



UNIVERSITÀ  
DI TRENTO

Facoltà di  
Giurisprudenza

COVID-19 LITIGATION

THE ROLE OF NATIONAL  
AND INTERNATIONAL COURTS  
IN GLOBAL HEALTH CRISES

edited by  
PAOLA IAMICELI  
FABRIZIO CAFAGGI

2024





**UNIVERSITÀ  
DI TRENTO**

**Facoltà di  
Giurisprudenza**

**QUADERNI DELLA FACOLTÀ DI GIURISPRUDENZA**

**77**

**2024**

Al fine di garantire la qualità scientifica della Collana di cui fa parte, il presente volume è stato valutato e approvato da un *Referee* esterno alla Facoltà a seguito di una procedura che ha garantito trasparenza di criteri valutativi, autonomia dei giudizi, anonimato reciproco del *Referee* nei confronti di Autori e Curatori.

PROPRIETÀ LETTERARIA RISERVATA

© *Copyright 2024*  
*by Università degli Studi di Trento*  
*Via Calepina 14 - 38122 Trento*

ISBN 978-88-5541-060-1  
ISSN 2284-2810

Libro in Open Access scaricabile gratuitamente dall'archivio IRIS - Anagrafe della ricerca (<https://iris.unitn.it/>) con Creative Commons Attribuzione-Non commerciale-Non opere derivate 3.0 Italia License.

Maggiori informazioni circa la licenza all'URL:  
<http://creativecommons.org/licenses/by-nc-nd/3.0/it/legalcode>

*Marzo 2024*

COVID-19 LITIGATION

THE ROLE OF NATIONAL  
AND INTERNATIONAL COURTS  
IN GLOBAL HEALTH CRISES

edited by  
PAOLA IAMICELI  
FABRIZIO CAFAGGI

Università degli Studi di Trento 2024



## INDEX

	Page
Benn McGrady and Daniel Hougendobler <i>Foreword</i> .....	1
PART I THE COVID-19 LITIGATION PROJECT: A RESEARCH AGENDA	
Paola Iamiceli and Fabrizio Cafaggi <i>Decision-making in times of uncertainty and the protection of fundamental rights: a comparative view on global litigation during the pandemic</i> .....	11
Roberto Caranta and Benedetta Biancardi <i>A methodology to draft a glossary of comparative (administra- tive) law</i> .....	57
PART II THE ROLE OF SUPRANATIONAL COURTS	
Laila Medina <i>Judicial protection and the role of the courts in the pandemic: perspectives from the European Court of Justice</i> .....	77
Boštjan Zalar <i>Public health and fundamental rights between old and new vulnerabilities: is a conciliation possible?</i> .....	93
PART III COUNTRY SCENARIOS AND THE ROLE OF NATIONAL COURTS	
Matej Accetto <i>The pandemic and the Slovenian constitutional jurisprudence</i> .....	119
Edith Zeller <i>Judicial review in Austria and the role of Austrian courts in the COVID-19 pandemic</i> .....	147

INDEX

	Page
Madan B. Lokur and Rupam Sharma <i>Constitution under lockdown. Judicial response to Corona- virus in India</i> .....	175
Manimuthu Gandhi, Tania Sebastian and Rajasathya K.R. <i>Response of higher judiciary to COVID-19 disruptions in India</i> .....	203
Damian Chalmers <i>The political ordering of rights and bodies in South-East and East Asia</i> .....	241
Natalia Rueda <i>Pandemic and judicial protection of fundamental rights in Lat- in America</i> .....	259
Emmanuel Kasimbazi <i>Trends in COVID-19 litigation in Africa</i> .....	291

PART IV

CROSS COUNTRY ANALYSES

Pedro A. Villarreal <i>The comparative and international law dimension of quaran- tines against COVID-19</i> .....	317
Gianmatteo Sabatino <i>Private insurance schemes and COVID-19 pandemic. Lessons from a comparative analysis</i> .....	337

CONCLUDING REMARKS

Fabrizio Cafaggi and Paola Iamiceli <i>COVID-19 litigation: the drivers of institutional responses to the pandemic and the role of courts</i> .....	369
--	-----



# DECISION-MAKING IN TIMES OF UNCERTAINTY AND THE PROTECTION OF FUNDAMENTAL RIGHTS: A COMPARATIVE VIEW ON GLOBAL LITIGATION DURING THE PANDEMIC<sup>1</sup>

*Paola Iamiceli\* and Fabrizio Cafaggi\*\**

*SUMMARY: 1. Facing unprecedented challenges in times of uncertainty. Why a project on COVID-19 litigation? 2. The Database design and the role of comparative law. 3. An overview on COVID-19 litigation. 4. How has the litigation evolved? 5. The main questions addressed and the book structure. 5.1. Navigating through the book.*

---

<sup>1</sup> This book has been developed within the “Covid-19 Litigation” Project, coordinated by the University of Trento and co-financed by the World Health Organization (2020-2023). We are particularly grateful to all participants in the project, including judges and scholars, who contributed to case collection, legal and comparative analysis, and, before, to Benn McGrady (WHO) for entrusting us with a challenging project and for providing valuable insights in its design and development. We also wish to thank all participants in the International Conference held at the Trento Faculty of Law on 28 and 29 November 2022 on “COVID-19 Litigation. The Role of National and International Courts in global health crises”, who enriched the comparative analysis and the policy debate, partly reflected in this book. This book and the whole project would have never reached its scale and depth without the long standing commitment of many young scholars, who constantly contributed to the design, development and update of the Database and the News Page. Our credit goes to them, whereas errors and omissions remain our responsibility.

Last but not least, we wish to thank Marco Nicolò and Laura Piva for developing most tables in section 4 of this Introduction and to Gianmatteo Sabatino and Marco Nicolò for supporting us in editing the book chapters.

\* Professor of Private Law, Faculty of Law, University of Trento.

\*\* Italian Council of State, Former Professor of Private Law and Private Comparative Law at the University of Trento, the European University Institute and the Italian National School of Administration.

### *1. Facing unprecedented challenges in times of uncertainty. Why a project on COVID-19 litigation?*

Recent times have exposed the global community to unprecedented challenges. Among these, the COVID-19 pandemic has forced institutions and individuals to make tragic choices, struggling for the ultimate extinction of virus, including its variants, and the recovery of lost resources and freedoms. Though differently per intensity, modalities and effects, these challenges have engaged every institution and individual around the whole globe: an unprecedented opportunity for global cooperation and solidarity<sup>2</sup>.

Not surprisingly, the scientific community has soon engaged in major actions to boost innovation in research and clinics. Clinical data sharing has become a priority for public health policy and research<sup>3</sup>. At later stages, the COVID-19 pandemic has stimulated a truly interdisciplinary dialogue aimed at improving preparedness and responsiveness through data analysis, connecting evidence on the spread of the disease and the impact of governmental measures to contrast the pandemic. Multiple initiatives have emerged to share data and information on national regulatory approaches, making the results available to health researchers, data analysts, economists, social scientists, and policy

---

<sup>2</sup> L.O. GOSTIN, R. HABIBI, B.M. MEIER, *Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats*, in *Journal of Law, Medicine & Ethics*, 48, 2020, 376-381, available at SSRN: <https://ssrn.com/abstract=3598165> or <http://dx.doi.org/10.2139/ssrn.3598165>.

The lack of solidarity has been pointed out in the Lancet Commission's work, calling for a different approach in the future global crisis management. See J.D. SACHS et al., *The Lancet Commission on lessons for the future from the Covid-19 pandemic*, in *Lancet*, 400, 2022, 1224-80, 1268, Published Online September 14, 2022 ([https://doi.org/10.1016/S0140-6736\(22\)01585-9](https://doi.org/10.1016/S0140-6736(22)01585-9), last visited on 17.12.2023) («We call for all countries, especially the richest and most powerful, to support, sustain, and bolster the work of the UN system. We call for awareness of the benefits of multilateralism, solidarity, cooperation, and the shared commitment to sustainable development, whether facing pandemics, ending poverty, keeping the peace, or meeting global environmental challenges»).

<sup>3</sup> C. STAUNTON, *Open Science, Data Sharing and Pandemic Preparedness*, in J. GROGAN, A. DONALDS (eds.), *Routledge Handbook of Law and the Covid-19 pandemic*, London, 2021, 299 ff.

makers<sup>4</sup>. Other initiatives have sought to rank countries' performances by comparing data related to the control of the contagion<sup>5</sup>. Much more could be done to exploit such potential for global cooperation in health research and health public policy.

The role of science has been central for public choices. Scientific committees have been systematically consulted by governments to provide a reasonably solid basis for political and administrative decisions. Although cooperation has occurred at supranational level, including within the EU framework, policy responses were heterogeneous, often uncoordinated, with different degrees of effectiveness. A major call for multilateral collaboration and coordination is a clear legacy of the pandemic crisis<sup>6</sup>. To learn from different approaches, comparative institu-

---

<sup>4</sup> Without ambition for comprehensiveness, a few of these initiatives may be here referred to, such as the Oxford Covid-19 Government Response Tracker: T. HALE et al., *A global panel database of pandemic policies (Oxford Covid-19 Government Response Tracker)*, in *Nature. Human Behaviour, Resource*, <https://doi.org/10.1038/s41562-021-01079-8> (last visited on 07.01.2024); the Covid-19 Law Lab of the O'Neill Institute at Georgetown University (<https://oneill.law.georgetown.edu/projects/covid-19-law-lab/>, last visited on 07.01.2024); the Oxford Compendium of National Legal Responses to Covid-19 (<https://oxcon.ouplaw.com/home/occ19> last visited on 07.01.2024); S. JASANOFF, S. HILGARTNER, J.B. HURLBUT, O. ÖZGÖDE, M. RAYZBERG, *Comparative Covid Response: Crisis, Knowledge, Politics Interim Report* (available at [https://assets.websit e-files.com/5fdcfca1c14b4b91eeaa7196a/5ffda00d50fca2e6f8782aed\\_Harvard-Cornell %20Report%202020.pdf](https://assets.websit e-files.com/5fdcfca1c14b4b91eeaa7196a/5ffda00d50fca2e6f8782aed_Harvard-Cornell %20Report%202020.pdf), last visited on 17.02.2024).

<sup>5</sup> See, for example, the GCI Dashboard (<https://covid19.pemandu.org/>, last visited on 07.01.2024); N. HAUG et al., *Ranking the effectiveness of worldwide Covid-19 government interventions*, in *Nat. Hum. Behav.*, 4, 2020, 1303, <https://doi.org/10.1038/s41562-020-01009-0>, last visited on 07.01.2024. A critical appraisal of comparative performances ranking is made by S. JASANOFF, S. HILGARTNER, *A stress test for politics. A comparative perspective on policy responses to Covid-19*, in J. GROGAN, A. DONALDS (eds.), *Routledge Handbook of Law and the Covid-19 pandemic*, cit., 289 ff.

<sup>6</sup> See WHO, *From emergency response to long-term COVID-19 disease management. Ending the COVID-19 emergency and transitioning from emergency phase to longer-term disease management: Guidance on calibrating the response*, September 2023, available at <https://iris.who.int/bitstream/handle/10665/372712/WHO-WHE-SPP-2023.2-eng.pdf?sequence=1> («WHO encourages Member States to begin or continue using the WHO Partners Platform, a centralized way to share preparedness, readiness, and response actions that are being planned and implemented; identify and update re-

tional analysis of different, sometimes opposing, strategies can provide policy makers with suggestions for similar future events<sup>7</sup>. Such analysis can focus on how State institutions interacted during the crisis and which roles they played during the emergency compared to those defined by the principle of separation of powers in constitutional democracies during ordinary times<sup>8</sup>.

Whereas several projects have been aimed at tracking policy responses and facilitating comparative analysis, very few have focused on the role of courts during the pandemic<sup>9</sup>. Yet, courts have been among the first institutions to provide answers to individual citizens and groups challenging public choices made by legislators and administrations to fight against the pandemic and mitigate its impacts. Indeed, since the very beginning of the outbreak, judicial review has been sought to protect fundamental rights and freedoms that were limited through public health measures<sup>10</sup>.

---

source and technical assistance needs; and track relevant contributions committed in the context of this pandemic»).

<sup>7</sup> See C. COGLIANESE, *What Regulators Can Learn from Global Health Governance*, in *Global Health Governance*, Vol. XI, Special symposium issue, 2021, 14 ff.

<sup>8</sup> See T.G. DALY, *The Pandemic and the Future of Global democracy*, in J. GROGAN, A. DONALDS (eds.), *Routledge Handbook of Law and the Covid-19 pandemic*, cit., 5 ff.

<sup>9</sup> See, for the USA, the *COVID-19 Litigation Tracker* of the American oversight (available here: <https://www.americanoversight.org/litigation-tracker-covid-19-oversight-hub>); the *COVID Coverage Litigation Tracker* of the University of Pennsylvania, displaying some caselaw analytics in the field of insurance law; for Italy, see the *Osservatorio COVID* set up by Matteo Gnes at the Urbino University (<https://sites.google.com/uniurb.it/ossacovid19/home>), including a section on Italian COVID litigation.

<sup>10</sup> Among the first decisions: Colombia, Council of State, 4 February 2020, No. 05001-23-33-000-2020-03884-01 on the challenges posed by digitalization with regard to the right to appeal; China (PRC), Gangzha Primary People's Court, Nantong, Jiangsu, 7 February 2020, *Prosecutor v Zhang* (2020) Jiangsu 0611 Criminal 1<sup>st</sup> No. 55, on fraud in masks' trade; Germany, Federal Constitutional Court, 31 March 2020, No. 1 BvQ 63/20, on restraints imposed on freedom of religion.

