

Chapter 10

The Case of Coronavirus

Contact-Tracing Apps: Arguments for Trust



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Abstract This chapter investigates, from a rhetorical perspective, the arguments used in public communication to overcome the prisoner’s dilemma when cooperation among citizens is needed, using as a case study a communication campaign designed by the Italian government to use the “Immuni App”, a Covid-19 contact-tracing application.

Keywords Legal argumentation · Rhetoric · Trust · Public communication · Topical demand

10.1 Introduction

The pandemic spread of the virus has brought about a change in the lives of citizens, requiring a cooperative effort to encourage everyone to do their part. To contribute to the collective plan to combat the spread of the virus, citizens’ coordination and cooperation skills are tested: from social distancing to fiduciary isolation, from compliance with the rules of access to public places up to the use of contact-tracing apps.

We are faced with a typical social dilemma: a situation in which individual interest seems, at first glance, to conflict with collective interest. This situation can be explained as a great ‘prisoner’s dilemma’ in which compliance with the rules by one subject can lead others to violate them. If everyone stays at home to avoid contagion, precisely because ‘they’ stay at home, bearing sometimes even high costs, I will be able to feel safe in going out and enjoying the benefits of the outdoors without running the risk of being infected. By benefiting from the loyal behaviour of most, free-riders get the benefits without incurring the costs. But if everyone were to behave non-cooperatively in the same way, of course, these benefits would evaporate in an instant. If everyone, seeing the crowded streets, underestimated the danger and went out, the danger would materialize precisely because of this.

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The protection of public health requires communication choices aimed at supporting citizens' cooperation. How to induce people to go against their personal interest to promote, at the same time, their personal interest as well as the social one?

This chapter aims to investigate the arguments used in public communication to solve the prisoner's dilemma and to induce individuals to continue to cooperate. I will use as a case study the one related to the use of the 'Immuni App': first I will select the topics presented in Italy in official government communication to convince citizens to use the contact-tracing application; secondly, I will analyse from a rhetorical point of view the strategies and reasoning errors that make us decide whether or not to download the app-system on our smartphone. The argumentative analysis will, finally, involve some reflections on the conception of social life, almost entirely based—at least as regards our juridically oriented behaviours—on a paradigm that we can call distrustful. The idea that seems to guide us is that, when we deal with the law, we put aside the trust we have in others, and indeed, precisely because we do not trust others, we turn to (compulsory) law and its solutions.

10.2 The Case of 'Immuni' Contact-Tracing App

The States affected by the pandemic have had to take measures to contain the spread of the virus.

Since the first phase after the emergency in April 2020, the possibility of using systems for tracing the spread of the virus, on the basis of the collection of personal data through specific technologies, such as contact tracing apps, was taken into account by multiple governments.

Italy, to whose experience we will refer in this article, opted for the use of 'Immuni', an application that uses Bluetooth technology.

This app is able to help to identify subjects who could be infected as soon as the potentially contagious event occurs, so as to avoid further transmission of the virus by those who are unaware of having come into contact with it. If an individual with the app on the phone becomes infected with the COVID-19 virus, the app allows others, who were in close contact with that individual in the recent past, to be alerted of a potential risk of infection and to take appropriate action.

The 'Immuni' application was developed from the collaboration between the Presidency of the Council of Ministers, the Minister of Health, the Minister for Technological Innovation and Digitization, the Regions, the extraordinary Commissioner for the Covid-19 emergency and the public companies Sogei and PagoPa. The app was publicly presented as the help of technology to break the chain of infections and better monitor the epidemic. The system was also developed thanks to an in-depth dialogue with the Guarantor for the protection of personal data, thus paying utmost attention to issues of privacy.

The use of this containment model, based on the ability of a computer system to reconstruct and, in a certain sense, predict the path of the spread of the virus, immediately aroused many perplexities. The effective use of this measure presupposes its

large-scale application, which requires a high level of trust, both in institutions and in citizens.

