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Urban Informality

A Multidisciplinary Perspective

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Contents

The Legal Value of Informality for the General Interest: The Example of Cities

Fabio Giglioni

1 Informality in Law

Law is normally required to apply rigorous logical processes that make it possible to establish order to the plurality of rules that govern social coexistence. For this reason, law is above all a question of form, that is, it operates according to a rational method that establishes the prevalence of the rule that must be observed to ensure the peaceful coexistence of people in the individual subjective legal situations taken into consideration. In these brief words, all the problems that arise from informality regarding the law become evident: in a certain sense, they would seem to be two irreconcilable concepts.

Truth be told, consolidated studies have clearly shown that law is not alien to the interests, which constitute the substratum of the rules, and the values that inspire it. Thus, alongside a formal dimension there is also a substantial value, which immunizes the law from a claimed mechanical function. In other words, the connection with formality does not reduce the right to an exact, rigid and immutable science, as it is often seen by the layman, rather it is affected by social dynamics, drawing life from them, and it adapts itself to circumstances. The point is that these processes of updating the legal method depend on a formal basis recognized by the legal system, almost always of a legislative source, from which every development of legal logic moves.

These traits are even more evident when one assumes—as in the present case—the perspective of public law and administrative law. The circumstance that links these specific branches of the legal study to the protection of public interests overloads the law with formal requirements. One need only think of some elementary differences between private law and administrative law. In private law, legal relations must be imputed around formal legal acts only when the law explicitly requires it, so that it is a

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daily experience that the overwhelming majority of the sales that everyone carries out do not include the stipulation of a written contract; in administrative law, on the other hand, the form constitutes an essential prerequisite for the validity of any legal act that claims to regulate situations in which public interests are at stake. Moving forward in the reasoning, it is known that any administrative law manual dedicates a few pages to the principle of legality as an essential principle of any action carried out by public authorities, while it is equally true that the manuals of private law do not explicitly mention this among the essential principles, although this does not mean that in private law one can disregard it. Furthermore, much could be said about the principle of publicity, today updated and strengthened by the principle of transparency, which requires the availability and accessibility of both public organizations and the main acts and data that public authorities hold and produce, while the confidentiality is an important value in private law relationships. In short, if the reasoning on informality is placed within the context of public law, and administrative law, the the problems seem to be even more acute.

This is the reason why the informal sphere of human relations is set by law in two possible areas: that of irrelevance and that of unlawfulness. In the first area, lawyers assign the relations which, since they escape the requirement of formality, are not recognized as worthy of consideration. It is often believed that this marks the distinction between sociology and law: everything that animates social relations in an informal way is considered to belong to sociology and, at most, if these relations also bring institutions into play, of political science. In any case, this would certainly be extraneous to law. The second area, on the other hand, includes the informal relationships that are relevant to the law in pathological terms, constituting offenses. Unlike the economy, for example, which evaluates informal relationships that still produce economic value with great interest, law usually judges them in severe terms, providing for the application of the so-called secondary sanction rules. In essence, therefore, informal relations are normally ignored by lawyers and, when instead they take on relevance, they are judged as a negative value, so as to require a reaction that reaffirms the superiority of the law of the recognized forms, which from this moment onwards I will call ‘formal law’ or ‘established law’.

Such a conclusion, however, could hardly be considered exhaustive. For example, it is not always true that in the face of violations of rules that make a given social experience illegal, as well as informal, the public authorities react immediately by restoring formal legality; and this should not be confused with the controllers indolence, because more often than not this outcome depends on precise choices that try to recover paths of legitimacy. There are also many social experiences that see the activation of citizens, both individuals and groups, for the care and regeneration of abandoned goods and spaces, green areas left in decay, recovery of inactive cultural spaces, re-use in a new form of productive settlements that have ceased to operate, and so on. In these situations, we see some social practices that almost always originate from paths that are not formally recognized by law, but which are equally capable of earning respect and attention from the legal system. These are, therefore, informal experiences that show legal potential of interest and, precisely for this reason, deserve

to be further explored, because the doubt they raise is that informality, despite the initial premises, can instead be reconciled with formal law.