Unless differently specified, all judicial rulings cited in this article may be found (in summary and, in most cases, in full text) in the Covid-19 Litigation Database, available at <https://www.Covid-19litigation.org/case-index>, and, in a more concise format, in the News Page at <https://www.covid19litigation.org/news> (last visited on 17.12.2023).

Critical questions reached the courtroom. Can a government measure impose restrictions on freedom of movement, public gathering, or the right to attend religious services, in order to pursue public health objectives in the context of a pandemic? What scientific basis is needed to justify the closure of schools or shops for the same reasons? When and to what extent does a health emergency justify a reduction in the protection of the rights of asylum seekers? When and to what extent does public health monitoring justify a reduction in the protection of personal data? Can a citizen or a collective interest organization adopt precautionary measures not taken by inert states and public authorities, when those measures are essential to protecting public health and other fundamental rights? Or can they claim priority access to health treatments or vaccination, challenging priorities already defined by law or in other regulatory acts? Under what conditions can the law mandate vaccination? When can it make access to essential services or the exercise of personal or economic freedoms subject to it? More generally, have political decisions led to a fair result with respect to the rule of law and fundamental rights? When can individuals and representative organisations seek damages for governments' failure to adopt adequate measures against the pandemic?

These questions soon became central for courts, while governments and other public authorities had to make immediate decisions, in contexts of great uncertainty. This is where judges acted as guardians of rights and freedoms, striking new balances in light of the rule of law and of general principles such as proportionality, effectiveness, precaution, and solidarity. When the emergency forced a re-allocation of powers with significant delegation to the executive and a reduced space for legislators, the courts contributed somewhat to rebalancing and counterweighing this imbalance dictated by the emergency<sup>11</sup>. Delegation of

---

<sup>11</sup> T. GINSBURG, M. VERSTEEG, *The Bound Executive: Emergency Powers During the Pandemic*, in *International Journal of Constitutional Law*, 19, 2021, 1498 ff.; F. CAFAGGI, P. IAMICELI, *Uncertainty, Administrative Decision-Making and Judicial Review: The Courts' Perspectives*, in *European Journal of Risk Regulation*, 12(4), 2021, 792-824.

power to the executive was implemented both by legislative and administrative decisions and led to either constitutional or judicial review<sup>12</sup>.

COVID-19 litigation was not, as such, an isolated phenomenon. Though to a different extent, through different means and with different outcomes, in most jurisdictions judges addressed very similar issues. They often decided within urgency proceedings, mostly dealing with measures taken under emergency frameworks<sup>13</sup>. Unlike for scientists and policy makers, the space for dialogue and cooperation among judges was rather limited, even more so at supranational level.

Started by an international research group coordinated by the University of Trento, the COVID-19 Litigation Project was primarily aimed at facilitating access to courts' decisions as an essential part of the frame of references potentially guiding public choices in times of pandemic. The support of the World Health Organization enabled to develop the project on a global scale and to broaden the international network of universities, courts, individual scholars and judges partaking in this initiative<sup>14</sup>.

The objective was first and foremost to allow *policy makers* to compare the modes and outcomes of judicial review carried out on a wide range of measures in order to draw potentially useful indications from them to guide future decision-making. Secondly, for *judges* the project

---

<sup>12</sup> See for example the judgments concerning OSHA and FTC in the US. See United States, US Supreme Court, 13 January 2022, no. 21A244 and 21A247, where the US Supreme Court suspended the Occupational Safety and Health Administration (OSHA) – a federal agency – vaccine or test mandate for employers with at least 100 employees due to the lack of the Agency's power in this regard. See A. GLUCK, J. HUTT, *Epilogue: COVID-19 in the Courts*, in I.G. COHEN, A.R. GLUCK, K. KRASCHEL, C. SHACHAR (eds.), *COVID-19 and the Law. Disruption, Impact and Legacy*, Cambridge, 2023, 391-406, 393 ff.

<sup>13</sup> On the ascendance of the so called 'shadow docket' in the USA, see A. GLUCK, J. HUTT, *op. cit.*, 393 ff.

<sup>14</sup> Partners in the 'Covid19 Litigation' project are: the Solomon Center of Health Law (Yale Law School), the Externado University in Colombia, the National University of Singapore, the VIT School in Chennai (India), NTH University in Taiwan, Makerere University (Uganda), the Center for Health Law Research at QUT (Australia), and the Global Pandemic Network. A more recent collaboration has been started with the O'Neill Institute of Georgetown University (USA).

has aimed at encouraging, directly or indirectly, a dialogue between the courts of different countries, with a view towards a possible transplant of similar interpretative and balancing techniques with full awareness of different legal traditions. Thirdly, *scholars* have been offered the opportunity to identify new lines of research, including interdisciplinary investigations, aimed at integrating models for determining public health measures and considering their impact on the fundamental rights of individuals and the community<sup>15</sup>.

## 2. *The Database design and the role of comparative law*

The main output of the COVID-19 Litigation project is represented by a publicly accessible Database featuring structured analysis in English language on judgments issued by courts in around 80 jurisdictions in all world continents on challenges against anti-pandemic measures. The Database is complemented by a News page, featuring continuous

---

<sup>15</sup> On a holistic approach to the study of the impact of anti-pandemic measures in the context of the scientific debate, aimed at enhancing the dialogue between data science, epidemiology and other sciences. See, e.g., T. ALAMOA et al., *Data-Driven Methods for Present and Future Pandemics: Monitoring, Modelling and Managing?*, available at the link <https://arxiv.org/pdf/2102.13130.pdf> (last visited on 07.01.2024); N. HAUG et al., *op. cit.*, 1303; J.M. BRAUNER et al., *Inferring the effectiveness of government interventions against Covid-19*, <https://www.science.org/doi/10.1126/science.abd9338> (last visited on 07.01.2024). Multidisciplinary research on the impact and the effectiveness of anti-pandemic measures has grown overtime; see e.g.: E. HAN et al., *Lessons learnt from easing Covid-19 restrictions: an analysis of countries and regions in Asia Pacific and Europe*, in *Lancet*, 396, 2020, 1525-34, Published Online September 24, 2020, [https://doi.org/10.1016/S0140-6736\(20\)32007-9](https://doi.org/10.1016/S0140-6736(20)32007-9) (last visited on 07.01.2024); T. HALE et al., *op. cit.*; T.J. BOLLYKY et al., *Pandemic preparedness and Covid-19: an exploratory analysis of infection and fatality rates, and contextual factors associated with preparedness in 177 countries, from Jan 1, 2020, to Sept 30, 2021*, in *Lancet*, 399, 2022, 1489-512, published Online February 1, 2022, [https://doi.org/10.1016/S0140-6736\(22\)00172-6](https://doi.org/10.1016/S0140-6736(22)00172-6) (last visited on 07.01.2024).

However, there are no known interdisciplinary approaches that incorporate the impact of anti-pandemic measures on fundamental rights.

updates on relevant caselaw, and by a set of materials, built on the project dataset, in the form of both qualitative and quantitative analyses<sup>16</sup>.

The purpose is not to map all available case law. Neither comprehensiveness nor statistical representativeness are within the scope of the COVID-19 Litigation Project. Instead, the approach is selective. Case selection has been question-based, and reflects the main issues that were faced by policy-makers during the different waves of the pandemic and gained higher attention in courts.

Within case selection, special attention was paid to Supreme Court decisions and, more generally, to those that, due to their content and the authority of the courts, could influence subsequent decisions due to their precedential value or particularly innovative character. To the extent possible, both the Database and the News page provide cross-references to linked judgments within appeal proceedings or issued on the same subject matter within the same jurisdiction to shed light on the jurisprudential evolution.

Furthermore, selection prioritized judgments that would enable researchers to compare different balancing techniques and different applications of general principles. Adequate geographical distribution among countries and world regions was also ensured together with a certain differentiation among areas and topics during the various phases of the pandemic.

From a scholarly research perspective, the project methodology has embedded a comparative law approach. Among the main challenges in presenting caselaw from possibly the entire world, stands the need for a sufficient standardization in the use of legal terms, both from a procedural and substantive law perspective. This step has been essential to develop coding techniques and common analytical tools (case summary templates and common standards for news reporting) that were sufficiently open-ended to cope with different legal traditions and judicial systems. To this end a “Covid-19 Litigation Comparative Glossary” was developed to establish correlations in the use of legal terms (e.g.,

---

<sup>16</sup> See <https://www.covid19litigation.org/resources> for the legal briefs and articles. Some quantitative estimates of the cases taken from the Database can be seen at <https://www.Covid-19litigation.org/case-index/database-charts> (as explained in the text above, these analyses have no statistical ambition).



judicial review, constitutional review, emergency decision making, standing, etc.) with due regard to national legal traditions in the framework of different legal families<sup>17</sup>.

Last but not least, the project established interdisciplinary dialogue between lawyers, policy makers, and members of the scientific community (from the life sciences to mathematics and the data sciences) to explore not only how science has influenced policy making and, consequently, judicial review, but also the extent to which lessons learned from COVID-19 litigation can provide any guidelines for future decision making consistent with a science-based approach.

### *3. An overview on COVID-19 litigation*

Though without any statistical ambition, the COVID-19 Litigation Project has enabled to collect a significant amount of data on existing case law in the field of pandemic and fundamental rights. More than 80 jurisdictions have been considered in all world regions. Relevant information has been coded concerning, among other aspects, the existence of litigation, the relevant subject matters, the identity of the parties (whether individual or groups, whether public or private), the litigation outcome (whether the claims have been upheld or not). The availability of these data, rather unique in the international landscape, enables not only to shed light on the role of courts in times of pandemic, but also to design possible research paths for a deeper comparative analysis in this field.

The Project has developed two main analytical instruments: the Database and the News page. The first one presents a more complex architecture enabling a deeper analysis about the selected judgments, covering not only the essential identification references and access to the full text, where available, but also a summary of the case facts, of the courts' reasoning and conclusions, of the balancing techniques used by the judge, of the relevant fundamental rights protected, of the general principles applied, of the outcome of the case. The Database mostly

---

<sup>17</sup> See in this Book the contribution of Benedetta Biancardi and Roberto Caranta.

covers cases from 2020 and 2021; to a more limited extent, it also includes cases from 2022. By contrast, the News page, started only in late 2021, provides for more concise information about recent rulings, therefore covering cases selected from late 2021 until today. A subset of cases appears in both the Database and the News page. For analytical purposes, we present here information about cases uploaded in the Database until December 2022<sup>18</sup>, whereas we devote a distinct analysis to the dataset underlying the News page<sup>19</sup>.

(i) *Total amount of cases selected. Cases by year*

Up to December 2022, 1973 cases were selected, reported in full, and uploaded onto the Database<sup>20</sup>. 40% of these decisions are from 2020, while 44% are from 2021, whereas a more limited fraction (16%) are cases from 2022. As explained above, 2022 cases mostly feature in the News page, together with cases from 2023. Considering the two datasets together and taking account for the coinciding cases, no major changes occur but the share of cases from 2020 declines to 35%, the one for 2021 to 39% and the one of 2022 increases up to 26%.

From this evidence alone, mostly linked with the time of research and analysis, it is not possible to infer a marked decrease in global litigation in 2022, although this decline is certainly reported by project partners in areas in which public health measures and constraints have been relaxed (e.g., in many European countries). Certainly, as we will see later, the types of cases and the areas of litigation have changed over time and across countries. A definitively different scenario opens up in 2023, as shown below<sup>21</sup>.

---

<sup>18</sup> The analysis included in this section is based on the results presented and discussed by us in a wider contribution: P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic. A comparative analysis*, in *BioLaw Journal*, 1, 2023, 377 ff.

<sup>19</sup> See § 4 below.

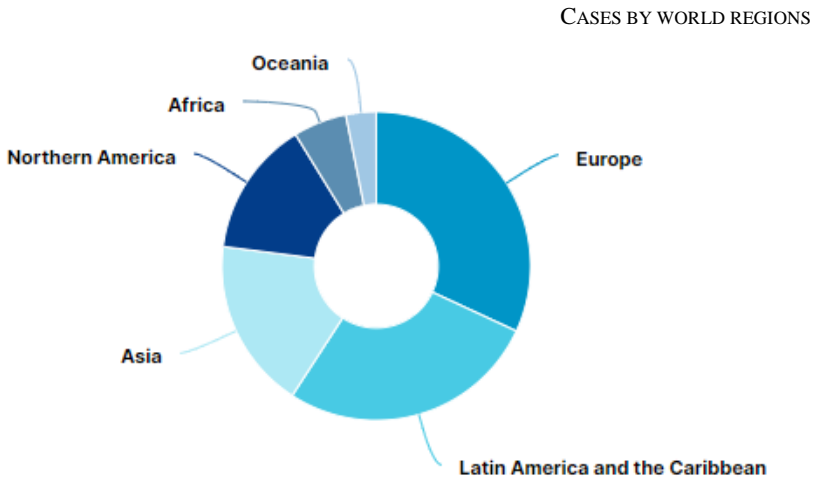
<sup>20</sup> In fact, Database development continues on a rolling basis. At the time this chapter is submitted, the cases uploaded on the Database are 2023.

