

# The Position of the Municipal Public Administration in the Context of the Pandemic: An analysis from the experience of Juiz de Fora/MG

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Received: 25 Mar 2022; Received in revised form: 18 Apr 2022; Accepted: 22 Apr 2022

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## Abstract

The COVID-19 pandemic demanded the adoption of swift measures by public managers to control the spread of the disease, as the virus had a high rate of transmissibility. Effective, non-pharmacological actions involving social distancing and isolation were widely applied. It was noticed that they provided opportunities for the collision between the rights to free enterprise and health, by restricting the full exercise of commercial activities. These, intrinsically, promote agglomeration of people. It is therefore necessary to assess whether the restrictive measures for the promotion of the rights to health and life were proportional to the preservation of the essential core of free enterprise. The context of the city of Juiz de Fora was chosen for analysis, between the months of February 2020 and December 2021. Data regarding the number of cases and deaths in the municipality on each day of publication of the municipal decrees that conveyed trade-restrictive measures. The research was supported by the theories of fundamental rights and legal arguments, for the rational (argumentative) and proportional investigation of the implementation of fundamental rights, in the face of conflicts in the concrete case. Still, the consequentialist theory was used to assess whether the examination of economic, social and political impacts prevailed. It started from the assumption that the rights inherent to the exercise of economic activity would prevail over the adoption of sanitary control measures. Through the empirical research methodology, combined with qualitative and inference strategies, it was found that the municipal administration of Juiz de Fora, proportionally, privileged the right to health, over free enterprise.

**Keywords—** Municipal public administration. Fundamental rights. Right to health. Pandemic. Proportionality. Restriction on trade.

## I. INTRODUCTION

The COVID-19 pandemic triggered, among other problems, a striking principled conflict to be resolved by public entities, that is, the option for measures that privilege the right to free enterprise (corollary of the right to freedom, property, work and other rights financed by the income it generates) or the preponderance of the right to health and, reflexively, the right to life. Many economic activities promote, to some extent, agglomeration of people and, as a result, imply the spread of COVID-19, so that representatives of the Executive Branch had to opt for the adoption of initiatives that restricted economic freedom or that maintained them. to a certain extent, despite the consequences that these could have for the increase in cases of the disease.

Fast and efficient initiatives were demanded by these public managers, making it impossible to wait for the deliberations that regularly took place in the midst of the legislative process, since the advance of the disease was rapid. Such initiatives were supported by Law No. 13,979 (BRASIL, 2020). In this way, as federal legislation determined measures related to the fight against the pandemic throughout Brazilian territory, the administrative acts executed only by the Executive Branch were based on these provisions.

The Federal Supreme Court (STF), in turn, which has the primary attribution of standardizing national jurisprudence on the interpretation of the Constitution (BRASIL, 1988), acted in order to avoid the concentration of powers in only one federated entity. It was reaffirmed

that public entities have concurrent competence to legislate on matters pertaining to public health in each location.

In this way, the Chief of the Federal Executive Branch was not allowed to determine which would be the essential services throughout the country, without respecting the autonomy of each local entity. Thus, attention was reinforced to the content of item II of article 23 of the Constitution (BRASIL, 1988), which considers the common competence of all public entities for matters related to health.

So, the edition of decrees by the Chief Executive to deal with measures related to the control of the disease needed to be increasingly commonplace, especially in the municipal context.

Faced with this scenario, the present research sought to answer whether there was a preponderance of the right to health, given the analysis of administrative acts to control the pandemic in the context of the Municipality of Juiz de Fora, or if there was a prevalence of free initiative.

The focus of the analysis fell on the right to free enterprise to allow the selection of decrees issued by the Municipality of Juiz de Fora, whose scope was to contain the spread of contagion by the coronavirus, which regulated the performance of commercial activities in the context of the pandemic. The limitation of the time available for this research, the dynamics of the change in the epidemiological picture and the high amount of administrative acts, due to the need for rapid initiatives by the municipality, were determining factors for this choice.

Furthermore, the research methodology used was inductive, as it consisted of examining the reality of a municipality. From the observation of what happened in the municipality, it was intended to assess the adequate solution of the collision between the equalizing norms of the health and economic problems caused by the pandemic. In this way, the concrete verification of the conflict between the right to health and the right to free enterprise guided, above all, the elaboration of the general premises to face the presented question.

