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RESEARCH ARTICLE

COVID-19: Introducing a sliding scale between legality and scientific knowledge

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Abstract

This article aims to explore the new normal in lawmaking during the COVID-19 pandemic. It proves how the pandemic has affected the making of legal norms, in terms of both process and content. It argues that COVID-19 legislation is largely driven by scientific data for the sake of public health. In this context, it explains how national-decision making is influenced by expert advisory bodies that attempt to specify how public health may be preserved during a pandemic crisis. Moreover, it sheds light into the fact that law-making during the first phases of the pandemic was approved and endorsed by the populations of states, due to their fear of the unknown disease. However, as the pandemic steadily became an established truth, the public's trust in lawmaking started to decrease. These shifts are well explained if one conceives lawmaking by expertise as a sliding scale, the ends of which are legality at one end and expertise coupled with popular acceptance at the other. This unique sliding scale depicts how COVID-19 lawmaking functioned, balancing between opposite trends.

Keywords: expertise; lawmaking; pandemic; public opinion; sliding scale

I. Introduction

The global outreach of the novel coronavirus triggered a domino effect with multiple implications for national healthcare systems, as well as state policies. It brought forward social change, showing that the protection of public health can be disruptive to human relationships, given that the vast majority of states implemented strict distancing measures.[1]

Quarantines imposed on the general population led to legal systems' doctrinal bewilderment, since the measures were unprecedently severe with respect to general human rights requirements.[2] Nevertheless, there was a strong and unified public opinion to back such severe human rights curtailments – at least during the first

[1]Sang-Heyon Jeon, 'Public Health and Constitutional Rights during the COVID-19 Pandemic' (2021) 20 (2) *Journal of Korean Law* 429, 432–33.

[2]Xigen Wang and Wenjing Wang, 'Integrating Human Rights Conflicts in COVID-19 Pandemic Prevention and Control' (2020) 19(3) *Journal of Human Rights* 343, 361.

outbreaks of the pandemic.[3] Most states relied heavily on plans deployed by national scientific committees.[4]

Their dedication to public health plans stemmed from this novel situation, which could only be addressed by the available scientific knowledge. States reasonably turned to scientific committees for assistance, while the notions of national preparedness and response planning[5] were used by governments as their shield against potential public criticism or to address legal queries.

Following these considerations, and taking into account the multifactorial and dynamic context shaped at the pandemic's outbreak, this article aims to examine the interrelation of four notions: (1) normalcy; (2) expertise; (3) legality; and (4) public opinion. These concepts interrelate and explain how COVID-19 has affected law-making by creating a new reality with long-term effects. Normalcy has a dual character: the notion signifies both changes in ordinary life and their legal implications. Expertise, on the other hand, denotes how the pandemic reintroduced the significance of scientific knowledge in the course of legal decision-making. In this regard, it will turn into legality to verify the concept's radical change during the pandemic by providing legislative and judicial examples. Finally, it will turn to the notion of public opinion to examine how the public has evaluated this new normal, and whether the public's views have a role to play in lawmaking, and in decision-making more generally.

Four propositions will be proved: (1) how COVID-19 has affected the ordinary political structure and social interaction, creating a new normal, both domestically and internationally; (2) how COVID-19 has reshaped legal dependence on science, introducing a unique sliding scale; (3) how this sliding scale, which demonstrates the relationship of legality and science, affects the former; and (4) what role public opinion has in this interplay. These four propositions will provide a complete view of the legal saga caused by the pandemic's spread.

II. The pandemic and the new lawmaking normal

As far as the first proposition is concerned, the current ongoing global situation is far from normalcy. Although a self-evident proposition *prima facie*, the long-term effects of the pandemic are not always visible. COVID-19 established a crisis lasting for more than two years, and it is correctly suggested that it poses the most significant health challenge since the Spanish flu pandemic of a century ago, and the most influential economic incident since the 1929 global financial crisis.[6] Overall, it is one of the most important international crises after World War II, in terms of the toll of deaths and disease.[7]

[3]Karlyn Bowman Clemence, *Political Report: COVID-19 Documenting Changes in Public Opinion* (American Enterprise Institute, Washington, DC, 2020).

[4]Efthimios Parasidis, Micah L Berman and Patricia J Zettler, 'Assessing COVID-19 Emergency Use Authorizations' (2021) 76(3) *Food & Drug Law Journal* 441, 448.

[5]WHO, 'Investing in and Building Longer-Term Health Emergency Preparedness During the COVID-19 Pandemic: Interim Guidance for WHO Member States' (6 July 2020), available at <WHO/2019-nCoV/Emergency_Preparedness/Long_term/2020.1>.