The Italian government, in April 2020, launched a communication campaign on raising awareness of the use of the app: encouraging information for downloading the application was made available on the official website of the app.¹

On the one hand, there is the fear of citizens for the spread of the virus, for the prospect of registering hundreds of deaths a day again, or for a new economic crisis. Faced with this scenario, the app could offer a concrete solution to monitor infections. But, on the other hand, citizens fear that someone may come into possession of sensitive data collected by the app, a risk that is not eliminated by the government decree which states that each piece of information collected by the app must be divided into various parts and each part must be stored on different servers.

Therefore, the dilemma is between using the app and not using it.

10.3 Social Dilemmas

The choice that Italian citizens (but not only Italians) are called to make regarding the Immuni app could be seen as analogous to the situation in which individuals find themselves in the famous Prisoner's dilemma (PD).

Such a situation is a typical social dilemma which is, by definition, a situation in which every group member gets a higher outcome if he/she pursues his/her individual interest, but everyone in the group is better off if all group members further the common interest (Bicchieri, 2006: 140).² In social dilemmas, there is a huge difference between the costs and benefits accruing to an individual.

Game theory has been applied, since the 1950s, to the analysis of various issues concerning the ethics and philosophy of policy, in order to determine the choices that a rational individual should make, in the most diverse situations, given its aims and opinions (John von Neumann & Oskar Morgenstern, 1944). In this perspective, 'games' are all those situations in which two individuals, or, more generally, two 'actors', where this term may apply not only to people, but also to organizations, businesses, governments and so on, are involved in some strategic interaction. The general and abstract nature of the notion of game has made it possible to apply game theory in the most diverse fields, social sciences and economics, strategic studies, ethics and philosophy of politics (Festa, 2008). Game theory offers us dynamic models for the simulation of actions by rational individuals and leads us to illuminating conclusions, and often unexpected ones (Axelrod, 1984, 1997).

The use of the Immuni App is an example of what experimental subjects may face in the Prisoner's Dilemma, which is a clear example of a public good dilemma. Public

¹ <https://www.immuni.italia.it/>.

² See also Dalyot et al. (2022, this volume) for a quantitative study of how people respond to social dilemmas in the context of the COVID-19 pandemic.

good dilemmas have the property that the individually rational choice is always a defection: but if all refuse to cooperate, all are worse off.

The Prisoner's Dilemma owes its name to the story with which it is usually illustrated: two thieves in a stolen car get arrested. The police can sentence both of them to one year for theft, but since it is suspected that the two have recently committed a major robbery, they would prefer to indict them for this crime, which would cost the perpetrators ten years in prison. To get a confession, the commissioner proposes to each of the prisoners the following alternative: confess the robbery and betray one's accomplice or remain loyal to him and keep quiet. If only one prisoner confesses, he will be set free and the accomplice will serve the entire sentence, that is ten years. If both prisoners confess, they will both get a 5-year sentence discount for cooperating with the police, serving only the remaining 5. If both remain silent, the police will not have enough evidence to indict them for the robbery, so that both will 'serve only 1 year for the theft of the car.

In its general form, the prisoner's dilemma can be defined as a game in which each player can cooperate or defect. If the prisoners cooperated, that is, if none of the two confessed, they would only serve 1 year in prison instead of 5. Cooperation ensures better results for both players, but each prisoner then finds himself grappling with a dilemma: on the one hand, he knows that the only rational strategy is to confess, but on the other hand, he understands that it would be convenient for both of them to remain silent (Pestelacci & Tomassini, 2008).

We can apply the PD model to the choice of application of the Immuni app: everyone has to decide whether to use the app or not, and may find themselves thinking that:

- (a) if at least 60% of Italians used the app, then it would be better for me not to use it, because in this way I would have two advantages: (1) most citizens would be traced and therefore the curve would remain under control even if new outbreaks re-emerge, and (2) I would not take the risk of giving my data to unknown servers;
- (b) if at least 60% of Italians did not use the app, then it would be better for me not to use it because (1) even if I were one of the few to use it, this would still not be enough to control the infection, and (2) I would not run the risk of giving my data to unknown servers.

Conclusion: whether others use the app or not, it is better for me not to use it.

