

# PUBLIC LAW AS A VICTIM OF THE ECONOMY

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## Abstract

*Every day of 2009 has a common speech: economic crisis and its consequences, not only in economic topics, but also in few others domains, connected with the real economy. However, in this public speech, it was a problem: we must find a guilty element, because it must be someone who was not able to function correct, to not respect some rules that was good many years, but not in first years of 21<sup>st</sup> century. And, as always, every specialist and whole political class offered an answer. But this is not enough: a crisis has not only causes, but it has its victims. The globalization was one of them; human rights – in few states, young generation is a perpetual victim. In legal branch, the consequences were much simple: private law (banking law and commercial law) didn't suffer too much, but public law – because whole eyes were settled in this direction – felt this pressure. State intervention in the economy was considered not really political correct, not really a benefit for economies, but something necessary. In fact, public law was considered only a reserve. In this case, can we speak about a de-legitimization of public law? Is the purpose of public law available for 21<sup>st</sup> century or it become now only a simple reserve, necessary only to solve the "side-slip" of the private law? And, because the connection between private law and the economy is too strong, can we see now the public law as a victim of the economy?*

**Keywords:** public law, private law, economy, legitimization, victim.

## Introduction

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But this reserve was forced to solve all the difficulties of banking system – of private law mistakes, in other words. This process must be understood somehow: as a manifestation of private law force? As a demonstration of continue sacrifice of public law during the economic crisis? It is very important to offer an answer to those questions, because, without it, during another new crisis we'll discover that we didn't learnt nothing from this, and we'll make the same mistakes: erare humanum est, perseverare diabolicum!

The author intends to answer underlining few ideas who are still available in legal science, especially in their relation with new socio-political paradigm. In the same time, we must offer a perspective for the future: the dispute between public law and the economy will have, on this lack of resources time, a long continuation: the pressure for both direction of human activity is too big now to can be avoided.

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There is some literature for this subject: less in Romanian doctrine, more in Western Europe and other developed part of the world. But this idea is not too much studied, because it is a Pandora box for a fundamental change to some truths understood as “eternal”, after 1989: the complete victory of capitalism (the economy) against communism (state intervention and public law).

The author believes that is time to come back to normal logic in public law and into the economy, because this way of world organization cannot be changed.

### Paper Content

1. Toward the end of the 1990s, a group of economists, specializing in finance and building upon the emerging emphasis on institutions, conducted cross-country econometric research to determine what legal rules best contributed to strength in the financial sector and thereby to economic growth. Their studies in Law and Finance represented an unprecedented focus on microeconomic analysis of the influence of legal rules on economic growth. Their work led to another researches by other economists and by lawyers into the role of legal institutions in economic development<sup>1</sup>.

A major conclusion reached in their studies was that countries whose legal systems originated in the English common law have enjoyed superior per capita income growth compared with so-called civil law countries, whose law is based on European codes, especially those countries whose law is based on the Napoleonic codes and hence on French law<sup>2</sup>.

Their conclusions have drawn criticisms on various grounds, especially because many civil law countries—not only those in Western Europe but also some developing countries—have enjoyed superior economic growth and because many common law countries in the third world have done quite poorly in the economic growth tables.

But this idea is not new, Max Weber had spoken about this in his fundamental book dedicated to the ethics. The religion was seen as an obstacle, the strongest one for the society to achieve economic development. But the center of Weber's study was the relation between Catholics and Protestants, this rivalry being easy to find for empirical studies. But Max Weber didn't imagine the first years of 21<sup>st</sup> century, when communist China represents the strongest economic force, and its religion is something completely different by the Western Europe; for sure, the Arabic petro-dollars was not imagined by Weber too – and, of course, the deep economic transformation in global political and legal world.

Despite such criticisms of these economists' specific results, the idea that institutions and especially legal institutions are crucial to the process of economic development is now broadly accepted in the academies and in the research departments of international financial institutions such as the World Bank.

When we speak about economic development, we must analyze a framework that includes:

- a) A correct attitude for work belonging to the citizens;
- b) A coherent legal framework;
- c) The dimension of demography;
- d) The possibility to have access to important amount of resources;
- e) The quantity of energy consumed for produce one piece of product.

If we try to explain the first and the third causes of a real and strong economic development, we must talk about geopolitics.