As a premise, the following considerations refer to situations in which informal social practices are aimed at achieving general interests, interests—that is—which concern not only those who promote the measures, rather a wider audience of people who go beyond the leading actors. For this reason, we are dealing with episodes that see public authorities involved in a more or less active manner, to which our constitution assigns the task of guaranteeing—in fact—the protection of collective interests.

2 Examples and Models of Conciliation Between Informality and Formal Law

The experiences that have recently been mentioned are numerous and very different from each other. To simplify the discussion, it will be useful to try to identify some categories that can collect them. The proposed categories outline five models in which informal experiences and established law coexist: tolerance, recognition, innovative legal qualification, collaboration agreements and, finally, the re-use of goods in transition.

2.1 The Tolerance Model

The first model includes all the social practices which, established from events unrelated to paths of preventive legitimation, find neither obstacles to their affirmation nor are subject of proceedings and processes that provide for their stop. Lawyers qualify these experiences as existing in fact, that is, real but without a legitimate legal connection. The reasons why the authorities tolerate these social practices can vary: sometimes there are reasons of public order that advise prudence in eliminating experiences that could cause serious unrest; at other times, prudence is suggested by the awareness of public authorities that they are unable to offer a useful alternative for the same purposes that social practices pursue; in other circumstances, even cynical evaluations can be recorded, since the responsibility for what happens, by taking action that is not legitimized in advance, falls entirely on those who have made risky choices which, conversely, would have other results if the public authorities establish relationships, however minimal; in other circumstances—think of small local realities—tolerance is justified by the climate of community trust that exists between public authorities and citizens, favored by the fact that they often know one another; finally, there are cases in which the practice activated is useful to collective interests, without necessarily passing through an explicit recognition. On the other hand, there is no lack of rules and principles in the legal system that support the usefulness

of spontaneous social activations that are considered fully legitimate: for example, aid measures for a state of necessity or due to natural disasters. Here, however, the cases that are taken into consideration are different: they disregard these norms and therefore tolerance is not attributable—at least not apparently—to legitimate cases.

The relevant circumstance that occurs inevitably makes those experiences precarious: their existence is always susceptible to being repressed and canceled at any given time, precisely because it was born outside of preventive legitimation procedures. It could be objected that law does not have any space in these events, that only politics does: after all, public authorities may wish or urge the conclusion of these experiences for the reaffirmation of formal law, but instead of achieving this aim with the force of formal law they do so through persuasive action, sometimes granting indirect support, as it happens when the social services of a municipality become available to protect the weakest people, when the municipal companies or companies called to guarantee public services act in any case not to aggravate the precarious conditions of an illegal occupation, when mediating takes place that also involves other subjects because the action carried out by citizens concerns the private assets of others, etc. The point, however, is precisely this: in such circumstances is it still possible to confirm that these experiences are outside the law or, instead, are we in the presence of legal relations? Doesn't the commitment taken on by local authorities, directly or indirectly when they involve public services, ultimately manifest, albeit in an implicit and provisional form, a decision of support and enforcement? Some sentences by criminal judges,[1] for example, which legitimize long-lasting experiences tolerated by public authorities or whose compatibility with public interests is emphasized, seem to lead to an affirmative conclusion.