Interpreting the problem as a Prisoner's Dilemma, it might seem that no one has any incentive to use the app. Not using the app is, in fact, the most advantageous answer regardless of what others do.

The result of a game of public goods will depend on the choices of the participants, each of whom must decide whether to cooperate in the production of the good (i.e., to contribute to its production costs) or to defect (i.e., not contribute).

The experimental game-model shows that there is a 'game result', which both players prefer to the proper solution of the game. This circumstance is a salient aspect of the prisoner's dilemma, and it is also the hallmark of social dilemmas. If

everyone behaves like a free rider', in the hope that others will contribute to the production costs of the public good, then no public good will be produced.

Furthermore, if everyone interprets the problem of the use of the contact tracing app in this same way, not using the app is going to be the stable choice.

According to the PD model, the choice to use the Immuni-App is thus excluded, while it would be the choice that increases the chances of getting out of the crisis.

Game theory precisely shows that, under certain conditions, the production of public goods can be successful by means of voluntary individual contribution (Verbeek, B., & Morris, C., 2004).

While in the prisoner's dilemma the paths of cooperation are obstructed by the rationality of the players, and by the trust in the rationality of their members, there is another game, the so-called Stag hunt game (SH), which demonstrates the different mechanisms for achieving a cooperative balance.

In the SH model, the players—two hunters—must choose whether to hunt the hare or the stag. While a hunter can hunt the hare alone, the stag hunt can only be implemented in collaboration with a partner; on the other hand, the reward that everyone can expect from the solitary decision to hunt the hare is rather small, while in agreeing to join the stag hunt, both hunters can expect a greater reward.

The decision problem involves a choice between a minor goal, but achievable individually, and a major goal, but possible only if individuals are willing to collaborate. In this second case, the possibility of achieving the greatest goal depends not only on the individual, but on the decisions of others: the best choice depends on what others choose to do. Since the Stag Hunt is the move that, if implemented by both, leads to the result preferred by both, it can be understood as the cooperative move; on the contrary, hare hunting represents non-cooperation, that is, defection.

The structure of the game-model applied to our case at hand is the following:

- (a) If others use the app, we should use it.
- (b) If others don't use it, we don't want to use it.

Conclusion: we should do what others do.

The advantage of this model is to hypothesize two situations of equilibrium: one in which everyone uses the app and one in which no one uses it. Applying this model to the app-case, the use of the app is not rationally excluded, depending on trust.

In the Stag Hunt, temptation defection is determined by the players' distrust in the rationality of their partners. This means that if we do not trust our hunting partner's cooperation and believe that he will eventually choose to hunt the hare, then it will be safer for us to do the same. Similarly, if we do not trust the cooperation of our fellow citizens and believe that many will not use the app, it will be safer for us not to use it.

This game model admits the possibility that players, voluntarily, realize the public good as long as there is trust. Trust is, therefore, the essential success factor of the interaction. The expectation of reciprocity increases the benefits for all participants: hence, mutual trust is the variable that influences the success of the strategy.

Game theory has the merit of analysing social relationships and showing different possible behavioural patterns, revealing the need, from a rhetorical point of view, to build trust.

According to Italian sociologist and economist Antonio Mutti, it is necessary to invest in ‘trusted speakers’. Trusted Speakers are institutions and individuals who already enjoy trust and who certify the trustworthiness of other individuals and institutions that need trust (Mutti, 1998). Trust Speakers have the task of producing the multiplicative effects of trust. The diffusion of trust at the institutional level is expressed by managers and experts, but also by political leaders who are bearers of highly expressive values. The more the confidence enjoyed by the speakers is high and extended, the more effective and extended the induced propagator effect will be.

It is, therefore, clear that the role of public speeches induces great responsibility. If the use of the app is associated with multiple risks to our privacy, rather than its advantages, the population will clearly tend to be less inclined to download and use it. There are many different interests and individual evaluations: the task of the institutional public communication would be to favour their coordination.