[6]Jonathan Davies, 'Legal and Ethical Ramifications of COVID-19 in Israel' (2020) 39(2) *Medicine and Law* 225, 225

[7]ILA, Global Health Committee, 'Interim Fourth Report of the Committee' (10 May 2022), available at <https://www.ila-hq.org/images/ILA/docs/ILA_2022/Global_Health_Law_Interim_Report_2022.pdf?fbclid=IwAR2YExUrvfoKQkAupC04kYkIGkjml44JprctZDAiHAjUGTYPofWXKIUluvo>.

From a legal perspective, COVID-19 brought about sweeping changes. Most importantly, it changed the route of law-making, in terms of both process and content. The major procedural change in this new normal is that the pandemic legislation was largely not the result of collective bodies vested constitutionally with legislative powers, following ordinary procedures and abiding by constitutional standards; rather, COVID-19 legislation passed primarily into the hands of the executive for the sake of the timely entry into force of those rules expected to halt its proliferation. In other words, the public health emergency prompted parliamentary oversight, under the pretext of the need for swift legislative responses.[8]

The crashing majority of states initiated emergent processes of law-making for the sake of public health. The respective legal norms that curtail civil liberties for the sake of public health and the pandemic's deceleration are by definition doubtful if not problematic. This shift in law-making reached all states; thus, it was not a single incident. In this regard, the pandemic has reshaped the concept of normalcy.[9] COVID-19 lawmaking is characterized by the executive's dominance, since 'governments have leveraged emergency prerogatives to boost their legislative powers'.[10]

The widespread exercise of lawmaking powers by governments is not new during emergency situations, when legislatures delegate extraordinary lawmaking power to the executive branch to cope with pressing circumstances. Yet the pandemic's management differs from the 'paradigmatic emergency scenario'[11] since the lawmaking powers of executives remained, and were followed by subsequent administrative orders specifying the implementation of the pandemic's non-proliferation measures. The volume of orders and regulations was unprecedented in an attempt to cover all aspects of public health protection. In this regard, a major shift in lawmaking was recorded. The prevalence of administrative lawmaking – both primary and secondary in the form of regulations – to combat the pandemic became commonplace. In addition to lawmaking's reconfiguration, its content has been primarily for a restrictive nature *vis-à-vis* fundamental civil liberties. These two conditions raised doubts over legality and democratic lawmaking during public health emergencies, given that the risk of power misuse heightens. From this angle, there is the occurrence of a new legal *topos* between normalcy and the absence of an official emergency declaration.[12] Most Western democracies did not opt for the proclamation of an emergency situation, with the exception of Hungary and Poland.[13] States opted not to extend the state of emergency regulatory framework to public health emergencies, whether there was an explicit provision in their constitution or not. From this point of view, they did not found containment strategies on state of emergency

[8]Elena Griglio, 'Parliamentary Oversight Under the COVID-19 Emergency: Striving Against the Executive Dominance' (2020) 8(1–2) *Theory and Practice of Legislation* 49.

[9]Karol Wozniacki and Boguslaw Przywora, 'Legal Basis for Introducing Restrictions on Human Rights and Freedoms During the First Wave of the COVID-19 Pandemic' (2021) 46(3) *Review of European and Comparative Law* 43, 46.

[10]Elena Griglio, 'Governments as COVID-19 Lawmakers in France, Italy and Spain' (2020) 22(4) *European Journal of Law Reform* 398, 398.

[11]Shaun Fluker and Lorian Hardcastle, 'Executive Lawmaking and COVID-19 Public Health Orders in Canada' (2020) 25(2) *Review of Constitutional Studies* 145, 149.

[12]Very few states opted for an official emergency declaration. In most cases, governments did not espouse this policy to pertain a status of normalcy. This ambivalent stance offers a facade of typical legality – a very helpful tool in international relations – although there is no guarantee about substantial requirements.

[13]Joelle Grogan, 'Analysing Global Use of Emergency Powers in Response to COVID-19' (2020) 4 *European Journal of Law Reform* 338, 345.

clauses. There are two notable exceptions to this general stance. First, Spain took advantage of the constitutional option provided. It declared a state of alarm, the most moderate among the state of exception and the state of siege provided by its constitution.[14] Second, Italy – which was severely hit by the pandemic – initiated strict measures of a national ambit, with no profound constitutional and legal basis.[15] Other national responses ranged between an intermediate response and dubious constitutional conditions, with no official emergency proclamation, but the enactment of such lawmaking processes.

