Athens Journal of Law 2023, 9: 1-12
https://doi.org/10.30958/ajl.X-Y-Z

News and Perspectives of Public Law

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Since the earliest classic division of law into public law and private law, envisioned by the 3rd century Roman legal expert Ulpian, interdisciplinarity as a fundamental feature of the law has currently become noteworthy. The recent exceptional pandemic situation that we have faced, which can easily be regarded as "crisis," has revealed once more that reference to society can only be made by resorting not only to law but also to ethics and morals. Public authorities have often found themselves in the position of making administrative decisions for the population, objected by the great majority, as fundamental rights have been restricted for short periods of time. This paper addresses a current topic of interest, namely Considering interdisciplinarity, can we speak nowadays of a new public law? If so, what should we do with the old law? Should we discard it or rebuild it? These questions are answered herein by using research methods specific to law, in order to emphasise the conclusions according to which the measures for good administration carried out by public authorities must express both the letter of the law and the spirit of the law, taking the general interests of society into account.

Keywords: *Public law; Public Interest; European Ombudsman; Maladministration; The Venice Commission.*

Introduction

Humanity is going through a period of full changes that are unique due to their unpredictability. At the same time, however, such changes are wonderful because they challenge us to relate to the environment not as a "given" (le donné), but as a "construct" (le construit) - by means of the contribution of each and everyone. Moreover, it is necessary for decision-makers, national public authorities or institutions or even any official body of the European Union to offer citizens the required and necessary guarantees that their rights be preserved. In this respect, we believe that two of the rights regulated by the Charter of Fundamental Rights of the European Union: art. 41 - *Right to good administration* and art. 47 – *Right to an effective remedy and to a fair trial* are intertwined with the responsibility of ensuring a high level of environmental protection and quality improvement, as per art. 37 – *Environmental protection*.

Furthermore, for theorists and practitioners of law, the appeal of the period we are going through reveals a shade of the law noted by distinguishing the phenomenon of imminent dangers for individual persons as well as for species. This period is appealing because it obliges us *simple* individuals or representatives of the people or of the planet to resort to that state of individual conscience we

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possess to help by contributing to build a state of responsible collective conscience. The state of danger, the possibility of losing health or even life can generate a leap of faith to find solutions for coexistence, even in these perilous conditions. Similarly, of mention is the opinion of the doctrine according to which:

> *'before being a normative reality, law is a state of conscience, in the sense that the changing needs of society [...] are not transposed tale quale into the language and content of the law; they pass through the conscience of the legislator (or of the people if it is a habit), followed by a process of evaluation, valorisation and final exploitation by means of the legal norms*[1]'.

Considering the general background described above, this paper intends to reach a broad scope to answer specifically the following question:

> *Is there any change of validation for the theory of the classical division of law perceived by Ulpian, according to which law is divided into public law and private law, given that at the time interdisciplinarity is increasingly taking shape*?

The structure of this paper concerns the emphasis on the practical applicability of certain concepts, such as administrative acts, maladministration, administrative liability and more. Furthermore, the paper is drawn up in a personal manner and structured so as to combine information of the national doctrine with that of comparative law along with an interdisciplinary nature. Among the scientific research methods used, the computer, comparative or deductive logical methods stand out. These are necessary in the sections where case studies from French law or from the European Ombudsman's case studies were presented, precisely from the perspective of formulating the conclusions reached in this study, following documentation carried out on the topic.

General Matters – Reassertion of Common Values

The hypothesis from which we start in this analysis is based on the idea that, on the one hand, we cannot currently speak of national law without taking into account international public law and, on the other hand, national law in general cannot exist outside the acquis communautaire. In support of this idea, we mention, for example, that there are international legal instruments for the defence of the rights and freedoms of citizens, such as conventions, agreements, treaties, etc. There are forms of associations between states. There are common values and principles. But there also exist supranational mechanisms to verify

[1] See Popa (2020) at 58.

compliance with the rule of law[2]. Especially current in this context is the opinion expressed in the doctrine according to which:

> '*one of the most difficult problems standing in the way of the fulfilment of the rule of law: to find the most effective procedural ways to make state bodies which, directly or indirectly, have the power of coercion in order to make citizens to comply with the law, to find themselves in the situation of being bound to comply with them*'.[3]

Perhaps more than ever, humanity faces this reality: the obligation to identify legislative solutions for the time being as well as for future generations along the fine lines between law, ethics and morality. This is why the drafters of international legal instruments, which will subsequently be reflected in national legislation must show great wisdom in proposing those measures that safeguard the present as well as the future on the one hand and, on the other hand, that guarantee the existence of the rule of law.