In the same time, speaking about the possibility to have access to important amount of resources we are forced to analyze mainly the possibility for new wars, because in modern times the

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<sup>1</sup> Kenneth Dam: *The law-growth nexus : the rule of law and economic development*, Brookings Institution Press, (Washington D.C., 2006), p. 8.

<sup>2</sup> Ibidem.

prices of few important materials are more important than law principles of human rights and peaceful existence.

Only the last point (e) is connected with productivity, because to loose energy is a crime for today's economy. In fact, the difference between states is represented by this percentage: a modern technology means to economize not only the material resources used to create a new unit of product, but also it means to use less energy (and, if is possible, clean or renewable).

However, it is necessary to describe in a few words all these steps for the economic development, to understand much more the second idea: a coherent legal framework.

2. Several social scientists and historians have found strong evidence that culture explains at least some differences in the rate at which countries develop. An economic history said: if we learn anything from the history of economic development, it is that culture makes almost all the difference.

Unlike political and economic factors, cultural factors, such as ethnicity, language and religion, suffer relatively few changes over a comparatively long period of time. They can, therefore, serve as an important instrument for the comparative analysis of the world economy. However, given the great varieties of ethnic, linguistic, and religious groups throughout the world, the number of individual cultures is too large to be a practical tool and it would be very difficult to conduct useful multicultural economic comparisons. Consequently, to facilitate multicultural economic analysis and comparison, our analytical framework will be based on a synthetic term – “culture area”<sup>3</sup>.

There usually exists a small and relatively homogeneous core in each culture area. Culture areas also have boundaries. The influence of a specific culture is always strongest in the core and becomes weaker from the core to peripheral areas. In theory, the boundary of a culture area can be determined as the line beyond which the influence of culture reduces to zero.

However the boundaries between culture areas are not necessarily distinct; recognizable cultures within a given area may contrast with those of neighboring ones, and if the boundaries are not sharply delineated, zones of composite culture or blended traits may make the transition from one to another a matter of gradation. Within a single area, quite different ways of life may coexist as characteristic patterns<sup>4</sup>.

3. Natural resources once figured prominently as a production factor in studies of economic growth. At times, natural resources (such as land, climate, biology, water, minerals and energy) have indeed been the primary component among the factors that influence social and economic activities. But early pessimists like Malthus and Ricardo were probably wrong about the importance of scarce natural resources as a retardant of growth<sup>5</sup>.

However a huge labor force does not sufficiently represent an advantage in human resources for economic development, particularly when a country is undergoing transformation from an agricultural society, mainly using traditional methods of production to an industrial society, which requires not only new and advanced technologies but also well-trained personnel.

A well-educated and law-abiding population that possesses a strong work ethic is the sine qua non of modern economic growth. A striking feature of the world economy in the twentieth century was the enormous increase in the average level of education. Before the nineteenth century the majority of the population was illiterate in almost all countries.

Since then, universal enrolment in primary education has become obligatory in advanced countries. As a result the proportion of people receiving secondary and higher education has risen steadily.

Technological innovation has been the most fundamental element in promoting, either directly or indirectly, economic development and social change. Although it is very difficult to

<sup>3</sup> J. Sevilla: *Corectitudinea politica*, (Ed. Humanitas, Bucharest, 2007), p. 29 – 30.

<sup>4</sup> R. Cooper: *Destramarea natuilor*, (Ed. Univers Enciclopedic, Bucharest, 2006), pg. 82.

<sup>5</sup> Rongxing Guo: *Cultural influences on economic analysis : theory and empirical evidence*, (Palgrave Macmilan, London, 2006), p. 146.

measure its short-term impact precisely, no one would reject the idea that technological progress is changing the world at an incredibly high rate.

The most obvious contributions are in transport and communications where crude means (such as horses, carriages and handwritten letters) have been superseded by super-jets, telephones and faxes, as well as by increasingly efficient computer networks, including the Internet which is becoming the most important means for transmitting information. Mobile telephones, computer networks and other technological inventions which were once considered to be either impossible or useless are now becoming the necessities of our daily life<sup>6</sup>.

Before the early twentieth century, technological innovation had been contributed mainly by individual inventors or small-scale entrepreneurs. But now the great bulk of it – such as the space shuttle and the Internet, to list but two – is conducted by prominent firms with substantial budgets, as well as by governments. As a result the process of technological innovation has become more complicated than ever before.

