

## Public law after Pandemics. Brief considerations

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Page | 90

### ABSTRACT

*The last decades had passed public law in a rather second zone, because private law had taken over most of the legal action's visibility. Without denying the importance of legal relations under private law, any objective researcher cannot fail to notice that in most of the 21<sup>st</sup> century certain public law pillars had come to be modified by the action of legal norms and acts of private law. The number of legal acts under private law natural increase was accompanied by an approach when many legislators were rather unfavourable to public law, forgetting that still the state pillars are expressed by norms of constitutional and administrative law.*

*In this perspective, the appearance of crisis situations brought back the public law and is very tender for the public administration legal and material situation. In those moments, its true functioning capacity is checked, but it is also shown the main directions for activity improving, which a competent legislator understands immediately. For these reasons, the changes that public law and public administration obtain during a crisis and immediately thereafter can be defining for decades. Thus, we try to sketch a short form of what could become public law after this pandemic, without seeking to exhaust the material of debate.*

**KEYWORDS:** *Public Law, Pandemics, Good Governance, Legal Framework, Political Will.*

### 1.Introduction

At the end of 2019 there were no other threats to world stability in the global perception than those of an economic nature, even if at the regional level there were certain additions, usually as an effect of political actions. It should be noted that the last 20 years have almost reached a



consensus between academia and the political-economic environment on the possible causes of global crises, namely that they could have arisen only as a result of economic disruptions, possibly combined with various aspects of environment.

From this perspective, the appearance of a sanitary-medical crisis was a complete surprise, and this was seen mainly from the administrative and political reactions of each state. An issue that seemed impossible – namely a pandemic – came and suddenly changed not only the perspective on life, but especially the legal relationship between public and private law subjects. Page | 91

By definition, the onset of major crises is viewed with fear by individuals, but with different feelings by public law institutions.

In the first case, it is easy to understand this mental response, based on awareness of the biological and financial limits inherent in man. Not every person can be expected to act in a textbooks prescribed manner and therefore there may be a variety of mental and attitudinal responses to different crises. Obviously, major crises leave traces in the each affected person psychology, and in some cases can lead to panic or behaviours that reveal the strength of man character.

On the part of public institutions, however, we find another perspective, based on the attributes of public power that they have. Also, the impersonal nature of public institutions makes them less affected by certain human feelings – even if different emotions manifestations may occur at their management level. However, public institutions are required to function optimally, according to their field of activity manuals and procedures, assuming responsibility according to their attributions and bearing in case of need operations that have higher costs than the previously approved budgets. Thus, if an individual in a moment of crisis has the right to rest and can have more or less controllable behaviours, in the case of public institutions the moments of crisis force them to operate almost continuously, with standardized and effective reactions.

## 2. Good governance and citizens

Expectations that citizens have towards the public administration – as a system – are in fact based on the previous performance of each public institution. For this reason, in times of crisis citizen's expected results are not those prescribed by legal norms – because legislators want behaviour close to perfection – but that resulting from the daily practices of administrative institutions. However, the public administration situation in the 21st century is different from that of previous centuries. Specifically, in the world of information we live in, it is much easier to find out what good administrative practices are, so that citizens can increase the pressure on politicians to improve the quality of public services. From the same perspective, it is more difficult for politicians to refuse these improvements of administrative practices, because not bringing positive changes in this direction can result in substantial electoral losses.

Page | 92

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## 3. Public law and private law: a contemporary relation

The last decades had passed public law in a rather second zone, because private law had taken over most of the legal action's visibility. Without denying the importance of legal relations under private law, any objective researcher cannot fail to notice that in most of the 21<sup>st</sup> century certain public law pillars had come to be modified by the action of legal norms and acts of private law. Commercial law was largely installed in the instrumental part of public law, it taken over a large part of its tasks, bringing with it the idea of profit. Thus, in many countries the public-private



partnership has come to replace a part of the administrative law and the risk issue in these contracts is solved according to different criteria, some of which are rather private law.