<sup>21</sup> See § 4 below.

*(ii) Cases by world region and countries*

The intensity of litigation has varied depending on world regions and, within world regions, depending on the legal and political features of the States<sup>22</sup>.

Looking at world regions, Europe, Central, and South America show the highest concentration of reported cases. They are followed by Asia, North America, Africa and Oceania. Once again, this evidence only reflects the regional distribution of selected cases without any statistical implications about existing litigation in the different regions.



This evidence is not only linked to the number of decisions but also to different accessibility to caselaw, which has been rather difficult in certain regions (e.g. many African and Asian countries). In this regard, the role of project partners proved essential but existing obstacles to

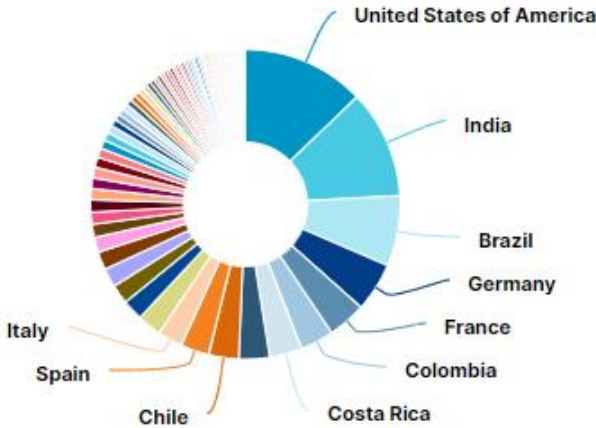
---

<sup>22</sup> See T. GINSBURG, M. VERSTEEG, *op. cit.*; from a different perspective, on the impact of the political change from Trump's to Biden's administration on COVID-19 litigation, see A. GLUCK, J. HUTT, *op. cit.*, 392.

accessing court decisions remained for a significant number of jurisdictions (e.g., in Central Asia)<sup>23</sup>.

A more precise picture may be drawn when the focus is shifted from world regions to countries. From this perspective, North America (with the United States) and Asia (with India) are the areas in which our dataset has shown the highest concentration of litigation<sup>24</sup>. In South America, Brazil was the country with the highest number of cases<sup>25</sup>; in Europe, the same was observed for Germany<sup>26</sup> and France<sup>27</sup>, followed by Spain<sup>28</sup> and Italy<sup>29</sup>; in Oceania, most litigation was found in Australia<sup>30</sup>; in Africa, in South Africa<sup>31</sup> and Kenya<sup>32</sup>.

CASES BY COUNTRIES



<sup>23</sup> See in this book the specific contributions about Indian litigation and African case law.

<sup>24</sup> Out of the 1973 selected cases (update: December 2022), 253 cases are from the United States and 223 from India.

<sup>25</sup> With 145 cases out of the 1973 selected cases (update: December 2022).

<sup>26</sup> With 101 cases out of the 1973 selected cases (update: December 2022).

<sup>27</sup> With 79 cases out of the 1973 selected cases (update: December 2022).

<sup>28</sup> With 590 cases out of the 1973 selected cases (update: December 2022).

<sup>29</sup> With 51 cases out of the 1973 selected cases (update: December 2022).

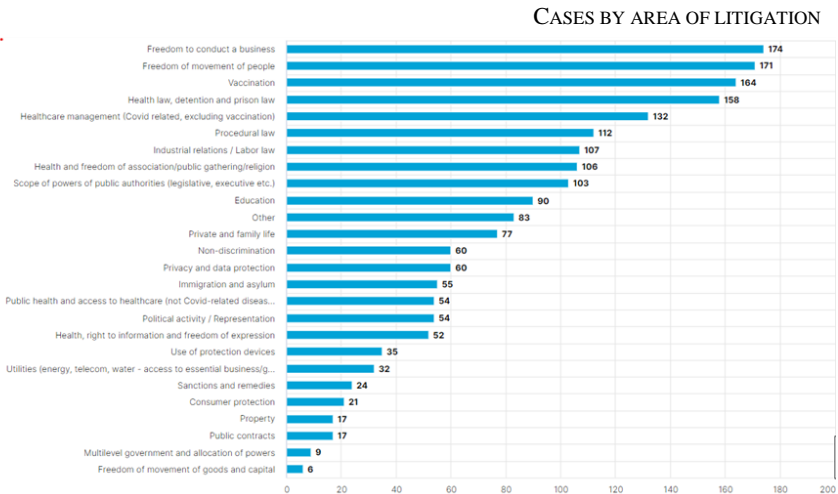
<sup>30</sup> With 53 cases out of the 1973 selected cases (update: December 2022).

<sup>31</sup> With 25 cases out of the 1973 selected cases (update: December 2022).

<sup>32</sup> With 21 cases out of the 1973 selected cases (update: December 2022).

*(iii) Cases by area of litigation*

The global picture shows that certain areas of litigation, namely freedom of movement and freedom to conduct a business, were at the top of COVID-19 litigation areas within the Project dataset. Indeed, these are the freedoms that, almost universally, have been mostly limited since the beginning of the pandemic, with major impact on several dimensions of social and economic life of groups and individuals. Just after freedom of movement and freedom to conduct a business, detention-related matters, vaccination, and COVID-19-related healthcare management were among the most common areas of litigation within the Database set of cases.



As more precisely shown in the analysis below<sup>33</sup>, litigation matters have evolved over time. This evolution has clearly reflected a change in regulatory measures (e.g. the shift from total lockdowns to more selective closures through zoning schemes, or from mandatory vaccination to promotional approaches, etc.). Whereas freedom to conduct a busi-

<sup>33</sup> See § 4 below.

ness remained the most litigated issue throughout 2020 and 2021<sup>34</sup>, vaccination soon reached the top by 2021 and continued to be highly relevant throughout 2022, when a high number of cases concerning employment relations shed further light on the implications of vaccination mandates on the former<sup>35</sup>. Of course, vaccination litigation also changed overtime: in 2021 it began as litigation regarding accessibility and prioritization of certain segments of the population during the vaccination campaign<sup>36</sup>; then exemption from vaccination mandates and their lawfulness later became among the most critical issues litigated in the courts, at least where the question of accessibility was overcome and mandatory vaccination schemes were adopted<sup>37</sup>.

---

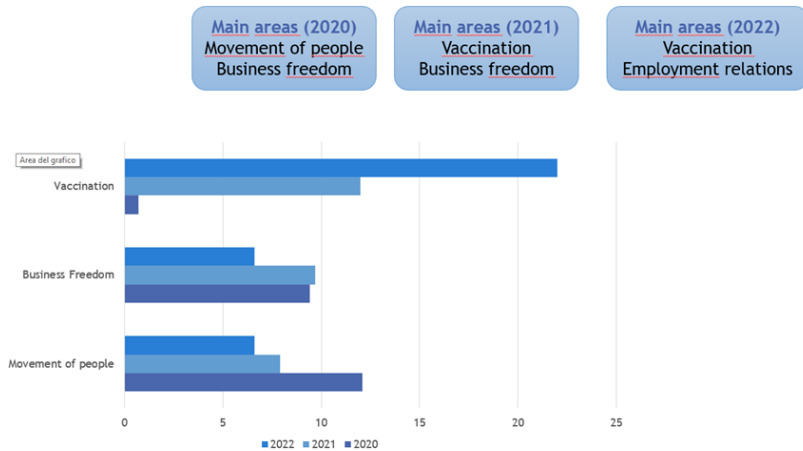
<sup>34</sup> See, among the oldest ones: for the United States of America, United States District Court for the Northern District of California, 2 June 2020, *Altman v. County of Santa Clara*, 464 F. Supp. 3d 1106 (<https://www.covid19litigation.org/case-index/united-states-america-united-states-district-court-northern-district-california-altman-v>); for Italy, Council of State, 15 June 2020, No. 3832 (<https://www.covid19litigation.org/case-index/italy-council-state-no-3832-2020-06-15>); for India, Delhi High Court, 28 May 2020, CM 11450/2020 (<https://www.covid19litigation.org/case-index/india-delhi-high-court-cm-114502020-2020-05-28>); for South Africa, High Court, 1 June 2020, 22352/20 (<https://www.covid19litigation.org/case-index/south-africa-high-court-22352-20-2020-06-01>).

<sup>35</sup> See, e.g., Australia, Fair Work Commission, 8 July 2022, [2022] FWC 1774; Singapore, High Court (General Division), 16 June 2022, No. SGHC 141; Switzerland, Federal Administrative High Court, 26 April 2022, A-5017/2021; France, Council of State, 18 January 2022, Council of State decision n°457879; Italy, Constitutional Court, 9 February 2023, n. 15.

<sup>36</sup> See, e.g., Germany, Administrative Court of Frankfurt am Main, Feb. 12, 2021, No 5 L 219/21.F; India, High Court of Bombay, June 14, 2021, PIL(l)-9228-2021; Brazil, Brazilian Supreme Federal Court, 30 August 2021, Ação Cível Originária 3.518 Distrito Federal. Min. R.L.

<sup>37</sup> See, e.g., Austrian Constitutional Court G37/2022, V137/2022-11, that, based on the ECtHR decision in *Vavříčka and Others*, recalled the importance of the society's social solidarity. The Court strongly relied on the proportionality principle, considering the vaccination mandate absolutely necessary for the intended aims (preventing the spread of Covid-19 and ensuring the functioning of the health system) and anyway subject to monitoring by the competent Ministry, vested with a power to suspend the mandate based on new contextual elements. On the relevance of the principle of solidarity with regard to vaccination mandate, see also the Italian Council of State, 20 October 2021, No. 7045. With regard to the different area of freedom of movement, see

## CASES BY AREAS AND BY YEAR



Our dataset also shows some correlation between world regions and areas of litigation. Whereas in Europe most cases have emerged with regard to freedom of movement and freedom to conduct a business (including business closures)<sup>38</sup>, in North America, business freedom, pub-

---

the Russian Supreme Court, emphasizing that constitutionally permissible and necessary temporary restrictive measures were aimed to aid the self-organization of society and represented a form of social solidarity based on the trust between the state and society, considering that restriction on the right to free movement is not equivalent to the restriction of personal rights (Arts. 22(1) and 751 of the Russian Constitution (Russian Federation, Supreme Court of the Russian Federation, 10 February 2022, Case No. АП/21-565)). See Italian Constitutional Court 14/2023 making reference to the constitutional principle of solidarity to found the vaccination mandate for limited categories of professionals (health care workers and teachers). The Italian legislation has been held constitutional in relation to the rule that makes vaccination a legal requirement to exercise the profession.

<sup>38</sup> See, e.g., on freedom of movement: Netherlands, Council of State, 15 March 2023, 202202979/1/A2 (<https://www.covid19litigation.org/case-index/netherlands-council-state-2022029791a2-2023-03-15>); Spain, Supreme Court, 25 January 2022, No. 60/2022 (<https://www.covid19litigation.org/case-index/spain-supreme-court-no-60-2022-2022-01-25>); Germany, Federal Constitutional Court, 19 November 2021, 1 BvR 781/21 Rn. 1-306 (<https://www.covid19litigation.org/case-index/germany-federal-constitutional-court-1-bvr-78121-rn-1-306-2021-11-19>); on business closures: Belgium, Council of State of Belgium, 10 February 2022, Council of State decision n°252.960 (<https://www.covid19litigation.org/case-index/belgium-council-state-belgium-council-st>

lic gatherings (including those held for religious services)<sup>39</sup>, prisoners' rights<sup>40</sup>, and vaccination<sup>41</sup> have been the most prominent areas of litigation. Comparatively, in South America, the courts have mostly dealt with prisoners' rights, vaccination, and healthcare management<sup>42</sup>. Cases from Oceania have mainly concerned employment relationships (with special regard for dismissals linked to the vaccination mandate) and vaccination<sup>43</sup>, followed by freedom of movement (being the most liti-

---

*ate-decision-no252960-2022-02-10*); Germany, Federal Supreme Court, 17 March 2022, No. III ZR 79/21 (<https://www.covid19litigation.org/case-index/germany-federal-supreme-court-no-iii-zr-7921-2022-03-17>); Slovenia, Constitutional Court of the Republic of Slovenia, 7 October 2021, Decision U-I-155/20 (<https://www.covid19litigation.org/case-index/slovenia-constitutional-court-republic-slovenia-decision-u-i-15520-2021-10-07>).

<sup>39</sup> See, e.g., United States of America, U.S. Supreme Court, 25 November 2020, *Roman Catholic Diocese v. Cuomo*, No. 20A87 (<https://www.covid19litigation.org/case-index/united-states-america-us-supreme-court-roman-catholic-diocese-v-cuomo-no-20a87-2020-11>).

<sup>40</sup> See, e.g., United States of America, Supreme Judicial Court of Massachusetts, 18 November 2021, No. SJC-13125, 2021 WL 5366085 (<https://www.covid19litigation.org/case-index/united-states-america-supreme-judicial-court-massachusetts-no-sjc-13125-2021-wl-5366085>).

<sup>41</sup> See, e.g., Canada, Federal Court, 14 January 2022, 2022 FC 44 (<https://www.covid19litigation.org/case-index/canada-federal-court-2022-fc-44-2022-01-14>); United States of America, United States Court of Appeals for the Fifth Circuit, 12 November 2021, No.17 F. 4th 604 (<https://www.covid19litigation.org/case-index/united-states-america-united-states-court-appeals-fifth-circuit-no-17-f4th-604-2021-11>).

