RELEASING THE ADMINISTRATIVE CREATURES FROM THE LAW
A Comparative Law analysis of the Supreme Court ruling on vaccine mandate

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On January 13, 2022, the U.S. Supreme Court voted 6-3 to suspend the application of the vaccine mandate issued by the Occupational Safety and Health Administration (OSHA). Rather than study the merits of the case, my interest is to examine -from a Comparative Law perspective- the Administrative Law concept that derives from that ruling from the standpoint of the common good.

I

The Supreme Court ruling assumed an idea of administrative agencies limited to the enforcement of the positive law. According to the majority of the Justices, the "*Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided*". Therefore, the authority of the OSHA based on the Occupational Safety and Health Act was interpreted from a narrower and literal lecture of the Act. "*Occupational safety*" and "*emergency temporary standards*" were interpreted under their literal and more limited meaning. Any other interpretation "*would significantly expand OSHA's regulatory authority without clear congressional authorization*". Evidence of that conclusion is that the OSHA "*in its half century of existence, has never before adopted a broad public health regulation of this kind*".

Justice Gorsuch, with whom Justices Thomas and Alito joined, concurred with the opinion, introducing a more restrictive interpretation of the entailment of the OSCHA to the Law. Answering the question "who decides?" the concurring opinion recalls that the Court is not "*a public health authority*", but "*it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land*". Therefore, it is Congress -not the agencies- who has the authority to decide on health measures. Congress cannot transfer "*its legislative powers to unelected officials*" based on the nondelegation doctrine. According to that position, the real question is to highlight that any delegation of power would be unconstitutional. Hence, the power to respond to the pandemic rests with Congress -and the States- but not in the OSCHA.

The dissenting opinion of Justices Breyer, Sotomayor and Kagan argued that the OSCHA fulfilled the Law mandate: it "*took action to address COVID–19's continuing threat in those spaces*". The interpretation adopted by the Court "*stymies the Federal Government's ability to counter the unparalleled threat that COVID–19 poses to our Nation's workers*". The dissenting opinion does not challenge the premise that the positive Law limits the agency. What was challenged was the interpretation of the Act and, therefore, the agency's scope of authority.

The matter of interpretation was, then, the positive scope of the statute, based on the idea according to which the OSCHA must implement the positive Law -and nothing more. For the majority of the Court, the Law does not grant the authority to issue the vaccine mandate; for the dissenting Justices, the Law does grant the statutory authorization. From a Comparative Law perspective, this is a very restricted concept of Administrative Law.

II

Scholars have devoted time and energy to find a comprehensive definition of Administrative Law in the Civil Law models. In 1954 George Vedel explained that the Administrative Law definition depends on the Public Administration concept, which refers to the Executive Power (*pouvoir exécutif*). Consequently, the first and most basic definition of Administrative Law is, precisely, the "execution" of the "written" Law by the Public Administration. That idea inspired Kelsen and Merkl, which defined the administrative activity as subordinated to the Law. Under a reduced vision of the Executive Power, the Public Administration is nothing more than an automaton of the positive Law.

As Vedel warned, that was a distorted vision. Certainty, the Public Administration resides primarily in the Executive, but that does not mean that it is limited to the "execution" of the Law enacted by the Legislative Power. As Fritz Fleiner concluded in 1933, there is something more than the mere "execution" of the Law. But what is that *something more?*

What identifies the Administrative Law is not the implementation of the Law but the concrete protection of the common good. At the beginning of the 20th century Leon Duguit, in France, explained that the Government exists to assure the satisfaction of society's necessities. That idea was developed by Gaston Jezè, who defined the Administrative Law as the Law of the "public services" -one of the most contested concepts of the French Law. As a result, the Public Administration was defined as the power that serves the general interest.