Using game theory as a method of analysis, according to the Prisoner’s Dilemma, when confronted with the decision whether or not to use the app, the strategically rational conclusion for each citizen would be that it is better not to use it. In contrast to the PD model, the SH model of strategic interaction has the advantage that it allows for two strategically rational solutions: when both players cooperate and when both players defect. Hence, a player’s decision to cooperate or not under the SH model depends on the expectation that the other player will cooperate. This means that citizens are more likely to be persuaded to use the app if they trust that their fellow citizens (or at least 60% of them) will use it as well.

Hence, for the purposes of the communication campaign, aimed at inducing citizens to act cooperatively by using the app, to maximise the chances of success, the Prisoner Dilemma should not be used to frame the central message, and preference should be given to the Stag Hunt model. Public speeches must build trust: only through collaboration and mutual trust will it be possible to overcome the crisis.

10.4 Trust in the App! A Selection of Pro-arguments

Considering institutional public communication, it is interesting to note that the name given to the app consists of the adjective in the plural: in Italian ‘Immuni’ (not ‘Immune’). This is an important expressive choice: from a rhetorical point of view, the name in the plural suggests the social interest in immunization. The name in the plural also emphasizes the relational dimension of the act of downloading: the choice to download the app does not only concern the individual, but affects everyone. Everyone’s behaviour can have positive effects on everybody else.

Despite several institutional messages, the public campaign in Italy turned out to be unsuccessful.

I will present a selection from the main topics that have been used in Italian political public communication to encourage citizens to use the application and I will try to explain its failure.

Some topics are those published on the official website,³ promoted by the Prime Minister Giuseppe Conte: in the section dedicated to ‘frequently asked questions’, recurring questions are fleshed out; their answers suggest reasons for deciding to download the application, for example:

- (6) Why is it important to download Immuni?

With Immuni we have an extra weapon to limit the spread of the coronavirus. The more people download it, the more effective this weapon becomes.

- (7) Can I decide not to use the app?

Yes, the download and use of Immuni take place on a voluntary basis. Immuni is an important tool in the fight against the Covid-19 epidemic and the more it spreads, the more effective it is. We therefore recommend that you install it and encourage colleagues, family and friends to do the same.

In October 2020, according to data released by the media, the application was only used by about 18% of the Italian population, between 14 and 75 years old, in possession of a smartphone. This was far from the 60% target, a percentage necessary for the system to become an effective tool in containing the pandemic. The government decided to give a greater push to the spread of the app, through a campaign, from 5 to 11 October 2020, in which all the newspapers, public and private, participated. The Prime Minister, Giuseppe Conte, during the presentation of this informative initiative, declared:

- (8) “It is a useful tool because it facilitates contact tracing. While it is optional, it is definitely a moral imperative to participate in this program. The data becomes anonymous. The geolocation remains disabled, but downloading the app gives our prevention system the possibility to be more efficient”.

Despite a pervasive awareness campaign, promoted by the government and supported by the main newspapers, the app was not sufficiently downloaded and was, in the end, a failure.

The reasons for the failure are explicit in some argumentative errors, which are already evident in the selected public discourses.

Let us examine more closely the selected paradigmatic discourses, on which the Italian public opinion was oriented in the choice of using or not the contact tracing app.

10.5 An Argumentative Analysis

At a first level of an analytical overview, it is possible to identify standpoints and arguments as follows:

³ <https://www.immuni.italia.it/faq.html>.

Example 1

ISSUE: Do I download the app?

STANDPOINT: Yes, I should download the app.

ARGUMENT: It is an extra weapon to limit the spread of the coronavirus.

Example 2

ISSUE: Do I download the app?

STANDPOINT: Yes, I will download the app.

ARGUMENT: It is an important tool in the fight against the Covid-19 epidemic.

Example 3

ISSUE: Do I download the app?

STANDPOINT: Yes, I will download the app.

ARGUMENT: It is a moral imperative to participate in this program.

I will now consider, more specifically, the topical component in the selected arguments. My analysis will draw on the *Argumentum Model of Topics*, following Eddo Rigotti and Sara Greco's inferential theory, by focusing on the maxims arising from hooking points and on the *endoxa* they evoke (Rigotti & Greco, 2019).