The research gained the predicate of qualitative in relation to the study of the theoretical framework and the literature review. The empirical method, based on the survey and verification of acts of the municipal Executive Power, was also used to determine the decrees of the Municipality of Juiz de Fora, as well as to verify the number of cases and deaths in the municipality, disclosed by the daily epidemiological bulletin published by the State of Minas Gerais. The study of the situation experienced in Juiz de Fora, as highlighted, was the basis for the formulation of analytical parameters

of the collision between the principles of health and free enterprise in the context of the COVID-19 pandemic. Despite the limitation of the analysis derived from the research cut, the applied methodology can be replicated in other municipalities, in order to verify the occurrence or not of the same results.

The Minas Consciente Plan, prepared by the Government of the State of Minas Gerais, was also analyzed, as it was the tool used by the State to try to standardize the actions of the 853 (eight hundred and fifty-three) municipalities of Minas Gerais, related to the control of economic activities. Despite the non-compulsory adherence to the program, Juiz de Fora chose to follow it, in mid-May 2020. From that moment on, it committed to respecting the guidelines established in the deliberations of the Minas Gerais government (MINAS GERAIS, 2020).

Through Posner's consequentialist theory (2010), in which the verification of the relevance of the consequences of decisional acts is prioritized over the detailed analysis of the application of the norm that best coexists with the scope of the legal system, it was investigated whether such acts have the aim of giving greater importance to the economic, political and social aspects of administrative decisions, to the detriment of the preservation of the fundamental right to health, which was considered as a research hypothesis.

The influence of such thinking in the scope of Administrative Law was also analyzed. In this sense, attention was paid to the studies by Binenbojm (2020), in relation to the so-called pragmatic turn of Administrative Law, which transfers the concerns of this branch of Law to the analysis of the results of state decisions and the practical consequences verifiable in reality.

The post-positivism doctrinal parameters were also used, concerning the teachings that the entire Constitution (BRASIL, 1988) must be respected, as well as that the Law is capable of offering the necessary answers to social problems, without, then, normative gap that gives rise to social anomie. In this way, the Theory of Law as Integrity, elaborated by Dworkin (2002), was used, in which the uniqueness of the legal system is affirmed, formed by interconnected norms and by legal decisions that form precedents capable of adequately guiding the content of subsequent decisions. Furthermore, it used the Theory of Fundamental Rights, evidenced by Alexy (2001), in which the origin, justification and normative characteristics of human rights included in the legal system are sought. Furthermore, the dictates of the Theory of Legal Argumentation (ALEXY, 2002) were used. In this one, it starts from the understanding that the analysis of the

arguments must be characterized as rational, attending, therefore, to the dictates of the Democratic State of Law. Thus, such theories helped to defend the normativity of constitutional principles.

In the research on screen, it was verified the need to use the weighting technique of Dworkin (2002), by the public administrator, when evaluating which right would have greater weight, given the pandemic circumstances. In this way, based on the experience of the Municipality of Juiz de Fora, the balance between the fundamental right to health and free initiative was carried out, a corollary of the fundamental right to freedom.

The adoption of social isolation, in compliance with the guidelines of the world public health authorities linked to the World Health Organization (WHO), made the representatives of each municipal entity, using the prerogatives of the police power, issue decrees determining the closure of establishments. commercial activities that did not develop essential economic activities, thus conceived as essential for the survival of individuals in society.

Faced with the conflict of rights, as highlighted, we sought to verify if the local Public Administration was favorably inclined to the political, social and economic consequences that could arise from the administrative decision or if it favored the preservation of public health.

Therefore, firstly, it was discussed about the correspondence of the post-positivist theory with the precepts of the Rule of Law. Then, considerations were made about Legal Consequentialism, a theory whose main author is Posner (2010), in which the insertion of economic precepts in Law, which provide the well-being of society in general, is discussed. Attention was paid to the influence of such theory on Administrative Law by observing the pragmatic turn of Police Power proposed by Binembjom (2020).