It is true that an exceptional population growth of our planet – over 55% in the last 35 years<sup>1</sup> – has led to an increase in the private law subjects. In the same sense were the great innovations that in the last 35 years have come to dominate our life, because they are the quasi-exclusive product of private economy actors. These modern tools are exploited mainly under private law contracts, even if the public authorities supervise certain aspects of the way in which they are concluded and executed. However, the number of legal acts under private law natural increase was accompanied by an approach when many legislators were rather unfavourable to public law, forgetting that still the state pillars are expressed by norms of constitutional and administrative law.

The great technological and scientific successes of the last decades have brought under control almost all the existing diseases, improving the life expectancy globally, so that compared to 1900 the average life limit for the 2020s is over 30 years higher<sup>2</sup>. The quality-of-life growth took place as a result of a good combination between the means that public law provided to the private environment, so that in many countries good governance did not remain a concept mentioned in universities, but even a daily reality.

As a result of this practical progress, the idea of a pandemic had been almost eliminated from almost all political leaders' thinking, so that the virus that manifests itself with force since 2020 has made a great change in the legal paradigm. Thus, public law returned to attention, and the results of the legal norms application that constitute it became decisive for the immediate fate of millions of people. The quality of regulations in the field of public law does not mean in the moments of a pandemic only a theoretical debate in universities, but an issue that provides effective means of action to all those who fight against this disease consequences.

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<sup>1</sup>World Population 1950 – 2021, available at <https://www.macrotrends.net/countries/WLD/world/population>

<sup>2</sup> M. Roser, Es. Ortiz-Ospina and H. Ritchie, *Life Expectancy*, available at <https://ourworldindata.org/life-expectancy>, consulted on 28<sup>th</sup> of June 2021.



#### 4. Public law and its request on solving the pandemic

Pandemic means a forcing of public law limits because there are not always enough technical-material tools for the use of the medical authorities. In contemporary society where there are high expectations of individual rights and freedoms, public health laws have an important role to play in ensuring that, as far as is possible, the public's health and the public's freedom are both balanced and protected. Public health laws play a key role in setting out the rights and responsibilities of individuals, communities and governments, providing transparency and accountability to the frameworks for decision-making. Public health measures directed at implementing social distancing, quarantine or travel restrictions will not only infringe on individual liberties that are often taken for granted in contemporary societies, but are also likely to have a profound economic impact<sup>3</sup>.

From this perspective, public law is called upon to create a special legal framework that answers the following questions:

- 1) How can the private economic activities be regulated, so that they can have as few disturbances as possible?
- 2) How can the action of public institutions be regulated, so that they can carry out both the usual tasks and the new ones that appear due to pandemics?
- 3) How many resources from the state reserves should be directed to support the fight against the pandemic and how many resources should be mobilized on the spot?
- 4) What will be the legal relationship between the center and the local communities, because the latter could not survive without the center support and will not be able to recover much of the income loss without the support of governments?

At local level, businesses were closed or experienced a reduction in their cash flow as public health measures was introduced or people stayed home voluntarily. In such an environment,

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<sup>3</sup> B. Bennett, *Legal rights during pandemics: Federalism, rights and public health laws – a view from Australia*, in *Public Health* 123 (2009), p. 234, available at DOI:10.1016/j.puhe.2008.12.019, consulted on 28<sup>th</sup> of June 2021.



the economic cost to individuals and businesses is significant, which in turn demands consideration of development of support systems and compensation systems for those affected.

5) What should be the contribution of each individual in the country in combating and controlling the pandemic? By far, this is the most difficult question, because the human mentality is not one of certain restrictions complete acceptance, but rather living by ignoring / rejecting them.

Quarantine laws and public health laws do give governments some fairly broad powers to declare quarantine and to restrict the movement of individuals. There is a very real sense in which these powers may well be needed in order to ensure an effective public health response to pandemic influenza. However, these laws are also clearly situated within a broader social context. Our perceptions of individual liberty and individual rights have undergone considerable evolution since most of our public health laws were originally introduced. Today, the public is likely to have high expectations about the preservation of individual liberty and freedom of movement. These expectations underpin the political context for the development and application of public health laws. Appropriate responses to these expectations will also play an important role in addressing community unease and potential disobedience to the implementation of response measures. When seeking to clarify public health laws, it is important that we take this broader social context into account. Public health laws are not only about articulating the coercive powers of the state for enforcement of public health measures, but also about the limits of state power and the rights of individuals and communities. Given the potential for public health laws to impact upon the freedom of individuals, and the need for public health laws to balance the interests of individuals and society, public health laws will ideally have a transparent ethical framework, articulating the principles upon which state intervention will be premised<sup>4</sup>.