Here, I will limit myself to the presentation of its fundamental traits, useful to investigate the relationship between the argument choice and the communicative context. The theoretical commitment of the AMT model is that topics are the component of argumentation theory by which ideally all (theoretically possible) relevant arguments, in favour and against any standpoint, are generated by specifying their inferential structure through a system of *loci* (Rigotti, 2006, 2008).

Two fundamental notions are involved by this definition: standpoint and *locus*. A standpoint is a statement for whose acceptance by the addressee the arguer intends to argue. A locus is a "sub-generator" of argumentative procedures consisting of one or more maxims; the inferential process cannot be activated if the maxim is not combined with an *endoxon*, that is already within the shared opinion.

If we compare the arguments, we note that the *locus* at the origins is the same (specifically, *locus from final cause*), but the inferential connections are different, depending on the material-contextual component (Greco, 2011).

In arguments 1 and 2, the common *datum* is that "the spread of the coronavirus is a fight, a war". In this sense, the application to be used on the smartphone is not just a tool, but a weapon (*first conclusion*). Evoking, through images, the analogy with the weapons that are used to fight a war, has an effect of sure impact, in accordance with recurrent linguistic uses in the communication of the pandemic, such as "being in the trenches against the Coronavirus", "combat the virus".⁴

But the war metaphor is also a way of representing and organizing our world: there are "many expressions that are based on a conceptualization, and they are used not

⁴ For example, in the communication of local health companies (https://drive.google.com/file/d/1tTZH7QNfJdAae0oryM0Bx77a_dYjtp_/view), or in the expressive choice of the press to describe the action of the doctors (https://www.ilmattino.it/moltodonna/virologhe_scienziate_spallanzani_covid_vaccino_test-5607421.html).

just for talking about something, but for reasoning about it as well” (Lakoff, 1993: 206). Understanding a conceptual metaphor means establishing correspondences between the two domains. In this mapping, citizens can be represented as soldiers fighting together for the same cause. The battlefield is that of their own cities, the weapon is available to everyone and it is their own telephone.

The use of the war metaphor is a determining topical component of the argument, yet its use is not reasonable in the communication strategy that aims at building trust. The state of war evokes the survival instinct and might induce everyone to prefer individual as opposed to social choices. As a matter of fact, the use of the war metaphor involves the emergence of another issue: do I want to be a soldier or not?

Therefore, the language of war does not engender trust in the other: the instinct for one’s own survival can lead everybody to non-cooperative choices.

In example 3, the Prime Minister is supposed to be, due to its institutional and top role in the management of the pandemic, the trust speaker, who suggests the use of the app as a moral imperative. That is to say, it is a profoundly right act. Formally, it is a fair act (*first conclusion*), so it is plausible to use the app (*final conclusion*).

The use of the application is a mere recommendation, not sanctioned by any penalty in case of non-use.

The arising question is: why does it remain ineffective?

I argue that it depends on the *endoxon*, which is intertwined with the argument and regards the concept of social and legal relationships. The success of the argument that using the app is a fair recommendation depends on sharing a concept of trust in social and legal relationships; since the mandatory nature of law is associated exclusively with coercion, eliminating or underestimating the trust-factor, citizens do not recognize that their duty to do something does not depend on the sanction. A consequence of this view is that, to ensure the effectiveness of a rule, not adequately obeyed by citizens and above all not sanctioned by those who have the duty to do so, it is necessary to enforce the rule with the help of the police force.

If the coercive law model prevails, the rule is binding only insofar as it is endowed with a sanction, with the consequence that where the sanction does not exist, or where the sanction does not come because it fails to be effective, there is no obligation to comply with it (Greco, 2021). In this framework, trust cannot exist, except on the condition that it is produced by the exercise of a power that forces individuals to perform their duty.

This explanation can be represented as follows:

Claim: The moral imperative argument of government failed.

Standpoints:

- (i) moral imperatives (such as using the app) are norms which are not backed by any penalty;
- (ii) the addressees of the argument (citizens) will not obey a norm that is not backed by any penalty.

Standpoint: The addressees of the argument (citizens) will not obey a norm that is not backed by any penalty.

