

GLOBAL CHALLENGES, LOCAL SOLUTIONS: AN INTRODUCTION TO NEW PERSPECTIVES TO INTERNATIONAL AND COMPARATIVE LAW

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INTRODUCTION

This special issue is the result of a joint (ad)venture, already three years ago, in which we collaborated to understand the implications of the COVID-19 pandemic emergency with respect to international, constitutional, and comparative law. The University of Houston Global Law and Policy for the Americas Initiative (GLPA), which provides a platform to engage with areas of international law where the domestic intersects with the global, together with the University of Bologna Center for Latin American Studies organized a six-event Webinar Series in 2021 and a follow-up Webinar in 2022, hosting renowned experts in international and comparative law from the United States, Europe, Mexico, and Latin America. This series was dedicated to the overlap and clashes between the global dimension of the pandemic crisis and the domestic/local nature of the solutions. The discussions with the speakers of such events were fundamental for the reflections we are sharing here. Therefore, we would like to start by thanking all of them: Anuscheh Farahat, Professor of Public Law, Migration, and Human Rights at the

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Though the world has turned the page on COVID-19 and appears to have returned to some normalcy, very little of the pre-pandemic era has remained the same. The global pandemic revealed, on the one hand, the ways in which modern society has advanced: for example, creating a new type of vaccine in record time; on the other hand, the many gaps in our local, national, regional, and global legal frameworks that contributed towards the pandemic having an even more devastating impact on

communities throughout the entire world. Several lessons arise from the management and the response to the state of emergency that COVID-19 created forcing different legal fields to merge. From the international perspective, international institutions demonstrated their fragility in combating the strong unilateralism exhibited by nations in their initial response to the global pandemic. But on a positive note, many international and transnational entities formed new partnerships and leveraged old ones in efforts to find coordinated ways of making medical supplies available and to mitigate supply chain disruptions. However, developing countries suffered from the impact of inequity, the unequal distribution of vaccines, and the lack of medical supplies to better manage the spread of the virus. Despite increased globalization since 1945, the pandemic chilled our hopes that our global institutions alone could effectively manage a global crisis. From the domestic perspective, separation of powers among governmental institutions and the potential imbalance in favor of a strong executive as well as, the centralization of decision-making (with the exclusion of territorial entities) within federal and regional States are trends that became the norm for nations in response to the pandemic, and still is being emphasized in practice.

Crises and emergencies expose or strengthen trends that may be already there: the transfer of powers to the executive in countries like Turkey or Hungary, for example, but also those European countries that were severely affected by the financial crisis responded through reinforcing the executive branch. The global pandemic highlighted persistent social injustice and racial inequity issues not only in the United States, Mexico, Latin America, and Europe; but also, throughout the world to varying degrees. The challenges to established legal frameworks at both the international and the national levels have been multi-faceted. Some examples were discussed in the Webinar Series and are highlighted in the articles that make up this dedicated issue.

Discussions also focused on the economic and political consequences of the global pandemic. Economic hardship faced by States became the reason to privilege one right over another, with frequent prevalence of the right to health over other rights (religious freedom, right to work, free movement, among others) even through disproportionately balancing rights in some cases.

The establishment of states of emergency led to the allotment of significant powers to executive and technical bodies bypassing the ordinary decision-making processes and their safeguards. International authorities, including the European Union (EU), assumed a relevant role in States' economic recoveries. Politics became even more personalized, which led to a clear emergence of key figures in the executives, sidelining the minority and opposition parties. A new connection between expertise and politics arose, as political actors instituted expert committees and groups at the national and local levels, or relied on the expertise of already existing institutes (like the Robert Koch Institute in Germany).

The issues addressed in this Webinar Series brought together the research interests of the GLPA Initiative and the Center for Latin American Studies of the University of Bologna, pivoting around four major points.

II. SOCIAL JUSTICE AND INEQUALITY AS A CORE ELEMENT FROM BOTH THE DOMESTIC AND THE INTERNATIONAL PERSPECTIVE.

A critical assessment of this issue takes into account inequalities within domestic societies and among different states, as the impact of the COVID-19 pandemic emergency has proven to produce unequal effects depending on social status and gender.