6) Because in the 21st century the social system is one that includes almost the entire population in different categories of action – from kindergartens to old people's asylums – the legislator is called to create a legal framework in which the damage to people's normal lives is as little as possible.

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<sup>4</sup>B. Bennett, *Legal rights during pandemics: Federalism, rights and public health laws – a view from Australia*, in *Public Health* 123 (2009), p. 235, available at DOI:10.1016/j.puhe.2008.12.019



The answer to these questions is treated in the other sciences literature as “crisis management”. Without contradicting this name, we will mention that the legal sciences use another paradigm, in which the current life is ordinary, and what goes beyond the normal framework is an exceptional circumstance<sup>5</sup>. For our text it is not necessary to study in depth the measures taken to control the pandemic, but their long-term effects, after the difficult moments we go through will disappear.

### **5. Public law and public health – a conceptual discussion**

We will note that from the point of view of the law doctrine we find ourselves – in the opinion of some authors – in front of a distinction between an “old (traditional public health)” and a “modern” one. Although we do not share this distinction, it is necessary to present it, in order to better understand what certain developments of the law could be after this pandemic.

Public health law is sometimes divided into “old public health” and “new public health.” Old public health law refers to the classic functions of government to limit the transmission of infectious disease and environmental hazards: these are measures like quarantines, vaccination, public sanitation, and food safety. These government policies pose “tragedy of the commons” issues: they require collective action or infrastructure that is unlikely or impossible without central coordination. COVID-19 and the person-to-person spread of the virus that causes it (SARS-Cov-2) meet this definition precisely. For any given individual, the costs of protective measures (like quarantine or self-isolation) may be greater than the risks posed by continuing ordinary life. But for the population as a whole, continuing life as usual will result in a large number of infections and/or deaths. As we have learned from past epidemics, these infections and deaths are often more concentrated in groups with pre-existing vulnerabilities, including people who are poor, ill, disabled, elderly, experiencing discrimination, or living in communities with poor infrastructure. Government policies that address “old” public health threats can be broad and sometimes coercive,

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<sup>5</sup>For details see Apostol Tofan, D., 1999, *Puterea discreționara și excesul de putere al autorităților publice*, Bucharest: All Beck.



including invasive interventions into daily life. But these actions rest on a solid foundation of case law that recognizes the unique capacity of government – particularly state government – to play a coordinating role in times when individual actions pose society-wide risks. Where there is a visceral threat to society as a whole, governments have wide latitude to protect the population<sup>6</sup>.

By contrast, “new” public health refers to governmental efforts to reduce risk factors leading to morbidity and mortality that are not infectious or transmitted by environmental hazards. Those risk factors include mental health problems, substance use disorders, and chronic noncommunicable conditions such as heart disease and cancer. These human problems may also benefit from centralized coordination, particularly in addressing social determinants of health (e.g., socioeconomic inequality). But “new” public health problems have more complex causes, and although government action can influence predictors of chronic and noncommunicable disease, these efforts are different in kind from efforts to limit agents of infectious or environmental disease<sup>7</sup>.

## 6. Public law, political will and good governance

In a pandemic, public law is the most requested, as its principles show us the inevitability of its action growth. However, unlike private law, the more pronounced application of public law has long-term effects on countries, and especially on their leaders. By their essence, the exceptional circumstances increase the power that the public administration has, implicitly their leadership. From this perspective, the objective pandemic situation and the superior power exercised leave traces in the psychology of leaders, who are not completely immune to the power temptations.

Numerous works have been written – many of them of great value – on a complex topic that offers many practical examples: the effect of political and administrative power on those who exercise it and its consequences on public life. Specifically, we are in a situation where today the

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<sup>6</sup>Underhill, K., 2020, *Public Health Law Tools: A Brief Guide*, in Kt. Pistor (ed.), *Law in the Time of COVID-19*, Columbia Law School, Scholarship Archive, pp. 59 – 60.