Argument (premises).

- (a) in law there is a ‘horizontal-relational’ dimension, which always accompanies the vertical-sanctioning one;
- (a1) The relational view of law is that according to which the law is addressed above all to citizens and their need to relate to each other; that is, the law asks to trust each other, establishing mutual rights and duties.
- (a2) The coercive view of law is that according to which, not only is a rule legal as it is sanctioned, but also—and above all—it is mandatory only because there is the threat of a sanction to support it.
- (b) on the basis of a coercive conception, citizens obey legal norms only because they are afraid of facing negative or painful consequences.
- (c) if an agent believes that a legal rule is binding only insofar as it is endowed with a sanction, plausibly, that agent will not consider rational to follow a rule that is not backed by any sanctions.

The analysis of the failure of the Immuni App allows us to conclude that the coercive and distrustful paradigm still prevails over the relational and trustful paradigm. The idea that seems to guide Italian citizens is that, when they are dealing with the law, they put aside the trust they have in others, and indeed, it is precisely because they do not trust others that they turn to law and its solutions.

A paradigm like this has solid and well-rooted foundations in modern legal thought (Greco, 2012): the coercive vision of law is a conception that is widespread not only among jurists, but also among ordinary citizens, which has the defect of removing an important part from the law, which concerns the ways of its functioning, the regulation of social relations and the responsibility that law attributes to each citizen. The law is addressed above all to citizens and requires them to trust each other and have consequent behaviours.

In some cases, even the effectiveness of a specific right and a specific legal relationship is based only on trust and on the behaviours aimed at achieving it: for example, the right to health, in particular in times of a pandemic, requires the cooperation of the majority of citizens as there is no full protection of one without the protection of the other. In many cases, certainly, the law requires less involvement, for example by imposing rather than doing, not doing: but also in these cases, trust comes into play. Indeed, when we expect others to behave according to what the rules prescribe, it is an act of trust that we put in place towards them: we all trust that other citizens respect the rules. There are norms (as principles or nudges) that, more than others, rely on those who apply them. Law never applies automatically and always relies on the responsibility of those to whom it is addressed; hence, hiding the trust means hiding the responsibilities that law entrusts to everybody.

10.6 Trust in Legal Relationships

I argue that the *endoxon* of the moral imperative argument (example 3) is different from that expected. For the argument to be effective, a trustful vision should be shared.

Instead, what appears to be common among citizens is an alternative compulsory conception of law.

The theory that there is a link between law and force has been much debated in the history of the philosophy of law. The fact that sanction and coercion must go hand in hand with law is not an invention of modernity. In the words of Aristotle (Aristotle, 1999, *Nicomachean Ethics*, 10.9):

For it is the nature of the many to be amenable to fear but not to a sense of honor, and to abstain from evil not because of its baseness but because of the penalties it entails; since, living as they do by passion, they pursue the pleasures akin to their nature, and the things that will procure those pleasures, and avoid the opposite pains, but have not even a notion of what is noble and truly pleasant, having never tasted true pleasure. [5] What theory then can reform the natures of men like these? To dislodge by argument habits long firmly rooted in their characters is difficult if not impossible. We may doubtless think ourselves fortunate if we attain some measure of virtue when all the things believed to make men virtuous are ours.

But for Aristotle, each community includes a particular type of friendship and justice. The concept of *philia* is extended to its maximum: when a community is created (*oinonia*), there are always relations of justice and friendship (Aristotle, *Nicomachean Ethics*, 8, 1159b 26–31).

Friendship is a virtue, or involves virtue; and also it is one of the most indispensable requirements of life. For no one would choose to live without friends, but possessing all other good things. In fact rich men, rulers and potentates are thought especially to require friends, since what would be the good of their prosperity without an outlet for beneficence, which is displayed in its fullest and most praiseworthy form towards friends? And how could such prosperity be safeguarded and preserved without friends? For the greater it is, the greater is its insecurity.