The COVID-19 crisis turned public health protocols into legal norms with a global ambit of application.[16] Apart from the abrupt change in the process and content of legal norms, there has been a hierarchical reclassification of norms, given that soft law provisions regarding public health have become obligatory overnight, due to the pandemic.

Two considerations arise from this novel occasion in lawmaking: the legal basis upon which states relied and how normativity has been reshaped due to the pandemic. As far as the first consideration is concerned, apart from the different types of fast-track lawmaking processes introduced by various states, the legal basis for such a legal turn is interesting. In this framework, three arguments profoundly stood out: (1) that public health emergencies tramp civil liberties in particular occasions; (2) that public health is a common but underestimated value in national legal orders; and (3) that individuals are personally responsible for the preservation of public health. More specifically, the first argument supports the case that public health emergencies trump other civil liberties when necessary. The pandemic qualifies as a public health emergency of international concern (PHEIC) according to the WHO, and therefore civil liberties may well be restricted for the sake of the pandemic's non-proliferation. Although the international community realized and proclaimed the existence of a PHEIC, this does not equate to a state of emergency. National governments avoided directly relating the two.

Therefore, the question of how a PHEIC may justify human rights legal curtailments remains. Put simply, the legal implications of a PHEIC are not defined yet. Although PHEIC signifies particular steps within the WHO realm and under the International Health Regulations (IHR),[17] the steps that states need to take are not concrete; even if the

[14]*See* art. 116 of the Spanish Constitution, which provides that: '1. An organic law shall regulate the states of alarm, emergency and siege (martial law) and the corresponding competences and limitations. 2. A state of alarm shall be declared by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorisation the said period may not be extended. The decree shall specify the territorial area to which the effects of the proclamation shall apply. 3. A state of emergency shall be declared by the Government by means of a decree decided upon by the Council of Ministers, after prior authorisation by the Congress of Deputies. The authorisation for and declaration of a state of emergency must specifically state the effects thereof, the territorial area to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements. 4. A state of siege (martial law) shall be declared by absolute majority of the Congress of Deputies, exclusively at the proposal of the Government. Congress shall determine its territorial extension, duration and terms.'

[15]Alessandro Simoni, 'Limiting Freedom During the COVID-19 Emergency in Italy: Short Notes on the New "Populist Rule of Law"' (2020) *Global Jurist*, https://doi.org/10.1515/gj-2020-0023.

[16]Audrey Lebret, 'COVID-19 Pandemic and Derogation to Human Rights' (2020) 7(1) *Journal of Law and the Biosciences* 1, 4-6.

[17]A PHEIC is defined in the IHR (2005) as 'an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a

WHO regime provides for a series of actions to be taken by states, these do not correspond to a general legal framework. Therefore, during the pandemic, states interpreted PHEIC in various ways to introduce restrictive legislation and justify compulsory quarantines.

This variation in national responses to the declaration of a PHEIC by the WHO is largely due to the vague legal framework governing health emergencies.[18] Voices within the WHO already mention that the implications of a PHEIC will be further specialized to better guide states on the necessary steps involved in the aftermath of a declaration, and also with the view of enhancing compliance with the WHO's regulations and invigorating monitoring. This discrepancy between the proclamation of a health emergency and the concept of a state of emergency is better illustrated if we consider that the WHO declared monkeypox a PHEIC, after concerns about the proliferation of infections in Europe.[19] However, this declaration did not prompt changes on a national level, since it did not evolve like the COVID-19 pandemic.

The second argument underlined that public health is a common value to legal orders, or an 'ethical point of departure for regulations',[20] since it stands as a prerequisite for the existence and survival of any nation. Indeed, public health forms a general principle that transcends national legal orders, as well as international law. Yet again, in most constitutions it occupies minimum legal space, and there has been little doctrinal analysis before the outbreak of COVID-19. Many governments, particularly in Western democracies,[21] built their policies on public health. The principle of public health was transformed to a kind of 'super norm', permitting any sort of legislation to be passed. Public health was sanctified, since most national campaigns epitomized how public health is interwoven with the national interest and wellbeing of a state. Thus, human rights restrictions were imposed in the name of public health. This rationale is based on two doctrinal simplifications: first, the right to health, of which public health is a facet, cannot by definition sidestep other human rights norms due to the social determinants and normative validity;[22] and second, public health cannot turn against individuals' access to health services.[23] These simplifications both stem from the fact that the notion of public health is not sufficiently explored and explained. It is an abstract concept that applies primarily to extreme circumstances, such as were caused by the pandemic; otherwise, it is generally neglected. Public health requires minimum health conditions, which will not lead a nation

coordinated international response' (WHO, *International Health Regulations* 2nd ed (WHO, Geneva, 2005) art 1.