The values the European Union is founded upon are provided in art. 2 of the Treaty on the European Union -T.U.E.:

> *'the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*'

Therefore, these values have already entered the collective mind and we cannot fail to emphasise that, in addition to law, the recent exceptional pandemic situation has also emphasised the reassertion of fundamental ethical values such as respect, integrity, liability or responsibility.

In recent years, there has been a development in some areas of society that call for urgency and maturity in administrative[4] decisions that cannot exist in the absence of a common political power at the supranational level. For example, the health crisis generated by the COVID-19 virus has overlapped with other events, such as the humanitarian crisis generated by the outbreak of a war on the borders of Europe and, at the same time, with the environmental crisis generated by irreversible climate change. All these have a wide spectrum of action, emerging from such current realities, because they have consequences for all people who make up the population of the planet on all continents.

Therefore, with good reason any normative action plan can only be developed under the observance of the fundamental rights, as provided by the Charter of Fundamental Right of the European Union. In this vein, the theory

[2]We do not detail in this paper for example, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.
[3]See Drăganu (1992) at 12.
[4]For more about public administration, see Popescu (2017) at 528-532.

according to which a specific feature of the public law is the priority of general interests[5] as opposed to private ones, while ever underlining the principle that every right always corresponds to a correlative obligation, whether for the citizen or the state, as was confirmed during the pandemic of 2020.

The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters and currently consists of 61 Member States[6]. In March 2016, the Venice Commission published the rule of law checklist[7] which consists of the following:

> *'legality; legal certainty; prevention of abuse (misuse) of powers; equality before the law and non-discrimination; access to justice*'.

As noted, legality[8] is the first principle used in this enumeration. Understandably, in the opinion of the Venice Commission, legality is the first basic pillar of any rule of law and it is natural it be so, since it is a social imperative that must be observed.

In relation to the last criterion listed – *the access to justice* – it is unavoidably noticeable that recently, two countries, Poland and Hungary challenged the Court of Justice of the European Union Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020, on a general regime of conditionality for the protection of the EU budget, and the action for annulment was dismissed on 16 February 2022[9]. Therefore, it is easy to note that access to justice works not only at the national level, but also at the EU level. In a different vein, we consider that another reality of the legal framework is illustrated through this case, namely the increase these days of the importance of financial aspects, as the States' no longer have the ability to face the new global social challenges on their won.

[5]We do not develop more on this occasion the issue of legality-opportunity in case of administrative acts, but we mention that art. 7 named: "*Absence of abuse of power*" of the European Code of Good Administrative Behaviour outlines the idea supported by us: "*Powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest*", https://www.ombudsman.europa.eu/en/publication/ro/3510

[6]See in this respect the public source at https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN

[7]CDL-AD (2016)007-rev Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice 11-13 Mars 2016).

[8]For more about legality, see Ștefan (2017).

[9]See in this respect public information at https://curia.europa.eu/juris/document/document.jsf?text=&docid=254061&pageIndex=0&doclang=ro&mode=req&dir=&occ=first&part=1

The Rule of the Law and the Increase of the Number of Administrative Acts issued during the Pandemic

It is already well-known after three years that the legal basis on the national level of the measures taken at the beginning of the pandemic of March 2020 were the Constitution, the law and then the normative administrative acts. Therefore, there were, in general, many administrative measures taken by the senior officers of all countries worldwide, in a period characterised by such an unprecedented unpredictability. From this vantage point, the Venice Commission sought know if a state of emergency had been declared, by which authority, and for how long. Therefore, a briefing document on this matter has been released[10]. This document is a summary of the measures taken by various countries starting from the spring of 2020, in order to institutionally respond to an unprecedented aggression with impact on life, namely a killer virus.

From the few examples briefly reproduced in the following, and even in the absence of official statistics, the unmistakable conclusion is that the large number of administrative acts issued in such a short time by governments around the world in response to an exceptional situation, cannot be compared with any other period in the constitutional-administrative history of any country that would claim a common battlefront generating similar administrative acts.