Specifically, technological and related products are positively related to capital stock of, and personnel engagement in, technological innovation. In addition, technological innovation is also related to educational levels, as the content of education changes over time to accommodate to the growing stock of knowledge. There has been a proliferation of specialized intellectual disciplines to facilitate the absorption of knowledge and to promote its development through research<sup>7</sup>.

4. If we are to explain why economic growth rates have been so diverse among nations, it is necessary for us to consider political and institutional influences. Institutions in economic research are analyzed as formal (laws, regulations) and informal (customs, traditions, norms) rules that structure and simplify human interactions within a society. Historically, institutions have been devised by human beings to create order and reduce uncertainty in exchange<sup>8</sup>.

They evolve incrementally connecting the past with the present and the future. According to new institutional economics, the economic system, like other production factors required in economic development, is a special kind of scarce resource and should be treated thus.

The economic system of any nation is the mechanism that brings together natural resources, labor, technology and the necessary managerial talents. Anticipating and then meeting human needs through production and distribution of goods and services is the end purpose of every economic system.

While the type of economic system applied by a nation is usually artificially decided, it is also to a large extent the result of historical experience, which becomes over time a part of political culture.

5. Public sector purchases totaled some 1.5 trillion euros in 2002. This explains the seriousness with which European Community institutions approached the task of injecting competition into public procurement as part of the single market project.<sup>9</sup>

By 1993, the institutions of the European Community had enacted the legislation required for completion of a single European public procurement market, potentially introducing competition into the huge market for purchases of goods and services by governments at all levels in member states.

Drawing on EC Treaty articles prohibiting restrictions on the free movement of goods, the rights of establishment, and the right to perform services within the single market, the Commission had proposed “positive” legislative measures supplementing these prohibitions, including procedures

<sup>6</sup> Rongxing Guo: *Cultural influences ...*, p. 147.

<sup>7</sup> Ibidem.

<sup>8</sup> A.M. Stoenescu: *Istoria loviturilor de stat in Romania*, vol. IV, part. I, (ed. Rao, Bucharest), p. 63

<sup>9</sup> Mitchell P. Smith: *States of liberalization: redefining the public sector in integrated Europe*, (State University of New York Press, Albany, 2005), p. 58

for purchasing of supplies, commissioning of works, and contracting for services by public authorities at all levels—local, regional, and national<sup>10</sup>.

As national governments transposed these measures into law the European Community formally moved toward a single market in public procurement.

However, as this chapter demonstrates, in practice little interpenetration of national markets ensued; legislation was a necessary but not sufficient condition for the genuine introduction of competition. Political leaders of the EU member states had supported the single market in public procurement, the appropriate legislation had been crafted by the European Commission and approved by the Council of Ministers, and single market public procurement rules had significantly altered domestic administrative practices.

Yet more than a decade after the formal completion of the single market in public procurement, there is only limited cross-border competition for public works and supplies contracts within the EU, and closed local, regional, or national public contracting practices constrain the emergence of a single European market<sup>11</sup>.

National governments support competition in the 1.5 trillion euro public procurement market because of the gains in efficiency and competitiveness it promises. Moreover, the fiscal benefits to be captured by competitive procurement coincided with objectives of budget consolidation central to the process of economic and monetary union accompanying the single market.

As an additional ingredient in the recipe for sector reform, the European Commission has supplied supranational leadership by promoting awareness of the potential benefits to governments and mobilizing support for a legislative package. Yet in successive Commission reviews of the progress of the internal market, public procurement persistently ranks among the “missed targets” of efforts to complete the project.

6. For the countries of the European Union as a whole, the protections traditionally accorded markets served by the public sector have been eroded significantly, and governments and public service providers that seek to sustain restrictive practices face further challenges.

Public services in numerous sectors now operate in a competitive environment that would have been unthinkable a decade ago. Governments cannot freely subsidize state-owned public service providers and thereby keep markets closed to foreign-owned or domestic private sector competitors. But the case studies also indicate that European economic integration has not created a liberalization steamroller that simply “flattens” the public sector across EU governments, rendering it an apolitical mechanism for the pursuit of economic efficiency<sup>12</sup>.

Nor has liberalization advanced without accommodating the interests of protected public service providers. There are few more vital contemporary questions for political scientists than those that emanate from the relationship between neo-liberalism, the exercise of state power, and the institutions and practice of global governance.

Since the demise during the early 1970s of the first “Washington Consensus” provided by the capital controls and fixed exchange rate system of the Breton Woods international economic order, its neo-liberal successor has come to dominate the relationship between states and markets in both the industrialized and the industrializing economies.