[18]Clare Wenham et al., 'Problems with Traffic Light Approaches to Public Health Emergencies of International Concern' (2021) 397 *The Lancet* 1856.

[19]WHO, 'WHO Director-General Declares the Ongoing Monkeypox Outbreak a Public Health Emergency of International Concern', 23 July 2022, available at <https://www.who.int/europe/news/item/23-07-2022-who-director-general-declares-the-ongoing-monkeypox-outbreak-a-public-health-event-of-international-concern>.

[20]Matthew K Wynnia, 'Public Health Principlism: The Precautionary Principle and Beyond' (2005) 5(3) *American Journal of Bioethics* 3, 3.

[21]Jelena Kostic and Marina Matic Boskovic 'How COVID-19 Pandemic Influences Rule of Law Backsliding in Europe' (2020) *Regional Law Review* 77, 82–83, https://doi.org/10.18485/iup_rlr.2020.ch6

[22]Evan Anderson and Scot Burris, 'Imagining a Better Public Health (Law) Response to COVID-19' (2022) 56(3) *University of Richmond Law Review* 955, 962.

[23]WHO, *Third Round of the Global Pulse Survey on Continuity of Essential Health Services During the COVID-19 Pandemic: November–December 2021' (Interim Report)* (7 February 2022) 28.

to extinction.[24] As a legal concept, it is by definition negative,[25] and requires citizens to remain healthy insofar as they are functional and useful to society. In this regard, public health minimizes health standards and departs from the legal standards entailed by the right to health. Moreover, public health refers to the public's protection from a potential peril – such as a pandemic – and does not take into consideration personalized health needs and treatment.[26] For these reasons, state policies that relied heavily on public health were ill-founded, although they had a solid legal basis.

The third line of argumentation focused on personal liability. Governments called citizens to show a responsible attitude and protect the public from the spread of the pandemic.[27] From this viewpoint, public health does not clash with civil liberties; rather, it is a matter of responsible citizens' rational decision-making to verify their commitment to common good by protecting the rest of the population from disease. This policy emphasized legal application and effectiveness instead of offering a comprehensive legal basis. Put simply, states addressed the public by underlying the fact that common good and public health protection are a collective mission applying to all, so the responsibility burden is also shared with citizens. This course of legal thinking twists the very essence of public health: it is not perceived only as a common good or an aspect of the social right to health; rather, the preservation of public health and the pandemic's deceleration become a collective national goal, cardinal to the wellbeing of each society.

The second consideration is about the reshaping of normativity. Soft law rules, which were part of the WHO's policy on preparedness and responsiveness, became mandatory overnight. Except for strict quarantine rules, social distancing relied primarily on the use of personal protective equipment (PPE). The use of masks, disposable safety gloves and antiseptic hand cleaner was given immediate legal force, and they were gradually incorporated into people's culture, as part of everyday rituals. Regulations such as the maximum number of people in close spaces, predetermined routes in crowded places, or seats' reallocation in the workplace manifest how the normative status of soft law recommendations which predated the pandemic changed drastically.[28] Although the WHO did not succeed in inducing states to a unified and harmonized policy towards the pandemic, it nevertheless explained just how important rules of sanitation are. The WHO may have failed to control the pandemic proliferation in the first place, or to swiftly inform states on the upcoming danger, but it did succeed in exporting sanitation rules and processes.[29]

[24]Lawrence O Gostin and Lindsay F Wiley, Public Health Law, Power, Duty, Restraint, 3rd ed (University of California Press, Berkeley, CA, 2016) 7–8.

[25]A refined definition of public health is that it is 'the duty of the legal powers and duties of government to assure the conditions for people to be healthy (e.g. to identify, prevent and ameliorate risks to health in the population), and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for protection or promotion of community health'. See Lawrence O Gostin, 'Public Health Theory and Practice in the Constitutional Design' (2001) 11 (2) *Health Matrix* 265, 265–66.

[26]WHO (n 23) 4–5.

[27]Tom H Christoffel, 'Right to Health Protection' (1978) 6(2&3) *Black Law Journal* 183, 197.