<sup>42</sup> See on prisoners' rights, e.g., Guatemala, Constitutional Court, 16 November 2022, Exp. 6733-2021 (<https://www.covid19litigation.org/case-index/guatemala-constitutional-court-exp-6733-2021-2022-11-16>); Colombia, Constitutional Court, 30 August 2022, Decision T-303/2022 (<https://www.covid19litigation.org/case-index/colombia-constitutional-court-decision-t-3032022-2022-08-30>). See, more extensively, the contribution of Natalia Rueda in this book.

<sup>43</sup> See, e.g., Australia, Federal Court of Australia, 27 June 2022, [2022] FCA 741 (<https://www.covid19litigation.org/case-index/australia-federal-court-australia-2022-fca-741-2022-06-27>); Australia, Federal Circuit and Family Court of Australia, 21 December 2022, *Wolfraad v Serco Australia Pty Limited* [2022] FedCFamC2G 106 (<https://www.covid19litigation.org/case-index/australia-federal-circuit-and-family-court-australia-wolfraad-v-serco-australia-pty>).



gated until 2021)<sup>44</sup> and private and family life<sup>45</sup>. African cases in particular have been identified in areas concerning the scope of powers of national authorities, followed by detention, and industrial relations<sup>46</sup>. Asian cases, which are predominantly Indian (64% of all Asian cases reported in our Database), are particularly interesting in comparative terms: when Indian cases are included in the analysis, the most relevant areas of litigation have been healthcare management, followed by business freedom, education and vaccination<sup>47</sup>; whereas, when Indian cases are set aside, other areas become comparatively more relevant such as the freedom of movement, the freedom of expression, and the right to information and detention<sup>48</sup>.

---

<sup>44</sup> See, e.g., New Zealand, The High Court of New Zealand, 19 August 2020, *Borrowdale v Director-General of Health* (<https://www.covid19litigation.org/case-index/new-zealand-high-court-new-zealand-borrowdale-v-director-general-health-2020-08-19>); Australia, Federal Court of Australia, 1 June 2021, *LibertyWorks Inc. v Commonwealth of Australia* (<https://www.covid19litigation.org/case-index/australia-federal-court-australia-libertyworks-inc-v-commonwealth-australia-2021-06-01>).

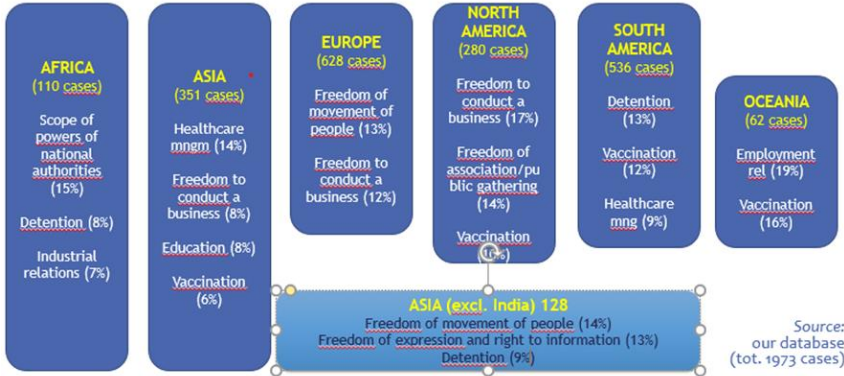
<sup>45</sup> See, e.g., Australia, Federal Circuit Family Court of Australia, 16 February 2022, MLC 8302 of 2020, on parents' decision concerning children vaccination (<https://www.covid19litigation.org/case-index/australia-federal-circuit-family-court-australia-mlc-8302-2020-2022-02-16>).

<sup>46</sup> See on the scope of powers, e.g., South Africa, High Court, 24 March 2021, No. 22311/2020 (<https://www.covid19litigation.org/case-index/south-africa-high-court-no-223112020-2021-03-24>); Uganda, High Court of Uganda, 23 July 2021, Miscellaneous Cause No. 194 of 2021 (<https://www.covid19litigation.org/case-index/uganda-high-court-uganda-miscellaneous-cause-no-194-2021-2021-07-23>).

<sup>47</sup> See on healthcare management, e.g., India, Supreme Court of India at New Delhi, 9 August 2021, No. 11622/2021, on oxygen supply (<https://www.covid19litigation.org/case-index/india-supreme-court-india-new-delhi-no-116222021-2021-08-09>).

<sup>48</sup> See on freedom of expression, e.g., Taiwan (ROC), Taiwan High Court, 26 January 2022, No. 1873 (<https://www.covid19litigation.org/case-index/taiwan-roc-taiwan-high-court-no-1873-2022-01-26>).

CASES BY AREAS AND BY COUNTRY



(iv) *The nature of the parties: public v. private; individual v. collective*

The database focuses on litigation against governmental measures. The private litigation concerning contracts, family and other relevant issues has been considered to a very limited extent. This choice is reflected in the identity of the parties litigating cases. Indeed, challenges against public health measures were not only brought before courts by individuals but also by groups, NGOs, businesses, other institutions, sometimes including public entities. Not only public authorities had to defend themselves before courts but also private entities, e.g. when carrying on public interest activity (such as hospitals, schools, universities) or economic activities (e.g. businesses): their decisions have been also contested before courts, either to indirectly challenge the underlying public regulation implemented by those decisions, or because these private institutions defined themselves safety measures within their discretionary power having an impact on individuals' rights and freedoms.

As we shall see, private actors were involved in the compliance monitoring process and to a more limited extent in the standard setting process, especially when soft law instead of hard law measures were chosen. Hence, the challenges were not only directed at administrative measures adopted by public and particularly governmental entities but also by private actors in matters delegated by public ones.

The litigation among public actors differs significantly from that between private and public actors. It mainly refers to entities that operate in federal states or states where there is a multilevel allocation of governmental powers. Litigation has focused on the competence issue and the conflict between different approaches to prevention and reaction to the pandemic evolution.

Most of the litigation examined in the Database has been brought by private individuals (62% of total cases). Collective proceedings, initiated by NGOs or homogeneous groups of individuals, represent a significant but smaller share (23%, with a lower share of 19% in 2022 cases), while proceedings initiated by public entities have been even more limited (15%).

Once again, looking at different jurisdictions, comparative analysis is suggestive: collective proceedings have been relatively more important in Africa<sup>49</sup> (32%), Asia<sup>50</sup> (29%, mainly India, 32%) and North America<sup>51</sup> (30%), and less in South America, Europe, and Oceania (19-21% of the total number of cases)<sup>52</sup>. Actions launched by public entities have

---

<sup>49</sup> See, e.g., High Court of Kenya, 19 April 2021, Petition No. E005 of 2020, dismissing a claim brought by an NGO against the closure of a hospital to the general public.

<sup>50</sup> See, e.g., India, High Court of Bombay, 27 January 2021, PIL No. 25 of 2020 (<https://www.covid19litigation.org/case-index/india-high-court-bombay-pil-no-25-2020-2021-01-27>), upholding a liability claim against a hospital based on a public interest litigation brought by an NGO together with two petitioners.

<sup>51</sup> See, e.g., United States Court of Appeals for the Eighth Circuit, 16 May 2022, *Arc of Iowa et al. vs. Kimberly Reynolds et al.*, <https://www.covid19litigation.org/case-index/united-states-america-united-states-court-appeals-eighth-circuit-arc-iowa-et-al-vs>, in which an advocacy organization supporting people with intellectual and developmental disabilities and the parents of children with disabilities brought an action against the Governor of Iowa challenging his decision to allow for in-person education without protective measures such as masks with a major risk for vulnerable persons such as disabled students.

<sup>52</sup> Again, being no statistical implication drawn, this evidence does not exclude that collective interest proceedings may have played an important role in many jurisdictions; see, for France, B. FAVARQUE-COSSON, *How did French administrative judges handle Covid-19*, in E. HONDIUS et al., *Coronavirus and the Law in Europe*, Cambridge, 2021, 86; for Spain, S. RAMOS GONZÁLES, *State Liabilities for personal injuries caused by the Covid-19 diseases under Spanish law*, *ibidem*, 365 ff., part. 379 ff.

been limited in all regions except for South America, and Brazil in particular, where this type of proceeding represents almost half of the litigation examined and has led courts to address critical issues in the field of healthcare management and vaccination with a special focus on the scope of powers of public authorities at the local and federal levels<sup>53</sup>.

Litigation among public bodies has focused primarily on the allocation of powers and liabilities in times of emergency and on the extent to which a concentration of powers by the executive was constitutionally legitimate<sup>54</sup>, or the extent to which the law could validly vest courts with ratification powers concerning the general scope of health measures that restricted fundamental rights<sup>55</sup>. In federal states, litigation has involved disputes between federal governments and States<sup>56</sup>. In States with strong local powers between the central state and regions, communities and cities, the conflicting views among different governmental layers represented a problem since the uniform response to the pandemic had to be balanced with the existence of different political preferences expressed by local communities, partly dependent upon the diverse characteristics of the spread of the pandemic. Regions or States with limited exposure had lower incentives to introduce strict measures from those with high level of exposure to the pandemic. The courts have monitored the use of power delegated by legislatures to central governments to ensure they did not overstep onto the domains of local governments<sup>57</sup>.

---

<sup>53</sup> See, e.g., Brazil, Court of Justice, State of Rio de Janeiro, 27 September 2021, No. 0059896-71.2020.19.0000 (<https://www.covid19litigation.org/case-index/brazil-court-justice-state-rio-de-janeiro-no-0059896-712020190000-2021-09-27>).

<sup>54</sup> In the USA see *Medical Pros. for Informed Consent v. Bassett*, Supreme Court of New York, Onondaga County, 13 January 2023, in which the State Court declares vaccine mandate for healthcare facilities and their workers null and void, being its adoption beyond the New York Governor's powers.

<sup>55</sup> Spain, Constitutional Court, 2 June 2022, Judgment 70/2022.

<sup>56</sup> See in the US *Commonwealth of Kentucky et al v. President Biden*, Court of Appeals for the Sixth Circuit, 12 January 2023, in which the Federal court has held that federal government must enjoin from enforcing vaccine mandate for federal contractors.

<sup>57</sup> See, for Italy, L. CUOCOLO, *I diritti costituzionali di fronte all'emergenza Covid-19: la reazione italiana*, available at <https://www.dpceonline.it/index.php/dpceonline/article/view/969/943> (last visited on 17.12.2023); G. DELLEDONNE, C. PADULA, *The*

## NATURE OF CLAIMANTS: PRIVATE V. COLLECTIVE V. PUBLIC

<i>Claimants</i>	<i>Individual (private)</i>	<i>NGOs and groups</i>	<i>Public entities/bodies</i>
Total	62%	23%	15%
Africa	49%	32%	19%
North America	62%	30%	8%
South America	59%	19%	22%
Asia	54%	29%	17%
Europe	68%	20%	12%
Oceania	76%	21%	3%

*(v) To what extent have claims been upheld?*

The Database allows to differentiate according to the outcomes of judgments. Inferences from the content can then drive reflections on the extent to which courts have been either deferential or intrusive. Upholding a claim has significant implications in times of emergency when the definition of a policy requires prompt action. Typically, upholding a claim does not simply translate into the annulment of an administrative act but requires alternative actions by the defendant public administration. It also signals the need for change to the same or similar public authorities in similar circumstances to the ones addressed in the ruling upholding the claim.

On the whole, research outcomes have escaped a clear polarization. In fact, although the majority of claims examined in the Database were rejected<sup>58</sup>, judicial review has led to annulling public acts or upholding, at least partially, other types of claims for a relevant portion of litigation examined (around 46%). Based on this data, it seems fair to assert that judges have neither shown full deference to governments, engaging in recurrent and automatic *ex post* validation of their actions, nor has judicial review in fact been entrusted with the task of recurrently bring-

---

*impact of the pandemic crisis on the relations between the State and the regions in Italy*, in E. HONDIUS et al., *op. cit.*, 301 ff.

<sup>58</sup> These are mostly cases where rejection was on the merits because, with a few exceptions, rejection decisions on essentially procedural grounds were not selected for publication in the Database. See, for a graphic representation, <https://www.Covid-19litigation.org/case-index/database-charts>.

ing public decision-making back on track with respect to fundamental rights, as these have otherwise been systematically violated<sup>59</sup>.

The data on outcomes also shows an evolution between different stages of the pandemic and the evolution of scientific knowledge. If cases of rejection prevailed in the first phase, the progress of scientific knowledge during the various waves of the pandemic has allowed judges a more rigorous review, at least in terms of the governmental duty to provide evidence-based decisions, reflected in the increasing number of annulments<sup>60</sup>.