2.2 The Recognition Model

In the recognition model, on the other hand, we find experiences in which the public authorities have taken a position on the informal event that has taken place, which is indirectly supported or, vice versa, temporary through an express resolution. An example of indirect support occurs when municipalities undertake to bear the utility costs that a group of citizens require in order to complete the regeneration of a given abandoned property; as far as temporary support is concerned, reference can be made to examples in which municipalities provisionally grant the attribution of a space or property already the subject of a social practice, often with the intention of arriving at a final definition of the legal relationship consistent with formal law. In these circumstances, although the social practice began informally, there is recognition by the public authorities that what has been started satisfies general interests. This recognition does not go so far as to want the condition of informality to stabilize in a lasting way. Indeed, indirect or temporary forms of support are posed as conditions

[1] See for example Court of Florence, 8 November 2019, no. 4530, regarding the Mondeggi case which caused considerable discussion.

for initiating a process that leads social practices within a framework that is closer to formal law, but nevertheless there is no doubt that recognition allows for the establishment of a bond of acceptance and compatibility of the informal experience with the established law. In support of this model there are some sentences by both criminal[2] and auditing courts.[3]

2.3 The Innovative Legal Qualification Model

The third model is characterized by the fact that it aims to introduce new qualifications to give legal substance to social practices that the law does not recognize. In this circumstance, the public authorities, upon evaluating positively the social experience produced, decide to innovate the body of legal institutions, introducing a new one that fits the social practice produced. This is what recently happened in the municipality of Naples in which, through specific resolutions, they declared some assets subject to regeneration processes initiated by autonomous communities as "assets for urban civic use." By readapting a legal institution known in our legal system, that of assets for civic use, which is generally used in rural areas, the municipality declared that, even in urban contexts, there are assets that belong to the community, which can use the assets directly for purposes of general interest. The qualification attributed by a municipal resolution (and not by force of a law, nb) concerning a single asset legitimizes the social community that undertakes the commitment of re-use and regeneration. The purposes of this management are explicitly stated in a charter or declaration of self-government, adopted by the communities in question. In this circumstance, therefore, the municipality only requires that there is correspondence between the activities carried out on the asset and the self-declared purposes and that the community that guarantees its use is always open to anyone who wishes to participate in the self-management, without limitations. In the specific case, moreover, the municipality has taken on the task of contributing toward some costs, such as utility bills. The local public authority, therefore, guarantees that the actions carried out are consistent with the general interests and the self-management communities, in turn, undertake to give an account of the activities carried out and the decisions taken via a democratic method.

This is clearly a model in which formal law seeks a framework compatible with informality through innovation. In fact, although the qualification of urban civic use asset absorbs the social experience into the context of formal law, the latter does not lose its informality trait, which is clearly demonstrated by the nature of the subject engaged in the re-use of the property and by the trait of self-management that characterizes the activity carried out. The qualification resolutions of the individual assets affected by these forms of self-management cannot be confused with concessions:

[2] See Corte di Cassazione, Criminal Section, 10 August 2018, no. 38483.

[3] See Corte dei Conti, Regione Lazio Section, 18 April 2017, no. 76 and 77; Corte dei Conti, section III, 19 September 2017, n. 456; Corte dei Conti, Regione Lazio Section, 29 January 2018, no. 52.

they differ from the latter because they do not establish selective assignment procedures, they do not provide for a relationship in which the municipality interferes in the management and they do not establish a term of the asset being managed, the duration of which depends on the vitality and compliance with the constraints determined by the managing community.

2.4 The Collaboration Agreements Model

The fourth model of conciliation between established law and informality is based on collaboration agreements. These acts, which take the form of agreements signed by public authorities and active citizens, have widely spread throughout Italy in recent years, starting with the first experience recorded in Bologna in 2014. Municipalities legitimized the use of these agreements by adopting a specific regulation, which governs the relationships between municipalities and active citizens for the regeneration and re-use of common urban assets. In this circumstance, a well-known path is undertaken in established law: the municipality, by virtue of the autonomy reserved directly by the constitution, approves a regulation to govern relations with citizens for the re-use and regeneration of spaces and assets existing on the municipal territory and, on the basis of this it identifies, in the collaboration agreements, the main legal instrument that legitimizes the citizens' action.