The German doctrine took that observation to define the Public Administration as an activity based on "*the immediate obtaining of certain material results*" (Fleiner). The idea was elaborated by Wolff, Bachof, and Stober, who defined the Public Administration as the power acting to pursue the general interest. In other words, the Public Administration is the instrument through which the Government serves the persons. That idea inspired the Spanish doctrine to elaborate the "vicarial" concept of the Public Administration recognized in Art. 103.1 of the 1978 Spanish Constitution, according to which the Public Administration shall serve the persons. Only the Public Administrative fulfills this task because the Legislative represents the people but does not serve the persons, as concluded by García de Enterría and Fernández. Accordingly, the Public Administration must act to serve the common good as a technical instrument of the Government, according to S. Martín-Retortillo. The Public Administration -as explained by Zanobini- *concretizes* the general welfare.

The European concept of "good administration" complemented that definition. Spanish professors Meilán Gil and Rodríguez-Arana defined the Public Administration as the citizens' service based on Aquinas' vision of the common good. That definition was adopted in the 2013 *Chart of the rights and duties of the citizens towards the Public Administration* that summarized the ius commune in the Ibero-American Administrative Law. The common good -explains professor Delpiazzo from Uruguay- reflects the concept of the Public Administration not based on the "execution" of the Law but in the service of the persons based on human dignity. In Argentina, professor Cassagne has recently concluded that the common good characterizes the administrative activity according to the subsidiarity principle.

III

In the U.S. Administrative Law, there is an obstacle to advancing in a Comparative Law study. As Bernard Schwartz explained, in the U.S., "*administrative law is not regarded as the Law relating to public administration,*" but the Law applicable to the agencies. From a comparative perspective is hard to support that conclusion because agencies *are* Public Administrations that act within the Executive Branch.

But, in any case, as part of the Executive Branch, the administrative agencies were defined by the Supreme Court as creatures of the Law, that is, as a body limited to the "execution" of the positive Law.

From the vicarial concept of Public Administrations as institutions that fulfill the common good, there are five general objections to the definition of the administrative agencies as creatures of the Law.

The *first* objection is that the vicarial concept denies a reduced vision of the Public Administration based on the positive Law. Professor Coviello, in Argentina, explains that the Public Administration is bound to the "*ius*" and not only to the positive law (*lex*), taking into consideration that the *ius* must be *res iusta*. That was the base of the monumental work done by the French State Council when it derived the general principles of Administrative Law from the *ius*. As I pointed out here, the construction of the general principles of Law was based on a Natural Law conception of the Administrative Law.

The *second* objection is that the positive Law cannot exhaust the scope of administrative action. The vicarial concept highlights the dynamism of the administration action based on the persons' service, which helps to understand why the Public Administration cannot be reduced to the implementation of the positive Law, as Professor Parejo said. Two techniques are used to assure the subordination to the legal system without the rigors of positivism. The first one is the recognition of discretionary powers based on the open determination of the general interest. The second one is the introduction of undetermined legal concepts in the Law, particularly of technical nature. Those techniques do not imply the "delegation" of the legislative power because the Executive acts as Public Administration when concretizing the discretionary powers and

the undetermined legal concepts. To serve the persons, the Public Administration must have a margin of appreciation that the Judiciary should respect.

The *third* objection is that the judicial review over the Public Administration must respect the deference in implementing the discretionary powers and the undetermined legal concepts following the margin of appreciation. That does not mean that the administrative activity is beyond the scope of the judicial review. But the Public Administration -and not the Judiciary- is the branch vested with the authority to decide how the common good can be determined in specific cases.

The *fourth* objection is that the Administrative Law goal is not only to prevent the abuse of power in the administrative action but also, to prevent that abuse in the administration's inaction. The common good calls for administrative action, particularly during pandemic times. Therefore, Administrative Law is not only about what the Public Administrations cannot do but about what the Public Administration must do to pursue the common good.

The final and *fifth objection* is that instead of evaluating the administrative action from the mere implementation of the positive Law as a safeguard to individual freedom, it is necessary to balance individual rights with the common good. The Inter-American Human Rights Court has decided that the common good is "*a concept referring to the conditions of social life that allow the members of society to achieve the highest degree of personal development and the greatest validity of democratic values*". The administration action that restricts individual rights -according to Art. 32 of the American Convention on Human Rights- must follow the "*just demands of the common good*".