This data varies across jurisdictions. Based on evidence shown in our dataset, for Oceania, North America<sup>61</sup>, Asia (excluding India) and Europe, the percentage of cases in which claims were rejected is more than 60% (between 62% in Europe and 66% in Oceania), whereas in South America and in India (excluded from the rest of Asia) the per-

---

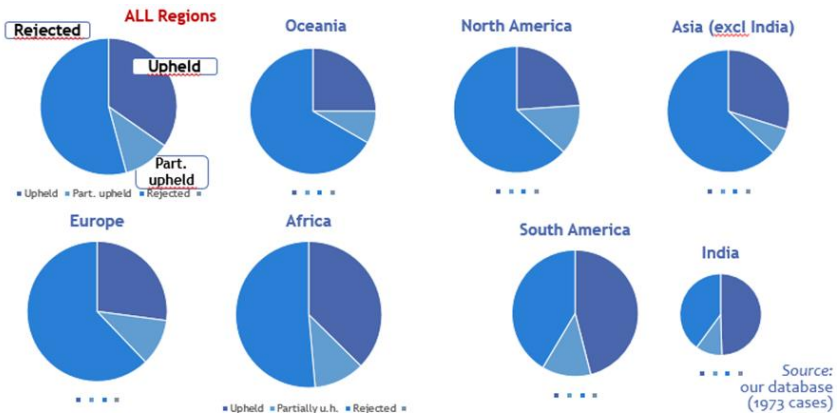
<sup>59</sup> For a broader examination: F. CAFAGGI, P. IAMICELI, *Uncertainty, Administrative Decision-Making and Judicial Review*, cit.

<sup>60</sup> Cf. F. CAFAGGI, P. IAMICELI, *Uncertainty, Administrative Decision-Making and Judicial Review*, cit. In a similar vein, with reference to Belgian jurisprudence, P. POPELIER et al., *Health Crisis Measures and Standards for Fair Decision-Making: A Normative and Empirical-Based Account of the Interplay Between Science, Politics and Courts*, in *European Journal of Risk Regulation*, 12(3), 2021, 618-643, <https://doi.org/10.1017/err.2021.7> (last visited on 17.12.2023): «In the first phase, the assumption is that the public expects the government to firmly respond to the crisis, no matter what, which leaves little room for judicial scrutiny of health crisis measures. In the second phase, when trust starts to wane, the assumption is made that the public expects the government to balance safety against fundamental rights and social needs». See also I. BAR-SIMAN-TOV, I. COHEN, C. KOTH, *Covid-19 Litigation in Israel*, in *The Journal of the Global Pandemic Network*, 1-2-3, 2021, 271-278. See also B. FAVARQUE-COSSON, *op. cit.*, 88 ff., illustrating the different approaches of the French Council of State during the different phases of the pandemic; and, for USA case law, A. GLUCK, J. HUTT, *op. cit.*, 392 («the litigation arc went from individual to governmental; from constitutional to regulatory; from deferential to restraining»). On these lines of analysis see also the contributions of Matej Accetto and Edith Zeller in this book.

<sup>61</sup> For an analysis on success rate in the US litigation concerning non-religious civil liberties challenges to Covid-19-related public health orders from the start of the pandemic in early 2020 to January 27, 2022, see K. MOK, E.A. POSNER, *Constitutional Challenges to Public Health Orders in Federal Courts During the Covid-19 Pandemic*, in *Boston University Law Review*, 102, 2022, 1729 ff., showing judicial deference toward states during emergencies.

centage is between 40% (India) and 41% (South America). The average data of South America is very similar to that of India. It should also be observed that the outcome of litigation in South America is quite diversified internally with a relative low percentage of rejections in Colombia (28%), Brazil (34%), and Argentina (35%) and quite high in Costa Rica (66%), where several rejections concerning enactment of the vaccination campaign for children occurred.

LITIGATION OUTCOME: CLAIMS UPHELD V. REJECTED



Although no statistical implications may be technically inferred, some hypotheses may be drawn about the different roles played by courts and adjudication in times of emergency.

One question in particular is whether any possible correlations may be retrospectively identified between the outcomes of litigation and the regulatory approaches taken by governments during the pandemic. Along these lines, one could investigate whether the successful outcome of litigation represented partial compensation for a lack of activism by States in their policies and responses in battling the pandemic<sup>62</sup>. The key distinction to explore is the correlation between governments’

<sup>62</sup> On the multi-level resistance opposed in Brazil by part of the Federal Senate, by courts through judicial review and by states and municipalities against Bolsonaro’s denialism and its consequences upon the rule of law, see T. BUSTAMANTE, E. PELUSO NEDER MEYER, *Brazil, COVID-19, Illiberal Politics and the Rule of Law*, in J. GROGAN, A. DONALDS (eds.), *op. cit.*, 225 ff.

action and omissions and the degree of rejection in either case. This analysis should be complemented with that on state's liability for omissions given that annulment of omission only leads to the imposition of a duty to act without judicial substitution of the inactive administration. From a different perspective, one could also question whether this data needs to be read in light of comparative law as well as existing differences in the scope and intensity of judicial review across different jurisdictions. In fact, rejections may be more frequent in legal systems that, based on a separation of powers, more firmly refrain from examining the contents of public decision-making beyond purely procedural aspects<sup>63</sup>.

The overall analysis shows that even when claims by private actors were upheld, collaborative governance has prevailed over conflicting governance.

#### *4. How has the litigation evolved?*

As explained above, next to the in-depth analysis presented in the Database, the COVID-19 Litigation Project has developed a simpler and more dynamic access to recently issued judgments through the News page. This more flexible instrument has allowed to trace upcoming litigation more promptly after the core years for pandemic litigation in 2020 and 2021. The selection of the judgments in the News section has followed methodological criteria inspired by the relevance of the judgments and their innovative content. Hence, a cautionary word should be spent on the correlation between the selection of judgments and the level of litigation. Recurring litigation with identical outcomes has not been reported. Hence, the number of reported judgments does not necessarily reflect the intensity of litigation.

The analysis deployed in this paragraph concerns this parallel dataset, complementing, to certain extent, the comparative analysis developed in the Database.

---

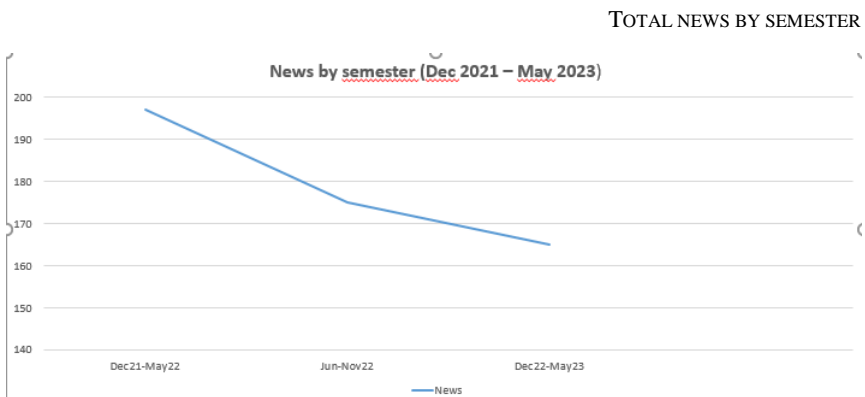
<sup>63</sup> T. GINSBURG, M. VERSTEEG, *op. cit.*



Whereas the News page has provided daily and weekly updates reaching out to the project fellow community through social networks, this analysis focuses on the dataset compiled from December 2021 to May 2023. As reiterated above, the present quantitative analysis does not have any statistical ambition.

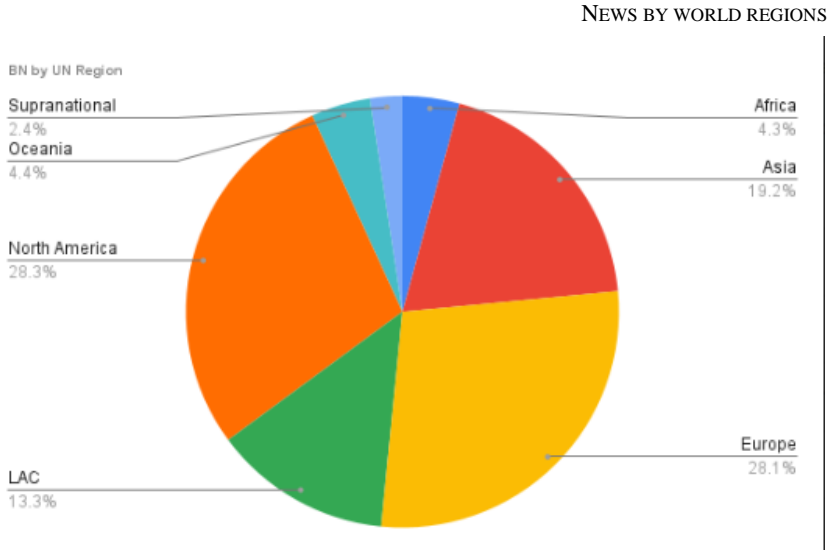
Within these boundaries, the News’ dataset comprises 537 cases. Out of these, 109 cases have also been fully examined and published in the Database and therefore considered in the comparative analysis developed in the paragraph above. The remaining 428 cases are totally new cases, therefore not featuring in that analysis.

Despite the consistent effort in providing continuous updates on relevant cases, a certain decline has been observed in the number of cases. Not surprisingly, news published in the semester December 2021 – May 2022 represents a share of 37% on the total set of news, whereas the share of the third and last semester (December 2022-May 2023) slightly declines to 29%, with a 32% of the intermediate semester (June 2022-November 2022). Although the news’ selection has been tighter than the one conducted for the deployment of the Database, these figures, supported by the Project team interaction with the country contact points, may suggest a lower intensity in litigation from 2021 to 2022 and, more particularly, 2023.



The decline in case number has particularly concerned South America, Oceania, Asia and Africa, much less Europe and North America,

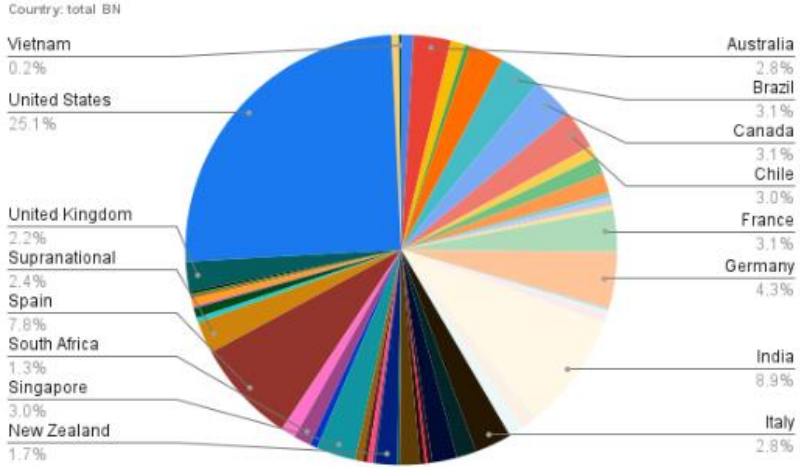
where the litigation has continued though at a different pace and with different features.



Within world regions, litigation seems to concentrate in the same countries where litigation has been particularly relevant in 2020 and 2021: the United States and India remain the countries with the highest level of litigation; at lower thresholds in the global landscape, stand out, in Europe, Spain and Germany, Brazil and Colombia in South America, Australia in Oceania, South Africa in Africa.

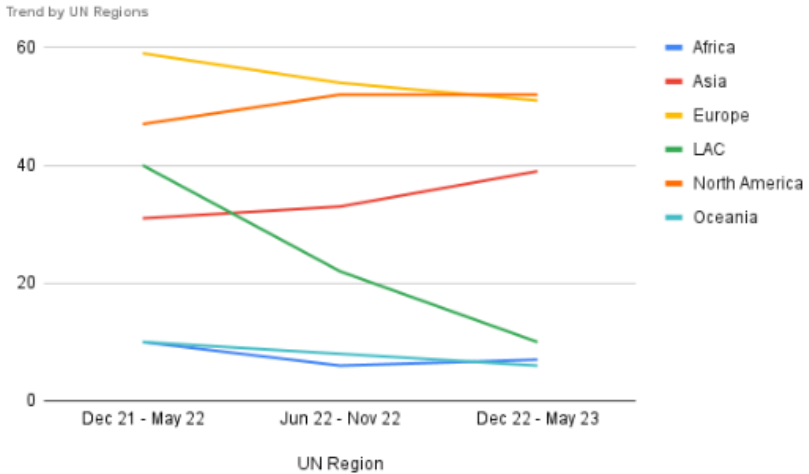
DECISION-MAKING IN TIMES OF UNCERTAINTY

NEWS BY COUNTRIES



This data has remained relatively steady from 2022 to 2023, with some exceptions for South American countries.

TRENDS - NEWS BY WORLD REGION AND BY SEMESTER



The data on the general decline in litigation from 2020-21 to 2022-23 is of course linked with the lift of most public health measures all over the world and with the end of state of emergency in those countries that had introduced it<sup>64</sup>. It is however notable that litigation has not stopped. Yet, as it will be more precisely shown below, its content and objectives have changed. The purpose is no longer to lead public authorities in the correction of their actions or omissions but to ascertain whether those actions or omissions were legitimate and, if not so, to recover costs and losses unduly borne, or to be reinstated in positions lost due to illegitimate acts (e.g., unlawful dismissal). This is because often the contested measures had ceased to operate when the judgment was rendered. The issue of mootness has been one of the most relevant ones to determine the scope and objectives of judicial intervention<sup>65</sup>.

These changes are partly reflected in the type of matters addressed in the observed litigation. Though still limited in number (mostly due to the length of proceedings and the possible link between civil and criminal proceedings), liability cases have increased from 2021 to 2022 and 2023<sup>66</sup>. The focus is then on the consequences of governmental actions and omissions and the compensation for violations of fundamental rights.