Afterwards, the methodology for obtaining and analyzing municipal decrees published by the Municipality of Juiz de Fora was specified, between the year 2020 and the month of December of the year 2021, in relation to the number of cases and deaths by COVID-19. in the municipality, measured from the official website of the State Health Department, in the same period.

Soon after, it was verified the way in which the position of the municipal public administration occurred, regarding restrictions on local commerce, in view of the number of cases and deaths from the disease. In addition to this, the evolution of the sanitary protocols of the Minas Consciente Plan for the macro and micro-

regions where Juiz de Fora was located was examined, according to the demarcations made by the Program.

Finally, considerations were made on the behavior of the local government in the context of the COVID-19 pandemic, in the proposed research cut, regarding the conflict between the right to health and free enterprise.

## II. METHODOLOGY

The empirical methodology of inference to obtain and analyze the data was used in this work, since it was intended, based on the criteria established for the classification of decrees, to formulate conclusions about those that were chosen as the object of this study (EPSTEIN; KING, 2013, p. 36). In addition, through the inference research strategy, we sought to reveal the entire process, from the moment when restrictions on trade were created, after the disease had spread over the territory of Juiz de Fora, until the moment when such restrictions were raised. data (EPSTEIN; KING, 2013, p. 42). The qualitative research strategy, in turn, was used in the interdisciplinary bibliographic study in the area of Law.

## III. RESULTS E DISCUSSIONS

The salient findings of this study are the following:

### 1. POST-POSITIVISM AS A STRENGTHENING THEORY OF THE DEMOCRATIC STATE OF LAW

In a democratically established society, institutional conclusions must come from procedures. The form must be respected in the context of decisions. The procedure allows one to control the powers and, with that, to restrain the commission of tyrannies. The aim is to rationalize the process of interpretation and application of Law, in which the theories of legal argumentation are located (CARVALHO; DUARTE, p. 130).

Argumentation is convincing from reasons. As a proposal to solve the problem of rationalization of the act of decision, Dworkin (2002) proposes that the norms that make up the legal system can be classified into two species: rules or principles; the latter derive from social values and, in the same way as the former, are binding, that is, they generate rights and duties for all individuals.

Rules differ from principles because they are definitive commands, while the latter, by conveying values, reflect the moral aspect of the community. Given this distinction of origin, it is observed that the principles are more abstract. As a result, they can more often collide

with each other. As a way of settling such conflict, there must be a balance, given the specific case (DWORKIN, 2002).

Advancing on Dworkin's (2002) considerations, Alexy (2001; 2002) uses the maxim of proportionality to resolve the conflict between principles, in order to demonstrate, argumentatively, which principle should stand out, given the analyzed context. Alexy (2001; 2002) aims to develop a legal theory that provides a rational basis for the application of fundamental rights.

In this sense, he subdivides it into three sub-maxims: adequacy, necessity and proportionality in the strict sense. Adequacy guides the analysis of the aptitude of the restriction to a principle to promote the other that collides with it; necessity presupposes the use of the least burdensome means to promote this opposite principle; proportionality in the strict sense, finally, measures whether the effectiveness of the prevailing principle overcomes the restriction to be promoted on the principle of less weight, in the specific case.

The Constitution must preserve, in its text, the principles that are identified with society. Thus, as evidenced above, it is a conflict between socially valued rights that are intended to guarantee the individual's inherent dignity. Thus, consideration, given the context of collision between the fundamental rights to health and free enterprise under examination, is essential.

## 2. RICHARD POSNER'S LEGAL CONSEQUENTIALISM AND THE PRAGMATIC TURN OF ADMINISTRATIVE LAW

Posner (apud RIEFFEL, 2006, p. 53-55), the main exponent of Legal Consequentialism, conceives of Legal Consequentialism encompassing the economy, Pragmatism and Liberalism as central factors. Pragmatism is an auxiliary element in the overcoming of Law, insofar as it separates it from Philosophy. It becomes, therefore, a tool to perceive a certain action as if it were based on facts and consequences, ignoring abstractions and metaphysical concepts. It also takes into account the best results for the community (KATAOKA, 2016, p. 85).