[28]See, for example, European Centre for Disease Prevention and Control (ECDC), 'Infection Prevention and Control and Preparedness for COVID-19 in Healthcare Settings' (sixth update – 9 February 2021), available at <https://www.ecdc.europa.eu/sites/default/files/documents/Infection-prevention-and-control-in-healthcare-settings-COVID-19_6th_update_9_Feb_2021.pdf>.

[29]Annelies Wilder-Smith and Sarah Osman, 'Public Health Emergencies of International Concern: A Historic Overview' (2020) 27(8) *Journal of Travel Medicine* 1, 13.

Overall, the pandemic brought a new normal in lawmaking, both horizontally in national legal orders, as well as on a vertical level, given states' unprecedented compliance with WHO regulations. This new normal also affected lawmaking processes and rules' normative value. These lawmaking trends have a great impact on lawmaking processes. Although most states have waived emergency regulations, the example and precedent set for such public health emergencies is more than certain.

III. COVID-19 and the cohabiting of law and science

This new normal in lawmaking due to the pandemic bears another significant feature: the undeniable influence of science on law and decision-making. Thus, the second proposition relates to the tangled tail between law and science. Many legal domains, such as environmental law[30] and sports law,[31] have been significantly affected by scientific doctrines or attainments, yet their relationship has not been smooth, taking into consideration that legal thought needs to doubt irrefutable presumptions.[32] In the present case, though, expertise was assigned with a double role: on one hand, it has been a driving force for international organizations dealing with health issues, and on the other hand it was governments' protection against public tiredness due to the measures.

As far as the first part is concerned, the pandemic reminded all stakeholders how important international health organizations and agencies are. Their importance is proven in two ways. First, during COVID-19's first outbreak there have been critical voices regarding the role of the WHO, as far as the point it decided to declare a pandemic is concerned, or with regards to the declaration of a PHEIC. However, criticism soon faded away, due to the need for action because of the great danger the pandemic posed to the international community. In other words, there was no room for theoretical debates, which was the case during the H1N1 and Ebola pandemics.[33]

States recognized that the WHO is *par excellence* the competent international organization to guide them in the fight against the spread of SARS-CoV-2, as well as a reliable partner. The enhancement of the relationship between the WHO (or other regional agencies and bodies) and states is the second aspect in which the importance of the former is confirmed. During the last two years, guidelines, regulations and all sorts of public health provisions created by the WHO were implemented and respected on a national

[30]Katalin Sulyok, Science and Judicial Reasoning, *The Legitimacy of International Environmental Adjudication* (Cambridge University Press, Cambridge, 2021) 20.

[31]Robert CR Siekmann and Janwillem Soek, *Lex Sportiva: What is Sports Law?* (Asser Press, The Hague, 2012) 116.

[32]Although the tangled relationship between scientific data and the correlative legal provision is a reality, the interaction of the two in general terms is not an attractive issue to explore. To this end, Kirk's description is illuminating: traditionally, law and science have had little in common. They developed as a result of different social and intellectual needs; their viewpoints and philosophies have deviated in significant ways and their practices have had little similarity. It is not surprising that common interest and aim have been slow in developing, and that mutual understanding has often been lacking. However, there has always been a philosophical bond between the two professions of science and the law – rarely recognized, but nonetheless present. To both, logic and fact are of primary concern. See Paul L Kirk, 'The Interrelationship of Law and Science' (1964) 13(2) *Buffalo Law Review* 393, 393.

[33]Eyal Benvenisti, 'The WHO – Destined to Fail? Political Cooperation and the COVID-19 Pandemic', Cambridge Legal Studies Research Paper Series, Paper No. 24/2020 (Cambridge University Press, Cambridge, 2020); Sara E Davies, 'Infectious Disease Outbreak: Mind the Rights Gap' (2017) 25(2) *Medical Law Review* 270, 272.

level. Therefore, states harmonized their policies against the pandemic to a significant extent. Although the primary role of the WHO is to monitor state cooperation during critical health situations, it turned out that during the COVID-19 pandemic it achieved harmonization, and to a great extent integration.[34] This argument becomes clearer at a regional level, bearing in mind the role the European Centre for Disease Prevention and Control, for example, assumed in the European Union.[35]