For example, in France, according to the official information of the Venice Commission, the first measures on the COVID-19 crisis were taken by the Ministry of Health based on the Public Health Code which prohibited public access to a great number of public gatherings, by means of a Ministerial Decree adopted on 14 March 2020[11]. Subsequently, the Organic Law Draft regarding the state of emergency was adopted in March 2020 to face the COVID-19 epidemic[12]. The Constitutional Council decided to endorse this law declaring a state of health emergency.[13] Albeit, there was a great number of non-conformity objections[14] on the text of this normative act.

In Romania, the state of emergency was declared by means of Decree of the President no. 195 of 16 March 2020 enforced on the territory of Romania.[15] It was further prolonged by Decree of the President no. 240 of 14 April 2020.[16] In Austria, the state of emergency was not declared, according to the aforementioned public document, but the Ministry of Health prohibited gatherings of more than 500 participants, and ordered the closure of universities and schools by means of the decree of 11 March 2020[17].

In Peru, the state of emergency was declared by means of a decree issued by the President of the country on 16 March 2020, while in the United States of America, the federal government and the 50 states issued state of emergency

[10]Public source at https://www.venice.coe.int/files/EmergencyPowersObservatory//T06-F.htm
[11]*Ibid.*
[12]Loi organique n°2020-365 du 30 mars 2020 d´urgence pour faire face a l´epidemie de covid-19.
[13]The state of emergency was declared by a decree issued by the Council of Ministers.
[14]We refer to Decision 2020 - 800 DC du Conseil du 11 mai 2020.
[15]Published in Official Journal no.212 of 16 March 2020.
[16]Published in Official Journal no. 311 of 14 April 2020.
[17]Public source at https://www.venice.coe.int/files/EmergencyPowersObservatory//T06-F.htm

declarations in response to the COVID-19 pandemic[18]. For example, according to the aforementioned document, at the federal level the President of the United States of America published Proclamation 9994 declaring a national emergency concerning the novel coronavirus disease (COVID-19) outbreak on 13 March 2020.

The Right to Good Administration and the Motivation of the Public Interest in the Decisions of the European Ombudsman

To reach a conclusion in relation to the subject matter of this study, it is interesting to see whether, at the European level, there have been cases of maladministration in public health services concerning the pandemic. In this respect, one of the levers created by the European documents is the possibility of citizens to file complaints before the European Ombudsman authority especially created in this context. Relatedly, there is another affirmation made on another occasion: "Each government body or rather each State is bound to ensure the provision of public goods or services for the fulfilment of the obligations incumbent on it."[19]

From the documentation carried out on the public source of information[20], it appears that despite being in the exceptional situation of the COVID-19 pandemic, the European Ombudsman was active during this period at publicly reporting cases of maladministration derived from the lack of transparency on public access to documents. Alternatively, they concluded the inquiry by assessing that there was no maladministration. For example, two different case studies from COVID-19 pandemic are herewith cited, both based on the lack of transparency, while also substantiated in the public interest.

Case study no. 1 - Decision on how the European Commission handled a request for public access to documents concerning the quality of medical masks distributed during the COVID-19 pandemic (case 79020121/MIG).[21]

In short, as evident in the public briefing of the situation, the case concerned a request for public access to documents concerning 1.5 million medical masks the Commission had purchased at an early stage in the COVID-19 pandemic. The masks did not meet the required quality standard and the Commission refused to give access to some of the requested documents, relying on the need to protect the commercial interests of the manufacturer in question.

> *'The Ombudsman therefore took the view that the Commission's refusal of public access in this case constituted maladministration, recommended that the Commission*

[18]*Ibid.*
[19]See Lazăr (2016) at 26.
[20]Public source at www.ombudsman.eu
[21]Public source at https://www.ombudsman.europa.eu/en/decision/en/156438

should reconsider its position with a view to granting significantly increased access to the documents at issue, from two reasons:

- *The Ombudsman found that the information at issue could not reasonably be considered to be commercially sensitive;*
- *Even if one were to accept that the Commission could reasonably invoke the relevant exemption, there is a strong public interest in disclosure.*

In conclusion, the Commission has reacted positively to the Ombudsman's recommendation by giving wider public access to the documents at issue. However, the Commission has still not given access to the three remaining documents in their entirety[22].

Case study no. 2 - Decision on the European Medicines Agency (EMA)'s refusal of public access to documents relating to the manufacturing of mRNA vaccines against COVID-19 (case 1458/2021/MIG)[23].

In short, the case concerned a request for public access to parts of an application for marketing authorization for an mRNA vaccine against COVID-19. The request contained detailed explanations regarding how the vaccine is manufactured. EMA refused to grant access to the documents because it considered their disclosure undermining to the manufacturer's commercial interests and because there was no overriding public interest in disclosing the documents.