The Modern Age introduced coactivity as an essential element of law and removed mutual trust from the way of thinking about law. The concept of law is, for modernity, distrustful. Modernity overturns the paradigm of justice, which is no longer explained under the principle of friendship, but as legality under the banner of fear. Hobbes' theory makes explicit the connection between law and coercion: men respect pacts only if forced. Normativity is necessarily based on a no-trust model for which only when one is forced, one is subject to law; in the absence of coercive power, there is no obligation. In chapter XXV of his best-known work, *Leviathan* (Hobbes, 1651), Hobbes distinguishes between commands and advice:

COMMAND is, where a man saith, "Doe this," or "Doe this not," without expecting other reason than the Will of him that sayes it. From this it followeth manifestly, that he that Commandeth, pretendeth thereby his own Benefit: For the reason of his Command is his own Will onely, and the proper object of every mans Will, is some Good to himselfe.

COUNSELL, is where a man saith, "Doe" or "Doe not this," and deduceth his own reasons from the benefit that arriveth by it to him to whom he saith it. And from this it is evident, that he that giveth Counsell, pretendeth onely (whatsoever he intendeth) the good of him, to whom he giveth it.

Therefore between Counsell and Command, one great difference is, that Command is directed to a mans own benefit; and Counsell to the benefit of another man. And from this ariseth another difference, that a man may be obliged to do what he is Commanded; as when he

hath covenanted to obey: But he cannot be obliged to do as he is Counsell'd, because the hurt of not following it, is his own; or if he should covenant to follow it, then is the Counsell turned into the nature of a Command. A third difference between them is, that no man can pretend a right to be of another mans Counsell; because he is not to pretend benefit by it to himselfe; but to demand right to Counsell another, argues a will to know his designes, or to gain some other Good to himselfe; which (as I said before) is of every mans will the proper object.

This also is incident to the nature of Counsell; that whatsoever it be, he that asketh it, cannot in equity accuse, or punish it: For to ask Counsell of another, is to permit him to give such Counsell as he shall think best; And consequently, he that giveth counsell to his Sovereign, (whether a Monarch, or an Assembly) when he asketh it, cannot in equity be punished for it, whether the same be conformable to the opinion of the most, or not, so it be to the Proposition in debate. For if the sense of the Assembly can be taken notice of, before the Debate be ended, they should neither ask, nor take any further Counsell; For the Sense of the Assembly, is the Resolution of the Debate, and End of all Deliberation. And generally he that demandeth Counsell, is Author of it; and therefore cannot punish it; and what the Sovereign cannot, no man else can. But if one Subject giveth Counsell to another, to do any thing contrary to the Lawes, whether that Counsell proceed from evill intention, or from ignorance onely, it is punishable by the Common-wealth; because ignorance of the Law, is no good excuse, where every man is bound to take notice of the Lawes to which he is subject".

From the Hobbesian analysis, the command can be traced back to the will of those who give it and characterizes the world of the law, which is imperative. The law is resolved in the power of an authority that commands its subjects (Gauthier, 1969).

The history of attempts to identify the differentiating features of legal norms from all other norms is long and complex. While proceeding in a synthetic way, it is impossible not to refer to Christian Thomasius, who in his *Fundamenta Juris Naturae et Gentium*, in 1705, argued that the qualification of law should be reserved only for the enforced norms, by distinguishing *honestum* (morality, understood as an internal forum), *decorum* (ie morality, in its social aspect) and *justum* (ie law) (Hunter, 2019).

A fundamental turning point is drawn by Immanuel Kant, who uses the concepts of autonomy and heteronomy (Kant, 1998). Autonomous are those imperatives, in which the one who sets the norm and the one who executes it is the same person. Conversely, heteronomous are those imperatives in which the person from whom the norm comes is different from the recipient who carries it out.

Autonomy of the will is the property of the will by which it is a law to itself (independently of any property of the objects of volition). The principle of autonomy is, therefore: to choose only in such a way that the maxims of your choice* are also included* as universal law in the same volition. That this practical rule is an imperative, that is, that the will of every rational being is necessarily bound to it as a condition, cannot be proved by mere analysis of the concepts to be found in it, because it is a synthetic proposition; one would have to go beyond cognition of objects to a critique of the subject, that is, of pure practical reason, since this synthetic proposition, which commands apodictically, must be capable of being cognized completely a priori. This business, however, does not belong in the present section. But that the above principle of autonomy is the sole principle of morals can well be shown by mere analysis of the concepts of morality. For, by this analysis we find that its principle must be a categorical imperative, while this commands neither more nor less than just this autonomy.