The differences among regions and the impact on the corresponding social realities must also be analyzed according to the role of relevant international human rights bodies, depending on which rights claims were submitted to such jurisdictions. During the Webinar on COVID-19 and Latin America: The Impact of the Inter-American System of Human Rights, experts discussed this topic from the perspective of the actions undertaken by the Inter-American Commission, which at the very beginning of the emergency had already established a "Rapid and Integrated Responses Coordination" — the SACROI COVID-19, a dedicated task force monitoring the responses from States and timely identifying and tackling situations that required

precautionary measures.¹ In Spring 2020, “Resolution Number 1: Pandemic and Human Rights in the Americas” encompassed comprehensive policy recommendations for States that spanned from the preservation of human rights defenders and journalists’ activities for their reporting function to the protection of vulnerable categories severely affected by the crisis.² Similarly, the Inter-American Court of Human Rights issued a declaration on April 9, 2020, that urged States to respond to the emergency by respecting human rights and the rule of law.³ It focused on the need for access to information, such as the internet, the need for access to justice, and protection for journalists and human rights defenders.⁴ Because Latin America is one of the most unequal areas on the planet, several effects had to be envisaged; such as the lack of daily sustenance to survive, the provision of healthcare for millions of people, and no access to schools for children, whose education depends on having internet connection. Additionally, increased poverty as a result of COVID-19 could be the drive for social disturbance, the response to which these papers and discussions addressed, that must continue to be monitored.

1. See generally INTER-AM. COMM’N ON H. R., *SACROI-COVID-19: Rapid and Integrated Response Coordination Unit*, https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/sacroi_covid19/documentos.asp; See Webinar Series *infra* note 5.

2. See INTER-AM. COMM’N ON H. R., *Pandemic and Human Rights in the Americas: Resolution: January 2020*, https://www.iwgia.org/images/publications/new-publications/IACHR_Resolution_1-2020.pdf.

3. See *Declaración de la Corte Interamericana de Derechos Humanos 1/20, COVID-19 Y Derechos Humanos: Los problemas y desafíos deben ser abordados con perspectiva de derechos humanos y respetando las obligaciones internacionales* [Declaration of the Inter-American Court of Human Rights 1/20, COVID-19 And Human Rights: Problems and challenges must be addressed from a human rights perspective and respecting international obligations], CORTE INTERNACIONAL DE DERECHOS HUMANOS, https://www.corteidh.or.cr/tablas/alerta/comunicado/declaracion_1_20_ESP.pdf.

4. *Id.* (explaining that trustworthy information on the pandemic, alongside internet data, was considered essential to respond to and monitor the spread of the contagion).

III. THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS AND FUNDAMENTAL RIGHTS HAVE BEEN AFFECTED SEVERELY DURING THE CRISIS.

Throughout the Webinars the discussants analyzed the domestic/constitutional dimensions.⁵ In fact, mainstream discourse claims that there was a concentration of power in the hands of the executives, during the pandemic crisis, similar to what happened during the financial crisis of 2008–2009. These studies demonstrate that executives responded more easily and more quickly to the crisis through bypassing parliaments and democratic debate, rather than through traditional democratic measures.⁶ Turning to the impact on fundamental rights caused by the pandemic emergency, which was unprecedented, fundamental rights such as the free movement of people and religious freedoms were limited for months. Social rights such as, the right to education or the right to work were restricted. Additionally, the freedom of enterprise and basically all aspects of economic/productive activities were halted. Overall, the collective dimension of the right to health prevailed over its individual facet, particularly with respect to limitations on rights and obligatory vaccinations.

The role of executive powers was assessed through comparative lenses thanks to a piece by Tom Ginsburg and Mila Versteeg, which provided a comprehensive amount of data updated through July 2020.⁷ These authors focus on the role of deliberation and cooperation between different institutions in the management of the response to the pandemic emergency.⁸ We agree that this is a trend that has become stronger in several

5. See generally *Constitutionalism, Trade, Social Justice & Sustainability in the Americas: Lessons from the 2020 Global Pandemic*, UNIV. OF HOUS. LAW CTR. GLOB. LAW AND POL'Y FOR THE AMS. INITIATIVE (April 15, 2021), <https://www.law.uh.edu/glpa/webinar2021/0415.asp>.

6. See generally *CONSTITUTIONS IN THE GLOBAL FINANCIAL CRISIS: A COMPARATIVE ANALYSIS* (Xenophon Contiades ed., 1st ed., Routledge 2013); See generally *MANAGING THE EURO CRISIS NATIONAL EU POLICY COORDINATION IN THE DEBTOR COUNTRIES* (Sabrina Ragone (ed.), 1st ed., Routledge 2018).