---

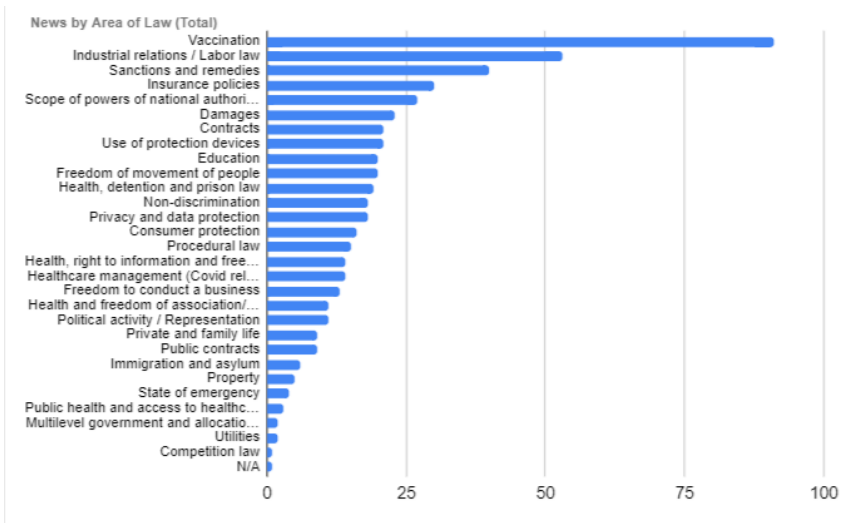
<sup>64</sup> WHO has officially declared the end of the pandemic in May 2023 but several countries have started to lift measures as soon as the contagion declined.

<sup>65</sup> See, for a deeper analysis, the contribution of M. Accetto, in this book, and our considerations in the concluding chapter.

<sup>66</sup> See, Austrian Supreme Court, 15 May 2023, 1Ob199/22d, rejecting the claims for compensation submitted by tourists harmed by the State's omission of measures contrasting the pandemic in its early stage in the framework of the pandemic law. Among the last ones, see Spanish Supreme Court, 31 October 2023, no 1360 (<https://www.covid19litigation.org/news/2023/11/spain-supreme-court-rejects-appeal-seeking-state-financial-responsibility-covid-19>), denying liability of the Spanish government for the measures adopted against the pandemic since the measures were deemed necessary, adequate, and proportionate to the gravity of the situation. For a wider comparative analysis, see our concluding chapter in this book, § 7.

Education cases have mostly concerned the recovery of fees claimed during the pandemic when education and related services needed radical changes and limitations<sup>67</sup>.

NEWS BY AREA OF LITIGATION

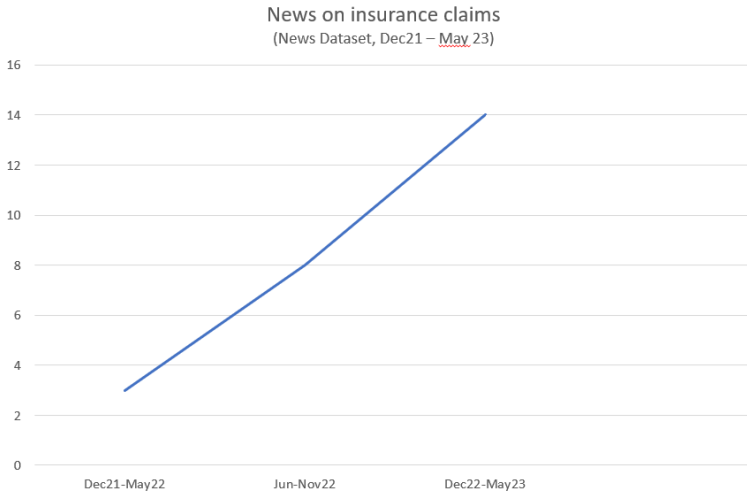


The News page also reflects a relevant stream of litigation on the interpretation of insurance policies, whether covering losses borne by businesses or individuals during the pandemic: another path to post-pandemic recovery<sup>68</sup>.

<sup>67</sup> See, e.g., USA, *University of Florida Board of Trustees v. Rojas*, Court of Appeal of Florida, 22 November 2022 (<https://www.covid19litigation.org/news/2022/12/usa-state-court-dismisses-covid-related-tuition-suit-public-university-had-not>), dismissing COVID-related tuition suit, as public university had not expressly promised in-person classes. More recently, see also: USA, Indiana Supreme Court, *Keller J. Mellowitz v. Ball State University and Board of Trustees of Ball State University and State of Indiana*, 21 November 2023, declaring the constitutionality of a retroactive statute prohibiting class actions against State Universities for breach of contract or unjust enrichment claims related to losses arising from COVID-19 (<https://www.covid19litigation.org/news/2023/12/usa-state-supreme-court-upholds-retroactive-law-limiting-class-actions-against>).

<sup>68</sup> See, e.g., for Spain, Provincial Court of Palma de Mallorca, 25 October 2022, ordering insurer to pay €100,000 compensation for rural hotel forced to close during the

## TRENDS - INSURANCE POLICIES



Comparatively, looking at top areas in 2020 litigation, cases on freedom of movement have radically decreased, almost disappearing in 2023<sup>69</sup>; the same applies to cases concerning freedom of business<sup>70</sup>.

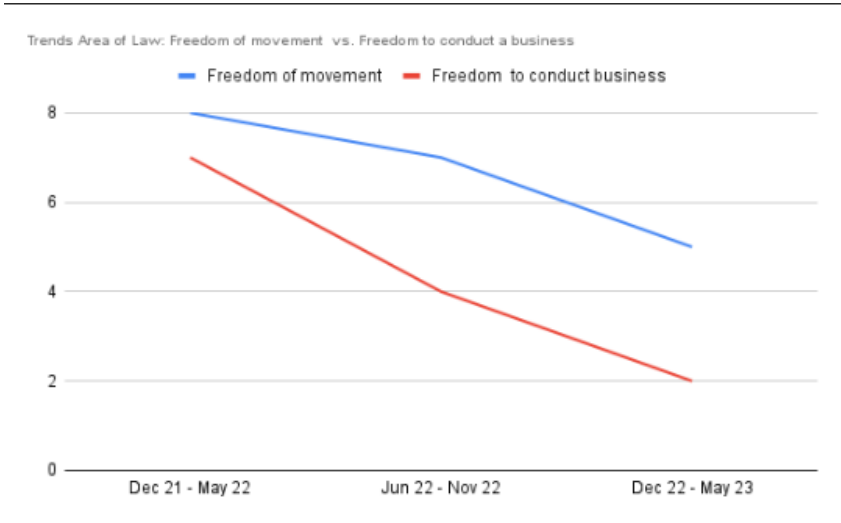
---

pandemic (<https://www.covid19litigation.org/news/2022/12/spain-court-orders-insurer-pay-eu100000-compensation-rural-hotel-forced-close-during>); for Africa, Gauteng Division of the South Africa High Court, 20 February 2023 (<https://www.covid19litigation.org/news/2023/03/south-africa-court-declares-insurer-liable-compensation-regard-business-interruptions>), finding a business insurer liable for compensation with regard to economic losses caused to insured parties by COVID-19 lockdown; for the USA, Supreme Court of New Hampshire, 11 May 2023 (<https://www.covid19litigation.org/news/2023/05/usa-yet-another-state-supreme-court-reverses-trial-courts-covid-related-business>), reversing a trial judgment issued in favor of a group of hotels in a COVID-related business interruption case. For a wider analysis, see the contribution of G. Sabatino in this book.

<sup>69</sup> See, however, Constitutional Court of Slovenia, 16 March 2023, U-I-78/22, ECLI:SI:USRS:2023:U.I.178.22 (<https://www.covid19litigation.org/news/2023/04/slovenia-constitutional-court-upholds-covid-19-containment-measures-constitutional>).

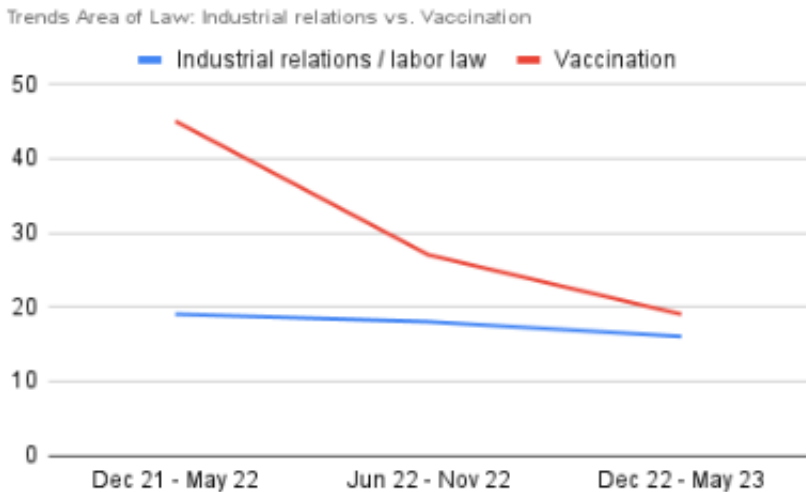
<sup>70</sup> See, e.g., Tokyo District Court, 16 May 2022 (<https://www.covid19litigation.org/news/2022/05/japan-tokyo-district-court-delimits-legality-restrictions-restaurateurs>), declaring unlawful certain restrictions issued against restaurateurs by Tokyo Prefectures and other neighboring districts in March 2021.

TRENDS - FREEDOM OF MOVEMENT AND BUSINESS FREEDOM

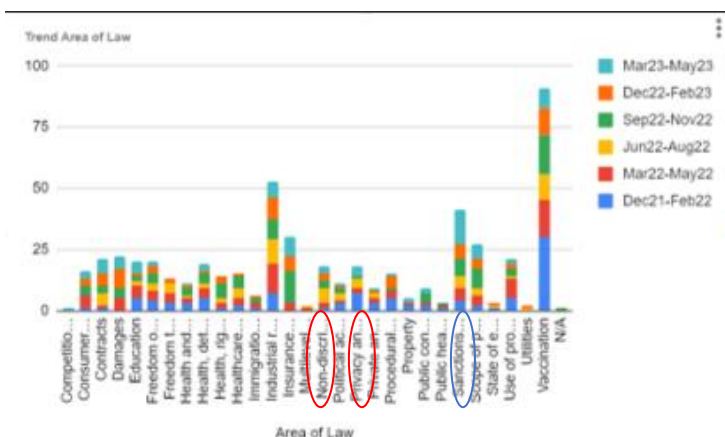


By contrast, litigation on vaccination (mostly on mandates and their impact on employment relationships) has been the most recurrently traced in the News page; interestingly, its share has decreased from late 2021 to 2023.

FOCUS ON VACCINATION AND INDUSTRIAL RELATIONS DURING THE THREE SEMESTERS



Other areas of litigation have also changed over time; e.g. non-discrimination and data protection cases have decreased<sup>71</sup>, whereas cases adjudicating sanctions for breach of anti-pandemic measures have increased<sup>72</sup>.



<sup>71</sup> See, among the few ones, Colombia, Constitutional Court, 26 September 2022, no. T-337/22 (<https://www.covid19litigation.org/news/2022/10/colombia-constitutional-court-holds-requiring-person-vaccinate-against-covid-19-order>), upholding a claim based also on non-discrimination and holding that requiring a person to vaccinate against COVID-19 in order to visit a relative hospitalized with high-risk disease is not proportional. More recently, see in Italy, Tribunal of Florence, 20 November 2023, awarding both restitution of unduly missed wages and compensation for non-economic losses suffered due to suspension from work of unvaccinated healthcare personnel, based on discriminatory nature of such measure. The Italian Constitutional Court had, however, already excluded the discriminatory nature of unpaid suspension from work of unvaccinated healthcare personnel in decision no. 15/2023, 9 February 2023.

On data protection: Czech Data Protection Authority, 24 April 2023 (<https://www.covid19litigation.org/news/2023/05/czech-republic-czech-ministry-interior-fined-collecting-health-data-covid-19-patients>), imposing a fine against the Czech Ministry of Interior for collecting health data of COVID-19 patients without legal basis; see also, more recently, CJEU, 5 October 2023, C-659/22, *Ministerstvo zdravotnictví*, ECLI:EU:C:2023:745, holding that GDPR applies to COVID-19 vaccination certificate verification.

<sup>72</sup> See, e.g., Italy, Constitutional Court, 26 May 2022, n. 127, holding that criminal sanctions for the violation of quarantine measures do not violate Article 13 on personal freedom; Chile, 1<sup>st</sup> Local Police Court of Copiapó, 27 September 2021 (<https://www.covid19litigation.org/news/2022/09/chile-failure-supermarket-adequately-implement-safety-measures-against-covid-19>).



As shown in the previous section, litigation matters have varied across world regions and countries. Based on the News' dataset (December 2021-May 2023), African cases have mostly concerned the area of industrial relations, followed by vaccination<sup>73</sup>; Asian litigation has mostly focused on sanctions imposed on those who violated anti-pandemic measures and, though to a more limited extent, on vaccination<sup>74</sup>; in Oceania, South America and Europe, vaccination, followed by industrial relations, has represented the most litigated area, together with (as third areas but only in Europe) data protection and sanctions<sup>75</sup>; vaccination ranks first in North America, too, but followed by the litigation on insurance claims<sup>76</sup>.