The second limb of this proposition relates to the reception of the national scientific committees' decisions by citizens. When it came to the pandemic's management, national bodies tended to receive negative feedback, since they were assigned by most governments to validate legal prohibitions, enacted in their name.[36] Relying on advisory scientific committees' feedback to take measures over COVID-19 signifies an 'interesting political shift away from entrenched ideological positions towards a pragmatic approach to policy development'.[37] On these grounds, these committees usually received mixed feelings from the public: as long as the pandemic persists, there is public curiousness regarding the expertise of the said committees and trustworthiness rates fall. States such as Australia, Canada, Chile and the United States created national advisory scientific committees in response to the pandemic, bringing together leading infectious disease scholars, or revitalized the synthesis of already existing advisory collective bodies – for example, Belgium, Italy, France and Germany.[38] Curiosity and doubt about the committees' role was not due to their recent creation; rather, it stemmed from the fact that governments had exercised their discretion to publish the committees' reports, or some information therein – as in the United Kingdom, Belgium or Estonia). This lapse in the systematic release of the committees' findings and the treatment of this information as confidential caused doubt and brought criticism over time.[39]

The above analysis indicates that scientifically driven political and legal measures cannot easily be accepted by the public if their rationale is not fully explained, given that they are almost always of a restrictive nature.[40]

These considerations reveal a paradox. Citizens worldwide came across the function and contribution of the WHO to significant aspects of life, and realized in abstract terms the importance of its regulations and recommendations. This applied on a general level, though, and people's perceptions of the necessary restrictive measures to combat the virus's proliferation became dismissive as the pandemic ground on. In other words, the general population was familiarized with the basic principles and guidelines required to

[34]Armin von Bogdandy and Pedro A Villarreal, 'International Law on Pandemic Response: A First Stocktaking in the Light of the Coronavirus Crisis' (2020) (MPIL, 2020).

[35]Michael Anderson and Elias Mossialos, 'Time to Strengthen Capacity in Infectious Disease Control at the European Level' (2020) 99 *International Journal of Infectious Disease* 263.

[36]For a comparative overview of such expert bodies, see OECD, *Survey on the STI Policy Responses to COVID-19,* 'Q1A: What arrangements, if any, do you have in place to ensure scientific advice informs national policy and decision making in relation to COVID-19?', available at <https://stiplab.github.io/Covid19/Q1A.html>.

[37]Sarah Moulds, 'Scrutinizing COVID-19 Laws: An Early Glimpse into the Scrutiny Work of Federal Parliamentary Committees' (2020) *Alternative LJ* 45(3) 180–187, 185.

[38]See in detail <https://www.oecd.org/coronavirus/policy-responses/building-resilience-to-the-COVID-19-pandemic-the-role-of-centres-of-government-883d2961>.

[39]Idem.

[40]Irina Georgieva et al., 'Perceived Effectiveness, Restrictiveness, and Compliance with Containment Measures Against the COVID-19 Pandemic: An International Comparative Study in 11 Countries' (2021) 18 *International Journal of Environmental Research and Public Health* 3806.

protect public health; however, as soon as these guidelines were specified to a national level, tailored to each state's idiosyncrasies, curiosity arose. Potential doubts, or disengagement with national scientific committees' standings, were the result of tiredness due to the pandemic's duration, but most importantly they were rooted on the way the need to protect public health was translated into highly specific measures that affected everyday life. For this reason, public opinion did not question the very essence of action against the pandemic, or the need for international cooperation; rather, it scrutinized how scientific advisory bodies interpreted such broad advice to suggest the measures to be taken by individual governments.[41]

Overall, this demonstrates that the pandemic increased the influence of science on the creation and formation of legal norms, which in turn has led to the harmonization of national legislation. In this regard, the pandemic was the catalyst – or a systemic shock[42] – for the enhancement of international regulation regarding health law. These positive developments coincided with popular scepticism about containment measures. The fact that science is considered a sacred standard trusted by people was reversed as scientific advice turned into policy-making.

IV. COVID-19 and legal uncertainty

The comprehensive reading of the first two propositions boils down to the fact that COVID-19 created a new normal in law-making processes, while science played a considerable role in the content of new norms. The third proposition capitulates on the rational of the first two. It refers to the anticipated absence of a clear legal context. Legal uncertainty[43] relates to the constant legal adjustment both at a national and an international level, taking into account the way measures are imposed, bypassing the usual lawmaking process. The phases of the pandemic required a differentiated treatment each time, so societies had to promptly adjust to new standards. Examples vary: the mandatory use of masks in open and enclosed places, the types of masks, closure of public structures such as playgrounds are just a few. Even when vaccination became part of the COVID-19 equation, legal uncertainty pertained to the need to take doses, how many or how safe national programs of mass vaccination were.[44] Such shortfalls in the pandemic's treatment stemmed from the difficulty in particularizing the general axes of public health protection.