7. See Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers during the Pandemic*, 19 INT'L J. OF CONST. L. 1498.

8. See *id.*

countries with respect to territorial entities and parliaments (especially decentralized federal and regional institutions with a progressive involvement of subnational authorities). Nevertheless, we consider that in many cases this approach responds more to “strategic” targets that are necessary to improving the response. The role of states, regions, and local entities has been paramount in the management of the pandemic emergency and from the perspective of the central/federal administration; involving them in the decision-making process was beneficial to ensure a better implementation of the decisions adopted mainly by the federal/central government.

The strive for differentiation among territories within States was also a relevant aspect, reflecting internal dynamics as in the cases of Bavaria in Germany or Catalonia in Spain demonstrate.⁹ In this respect, different phases can be identified. At the beginning, some territories wished to have more autonomy to choose different policies (either stricter or less strict than the government’s approach). The endurance of the state of emergency led to a shift, and progressively many regions and areas would have preferred a national solution in order to attribute political accountability to the state instead of themselves. These are often very unpopular measures. Similar to observations made on the increase of the role of territorial entities, the Webinars also reflected on the impact of legislatures. Parliaments are in fact slower than executives in responding, and often times constitutional clauses granting emergency authority provide mechanisms that allot major powers to executives.

There are also systems where none of these phenomena occurred. Instead, very extensive use or misuse of constitutionally regulated measures, like the “law decrees” in Italy or Spain, i.e., legislative acts to be passed by the executive in extraordinary situations of necessity and urgency (and then must be passed by the corresponding Parliament)¹⁰, have become the “ordinary”

9. See Francesco Palermo, *Is there a space for federalism in times of emergency?*, VERFASSUNGSBLOG: ON MATTERS CONST. (May 13, 2020) <https://verfassungsblog.de/is-there-a-space-for-federalism-in-times-of-emergency/> (discussing the complex relationship between federalism and emergencies).

10. Therefore, “law decrees” are sources which involve both the executive and the legislature, granting the former a preemptive and temporary decision.

source for regulating every response to the emergency, from rights restrictions to subsidies and medical measures. Depending on the majority in a parliament, such decrees are simply ratified by the legislatures, which in turn, lose their genuine participation. Tom Ginsburg's presentation highlighted current trends that exhibit a resurgence of nationalist governments, which begs a revisit to the essential question of, what exactly is the relationship between democracy and international law? He expands on this inquiry in his recent book, *Democracies and International Law*, where, using empirical methods, he questions the tenet that "international law requires democratic governance."¹¹

Discussions highlighted that the pandemic also demonstrated the importance of Governments in Europe and in global arenas due to their role within EU institutions (in the European Council and in the Council of the EU, both composed by members of the executives). Therefore, debates on the recovery plan or the vaccinations plan were led – as usual – by domestic executives.

Overall, constitutional and Supreme Courts both in the United States and in Europe were seen as deferential to political actors in moments of crisis, especially in the cases decided during the first few months following the outbreak of the pandemic emergency, when the consequences were absolutely unknown and the conditions unprecedented. Posterior cases have proven more diverse, as it is demonstrated for instance by the judgment, STC 183/2021, from the Spanish Constitutional Tribunal, which partially struck down the declaration of the "estado de alarma" in 2020.¹² In our opinion, the limitation of rights and freedoms

11. See Tom Ginsburg, *DEMOCRACIES AND INTERNATIONAL LAW* 6–30 (2021) (comparing democratic and authoritarian regimes and their approaches to international and proposing that an examination of the question of "what international law should do must be empirically informed."). See *id.* at 29.

12. See Jorge Lozano Miralles, *Democracia de emergencia y crisis sanitaria: el caso español* [Emergency democracy and the health crisis], 54 DPCE ONLINE (Special Issue 2022), <https://www.dpceonline.it/index.php/dpceonline/article/view/1702/1706>; see Roberto Blanco Valdés, *La lucha contra el Covid-19 y la declaración de inconstitucionalidad del primer estado de alarma de 2020 en España: sobre la limitación y la suspensión de los derechos fundamentales* [The fight against Covid and the declaration of unconstitutionality

spanning traditional rights to social and economic rights needs to be assessed through the lens of proportionality, in terms of duration in time and differentiation among territories, depending on the spread of the disease and the factual situation. A similar mechanism was adopted in a later phase of the pandemic emergency in Italy, for instance, according to specific data concerning the number of cases and hospital occupancy rate, regions were classified into different categories, which allowed for certain activities only in some parts of the country.¹³

IV. THE NEED FOR TRADE AND INCREASED COLLABORATIONS IN GLOBAL SUPPLY CHAINS' RESILIENCE MECHANISMS FOR TIMES OF EMERGENCY BECAME PARTICULARLY RELEVANT DURING THE COVID-19 PANDEMIC.