On a large subgroup of case news (approximately 70% of the total) the outcome of decisions has been examined. Though based on a more limited dataset (approximately 380 cases) compared with the dataset examined in paragraph 3, the analysis shows that success rate has not changed from 2020-21 to 2022-23: in this last period (mostly reflected in the News dataset) 43% of examined claims have been upheld, at least partially, whereas 51% of them have been rejected or declared inadmis-

---

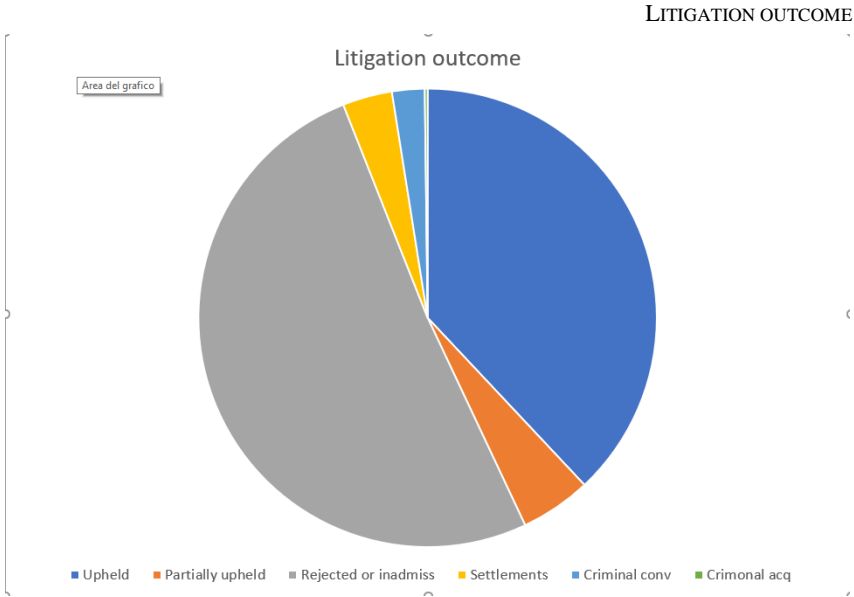
<sup>73</sup> See on industrial relations, South Africa, Labour Court of Pretoria, December 2022 (<https://www.covid19litigation.org/news/2022/12/south-africa-court-upholds-arbitral-award-ruling-voluntary-resignation-work-due-salary>), where the Court upheld arbitral award ruling that voluntary resignation from work due to salary cut after COVID-19 lockdown is a constructive dismissal which must be compensated.

<sup>74</sup> See, e.g., Singapore District Court, 17 May 2022 (<https://www.covid19litigation.org/news/2022/05/singapore-district-court-condemns-new-years-eve-celebrations-violation-restrictions>).

<sup>75</sup> Among many see, e.g., High Court of New Zealand, CIV-2022-485-000570 of 10 March 2023; Costa Rica, Administrative Tribunal of San José, 15 March 2023 (<https://www.covid19litigation.org/news/2023/05/costa-rica-court-suspends-mandatory-covid-19-vaccination-minors>); Italian Constitutional Court, no. 25/2023 (<https://www.covid19litigation.org/news/2023/05/italy-compulsory-vaccination-unconstitutional-if-primary-law-doesnt-specify-targeted>).

<sup>76</sup> On a claim against Pfizer, see, e.g., United States District Court for the Eastern District of Texas, Beaumont Division, *United States ex rel. Jackson v. Ventavia Rsch*, 31 March 2023 (<https://www.covid19litigation.org/news/2023/05/usa-federal-court-rules-favor-pfizer-covid-related-suit-false-claims-over-vaccine>).

sible<sup>77</sup>. A small group of cases includes settlement proceedings (3,5%) and criminal proceedings (2,5%); among the latter, the indicted persons were convicted in most cases.



Neither these values have consistently decreased or increased during the three semesters from December 2021 to May 2023<sup>78</sup>.

Once again, courts have proved to play their role of guardians of fundamental rights without need of systematically overturning governments’ decisions, neither showing plain deference, as already observed in the previous paragraph<sup>79</sup>.

As seen above, litigation outcome varies quite remarkably by country. Though based on a more limited set, comparative analysis inherent to the News’ dataset developed from December 2021 to May 2023, shows that examined claims have been upheld more often in countries

<sup>77</sup> Having regard to the Database set of cases, mostly concerning 2020 and 2021 litigation, 46% of claims have been upheld at least partially. See above, § 3.

<sup>78</sup> Indeed, e.g., success rate (upheld or partially upheld claims) has moved from 47% (first semester) to 39% (second semester) and back to 47% (third semester).

<sup>79</sup> See § 3.

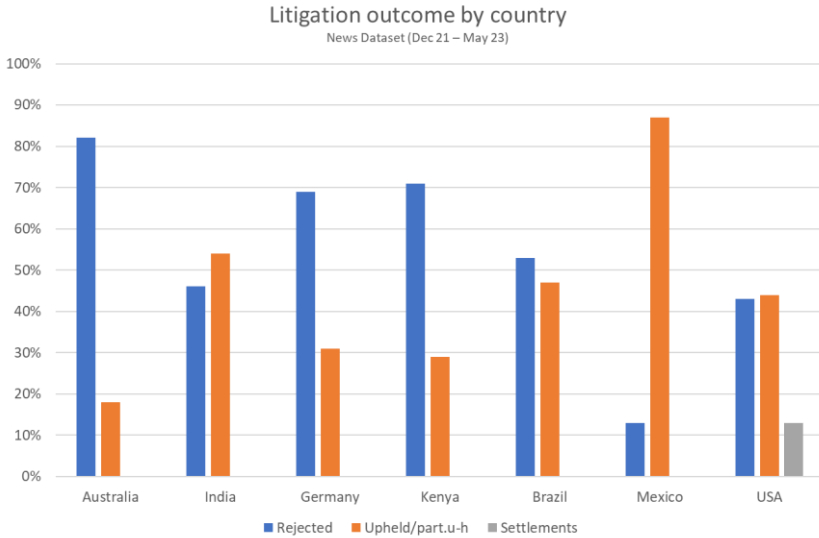
such as Mexico and India than in others such as Australia, or, within Europe, Germany or France<sup>80</sup>. These data are quite consistent with those emerged in the thicker dataset built for the Database (with cases from 2020 and 2021, mainly) apart from some variations. The latter concern, e.g., Brazil and the United States: in Brazil, there is an apparent decline of the success rate (from 66% to 47% of examined cases), probably linked with the lower need for judicial pressure over government due to the relative improvement in public health emergency<sup>81</sup>; by contrast, in the USA a more equitable balance between rejections and upholding has been apparently reached due to the emergence of a third class of outcomes, namely settlements. These have not been examined in the first phase of the project and have gained attention in its second phase, also due to their increasing relevance, particularly in the field of university fees restitution claims and in the one of insurance claims.

---

<sup>80</sup> This evidence is quite consistent with the one concerning Italian cases in our dataset, whereas, for Spain, the dataset shows a higher concentration of success cases (in which the claims have been upheld, at least partially – 65% of cases in this dataset).

<sup>81</sup> No evidence has been collected on whether this data reflects a progressive alignment of political choices with fundamental rights and the rule of law during the last phase of Bolsonaro's presidency and Lula's election. On the role of judicial review as form of resistance against Bolsonaro's denialism, see T. BUSTAMANTE, E. PELUSO NEDER MEYER, *op. cit.*, 235. For a wider picture, see the chapter of Natalia Rueda in this book.

LITIGATION OUTCOME BY COUNTRY



5. The main questions addressed and the book structure

Both the Database and the News’ page have provided the means for a wide comparative analysis on the role played by courts as guardians of fundamental rights in all world regions. Of course, this role has not emerged in a *vacuum*. National constitutional traditions, as well as the supranational legal framework for human and fundamental right protection, have represented the bases for judicial review<sup>82</sup>. Existing mechanisms of constitutional and administrative review have been used together with any other available means such as public interest litigation

<sup>82</sup> Both in Europe and in the Americas, supranational framework instruments such as the European Convention on Human Rights and the Interamerican Convention on Human Rights, played an important role. See, for the former, the Resolution *Pandemic and Human rights in the Americas*, adopted by the IACHR on 10 April 2020 (available at <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>, last visited on 07.12.2023); for the latter, the information document *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member states*, SG/Inf(2020)11, 7 April 2020 (available at <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>, last visited on 07.12.2023).

and urgency proceedings aimed at the protection of fundamental rights<sup>83</sup>. In some cases, procedural rules have needed adaptation; in others, innovative approaches have been used to overcome the obstacles posed by an unprecedented global health crisis<sup>84</sup>. To what extent innovation is due to remain as a legacy for the future is among the most intriguing questions<sup>85</sup>.

Moving from this landscape, the COVID-19 Litigation Project has been aimed at enabling a comparative analysis about the different approaches taken by courts all over the world in balancing the need to reduce contagion and mitigate its consequences with the safeguard of fundamental rights and freedoms<sup>86</sup>.

The different role played by general principles has been investigated. How was proportionality applied in accordance with different constitutional traditions?<sup>87</sup> Did it call for an evidence-based assessment of

---

<sup>83</sup> See, in particular, the analysis developed about Latin American litigation and about Indian case law, in this book.

<sup>84</sup> See, among others, the analysis developed about the Slovenian and the Austrian case law, in this book.

<sup>85</sup> A. GLUCK, J. HUTT, *op. cit.*, 392 ff., showing that, e.g., a particular doctrine, introduced by Judge Scalia in 1994 and aimed at curtailing delegation of powers to the executive to matters different from major political, social, economic questions (so called ‘major questions doctrine’), became much more relevant during the pandemic and remained so also with regard to non-COVID related litigation (such as in the field of environment): «[t]he ascendance of the major questions doctrine may be one of COVID-19’s most important legal legacies and the one with the biggest implications for the future of the modern administrative state».

<sup>86</sup> A first comparative analysis has been developed in P. IAMICELLI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit.

<sup>87</sup> It is quite remarkable that the tripartite test of proportionality (largely based on German doctrines and now enshrined in art. 52, in the Charter of fundamental rights of the European Union, hereinafter the CFR) was in fact used with similar, though distinct, approaches not only in several European systems, but also in South America with echoes in other continents. See e.g., ECHR, *Affaire Communauté Genevoise d’Action Syndicale (CGAS) c. Suisse*, March 15, 2022, Requête n. 21881/20; for Spain, Tribunal Supremo, 14 September 2021, 1112/2021, concerning the use of a Covid passport for access to bars and restaurants; in Italy, Constitutional court 14/2023 and 15/2023, 9 February 2023, on the balancing between the right to work and the right to health protection; for Germany, Constitutional Court, Const. Fed., 19 November 2021, 1 BvR 781/21 Rn. 1-306 (on the subject of curfews and restriction of interpersonal contacts);

risks, costs and benefits of the measure at stake?<sup>88</sup> How was uncertainty approached in judicial review?<sup>89</sup> What was the role of the precautionary principle in this regard?<sup>90</sup> And the one of science? Was any link established between precaution and proportionality?<sup>91</sup> And between propor-

---

but also, in South America, Colombian Constitutional Court, 25 June 2020, no. 201; in India, Supreme Court, New Delhi, 29 September 2021, No. 1113 of 2021 and No. 1114 of 2021; High Court of Madras, 30 July 2021, W.P. No. 8490 of 2020.

<sup>88</sup> See, e.g., for Spain, Tribunal Supremo, 14 September 2021, 1112/2021.

<sup>89</sup> On this aspect, see the considerations developed in the concluding chapter and in P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit.

<sup>90</sup> On measures restricting the free movement of Union citizens on public health grounds during COVID19 emergency, see CJEU, 5 December 2023, C 128/22, *Nordic Info BV*, ECLI:EU:C:2023:951, holding that, if there is uncertainty as to the existence or extent of risks to human health, a Member State must be able, under the precautionary principle, to take protective measures without having to wait until the reality of those risks becomes fully apparent. At national level, see, e.g., for France, Council of State, 13 November 2020, No. 248.918, for whom the precautionary principle is addressed to the public authorities in the exercise of their discretionary power; it implies a political choice on the level of acceptable risk and does not, as such, create a right of natural or legal persons; for Italy, Italian Council of State, decision no. 4407/2022, defining the content of the precautionary principle in time of emergency in conformity with the CJEU case law; in particular, the Court clarified that the principle of precaution when applied to contexts of scientific uncertainty may require preventive actions even if the benefits may not be fully defined in light of the available scientific evidence. See also K. MEBERSCHMIDT, *Covid-19 legislation in the light of the precautionary principle*, in *Theory and practice of legislation*, 8, 2020, 267-292, <https://doi.org/10.1080/20508840.2020.1783627> (last visited on 17.12.2023).

<sup>91</sup> See Italian Council of State 7547/2022, referring to the case law of the CJEU. For a recent consideration of such link see CJEU, 5 December 2023, C 128/22, cit., para. 80, holding that, when imposing restrictive measures on public health grounds, Member States must be «able to adduce appropriate evidence to show that they have indeed carried out an analysis of the appropriateness, necessity and proportionality of the measures at issue and to present any other evidence substantiating their arguments. Such a burden of proof cannot, however, extend to creating the requirement that the competent national authorities must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions» (see also para. 90).

tionality and reasonableness?<sup>92</sup> Was reasonableness used as a principle guiding judicial review in jurisdictions that are normally less prone to apply the principle of proportionality?<sup>93</sup>

The analysis emerging from this book's contributions will show how courts certainly relied on rooted traditions but had also to adapt these principles' application in light of emergency contexts<sup>94</sup>. Then, a question emerges and will here be discussed on whether these changes will remain within (or outside) possible future crises affecting fundamental rights in a comparable way<sup>95</sup>.

