as stated by many voices, if traditional rights and freedoms have been integrated by the Constituents in the name of the principles of substantial equality and solidarity, it becomes unsustainable to recognize fundamental rights to the weakest groups only "if and when the available resources, or the economic situation allows it:
F. Gabriele and A. M. Nico, *Observations "*at first reading" on the judgment of the Constitutional Court no. 10 of 2015: from the illegitimacy of "taking from the rich to give to the poor" to the legitimacy of "those who have had, have had, have had... let's forget the past*",* in **AIC Magazine**, n. 2, 2015.

[66] It is necessary to avoid trivializing social damage so that it does not lose its effectiveness, as happened with moral damage in Brazil, anchored according to the majority orientation to the pain, sadness, suffering and humiliation caused to someone, when in the midst of the euphoria of its introduction both in the Constitution and, subsequently, in the Civil Code of 2002, even the slightest discomfort was arbitrated exorbitant amounts in its name. on this point, M.C. Bodin DE Moraes. Conceito, função e quantificação do dano moral. **Rev. IBERC**, 2019, v. 1, n. 1, p. 1 ff., which advocates the preferable minority orientation according to which moral damage is the violation of human dignity understood as the confluence of the principles of freedom, equality, psycho-physical integrity and solidarity: Id, **Il Dano à Pessoa Humana. Uma leitura Civil-Constitucionale dos Danos Morais**, Renovar, 2003. The same situation was created in Italy in the 90s of the last century, with the recognition of existential damage, considered unjust because it was determined through the violation of an alleged right to happiness (on this point see P. Cendon and P. Ziviz, Existential damage: a new category of civil liability, Milan, 2000). P. Sirena, The concept of "damage", cit., p. 551 s., recalls that following the numerous "requests of a trivial nature", the Supreme Court was induced to "'normalize' the compensation for existential damage [...] admitting compensation only in cases of violation of a constitutionally relevant right of the person".

[67] Cass., sec. un., 5 July 2017, no. 16601.

system in that it overcomes the clear separation between civil law and criminal law which, in the hypothesis, dialogue with each other in full respect of the unitary nature of the legal system which sees the unitary value of the person at its apex[68].

In particular, despite the points still to be clarified on some aspects of this new figure of compensable damage, its provision also in the Italian legal system is presented as a useful tool to help curb corruption practices by companies and the PA and to reduce the sense of impunity where there are also private companies condemned to give considerable sums of money for social damage caused by corrupt acts.

As regards the violation of the rules adopted to avoid the spread of the virus, it is society as such that suffers the unjust damage that can be identified, for example, in the loss of trust in the system, in the negative change in the values perceived by people. Also in this case, the new type of damage would protect the constitutional interest in the protection of social well-being where "person and solidarity are" to be considered as "an inseparable combination because caring for the other is part of the concept of person"[69].

As mentioned at the beginning, the current pandemic strikes delicate balances between rights, freedoms and interests involved, which in times of crisis have been balanced on the basis of the principle of solidarity[70]. The speed of expansion of the virus has forced governments to adopt extraordinary measures to avoid the collapse of the health system but in doing so they have had to determine the closure of production and commercial activities not considered essential, with serious repercussions on the country's economy. We did not want to address this specific issue here, so as not to stray too far from the job proposal, but it should still be considered that although the government's responses to the emergency have rightly privileged being over having, the extraordinary measures taken in that delicate moment must remain so in order to prevent medicine from proving to be more harmful than the disease in the end. In fact, from many quarters there is warning of the need to prevent the pregnant need to fight the pandemic from leading to preempting economic needs, already quite affected by the current restrictive measures and suffering from a prolonged closure of production activities, if not at the expense of the end of welfare and consequently also of the health of citizens themselves.

Very critical times are looming, which make Rodotà's warning to avoid rights being restricted or even cancelled in difficult times or becoming "a luxury incompatible with the

[68] P. PERLINGIERI. **Civil law in constitutional legality**. Naples: Edizioni Scientifiche Italiane, 2006. p. 141
[69] Thus A. FLAMINI, **Civil Liability and the Constitution**, cit., p. 3.
[70] V. R. BARTOLI, *The criminal law of the emergency "to combat the coronavirus": problems and perspectives*, in *Sistema penale*, 24 April 2020, in *https:// www.sistemapenale.it*, which warns of the risks of extremism by stating that "it is necessary to avoid, that is, that those who speak out in favor of the measures adopted so far are identified as the fight against the coronavirus, but against democracy and the guarantees and those who are against the measures should be considered for democracy and guarantees, but also an ally of the coronavirus".

economic crisis, with the dwindling of financial resources"[71].

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[71] On the centrality of fundamental rights in the close link between democracy and rights, see the text by S. Rodotà, Why rights are not a luxury in times of crisis, published in *La Repubblica* on 20.10.14, available in: www.repubblica.it. Accessed on: 20 Aug. 2024, for which "the concrete problem is not the excessiveness of rights, but their daily denial determined by inequalities, poverty, discrimination, the rejection of the other which, by denying the very dignity of the person, contradict that 'politics of humanity' to which the story of rights is linked".

Scientifica, 2019. p. 53-78.

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