Though the latter elicited a global response, nations instead reverted to protectionist approaches to international trade. Export and import restrictions, mainly targeting health-related products, became the response of choice by many nations all over the world.¹⁴ Some nations even used national security exceptions in domestic and international trade law to justify increased trade tariffs on specific products of particular interest like steel and aluminum.¹⁵ Gaps in the supply chains and uneven shut-downs in the production of various inputs along those supply chains prevented easy access to necessary goods.¹⁶ These disruptions have continued and have been slow to recover as a result of the Russian-Ukrainian conflict that started in February

from the first state of alarm from 2020 in Spain], 54 DPCE ONLINE (Special Issue 2022), <https://www.dpceonline.it/index.php/dpceonline/issue/view/55>.

13. See generally MINISTERO DELLA SALUTE, <https://www.salute.gov.it/> (last visited July 9, 2023).

14. *Coronavirus: WHO Critiques EU Over Vaccine Export Controls* (Jan. 30, 2021), BBC, <https://www.bbc.com/news/world-europe-55860540>; For world map of temporary trade measures used during the COVID-19 pandemic, see generally *Covid Temporary Trade Measures*, INT'L TRADE CTR. (Sept. 30, 2022), <https://www.macmap.org/covid19>.

15. Proclamation No. 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018).

16. *Global Challenges, Local Solutions: Supply Chains, Sustainability, and Governance*, UNIV. OF HOUS. LAW CTR. GLOB. LAW AND POL'Y FOR THE AMS. INITIATIVE (March 10, 2022), <https://www.law.uh.edu/glpa/webinar2021/0415.asp>.

of 2022.¹⁷ However, the research here also demonstrates the adaptability of global institutions, like the World Trade Organization (WTO), to better facilitate coordination among nations. For example, the WTO in collaboration with other stakeholders undertook several actions to support and encourage the production and distribution of vaccines across the world, particularly for developing countries.¹⁸ They set up partnerships with inter-governmental organizations, non-governmental organizations, and the private sector to push for equitable distribution of vaccines and medical supplies.¹⁹ Furthermore, transparency requirements from the WTO became essential in facilitating trade responses to the pandemic, and to encouraging regulatory coordination, which is key to reducing delays in conformity assessment requirements of nations for essential medical products and supplies to enter market. The WTO also engaged in significant collective work on global health with the World Intellectual Property Organization (WIPO) and the World Health Organization (WHO).²⁰ The Trade Related Aspects of Intellectual Property (TRIPS) waiver, which would temporarily relax several intellectual property barriers in the TRIPS Agreement so as to allow for timely access to needed vaccines by developing countries, was finally agreed upon in March 2022.

The twelfth Ministerial Conference (MC 12), taking place in June 2022, successfully concluded a comprehensive package regarding WTO responses to the global pandemic and preparedness measures for future pandemics and other global emergencies.²¹ The MC 12, which narrowed the scope of the TRIPS waiver, was an important accomplishment for globalism that arose out of the many tragedies emerging from the COVID-19 pandemic. It set a foundation for leveraging the varied partnerships and collaborations the WTO created to minimize

17. Beth Stackpole, *Ripple Effects From Russia-Ukraine War Test Global Economies*, MIT MGMT. SLOANE SCH. (Jun. 28, 2022), <https://mitsloan.mit.edu/ideas-made-to-matter/ripple-effects-russia-ukraine-war-test-global-economies>.

18. See Gabrielle Z. Marceau & Mishaël M. Wambua, *The (New) Role of the WTO in Vaccine Distribution and Equity*, 45 HOUS. J. INT'L. L. 1, 15–20 (2023).

19. See *id.* at 20–23.

20. See *id.* at 26–27.

21. See generally *Twelfth WTO Ministerial Conference*, WTO (last visited July 18, 2023), https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm.

negative protectionism, and it facilitated rapid coordination for easy distribution of materials needed during global emergencies. There is more work to be done and in fact, specific initiatives implementing the MC 12 are underway, but the WTO has demonstrated that global institutions can play an important role in brokering coordination and collaboration among nations in times of crises.

V. SUSTAINABILITY AS A NEW CORE FOR INTERNATIONAL LAW, PUBLIC HEALTH, AND NATIONAL RE-INDUSTRIALIZATION POLICIES.

The global pandemic highlighted the need for more sustainable and resilient economic and governance frameworks that better align national and local policies, which were put in place to confront global emergencies through global collaboration. This is evident with supply chain management, climate change mitigation policies, and public health policies that improve the lives of every member of society impacted by global emergencies.