The absence of legality has puzzled the doctrinal consistency of national and regional courts, which still hesitate to touch upon the measures' legality according to their long-standing case-law due to the perils faced by public health. It is suggested that public health 'presents an area rife with scientific uncertainties, where decision makers must often

[41]Sabrina Germain, 'The Role of Medical Professionals in Shaping Healthcare Law during COVID-19' (2021) 3(1) *Amicus Curiae* 33, 50.

[42]Lisa Forman, 'The Evolution of the Right to Health in the Shadow of COVID-19' (2020) 22(1) *Health and Human Rights Journal* 375, 376.

[43]Anthony D'Amato, 'Legal Uncertainty' (1983) 71(1) *California Law Review* 1, 40.

[44]Uncertainty regarding mandatory vaccination existed before COVID-19. It is eloquently pointed out that, 'Information about the risks known when a vaccine or other drug is approved immediately becomes out of date as soon as that vaccine or drug is widely used in the general population. The larger the population exposed to a drug or vaccine, the greater the potential of unanticipated side effects and the greater the need to acquire and respond to that knowledge to enhance public safety.' See Mary J Davis, 'The Case Against Preemption: Vaccines and Uncertainty' (2011) 8(2) *Indiana Health Law Review* 293, 314.

address emerging health risks despite lack of sufficient prior research, or face disastrous health effects'.[45]

More specifically, national judicial approaches vary, demonstrating that doctrinal interpretation is not yet clarified.[46] The usual proportionality tests applied by courts to examine whether restrictive measures meet the requirements of necessity, appropriateness and proportionality could not suffice under these circumstances.[47] Thus, legality is severely questioned.[48]

Within this framework, one has to treat legality as an all-inclusive term and benefit from other disciplines. Apart from general policy, in most cases restrictive or other measures relied on the simple proposition that healthcare units had to be the last ones reached by the virus in order to continue their function effectively.[49] Their effectiveness and surge capacity was the decisive factor for short-term decisions. Therefore, legality is shaped on the premises of healthcare effectiveness, although this was only vaguely explained by national judicial bodies.[50] The interrelation between law and science is not a vague, abstract idea; rather, it is a tangible notion when it comes to healthcare effectiveness and surge capacity. The ability of healthcare units to cope with the COVID-19 cases is a variable infiltrating legality in the short term.[51]

Legal, scientific and judicial uncertainties are overcome not when they are explained in policy-making terms, but when they are connected to managerial healthcare necessities. Therefore, in order for legal uncertainty to cease to exist, law and science need be seen as a tallied couple and not as potential rivals.

V. Public opinion: between legal and social uncertainty

Finally, the fourth proposition relates to public opinion and how it functions like a barometer, measuring the success and effectiveness of national and international responsiveness to the pandemic. There is a subtle proof of all actions taken during the pandemic,

[45]Stephanie Tai, 'Uncertainty About Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty' (2009) 11(3) *University of Pennsylvania Journal of Constitutional Law* 671, 675.

[46]There are several examples where national courts reevaluated containment and quarantine strategies by considering particular restrictive measures disproportionate, thus readjusting their decision-making criteria. See the decision of France's Conseil d' État, which invalided the measure that suspended the issuance of visas for reasons of family reunification. Conseil d' État, 23 December 2020, N° 447698, 447783, 447784, 447785, 447786, 447787, 447791, 447799, 447839. On the contrary, the German Federal Constitutional Court found the 'Federal Emergency Brake' following laws Bundesnotbremse I and II in accordance with the constitution.

[47]Ioanna Pervou and Panagiotis Mpogiatzidis, 'Applying a Proportionality Test to Social Distancing Measures and Lockdowns: A Comparative Approach Among European States', paper presented to Atas do I Congresso de Direito Internacional: Sistemas Regionais de Direitos Humanos, Lisboa, 19 e 20 de Julho de 2021, 47–48.

[48]Fiona de Londras, 'Le Mailloux v France (ECtHR) and the Importance of Parliamentary COVID-19 Review' (4 December 2020), available at <https://blog.bham.ac.uk/cvro/echr/lemailloux>.

[49]Xiaoming Guo, 'An Academic Summary of the International Conference Series on "the Role of Proportionality Principle in the Pandemic Prevention and Control"' (2020) 19(4) *Journal of Human Rights* 535, 541.

[50]Barbara Boschetti and Maria Daniela Poli, 'A Comparative Study on Soft Law: Lessons from the COVID-19 Pandemic' (2021) 23 *Cambridge Yearbook of European Legal Studies* 20, 42.