At first sight, it might seem that this model does not have much to do with informality, but four elements must be kept in mind in this regard. Although in recent years both the state legislator and the regional legislators have intervened, more or less directly, on this type of model, many municipal regulations have been adopted in the absence of a predetermined legislative framework; thus, even in this case, formal law follows an original manner of affirmation by finding the source of legitimacy directly in the constitution. Secondly, with regard to the aforementioned regulations, a new legal institution is adopted, that of the urban common good. In recent years the doctrine has tried its best to find a definition of common goods, whereas the legal system continues to lack a general legislation; this is why the regulations represent an innovative tool. They offer definitions which, although not identical between municipalities, are quite similar. Thirdly, although the agreements can be stipulated with individual citizens and also with recognized formal associations and even with businesses, it is important to underline that the counterparts of the municipalities could also be groups of weakly structured citizens and, therefore, essentially informal. A fourth element to take into consideration is that the collaboration agreements are always open, which is equivalent to saying that non-contracting parties to the agreement can also participate in the fulfillment of the defined commitments, along with those who appear to be interested only after the stipulation is complete. Once again, therefore, we are before an innovative legal institution that reconciles formal law in an original way with a strong trait of informality. Collaboration agreements therefore demonstrate greater flexibility because their content is very broad and can include

both traditional experiences that are more adherent to formal law, and experiences with a highly innovative trait, aimed at reconciling formality and informality.

2.5 The Re-use of Goods in Transition

The last model concerns a particular case, one in which the ownership of an asset is subject to a change of ownership of the right. In these circumstances—such as the privatization of a public good or the transfer of assets that belonged to criminal organisations—very complex and even time-consuming procedures develop, such as to cause the need for the assets in question to be subject to regeneration and re-use activities in order not to compromise their ability to produce utility. To this end, self-produced social experiences are often activated with the support of public and local authorities, giving rise to informal activities which, in this case, have the peculiarity of arising within fully formal procedures. This gives rise to another model of conciliation between formal law and informality, the discussion of which, however, is conducted in greater depth in another essay in this volume (see the contribution by M. V. Ferroni).

3 The Unifying Contribution Offered by the Principle of Horizontal Subsidiarity

The models described demonstrate that informality is compatible with formal law if certain conditions are met. Of course, those described are very different models: in the third and fourth models, the public authorities explicitly look for original formulas of coexistence with informality, whereas, in the first two, the enhancement of informality is more uncertain and is closely linked to specific circumstances, in which the work of the judge is decisive. Despite these differences, what emerges in these situations is an opening of the legal system to social experiences that follow irregular paths, which are not resolved with the prevalence of formal law over informality.

How can this evolution be explained from a legal point of view? In these experiences, the principle that follows an effective recognition is not necessarily always established; this evolution is enabled by the principle of horizontal subsidiarity, affirmed in the Italian constitution in 2001 with the modification of art. 118. What happens in the models outlined, in fact, is nothing other than support of the actions taken on by citizens, individuals or groups, by the public authorities for carrying out activities of general interest.

This principle has recognized that it is not only the public authorities, which institutionally are responsible for this task, but also the citizens who act for general interests and, when this happens autonomously, it is the duty of the Republic to favor them. The principle of horizontal subsidiarity has thus enriched the catalogue of

rules that arbitrates institutional pluralism and social pluralism: it provides a favor toward citizens who are committed to general interests, even in forms other than those already recognized (by the principle of legality).

Furthermore, the support expressed by the subsidiarity principle expresses a solidarity relationship and therefore establishes a clear link with the duties of solidarity that form part of the constitutional order, which in this way, if fulfilled, are further enhanced. In other words, the principle of horizontal subsidiarity, although introduced after the approval of the constitutional provisions, fits perfectly with the democratic principles of the legal system and tries to develop further advances toward other forms of democracy than those of representation alone. It enhances all social forms of care for general interests, even if these are not attributable to the frameworks recognized by the legal system.