In our Webinar session on “Lessons from COVID-19 for Sustainability: Health and Climate Change,” Daniel Farber and Pedro Villareal discussed the important link between climate change and health, not only in terms of the correlation between severe changes in weather patterns and the spread of communicable diseases, but also in terms of the lessons that the global pandemic can provide for governments, global institutions, and the private sector regarding improved frameworks for coordinating local and national emergency strategies with global ones.²² The global pandemic lowered carbon emissions down to an estimated 18 percent during the peak of global lock-downs, demonstrating how quickly the planet responds to human action.²³ From a comparative perspective, significant portions of the EU’s large stimulus program for the COVID-19 recovery program has been used towards establishing comprehensive decarbonization strategies for the production of green energy and

22. See Webinar *supra* note 16.

23. See Corinne Le Quéré et al., *Temporary reduction in daily global CO₂ emissions during the COVID-19 forced confinement*, NATURE CLIMATE CHANGE (2020), <https://doi.org/10.1038/s41558-020-0797-x>.

the development of electric vehicles.

There are also many lessons for governance. Both in Brazil and the United States, for example, local governments, rather than federal ones, took the lead in decarbonization strategies.²⁴ Similarly, COVID-19 governance highlighted that local governments were more successful in implementing public health measures than federal or national governments. The private sector and universities also took the lead in implementing health measures through mask and vaccine measures, which were required to varying degrees, depending on the sector.²⁵ Several lessons about governance were highlighted in this discussion. First, decentralization is currently the framework most used in dealing with both environmental regulation and health policy. Local and state responses play a key role in addressing global emergencies, but these alone are limited in confronting the scale of the emergencies. Second, while national/federal responses are needed, they cannot replace global collaboration. A diversified set of actors with different sets of expertise — from the private, transnational, and public sectors — is important for not only managing global emergencies, but also assessing risk based on true scientific principles. Health regulation is clearly behind environmental regulation, both domestically and internationally, when it comes to assessing risk and with managing related disasters. Finally, international institutions alone have limited

24. See Stephen Abbott, *Local Governments Are Stepping Up Grid Decarbonization in 2022*, RMI (Jan. 12, 2022), <https://rmi.org/local-governments-are-stepping-up-grid-decarbonization-in-2022/>; Laura Silvia et al., *Subnational politics of the urban age: evidence from Brazil on integrating global climate goals in the municipal agenda*, PALGRAVE COMM'NS (2019), <https://www.nature.com/articles/s41599-019-0225-x>; Currently, the Biden Inflation Reduction Act has several policies that help to enhance local decarbonization strategies; See e.g., Chris Chyung et. al., *How States and Cities Can Benefit from Climate Investments in the Inflation Reduction Act*, CTR. FOR AM. PROGRESS (August 25, 2022), <https://www.americanprogress.org/article/how-states-and-cities-can-benefit-from-climate-investments-in-the-inflation-reduction-act/>; Carl Smith, *What Does the Inflation Reduction Act Do For State and Local Government?*, GOVERNING (August 17, 2022), <https://www.governing.com/now/what-does-the-inflation-reduction-act-do-for-state-and-local-government>.

25. Karen Mulligan & Jeffrey E. Harris, *COVID-19 Vaccination Mandates for School and Work Are Sound Public Policy* SCHAEFFER CTR. WHITE PAPER SERIES (2021), https://healthpolicy.usc.edu/wp-content/uploads/2022/07/USC_Schaeffer_Covid19-VaccineMandates_WhitePaper.pdf.

ability to provide the solutions for global emergencies, but can and should be improved to facilitate transparent risk assessments based on science and to foster better global collaboration among nations that also need the policy space to decide regulatory measures that work best for their individual populations.

In sum, much has been learned and continues to unfold from this crisis. New debates on the interconnections between global and local must be initiated. More research and understanding of current understandings of executive power, its limitations and overstepping, and the role of legislatures and parliaments vis à vis executive power, state governments, and local municipalities. Clearly, current legal frameworks encourage decentralization and a fragmented approach to global crises, even if the legal and governing international frameworks are in place to have more coordinated approaches. What will it take for coordination or solidarity to be the new normal when problems are global in nature but also encompass obvious national/local dimensions? It is not clear, because inherent to this question is the political dimension of first recognizing and subsequently, addressing global emergencies at all. However, legal and economic frameworks are in place to initiate policies that confront global emergencies, both nationally, regionally, and globally. Retooling them is key, along with the lessons learned and common will to do so are essential. With imagination and expertise, everything is possible but informed and strategic preparation is needed for the next global emergency.