Policies of privatization, deregulation, and liberalization of markets have not only given entrepreneurs and trans-national corporations greater freedom to innovate and take risks in pursuit of profit, but also largely redrawn the boundaries between the public domain of the state and citizenship and the private domain of the market, entrepreneurship and consumerism<sup>13</sup>.

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<sup>10</sup> Ibidem.

<sup>11</sup> Mitchell P. Smith: *States of liberalization* ..., p. 94

<sup>12</sup> Kenneth Dam: *The law-growth nexus* ..., p. 109

<sup>13</sup> Mitchell P. Smith: *States of liberalization* ..., p. 127

Globalization, often when allied to arguments about the need to maintain international competitiveness, has provided a generation of politicians with both a convenient alibi, to explain their inaction or indifference to rising inequality and other social consequences of unfettered market forces, and an ideological weapon, to justify major restructuring of domestic political, economic, and social institutions in the guise of urgent and overdue modernization. In fact, this was the program created by Anthony Giddens (the Third way) and implemented by Tony Blair.

7. The parallel response of a generation of voters, to this attempt to roll forward the frontiers of the private domain of the market, entrepreneurship and consumerism as agencies of social change, has been to abandon the public domain of political parties and the electoral ballot box in increasing numbers.

The first is that neo-liberalism has failed to provide a framework for state power and global governance capable of delivering stable and lasting prosperity for the richer industrialized economies, and a developmental route out of poverty for the poorest economies.

Second, the role of politics and the exercise of public policy should be more broadly defined than the simple construction of institutions for the market. While the World Bank has argued that this limited role for the state is an effective one, the analyses furnished by the contributors to this volume suggest otherwise. The relationship between the state and market needs to be reordered to foster a broader conception of the public domain that will deliver greater effectiveness in both state power and the pattern of global governance, and thereby advance human development. In particular, the contemporary pattern of state power and global governance needs to be re-balanced in favor of the public domain of the state and citizenship, in order to redress some of the inequalities bequeathed by three decades of liberalization, privatization, and deregulation.

Third, while international flows of finance, goods and trade have challenged and constrained the exercise of state power, the degree to which globalization has undermined the policy autonomy of the democratic state has in many cases been overstated. Consequently, any analysis of the impact of neo-liberalism upon state power and global governance must recognize the importance of context, including the impact of society, historical traditions and culture, in mediating the effects of neo-liberalism.

8. The 3rd May 2004 was widely marked, if not celebrated, by the British media as the 25th anniversary of the election of Margaret Thatcher as Prime Minister of the United Kingdom<sup>14</sup>.

This event was remembered as one of the pivotal turning points of twentieth century peacetime British politics. However, it was equally important for global political economy because it marked the beginning of the process by which the political leadership of the Group of Seven industrialized economies began to embrace the New Right's project of rolling forward the frontiers of the market in the name of neo-liberalism. This was the point at which the Thatcher Government, equipped with 'a different analysis and a different set of policies' challenged the social democratic orthodoxy about the role of state power, both domestically and internationally. Domestically, it identified six main obstacles to full employment and prosperity, namely, high state spending; high direct taxation; egalitarianism; nationalization; a politicized and Luddite trades union movement; and the presence of an enterprise culture<sup>15</sup>.

To restore the political and moral authority of the state, and to return politics to the "common ground" of prosperity would require nothing less than salvation for an "endangered species", and the rediscovery of the "missing dimension in our economic thinking" and "the only route to our prosperity, namely the entrepreneur".

Ronald Reagan supported this thesis, contending that "In this present crisis, government is not the solution to our problem; government is the problem".

<sup>14</sup> Simon Lee, Stephen McBride: *Neo-Liberalism, State Power and Global Governance*, (Springer, 2007, Netherlands), p. 31

<sup>15</sup> *Ibidem*.

Neo-liberalism thrived ideologically on both sides of the Atlantic during the 1980s and 1990s because it was able to exploit a loss of confidence in the efficacy of the Keynesian social democratic welfare state. Internationally, the suspension of the convertibility of the dollar, the introduction of floating exchange rates, and the liberalization of its financial markets by the United States had brought an end to the Bretton Woods era of managed capitalism through fixed exchange rates and capital controls. Domestically, the coincidence of rising inflation and unemployment in the aftermath of the 1973–1974 Oil Crisis had challenged longstanding assumptions about the attainability of full employment, the desirability of high rates of taxation, and the dangers of welfare dependency and subsidy addiction<sup>16</sup>.