<sup>7</sup>Underhill, K., 2020, *Public Health Law Tools: A Brief Guide*, in Kt. Pistor (ed.), *Law in the Time of COVID-19*, Columbia Law School, Scholarship Archive, p. 60.





pandemic is not yet completely under control, and this moment may be delayed for several years. In this perspective, the power of public administration will manifest itself with increased force for another period, and a part of the private social and economic environment will continue to be limited in its actions. However, this limitation decreases the financial strength of the private law sphere, making a greater number of people and companies dependent by government support and policies. In this context, the successes of the public environment in the pandemic control will not be complete except by providing stimuli that will restore the economy to previous levels.

Since law is in fact the human mind product, and it is not a static, perfectly controllable and without sentiments, it is obvious that the political and administrative leaders will result after the pandemic includes the whole complex of their ideas and desires. Obviously, the public law situation will be the most interesting and important, in terms of the novelties brought to the concept of public interest, public health, but also in terms of national legal traditions.

Specifically, the legal sciences and their practice will continue to be influenced by the models that each national legal system has created over time, so it is likely that the changes that will occur in each country will be in line with their last decade's characteristics. Thus, it is hard to believe that in a country where civil liberties have been disregarded for many years, they will flourish when the main effects of the pandemic end. This is also visible from the behaviour that each state had during the fight against the first effects of Coronavirus, because the more dictatorial a state was, the harder the administrative action.

Numerous books have been written about human nature, and especially about the nature of politics. From them it had emerged the idea that the political environment is one that is naturally more interested in gaining and exercising power, than in fulfilling the public good. Although it may seem a gratuitous and superficial statement, global economic rankings show that only a few countries reach a high standard of living, and they are not the most populous. In fact, from 194 countries, just 64 reached in 2020 the gap of 10,000 USD/capita<sup>8</sup>. This means that accumulations

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<sup>8</sup>International Monetary Fund, *List of Countries by Projected GDP per capita*, *International Monetary Fund World Economic Outlook, April 2021*, available at <http://statisticstimes.com/economy/countries-by-projected-gdp-capita.php>, consulted on 28<sup>th</sup> of June 2021.

of wealth and capital have not been possible on a large scale because the quality of governance has been poor for centuries, with no major improvements in recent decades.

This negative result always means a poorly performing legal system, which is rather based on favouring different categories of people – usually not a very large number, but essential for maintaining the exercise of power. This typology is even more noticeable in the very difficult moments of the state existence, because the governmental support is very useful in increasing the gaps between the politically-legally favoured and the others. Basically, almost every country' history mentions situations in which the ruling political class benefited from facilities that – after the difficult moments were overcome – allowed their rapid return to the previous situation, while other citizens became more vulnerable and implicitly easier to master.

If all people were implicitly good, worthy, and concerned only for the good of the national community, the results would have been different historically and legally. Basically, we can say that a country where all citizens behave just like that makes almost the entire judiciary useless. As this did not happen and it is unlikely to happen too soon, let's mention what two famous specialists in the theory of power – Bruce Bueno de Mesquita and Alistair Smith – say in a work with a more than suggestive title: “The Dictator's Handbook. Why Bad Behaviour is Almost Always Good Politics”<sup>9</sup>.

“Earthquakes and other disasters shake up political systems. However, the nature of the shakeup is very different under different institutions. Democratic leaders are very sensitive to disaster-related casualties. Allowing people to die reveals serious policy failure. Democrats need to deliver good public policy to reward their large number of backers. When they fail to do so, they are liable to be removed. Disaster-related deaths result in protest and in the removal of leaders in democracies. ... disasters can serve as rallying points in autocracies. Disasters can concentrate opponents of the regime, making it easier for them to coordinate. Yet the death toll from disasters has relatively little effect on a dictator's chance of staying in power. Indeed, if anything, large numbers of people dying in disasters enhance the political survival of autocratic leaders. People dying from an earthquake can't organize and so they do not endanger a dictator's survival in office.