This is not the place to explain Kant's practical philosophy in detail: but it is interesting to note, for the purposes of our analysis that in morality, the will is pure, not influenced by fears or impulses. In law, however, the will is no longer pure because it is linked to the faculty of constraining those who prejudice the freedom of others. Moral adherence is an end in itself, it does not serve to avoid punishment; if such adherence were obtained by force, it would cease to be spontaneous and the moral character of the act would be lost.

The law-coercion links is endorsed by legal positivism. Austin (1995) argued that law is a set of general commands from an authority, the sovereign, which are backed by threats and receive habitual obedience. Within the legal positivism tradition, coercion turns into a mechanism without which the modern state apparatus cannot function (Manzin, 2014; Puppo, 2018; Tomasi, 2020).

The idea that every legal norm is accompanied by a sanction, however, triggers an infinite regress. For example, think of a parking ban: there is a rule that requires the municipal police to sanction those who park their cars in a prohibited area. But if the rule is not applied, a rule that sanctions the police who have not enforced the rule must be imagined, in an infinite chain, up to an ultimate rule, which will not be sanctioned. The last transgression remains unsanctioned.

Hans Kelsen, to overcome the limitations of the theory of coactivity, reconfigures legal norms as hypothetical judgments. The structure of legal norms is of the type: *if ... then*. In structure, the consequence is the sanction: thus, the sanction becomes a constitutive part of the legal rule. With Kelsen, force is something that lies within the law: in this way, Kelsen imposes coercive law as a model of legal norm because all the norms are reduced to a single type.

From being a distinctive element of only legal imperatives (as it was for Kant), coercion has become with legal positivism an essential element of law.

Finally, within this framework, it is easier to understand why the argument offered in example 3, is not effective. The foundation of normativity in common legal thought is coercion: citizens need to learn to *feel* the duty to obey the rules, regardless of the danger of facing negative consequences if they do not. It is quite obvious that the challenge of a renewed public ethics involves that intertwining of customs, morals and law. Only with a profound rethinking of the concept of law is it possible to create that circle between interpersonal trust and institutional trust, the absence of which is one of the weaknesses of the socio-political system.

10.7 Final Remarks

The result of the analysis of the app-case, both from the point of view of game theory and from the point of view of argumentation, lead to the same conclusion: trust plays a central role. Since the use of the tracking application is not encouraged by any sanctioning rule, but is a mere recommendation, its effectiveness depends on its applicators. The argument pro-app is successful if it is preceded by a common shared

opinion about the concept of law, which includes trust and respect for reciprocity in the society.

Trust must not be a mere “outcome” of the existence of the law, but a constitutive element of the functioning of law itself, and even of its concept.

The case of the Immuni-app highlights the existence of a space in which the law refers to the trust of (and among) citizens.

The lasting propagation, among citizens, of a regulatory model of law, fruit of modern thought, that excludes trust and values coercion, inevitably will mark the failure of the argument. The coercive model is distrustful: only when one is “forced”, one is really “obliged”; there is no obligation, on the other hand, in the absence of coercive power. If the respect for the law is determined by the threat of the sanction, the civil relationship is undermined. When the authority of law, in other words, focuses on the exercise of force, the moment of trust can only recede until it disappears completely.

Otherwise, if the obligations predate the implementation of the sanction, then there are legal relationships, made up of obligations and expectations, which are left to the subjects involved.

In fact, the legal order makes sense only when a social order pre-exists, since legal relationships cannot exist when the elementary data of civil life expire. Without necessarily having to summarise the Aristotelian discourse on friendship in society, it can be concluded consistently that “*law takes root in a society that has already tasted the taste of trust*” (Greco, 2020: 216). Trust is a “fact”, without which no social order can be achieved.

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