[51]Julien Chaisse and Nilanjan Banik, 'Global Health Law & Governance Amidst the Pandemic' (2021) 30 (1) Annals of Health Law 207, 240*et seq.*

showing how far societies were able to cope with the situation. Public opinion is the link between law and science with community and people.

Scientific ignorance, and the feeling of widespread uncertainty it entailed, led the public to trust science during the first outbreaks of the pandemic.[52] Ignorance, uncertainty and fear of the unknown augmented public opinion's reliance on scientific knowledge at first. However, over the course of time, as public awareness of the pandemic increased and social uncertainty eased, legal uncertainty resurfaced. Legal and social uncertainty worked in opposite ways during the public health crisis.[53] This explains the paradoxes analysed above and sheds light on the ever-changing landscape concerning COVID-19.

VI. A unique sliding scale

The analysis of the four propositions presented demonstrates that the current legal scheme lacks normalcy (1). The creation and formation of legal rules is based on a *sui generis* sliding scale[54] where scientific expertise (2) coupled occasionally with public opinion (4) come to fulfill legality vacuums (4).

This sliding scale explains the emergence of legal norms through unconventional procedures and comes to unify the three distinct poles: expertise, legality and public opinion. In this unique sliding scale, the only element which does not fall within the regular parameters one usually considers in legal thinking is public opinion.[55] In particular, the hypothesis is whether expertise (scientific data) coupled with the support of the general population can substitute for the absence of normal and standard procedures in law-making. During the pandemic, governments had to take swift decisions for the sake of public health and implement measures of a restrictive character. Given that scientific health data is the driving force behind these measures, the question which follows is if the support by the public is enough to overcome legal shortcomings.

All in all, surveys show that there is wide understanding of the perils the pandemics brings worldwide, which is further translated as confidence and trust to the competent international organizations and bodies dealing with the pandemic. However, the same does not apply domestically: short-term decision-making often lacks support by the public, questioning in effect the legality and effectiveness of the measures taken (2, 3).

VII. Conclusions

The intrusion of expertise in lawmaking is inevitable as technological advancements prevail and govern more aspects of life. COVID-19 lawmaking though expertise tells a totally different story. The pandemic had a disruptive role in ordinary decision-making,

[52]Ting Xu, 'Uncertainty, Ignorance and Decision-Making: Looking Through the Lens of Modelling the COVID-19 Pandemic' (2021) 10 *Amicus Curiae* 13.

[53]Rolf Lidskog and Adam Standring, 'COVID-19 and the Environmental Crises: Knowledge, Social Order and Transformative Justice' in Patrick R Brown and Jens O Zinn (eds) *COVID-19 and the Sociology of Risk and Uncertainty, Studies of Social Phenomena and Social Theory Across Six Continents* (Palgrave Macmillan, Cham, 2022) 267–94.

[54]Frederic L Kirgis, 'Custom on a Sliding Scale' (1987) 81(1) *American Journal of International Law* 146.

[55]Andrea Renda and Rosa Castro, 'Towards Stronger EU Governance of Health Threats After the COVID-19 Pandemic' (2020) 11(2) *European Journal of Risk Regulation* 273, 280.

which was extended to lawmaking. Uncertainty existed both in society and in the legal world, and at times it took the form of legal bewilderment. In this context, reliance on expertise was maximized, although many shortcomings were noted regarding the specification of general public health requirements on a national level. This sliding scale demonstrates the difficulty in lawmaking when it comes to public health issues. Health plays a key role in the policy of every government; in this regard, all governmental decisions come with a relevant political cost.

Moreover, except for the explanation of the interplay between law and expertise, this sliding scale shows another unique feature. It reveals the tendency to internationalize lawmaking on issues of public health. During the pandemic years, governments carried the task of enacting legislation for the pandemic, and were burdened with heavy political cost due to containment measures. In this regard, the initiative by many states for an international pandemics convention was well anticipated.[56] This is one of the few times that states wish to be bound by an international legal instrument, and look for a common international framework. This state behaviour is rare, as states are usually hesitant to undertake international commitments, even when issues of a purely transnational/international character are at stake. As far as the pandemic is concerned, though, negotiations for a legally binding instrument under the auspices of the WHO signified states' inability, or their reluctance, to take the legal burden brought by a pandemic. As mentioned above, even expertise and scientific knowledge are scrutinized when specified, while they are better understood in abstract terms. In this regard, it comes as no surprise that there are grounds for a pandemics convention, and in turn for the enhancement of international lawmaking on health issues.

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[56]ILA (n 7).

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