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<sup>9</sup>Public Affairs, New York, 2011.



... As we know, autocrats don't buy political support with efficient public policy. Resources spent saving the lives of the people cannot be spent on cronies. In addition, as we have seen, autocrats are skilled at exploiting the international community. By letting more people die they may in fact be able to extract more relief assistance. The implications of these results are frightening. Small wonder, then, that far more people die in natural disasters in autocracies than in democracies"<sup>10</sup>.

## 7. Public law and its long-term national characteristics

The issue of dictatorships and the general idea of the rule of law become very important in this century, because the technologies for population surveillance have evolved to a level difficult to imagine a few decades ago, and their power to impose by normative acts that will change mainly the branch of public law. Obviously, normative acts appear – in the historical-teleological perspective – in different contexts that favour the parliamentary majorities, and these are more than once the product of some governments that exercise authoritarian or dictatorial power. However, in order to maintain power, these types of political regimes can use – without being compulsory – this moment of the pandemic, because it accustoms to a large extent people with the idea of restrictions, and less with that of freedom and assumption of legal and moral responsibilities.

In fact, global rankings on legality and democracy show that only a small part of the world's population benefits from regimes close to the basics of legality<sup>11</sup>, liberty<sup>12</sup>, democracy<sup>13</sup> and good governance<sup>14</sup>. Very relevant for our topic is the Freedom House report, which marked the 15th consecutive year of decline in global freedom. The consequences of these hierarchies are found in

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<sup>10</sup>Bueno de Mesquita, B. and Smith, A., 2011, *The Dictator's Handbook. Why Bad Behaviour is Almost Always Good Politics*, New York: Public Affairs, pp. 291 – 293.

<sup>11</sup>See The World Justice Project, *Rule of Law Index 2020*, available at [www.worldjusticeproject.org](http://www.worldjusticeproject.org), consulted on 28<sup>th</sup> of June 2021.

<sup>12</sup>See Freedom House report, *Freedom in the World 2021. Democracy under Siege*, available at <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege>, consulted on 28<sup>th</sup> of June 2021.

<sup>13</sup>See The Economist Intelligence Unit, *Democracy Index 2020: In sickness and in health?* <https://www.eiu.com/n/campaigns/democracy-index-2020/>, consulted on 28<sup>th</sup> of June 2021.

<sup>14</sup>See The Chandler Institute of Governance, *The Chandler Good Government Index 2021*, available at <https://chandlergovernmentindex.com/>, consulted on 28<sup>th</sup> of June 2021.



several matters that influence the legal framework in the field of public law – from migration and its regime, to the conditions of access to the labour market; from recruiting intellectual elites from abroad and implicitly granting citizens to reconfiguring education systems, etc.

From this perspective, the public law evolution after the end of the pandemic will be further marked by this separation of political regimes. Every legal norm enacted in the last 18 months that has strengthened population surveillance will be difficult to withdraw in countries where the standards of legality and democracy are not high, and this will most likely strengthen the political power over the long term to the detriment of the citizen.

## 8. Conclusions

The pandemic was not an expected event and much less easy to defeat. The lack of countries training in this matter means in fact a decrease of the political act of regulation and application of the public law' quality, because this operation belongs entirely to this branch of law.

At the same time, because the legal system is the product of some people, each country legal situation in mid-2021 is only a reconfirmation of a national political-social attitudes and practices. In this sense, it can be concluded that most countries have failed to get out of the typology set for decades or centuries, and this is not a positive fact, precisely because of the shortcomings that the reports in this text show.

Therefore, the title question does not involve – in a short-term analyse – a positive answer, but rather a predictable one that emphasizes the national traditions of the political environment strength. From this perspective, it is very possible that in the coming years authoritarian regimes will strengthen this attribute, precisely by growing the number of normative acts in the public law area, and countries where legality dominates to continue to progress on their way to increasing the quality of governance. But considering how many billions of inhabitants do not have good governance, it turns out that in addition to an idea of legality involution we can note other facts that will be the consequence of some leaders' desire to extend the exercise of national political power, damaging to the well-being of all citizens.



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