This is probably where the most important value of the principle of horizontal subsidiarity lies: it has the power to emancipate social experiences, which would in principle be irrelevant for the law, if the public authorities recognize consistency with the values and interests promoted by the legal system. This nomogenetic force makes it possible to mend informality with formal law in an original manner.

4 The Legal Space of Cities

The considerations made so far are based on events located in local contexts in which the protagonists—on the side of the administrations—are mainly the local authorities. In this regard, it does not really matter whether the local realities are small, medium or significant, because they are dynamics that can be applied everywhere. Indeed, in many ways, in minor local realities, trust, mutual knowledge of the inhabitants and social control of the territory help develop the emancipatory processes described here. On the other hand, it is perhaps no coincidence that the models reviewed presuppose, in very different forms, relationships based on the self-management of goods and spaces present in rural and less urbanized areas. As has been clearly pointed out, when there are forms of collective use of goods, which do not take into account the claims of exclusive use by the owners, regimes that become a right of expression by the community, which we could define in other words, a "community right" (Merusi, 2003, pp. 77 ff.), are established. The community establishes the rules for the use of the good for the benefit of everyone: this is certainly the case for goods for civic use, for the various forms of collective domains[4] and also for common goods.

The most interesting aspect, however, is that these forms of community right, well known in rural contexts, have made a considerable leap and are now recognized even in the most complex urban contexts and in large cities (many of the experiences mentioned above concern medium and large municipalities). This step deserves further study, because in complex urban contexts some typical conditions

[4] See law no. 168 of 2017 on collective domains.

seem to be missing that favor the affirmation of community right and, more generally, the emancipation of informality.

It should first of all be noted that, while bearing in mind the assessments just carried out, there has never been a lack of community-type experiences in the cities. It is worth noting a case known throughout the world such as that of *Christiania*, which is emphatically declared the Free City of Copenhagen today. Similar situations, even less noteworthy, can be found in other cities. Recently, in the United States of America, there has been the diffusion of the so-called Sanctuary Cities, thas is, cities that declare, in the name of the representation of the territorial community, the objection to the application of certain federal regulations in various fields: there are Sanctuary Cities that refuse the application of restrictive anti-immigrant regulations, but also others that, conversely, support the objection to the practice of abortion or the sale of weapons. They are strong examples of the affirmation of a community law in urban contexts that confront formal law.

Beyond the forms in which expressions of community right have appeared in the various national contexts, the question remains as to how to explain the emancipation of informality in cities. After a very long period that lasted several centuries in which cities lost their institutional legal dimension when state systems established themselves so as to become mere local administrative bodies, law scholars gradually began to re-appreciate the legal profiles of cities. The traits that make this institution not only a "creature of states," but also a "creature of communities" as highlighted by Gerald Frug (1980, pp. 1059 ff.). There are three profiles that make cities different institutions from other local authorities and therefore organizations suitable for the enhancement of informality.

First of all, cities are physically connected to a territory, but naturally predisposed to transcend it in terms of the balance of government, because they are crossed by flows of people, goods and capital that come from everywhere. Cities are crossing places that generate social and legal dynamics that go far beyond residents and their interests. The flows that occur in urban contexts bring with them resources, skills and means with which city institutions must necessarily deal. This determines an asymmetrical context between those who live in cities and those who have the right to participate in their formal decisions, which produces a search for communication channels that pass through representative associations, large companies or business associations, professionals, cognitive institutions and financial institutions. In other words, the asymmetry is recomposed with a dense network of relationships, not always formal, which condition the development of cities through agreements, pacts and understandings. In other words, cities develop informal governance models par excellence.

The second profile concerns the ability of cities to develop political-administrative directions in a horizontal and transnational manner. In other words, their dimension is such that they can also play a role of (relative) competition with the states to which they belong. This is relevant for our purposes because the legitimacy of actions no longer depends solely on the legislative command expressed by the state of belonging, but on decision-making processes that are often informal and determined in international or, in any case, supranational contexts.