IV

The concept of a Public Administration (or using the U.S. restricted terminology, "administrative agencies") as "*creatures of the statute*" that can only exert the authority expressly defined in the positive Law resembles the old concept of the Public Administration as the simple Executive Power. Under that restricted vision is the Legislative Power -not the Executive- the one with authority to serve the persons, a power that cannot be "delegated" to the Executive. As a result, the debate in the Court was reduced to the literal interpretation of "occupational safety" and "emergency temporary standards". That is a debate limited to the positive law, or as known in the civil law models, an *exegetic* approach of the Administrative Law.

Despite the split votes, there is a convergence in how the Supreme Court approach this case: the supremacy of the positive Law. For six Justices, the Law does not -and eventually, cannot- "delegate" in the OSHA the authority to issue a vaccine mandate. For three Justices, the Law does vest that authority. From a Comparative Law perspective, I missed a debate beyond the exegetic analysis of the positive Law. Or in other words: what is missing here is a dogmatic approach to Administrative Law. According to German

scholar Ebhard Schmidt-Assmann, the Administrative Law dogmatic refers to the construction of a rational system for practical purposes.

Hence, from a Comparative Law perspective, the debate should have been on how the pandemic must be addressed considering the Administrative Law dogmatic. The person's service during the pandemic and the protection of the health is the responsibility of the Executive, not the Legislative, because only the Executive -according to the vicarial concept based on the common good- has the mandate to serve the persons. I'm not arguing that the vicarial concept empowers the Public Administration to violate the Law. As I explained in a book published in 2011, I argue that the vicarial concept requires a vision of the Public Administration beyond the rigid scope of the mere "execution" of the positive Law.

Another consequence of this positivist approach is that the majority of the Court adopted a historical approach, considering that the OSHA "*in its half century of existence, has never before adopted a broad public health regulation of this kind*". The vicarial concept is not based on a petrified vision of the Administrative Law but on a dynamic one. Each "*period of the history of the States*" -wrote Ernst Forsthoff- "*produces its own type of Administration, characterized by its peculiar ends and by the means it serves*". What is relevant is not what the OSCHA has done in the past but what the OSCHA must do today to face an unparallel threat as the pandemic. Because as the World Bank stated, "*during times of crisis, the public administration is called upon to take a stronger role*".

V

From the vicarial concept, "occupational safety" and "temporary emergency standards" are undetermined concepts that only the Public Administration can concretize within a margin of appreciation that the judicial review must respect. Or in other words, as Vermeule explains, it is necessary to respect a deferential scope of the administrative decision-making process. In Comparative Law, the discretionary powers are not a "delegation" of the legislative power because the Public Administration is not acting as a legislator -or representative- but as the instrument to pursue the common good based on the good administration standards. Under that scope of a deferential judicial review, the conclusion could have been that the OSCHA acted within the scope of its authority. Or maybe not. But in any case, the approach should not have been based on the agencies as mere creatures of the Law under the judicial interpretation of undetermined legal concepts.

This case demonstrates that the U.S. Administrative Law, to reflect the complexities of the modern Administrative State, should get over the exegetic view of the positive Law and advance into a dogmatic perspective. In other words, it should move from the *lex* to the *jus*. Recently, Elizabeth Fisher and Sidney A. Shapiro have proposed a new Administrative Procedure Act "*firmly grounded on administrative competence*" in the sense that Administrative law should be "*focused on the competence of public administration*." Also, Cass R. Sunstein and Adrian Vermeule have argued that the U.S.

Administrative Law should be based on morality principles that, as I explained, resemble the general principles of Administrative Law in the Civil Law systems.

From a Comparative Law perspective, the U.S. Administrative Law will benefit from a dogmatic approach that considers the vicarial concept of Public Administration aimed at the common good without the rigors of the positive Law.

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