The Ombudsman closed the inquiry finding no maladministration for the following reasons:

'*The information of the requested documents is commercially sensitive under the law of the European Union, as the disclosure is likely to be useful to competitors*[24]*.*
Regarding whether there is an overriding public interest in disclosing documents, even if there are reasons why information related to the safety and efficacy of a drug should always be disclosed (for example, clinical trial results), the same is not applicable in the case of the information related to the manufacturing method used for a drug.
In conclusion, the Ombudsman recognises the sentiment of the complainant in this case of the interests of the wider public. However, it feels these are largely political questions which need be addressed by those politically responsible.'[25]

The Contribution of the Current Case Law in Defining the Legal Regime of the Administrative Liability

In order to determine the interdisciplinary nature of some concepts that are identified in the area of public law in general and administrative law in particular, a new type of liability arises while analysing legal liability: patrimonial administrative liability of the State for ecological damage. A recent

[22]*Ibid.*
[23]Public source at https://www.ombudsman.europa.eu/en/decision/en/149025
[24]For further details on European regulations in the field of competition, see Lazăr (2013) at 2 et seq.
[25]Public source at https://www.ombudsman.europa.eu/en/decision/en/149025

case law regarding ecological damage, which emerged in France from two case studies and was settled by the Administrative Court and the Conseil d'Etat illustrates the evolution of the administrative liability as it stands today. The above-mentioned case studies illustrate that "in France, administrative justice was born from a contest of historical circumstances and lasted only for practical reasons."[26] This surely confirms the great role of French case law in the creation of the law. Furthermore, we also note that, in 2020, a complaint was filed with the European Court of Human Rights against 33 countries for failing to take sufficient action on climate change.

Case study no. 1 *–"The Case of the Century" (L'Affaire du Siecle).*

In this case, France was found guilty by the Administrative Court of Paris for ecological damage regarding climate changes, the respective judgment consisting of 38 pages.[27] The press release of 3 February 2021 notes the following:

> *'In March 2019 4 non-governmental organizations filed four appeals with the Paris Administrative Court in order to have the French State's failure to act in the fight against climate change recognised, to obtain its condemnation to redress not only their moral but also their ecological damage and to put an end to the State's failure to fulfil its obligations.*
> *The court held that the French state should be held liable for part of this damage if it had failed to meet its obligations to curb greenhouse gas emissions. [...] The court estimated that the existence of such damage, which was not contested by the State, was reflected in particular in the constant increase in the Earth's average global temperature, which was responsible for a change in the atmosphere and its ecological functions*'[28].
> The judges *'then examined whether there was a causal link between this ecological damage and the alleged failures of the French state in the fight against climate change. They held that the French state should be held liable for part of this damage if it had failed to meet its obligations to curb greenhouse gas emissions. [...] The court held that the applicants were entitled to claim compensation in kind for the ecological damage caused by France's failure to meet its greenhouse gas emission reduction goals [...]]. In the end, the court held that the French state's failing to honour its obligations to combat global warming was detrimental to the collective interests defended by each of the applicant associations*'[29].
> In conclusion,
> '*The Court of Paris sentenced the State to pay each of the Associations a symbolic sum of one euro as compensation for the moral prejudice it had caused them*'[30].

[26]Rivero & Waline (1998) at 137, and Leș (2021) at 59.
[27]Public information at http://paris.tribunal-administratif.fr/content/download/179360/1759761/version/1/file/190496719049681904972190497 6.pdf
[28]For further details, see Ștefan (2021) at 17.
[29]*Ibid.* at 18.
[30]*Ibid.*

Case study no. 2 *– Commune de Grande - Synthe and several associations*[31].

In this case, the French Conseil d'Etat cancelled the refusal of the Government to take additional measures and required it to take such measures before 31 March 2022, being a case built on the Government's inaction.

The following information emerges from the press release of the French Conseil d'Etat: 'Commune Grande - Synthe and several associations (four non-governmental organizations) requested the French Conseil d'Etat to cancel the refusal of the Government to take additional measures to reach the target of reducing greenhouse gas emissions totalling 40% by the year 2030. To achieve the reduction targets set out in the Paris Agreement, meaning a 40% reduction in emissions as compared to 1990 levels, the Government had previously adopted a reduction plan covering four time periods (2015-2018, 2019-2023, 2024-2028 and 2029-2033), each with its own reduction targets'.