Neo-liberalism was able to exploit this uncertainty by placing faith in the market as a discovery process for entrepreneurs to acquire the knowledge and information that would enable them to take risks and innovate to provide new goods and services to consumers. The superiority of the market mechanism over the state was held not just to be economic, in terms of a more efficient allocation of resources, or political and social, as a better and more spontaneous basis for human organization, but also moral, because of its maximization of individual liberty from the state<sup>17</sup>.

9. If state and public intervention is not welcomed, it means that the economy is the single one correct ideology, because the struggle between two very old social notions cannot be finished without a real and clear winner: when two capital concepts fight one against each other, it cannot be a real scientific debate: there is only a place for one winner, and only one place for the second place (not looser, because these institutions are eternal).

But Stiglitz and other economists predicted that this moment (victory of economics) cannot be too long – it will be a time for “state revenge”, or – precisely – a moment of truth, for remake the balance, the equilibrium. The main problem was the dimension of the gap between economy and public intervention. If this gap was small, it was easy to recreate the balance.

But since Reagan moments and the first days of crisis (economic crisis) it was a long time, almost 25 years. In this time the gap becomes huge. The economy consolidated its image, but, as always, there is a difference between image and reality. And, when the reality finally had spoken, it was obvious that the economy is not only an image, and the state intervention, as expression of public law was necessary.

The author doesn't want to talk about the great ideological debates that appeared in 2007 in whole Western Europe about the collapse of capitalism. In fact, this debate is only an expression of something impossible to imagine 50 years ago: intellectuals cannot believe in state intervention in economy.

For sure, to understand this is necessary to come back to famous Fukuyama's essay about the end of history, where the capitalism was considered the only one legitimate way for humanity. This text was written soon after communism collapse, and for few years it was almost an acceptable idea. For sure, in modern times 15 years (1991 to 2006) represent a big period of time, with important changes in social reality. It is sure that the world as it was seen in 1990 was radically (and not only in a small part) modified by the technological advance of this time.

But 2007 was tremendous. And, like always in first moment of crisis, first months are used to talk about “what can we do, what kind of idea can bring a light is a tunnel”. But the ideological debates (of course, ideology, not scientific dialogue) were accompanied by the governmental actions, straighter and more unequivocal: they intervened to save the big actors of the private economy.

Of course, this is an administrative mechanism, created by state in the moment when state was created too. However, this intervention was claimed, and it was for many people the only chance to survive. In this case, we must note that this intervention was considered a “necessary bad”,

<sup>16</sup> A.M. Stoenescu: *Istoria loviturilor de stat* ..., p. 104.

<sup>17</sup> Simon Lee, Stephen McBride: *Neo-Liberalism* ..., p. 58.

because, like everyone understand, the economy is only one truth owner, and state is only a palliative when the speed of the economy decrease.

## Conclusions

As we can see, the state intervention – a form of administrative action – it was a perfect medicine to save great banking actors (and especially their bosses<sup>18</sup>), but it was seen only as a violation of ideological terms of society after communism fall. It is amoral to claim state intervention, and to present it like a wrong method to solve a problem, because for many years the ideological debate tries to impose a bad idea: that public law and its actions are the worst thing for the society.

So, we can conclude, without any hesitation – public law represent, in ideological war of 21<sup>st</sup> century only a victim of economy. In fact, we must understand this phenomenon, because a lawyer cannot stay only as technician: he must understand the context of the law science.

In this case, the specialists of public law felt that their works is not necessary. You can works well, but if public image of your work disregard whole activities of public sector, we can predict, for sure, for the next 10 years a great migration of best specialists from this sector to the private one. In this case, the quality of public services will decrease, because the interest for them is only at speech level. So, it must be adopted new regulation to prevent this exodus, otherwise, the gap between public and private law specialist will be very important, and nothing can replace the differences.

For us, like for other researchers, it is a time to re-evaluate these aspects, because is not the time to stay immobile. In fact, our opinion is sure that is necessary a new education of people in a sense of state intervention acceptance. And for this it is compulsory – again this imperative verb – to recreate and to re-present public law in its normal and correct light.

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<sup>18</sup> And, of course, their bonuses – received for “good activities for their banks”.