Finally, cities are complex systems that, albeit within the limits of the constitutional order, are capable of producing autonomous sources, whose legitimacy is not derived from a law. This capacity is given by the general qualification that the constitution assigns to all local authorities, but it is undoubtedly true that in complex realities the challenges are much more difficult, since social groups are not very homogeneous, individual freedoms are claimed with greater force and the conflicts are more frequent. This complexity requires innovations in composition solutions that translate into adaptations of measures, ideal for small neighborhood areas, but which are capable of building a plurality of community micro identities within the city.

These peculiarities of cities make these subjects suitable for dealing with the issues of informality in a multifaceted way. If this is the case, situating the reflections conducted here within complex urban contexts becomes quite interesting, because it involves studying community legal experiences where the institutional stratification is most solid. In these situations, what has been observed takes on even more significance for the transformations of law.

5 The Risks of Informality

To conclude these brief reflections, it is appropriate to focus on some risks that the processes of emancipation of informality can produce, if proper attention is not paid to their balancing with formal law. In fact, an excessive emphasis on informality could cause an excessive contraction of the law, compromising important values that formal law contains and which deserve to be safeguarded.

An initial risk, for example, is that of the administration's retreat, which could be induced to withdraw from its responsibilities in looking after general interests, exploiting the citizens' initiatives. Some of the models described above could be used by local authorities to make up for their own shortcomings, placing their burdens onto the citizens. This eventuality, in addition to being questionable on a political and ethical level, envisages a relationship with citizens that is instrumental, rather than of an enhancement nature, as the principle of horizontal subsidiarity would require. Hence, the public administration would fail in its duties and result in a surreptitious replacement of public personnel with citizens, which of course cannot be accepted. Truth be told, the models described above should give rise to forms of shared administration, which recently the Constitutional Court has recognized as new forms of collaboration for better and innovative care of general interests.[5] The effect should not be to withdraw the administration from its tasks, but to exercise them in a new way, along with the citizens.

The second risk the enhancement of informality can produce is the overexposure of the political plan at the expense of the administrative plan. In a certain sense, looking at art. 97 of the Constitution, we can conclude that the models of conciliation

[5] Reference is made to the important sentence by the Corte Costituzionale no. 131 of 2020.

between formal law and informality enhance the principle of good performance much more than the principle of impartiality. Indeed, when administrations favor these experiences, they express a relationship that is anything but impartial. This condition can make the political dimension prevail over the administrative dimension and restore a public administration that is too subject to political orientation. For this reason, the models described above do not require less administration, but rather a public administration that is even more equipped and aware.

The third risk derives from the community valorization of the law. While this undoubtedly produces some positive aspects in building bonds of solidarity and mutual belonging, on the other hand, communities could also produce exclusions, which can have an impact on different factors: ideologies, wealth, age, ethnicity, etc. If the enhancement of community right is independent of any verification exercised by public authorities, the risk of discrimination becomes very strong, given that only the latter are called upon to apply a broader range of values than individual social groups, adopting a more comprehensive and inclusive vision of the territory's needs.

Finally, the last risk concerns the protection of the principle of equality. Valued social practices, albeit for general interests, tend to differentiate citizens: the favor expressed by the principle of horizontal subsidiarity is based on a judgment of value that distinguishes some experiences from others. All this produces a differentiation that is considered positive, but which must be constantly monitored and controlled to avoid that it ends up producing distorting effects. In other words, the balance with formal law is necessary if we want to exclude the possibility that the legitimate advantage is transformed into an unequal privilege.

Each of these risks can be contained and limited only if informal relationships find a correct composition with formal law. This essay, therefore, which arose from the need to demonstrate that it is possible to reconcile formal law with informal social practices, but which ends with the caveat that this process, which is also welcome, must avoid producing an opposite imbalance because, behind formal and established law, there are just as many values to be preserved in our legal system.

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