The French Conseil d'Etat admitted the petition of the plaintiffs, noting on the one hand that the decrease in emissions in 2019 was low and that in 2020 was insignificant because economic activity has been reduced by the health crisis. On the other hand, by observing the trajectory, which particularly provides a 12% reduction in emissions for the period 2024-2028, it does not seem to be achievable if new measures are not quickly adopted.

In conclusion, the French Conseil d'Etat requested that the Government take additional measures until 31 March 2022 in order to reach the target of reducing greenhouse gas emissions totalling 40% by the year 2030[32].

Leaving the national plan and looking towards the European one, there is a noticeable precedent consisting of filing complaints before the European Court of Human Rights against certain States, in order to establish their legal liability of a new type, concerning the environment. We refer here to the case *Claudia Duarte Agostinho and Others v Portugal* and 32[33] Other States[34] filed on 7 September 2020. The case concerns greenhouse gas emissions from 33 Contracting States which is said to '*contribute to global warming […] and are affecting the applicants' living conditions and health*'[35].

As the doctrine notes: '*the applicants are young Portuguese aged between 8 and 12 who filed allegations against 33 European countries for failing to comply with their commitments in order to limit climate change*'[36].

[31]Decision du Conseil d´Etat n°427301 du 19 Novembre 2020.

[32]Public information at https://www.conseil-etat.fr/actualites/emissions-de-gaz-a-effet-de-serre-le-conseil-d-etat-enjoint-au-gouvernement-de-prendre-des-mesures-supplementaires-avant-le-31-mars-2022

[33]The 33 defendant countries are: Austria, Belgium, Bulgaria, Switzerland, Cyprus, Czech Republic, Germany, Denmark, Spain, Estonia, Finland, France, United Kingdom, Greece, Croatia, Hungary, Ireland, Italy, Lithuania, Luxemburg, Latvia, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Sweden, Tukey, Ukraine.

[34]Public information at https://www.nhri.no/wp-content/uploads/2020/11/DUARTE-AGOSTINHO-and-others-vs-PORTUGAL-and-32-others-unofficial-translation-fr.en_.pdf

[35]*Ibid.*

[36]This case is discussed in detail in Duțu (2021) at 238-243.

Conclusions

Following the documentation carried out on the proposed topic, both from national law and from comparative law, the research objective of this study is fulfilled: providing information on the status and perspective of public law in general.

The following can be concluded:

First, nowadays law cannot be imagined without denying its classical division into public law and private law, as described by the Roman legal adviser Ulpian. Notwithstanding, a potential answer to the questions that make up the scope of this paper, is that it is impossible to say that there is a new public law that is autonomous, even if it benefits from interdisciplinarity. From this point of view, certainly the destruction of old public law and its replacement with a new public law is out of question. The solution can be the following: to keep its form, but adjust its content to new social, economic, ethical and moral realities, all of these observing its tendencies.

Another conclusion is that the exceptional situation, experienced since March 2020 to the present, calls for exceptional measures of State authorities, that should be supported on the letter and spirit of the law. Furthermore, the idea of solidarity between States and joint action against a killer virus while leaving aside their own political, national ideologies has become one of the most important. Never and nowhere in the world in such a short period of time have States been united in generating a firm institutional response to create the legal framework to combat the unknown state of danger to people's lives. And this is not on a declarative but practical level. Conclusions are based on the report drawn up by the Venice Commission. Therefore with this in mind, public authorities, in declaring exceptional measures, applied the principles of the regime of public power, a regime in which public interest has priority over private interest.

Furthermore, another conclusion that emerges from this analysis is that the executive public authorities have adopted many measures substantiated by administrative acts: decrees, orders, etc., more or less objected to by the citizens due to the fact that over a relatively short period of time, their rights and freedoms were restricted. Therefore, the philosophy of the measures taken by public authorities was based on public interest, in protecting the public health of citizens. From this point of view, public health services stood out remarkedly during the pandemic, compared to other public services, as mentioned above re complaints addressed to the European Ombudsman. On this topic, two recent complaints addressed to the European Ombudsman were presented above.

In the end, this study has brought additional information to outline the interdisciplinary nature of certain branches of law that traditionally have belonged to the branch of public law. In addition, it has shed light and analysed administrative liability within administrative law, by revealing a new type of

liability i.e. patrimonial administrative liability of the state for ecological damage.

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