The role of courts has not been examined without considering its possible links with other powers and institutions. On the one hand, the possible impact of judicial review on policy making has been considered; on the other hand, the analysis has concerned its relationship with the role of scientific communities and advisory boards.

On the first perspective, how could judicial review be sufficiently timely to steer public action? How could courts ensure respect for the rule of law in times of emergency, also facilitating the monitoring by Parliaments in contexts in which the executive has been normally vested with core powers? How could courts not only assess the validity of public decisions but also ensure that adequate measures could be taken when States were reluctant to do so? The comparative analysis de-

---

<sup>92</sup> Reasonableness was used in both common law and civil law jurisdictions, often to complement rather than substitute proportionality. See, e.g. ECHR, *Affaire Communauté Genevoise D'action Syndicale (CGAS) c. SUISSE*, 15 March 2022, Requête n. 21881/20. Based on the famous *Jacobson* doctrine, reasonableness has remarkably shaped judicial review in the USA. See, among many, United States District Court for the Eastern District of New York (Eastern District of New York), 12 October 2021, *Dixon v. De Blasio*, Case No. 21-cv-5090, 2021 WL 4750187. On the role of *Jacobson* in the US judicial review during the COVID-19 pandemic see also L.F. WILEY, *The Jacobson Question. Individual Rights, Expertise, and Public Health Necessity*, in I.G. COHEN, A.R. GLUCK, K. KRASCHEL, C. SHACHAR (eds.), *op. cit.*, 206 ff.

<sup>93</sup> For a deeper comparative analysis in this regard see also P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit.

<sup>94</sup> See, in particular, the contributions of AG Medina and of M. Accetto in this book.

<sup>95</sup> See footnote no. 85 above on the "major questions doctrine" in the US judicial review.

ployed in this book will show how, at least in some jurisdictions, courts have been able to issue orders for positive action by public authorities and (or) to provide guidance for future decisions<sup>96</sup>; they have done so while assessing measures that could expire soon (and sometimes had already expired at the time of judgment) but could also come back to the policy arena and pose equivalent challenges<sup>97</sup>.

On the second perspective, authors have been invited to consider that the scientific debate has not only steered policy decision-making, but also impacted on judicial review, influencing the reasonableness assessment, the proportionality test as well as the application of the precautionary principle<sup>98</sup>. The extent to which science has represented the basis for assessing the validity of public measures and the ways in which courts have handled the possible conflicts among different scien-

---

<sup>96</sup> See, e.g., South Africa, High Court (Gauteng Division, Pretoria), 17 July 2020, no. 22588/2020, *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP); High Court of Kenya, 3 August 2020, Petition 78, 79, 80, 81/2020, *Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others*; High Court of Kenya at Siaya, 15 June 2020, Petition No 1 of 2020, *Joan Akoth Ajuang & another v Michael Owuor Osodo the Chief Ukwala Location & 3 others*; *Law Society of Kenya & another* [2020] eKLR; Brazil Supreme Federal Court, 30 August 2021, *Ação Cível Originária 3.518 Distrito Federal. Min. R.L.* (<https://www.covid19litigation.org/case-index/brazil-brazilian-supreme-federal-court-acao-civel-originaria-3518-distrito-federal-min-r>); Colombia, State Council., 50001-23-33-000-2020-00364-01 (AC) 3 July 2020; India, High Court of Bombay, 14 June 2021, PIL(l)-9228-2021 (<https://www.covid19litigation.org/case-index/india-high-court-bombay-pill-9228-2021-2021-06-14>).

<sup>97</sup> See, in particular, Slovenian Constitutional Court, Decision No. U-I-83/20 of 27 August 2020, discussed in the contribution of M. Accetto in this book.

<sup>98</sup> See, e.g., for Chile, Corte Suprema. Rol N°102533-2022, 24 January 2023, where the Court granted protection of the fundamental right to health to a minor (under 3 years) who was excluded from the vaccination plan established by the Ministry of Health. The Court considered that the Technical Committee for the evaluation of Vaccines recommended the inclusion of children from 6 months-old to 3 years-old in the vaccination plan, based on scientific evidence. Hence, for the Court, the defendant acted arbitrarily as it did not duly justify why it still excluded this age group in the vaccination plan, despite having recommendations and authorization to include it.



tific communities, are among the questions examined in the project and therefore in this book<sup>99</sup>.

### *5.1. Navigating through the book*

The book is divided into four sections, preceded by a foreword, written by the WHO officers who supported the project design and implementation, and followed by a concluding chapter.

The first section, including the present contribution, illustrates the research questions underlying the project, the project objectives, structure and methodology, the main outcomes, the way forward. Together with the present chapter, the one written by Roberto Caranta and Benedetta Biancardi sheds light on the comparative law methodology steering the project. More particularly, it presents the objectives and the approach taken to build an important legal tool such as a Comparative Law Glossary. Without ambition for completeness, this tool has helped researchers to navigate in the challenging context of comparative legal analysis of case law from tens of different jurisdictions around the globe. Combining accuracy with conciseness, the Glossary has shed light on both similarities and divergences in legal concepts and legal traditions, well beyond (and in fact refusing) any word-by-word translation technique. Interesting examples are provided to show strengths and weaknesses of this analysis (e.g. abuse of rights, rule of law, compensation) with a view to possible future developments along this research path.

After the introductory chapters, the second book section addresses the impact of the pandemic through the lenses of supranational law and courts. Although most challenges were brought before national courts and related to legislative and administrative decisions taken at national level and examined in light of national legislation, international and supranational law did play a role in COVID-19 litigation and the same applies to supranational courts.

---

<sup>99</sup> See, in particular, the concluding chapter for a comparative overview. On this research perspective, see also P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit.

Among the latter, European courts' action was of utmost importance. As illustrated in AG Medina's contribution, it has contributed to the double role played by courts in the pandemic: the one of guardians of individual rights and the one of monitoring over legislative and executive powers. In both cases, courts have provided not only an immediate answer in respect of the specific claim brought before the court, but also a longer term guidance for future decision-making. Moving from this perspective, this chapter explores the main lines of cases examined (or due to be examined) by the Court of Justice of the European Union and, within those lines, the extent to which EU law needs to be revisited or interpreted in light of the emergency. Whereas space for derogation and adaptation has been found by the Court, a firm reference is needed to ground principles of democracy, fundamental rights' protection and MS' cooperation.

A brief overview of the case law of the Strasbourg Court is then provided in Judge Zalar's contribution, whose analysis focuses on the characteristics of the proportionality test and its application by the ECHR within the balancing between health and human rights. The extent to which such case law has been respectful for States' margin of appreciation and, at the same time, able to protect the rights of the most vulnerable ones is of particular relevance in this analysis.

The third section of the book feeds the comparative analysis by offering an overview on the role played by the courts in different world regions and countries. Special attention has been paid to the extent to which courts have reviewed legislative and administrative action in order to protect fundamental rights and which type of dialogue they have engaged among them (e.g., first instance v. supreme courts) and with the executive.

In the European context, two areas have been examined more closely: the one of Slovenian litigation and the one of Austrian litigation with some comparative remarks concerning the German context. The two contributions show both similarities and distinctiveness in the role of courts, with special regard to constitutional courts, in the examined contexts. It could be worth observing that neither Slovenia, nor Austria declared a state of emergency and that in both cases the constitutional court played a relevant role, being possible not only for referring courts

but also for individuals to challenge the constitutionality of general legal acts providing for anti-pandemic restrictive measures. Not surprisingly, in both cases, the constitutional court had to face the issue of individual standing, namely whether a general legal act subject to constitutional review would concretely affect that specific individual, as well as the question concerning the judicial review of acts that were already expired at the time of the court's assessment: whether, in both cases, the court could build on earlier jurisprudence for providing effective protection of fundamental rights (like in Slovenia) or was led to adopt a less restrictive approach than before (like in Austria) is examined by the two Authors.

Without any intent of being representative of the by far more diversified European reality, the two overviews show how similar types of judicial review, involving similar balancing between fundamental rights and freedoms, and the use of the very same principles (e.g. legality or proportionality), could lead to different outcomes based on different approaches to judicial review, including its scope and available remedies. In this regard, the contribution of Matej Accetto illustrates the evolution of Slovenian constitutional jurisprudence on COVID-19 measures together with the internal facets of this evolution. Indeed, reaching the majority of judges' consent was sometimes challenging but the rule of law and the protection of fundamental rights have themselves contributed to make the governmental response more effective. More criticism emerges in other contexts. Based on a comparative analysis between Austrian and German litigation, the contribution of Edith Zeller shows the strengths and shortcomings of the judicial review in Austria with special regard to the distinct roles of the constitutional and the administrative courts and the lack of interim relief mechanisms for constitutional review. It also presents the evolution of this review throughout the pandemic waves with special regard to the attention increasingly paid to scientific evidence as a priority lens to examine the adequacy, reasonableness and proportionality of public decision-making.

Being one of the most severely affected countries in terms of death rate and in which some of the measures were longer maintained (e.g. school closures), India has represented a key case study within the Pro-

ject. Both the severity of the emergency, together with its impact on social and economic conditions of Indian population, and the role played by the executive and the judiciary at State and Union level are extensively discussed in the contributions by Justice Lokur and Rupam Sharma and by Professors Gandhi, Sebastian et al. The former focuses on the role played by the Supreme Court of India during the two main waves of the pandemic (respectively in 2020 and 2021) observing a clear change from a deferential to a proactive and dialoguing approach towards the government. The need for coordinated responses on four key issues (such as supply of oxygen essential drugs, method of vaccination, declaration of lockdown) has led the Court to engage in a constructive dialogue with the State courts, on the one side, and with the executive on the other side, though firmly acknowledging the separation of powers as well as the need to ensure protection of fundamental rights. The different facets of this dialogue, with special but not exclusive regard to Indian State Courts, are illustrated and discussed in the contribution by Manimuthu Gandhi, Tania Sebastian and Rajasathya K.R. Their analysis sheds light on the impact generated by both ordinary procedural routes as well by special proceedings, such as the Public Interest Litigation. The latter is presented as a means for reviewing Government's action and inaction with a view to protect fundamental rights with special regard to those of most vulnerable ones, such as migrants, elderly population, women and children. The extent to which courts have learned and adjusted their approaches after the first wave is also substantiated in this extensive survey, showing differences between High Courts and the Supreme Court of India.

Remaining in Asia, a very different picture emerges in Damian Chalmers' chapter concerning South-East and East Asia. The role of courts as guardian of public order is here highlighted, with relatively little space for the protection of individual rights in light of general principles such as non-discrimination or proportionality. The contribution discusses the extent to which this approach has preserved not only a high degree of executive autonomy but also, at least partially, a sufficient level of societal trust towards government. Hence, relevant insights enrich the analysis, enabling to compare judicial activism, ob-

served in other world and Asian regions, with the more limited role played by South East and East Asian courts.

The contribution by Natalia Rueda presents the main distinctive features of COVID-19 litigation in Central and South America, focusing on the nature of parties involved, whether public or private litigants, and on the role of special procedures, such as *amparo* and *habeas corpus*, as means for effective protection of fundamental rights, particularly those of the most vulnerable ones. More than in other world regions, vulnerability has been factored in courts' balancing in several Latin-American countries and the use of urgency procedures has contributed to provide effective remedies, including injunctions.

Without any aim of comprehensiveness and facing the challenges of tracing and accessing courts' decisions, the contribution of Emmanuel Kasimbazi provides an overview on the main trends in COVID-19 litigation in African countries. Although the scope of judicial review varies from country to country, the extent to which some decisions have tried to provoke substantive changes in government actions to better secure public health or to better balance fundamental rights and freedom is remarkable. Not only actions but also omissions have been challenged and remedies have been sought for effective protection of fundamental rights such as, e.g., the right to water or the right to education. The contribution also highlights the role played by groups and associations in filing claims before the courts, as well as the criticalities stemming from regulatory and financial conditions hampering such a role.

In the final section, the book offers a focus on two specific topics among those addressed by courts in COVID-19 litigation.

A first contribution deals with the use of one of the most burdensome measures on personal freedom, such as quarantines. In this regard, Pedro Villareal's chapter provides an overview on the scientific and legal grounds on which such measure has been adopted across the world. Moreover, a comparative analysis is sketched, shedding light on some of the factors explaining the different approaches taken by States in this regard. The extent to which international law and international institutions, such as WHO, have influenced States' action is also examined with a view to the possible developments in preparing a better strategy to face future health crises.

The impact of the pandemic on the insurance contracts and their interpretation is at the core of the second and last chapter of this section: another view on the economic effects of the pandemic and on the role played by courts in enforcing contracts that are potentially able to redistribute losses through the insurance market. Largely based on the COVID-19 Litigation Database and News' page, the contribution develops an insightful comparative analysis, taking into account not only the different legal traditions underlying the examined decisions but also the socio-economic and political contexts in which such litigation has grown and evolved through the pandemic waves.

Which lessons can be learnt from this multi-level analysis? What can be learnt from comparing different approaches to judicial review? Will courts build on the examined developments to continue their role of guardians of fundamental rights both in ordinary and emergency times? The concluding chapter will elaborate on these questions and propose the way forward.