For Posner (apud BINEBONJM, 2020, p. 57), the pragmatic stance seeks to identify the states of affairs that would be prognostically generated by each possible decision, but the criterion for defining the most appropriate choice may or may not include the maximization of good. In this way, it is linked to the understanding that it is a way to assess the consequences of a certain issue for society.

In this sense, the consequentialist theory praises a legal norm that values social well-being, insofar

as, in addition to taking into account the set of individual preferences, it considers the well-being of people, from the analysis of the consequences of the implementation of the normative text (RIEFFEL, 2006, p. 11). Law, by seeking in economic science mechanisms that are consistent with social reality, can provide more efficient results (KATAOKA, 2016, p. 85).

Binenbojm (2020, p. 68) considers the influence of pragmatism as a social and legal interpretive strategy, as a way of seeking the best solution for the situations faced by society. Thus, it emphasizes that pragmatism is more beneficial to elucidate such issues, given that the empiricist and contextual perspectives, combined with the search for the practical consequences of decisions, provide better subsidies for facing concrete everyday problems in a more enlightened way, informed and, in a way, more intelligent (The Pragmatic Turn of Administrative Law).

## 3. METHODOLOGY FOR OBTAINING AND ANALYSIS OF DATA

As a way of verifying the management posture of the Municipality of Juiz de Fora, the municipal decrees published between February 2020 and December 2021 were analyzed.

Furthermore, the purchase and sale activities carried out in commercial establishments (shopkeepers) were the focus of the examination.

The content of the administrative act, therefore, was analyzed to assess the level of restriction on commercial activities, given that these limitations contribute, to some extent, to the reduction of the agglomeration of people.

Concomitantly with the verification of municipal decrees, the number of cases and deaths of the disease in the municipality, made available by the Diário Epidemiological Bulletin of the State of Minas Gerais, on the day of publication of each decree, was examined. These bulletins were collected from the official website of the State Health Department.

It was also verified, in relation to the publication dates of each decree, which would be the flexibility modality indicated by the Minas Consciente Program for each region. For this purpose, the Transparency Report published on the date of the decree or at an approximate date was sought on the program's official website.

To the published decrees, the following classifications were given in relation to the level of restriction on local commerce: high restriction, medium restriction and low restriction.

#### 4. DATA ANALYSIS

35 (thirty-five) municipal decrees, 30 (thirty) epidemiological bulletins and 22 (twenty-two) transparency reports of the Minas Consciente Program were analyzed. It was found that the municipal government was concerned about constantly updating measures to restrict local commerce.

Therefore, it was found that, of the 35 (thirty-five) decrees analyzed, 20 (twenty) were classified as high restriction, 13 (thirteen) as medium and 2 (two) as low restriction. It was verified, therefore, that the research hypothesis was not confirmed, since it was assumed that the municipal entity would have given priority to measures of greater flexibility to commercial activities, to the detriment of those of a more restrictive nature.

#### IV. CONCLUSION

The prioritization of health protection was detected, to the detriment of the economic, social and political consequences that they could generate, in view of the establishment of more severe levels of restriction to the full exercise of commercial activities, which is in line with the foundations of the State of Law, in which fundamental rights (search for the dignity of the human person) prevail to the detriment of economic freedoms.

The municipal administration, in view of the number of cases and deaths from the disease, adopted a stance that privileged the right to health, in the face of the right to free enterprise, having demonstrated greater adherence to the Theory of Fundamental Rights, to the detriment of the Consequentialist Theory. The assessment of the preponderance of the fundamental right to health is in line with the claim to safeguard life as the most relevant legal asset of the legal system, considering that, without it, it is not possible to enjoy any other rights supported by the Constitution (BRASIL, 1988), as well as the requirement to exercise duties is impossible.

It is important to highlight that the research carried out presents the limitation of investigations conducted by the methodological strategy of the case study, that is, the need for caution for the universalization of data. This universalization can only be carried out if it is verified that the results derived from the analysis of the sample in question are coincident with the reality inherent to other municipalities, which requires verification in additional research. Thus, the objective of the case study is to obtain a replication pattern that allows readers to establish connections in the face of other realities to be considered (EPSTEIN; KING, 2013, p. 53).

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