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

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COVID-19 LITIGATION: THE DRIVERS OF INSTITUTIONAL RESPONSES TO THE PANDEMIC AND THE ROLE OF COURTS

Fabrizio Cafaggi[*] *and Paola Iamiceli*[**]

SUMMARY: *1. The role of courts in the COVID-19 pandemic: which legacy? 2. Linking regulatory approaches to judicial review. 3. The scope and the intensity of judicial review. 4. Judicial decision making under uncertainty and the provision of scientific evidence. 5. Judicial innovations in times of pandemic. 6. A comparative analysis of the principles applied by national Courts. 7. Liability and immunity of governmental entities for COVID-19 related measures. 8. Which lessons to draw on the boundaries between emergency and ordinary laws?*

1. The role of courts in the COVID-19 pandemic: which legacy?

The battle against the pandemic has been considered a defeat rather than a victory even if the pandemic (not the SARS-CoV-2) is officially over[1]. The States were not prepared to contrast the consequences of a disease whose origins and effects remain for the most unknown, despite the incredible efforts of the scientific community[2]. The lessons from

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[1] The declaration of pandemic was issued by WHO on 8 March 2020. The end of the pandemic was declared by WHO in May 2023. The WHO provided recommendations on how to move from emergency to long term risk management. See WHO, *From emergency response to long-term COVID-19 disease management: sustaining gains made during the covid-19 pandemic: Guidance on calibrating the response*, September 4th 2023, available at *https://www.who.int/publications/i/item/WHO-WHE-SPP-2023.1*.

[2] J.D. SACHS et al., *The Lancet Commission on lessons for the future from the Covid-19 pandemic*, in *Lancet*, 400, 2022, 1224-1280, Published Online September 14, 2022 (*https://doi.org/10.1016/S0140-6736(22)01585-9*, last visited on 17 December

SARS-CoV-2 will be remarkably useful to (re) design international and national institutions and their legal instruments to govern similar events in the future. Preparedness should become a priority in the health care architecture since time is of the essence[3]. Prevention is based on the adequacy of the health care systems to detect and protect individuals from the contagion. However, the signals coming from the States are not encouraging. An appropriate globally coordinated surveillance system on the possible re-emergence of SARS-CoV-2 or similar viruses, is not yet in place and the transformations of national health care systems to ensure more adequate preparedness and more effective coordination have not yet occurred[4].

The SARS-CoV-2 has been declared an occupational disease in recommendations and conventions from the World Health Organization (WHO) and the International Labour Organization (ILO)[5].

The pandemic of SARS-CoV-2 has posed institutional challenges whose consequences will go beyond the end of the pandemic: how have emergencies redefined the division of powers and what are the limits to separation? Separation of powers and the protection of fundamental rights are significantly affected by emergencies. States of emergency have temporarily redistributed powers and functions compared to the constitutional order in ordinary times. Courts have scrutinized both the

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2023), has stated at outset of its report: «Too many governments have failed to adhere to basic norms of institutional rationality and transparency, too many people – often influenced by misinformation – have disrespected and protested against basic public health precautions, and the world's major powers have failed to collaborate to control the pandemic».

[3] J.D. SACHS et al., *op. cit.*, 1226, illustrating the core elements needed for sufficiently strong preparedness plans.

[4] In particular, the Lancet Commission has suggested the adoption of vaccination plus program. See J.D. SACHS et al., *op. cit.*, 1264.

[5] The consequences stemming from the qualification of COVID-19 as occupational disease have been examined by the Courts. See, for example, Corte Superior de Justicia del Lima (Peru), no 10944/2022, news available at *https://www.covid19litigation.org/news/2023/09/peru-lima-high-court-declares-covid-19-occupational-disease-all-workers*, concluding that COVID-19 can be considered an occupational disease because it can be transmitted orally among individuals, including in the workplace, and referring to international instruments such as the ILO conventions and recommendations that support classifying COVID-19 as an occupational disease.

content and duration of the state of emergency[6]. Health emergencies require to balance the individual and the collective right to health in the two dimensions of the right to prevent and the right to cure. They also require balancing health with other fundamental rights like the right to education, the freedom of expression, the freedom of religion.

Recent pandemic like SARS, MERS, Ebola, swine flu, avian flu and the Zika virus have posed similar challenges, but the speed and scope of contagion in the case SARS-CoV-2 has been wider with stricter and longer restraining measures[7]. The development of the pandemic and its spread have been very fast[8].

Both international and national laws prescribe a state's duty to act in case of health emergency. A positive State's obligation to prevent and to contrast the pandemic exists at the international level. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the central international human rights obligation on States *vis-à-vis* infectious diseases, requires them to take steps necessary for the «prevention, treatment and control of epidemic, endemic, occupational and other diseases» (Article 12(2)(c)). Hence, under international law there is a

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[6] See for example the two judgments of the Spanish Constitutional Court declaring the unconstitutionality of state of emergency (*estado de alarma*). Judgment of 14 July 2021 about the first state of alarm: *https://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2021/13032.pdf*. Judgment of 27 October 2021 about the second state of alarm: *https://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2021-19512.pdf*.

[7] On the differences between SARS-CoV-2 and the previous health pandemics see, among others, E. PETERSEN et al., *Comparing SARS-CoV-2 with SARS-CoV and influenza pandemics*, in *Lancet Infect Dis.*, 20, 2020, e238-e244.

[8] The number of deaths reported and estimated was very high compared to previous pandemics.

On 30 January 2020 COVID-19 was declared a Public Health Emergency of International Concern (PHEIC) with an official death toll of 171. By 31 December 2020, this figure stood at 1,813,188. Yet preliminary estimates suggest the total number of global deaths attributable to the COVID-19 pandemic in 2020 is at least 3 million, representing 1.2 million more deaths than officially reported. (*https://www.who.int/data/stories/the-true-death-toll-of-covid-19-estimating-global-excess-mortality*).

Globally, as of 5:57pm CEST, 25 October 2023, there have been 771.549.718 confirmed cases of COVID-19, including 6.974.473 deaths, reported to WHO. As of 22 October 2023, a total of 13.533.465.652 vaccine doses have been administered. Source: WHO Coronavirus (COVID-19) Dashboard *https://covid19.who.int/*.

State obligation to prevent, treat, and control. Many national Constitutions define a right to health that includes positive actions by the State[9].

State measures include prohibitions, orders to adopt precautionary and preventive measures, including testing, vaccination, and recommendations concerning pro-social behaviour. A relevant distinction in the context of State measures should be made between precautionary, social, and health measures[10]. Social measures were predominantly taken by executives delegated by legislators, in some cases within the framework provided by a state of emergency law, in other cases within the ordinary constitutional framework[11].

Judicial review has focused on administrative measures, while constitutional review has addressed legislation, providing the basis for administrative action.

The delegation of regulatory power to the executive has led to the use of administrative acts instead of legislation and, correspondently, to the shift from constitutional to judicial administrative review. Administrative judicial review has therefore performed a more relevant role, carried by constitutional courts in ordinary times.

The challenges posed by the pandemic were relatively similar across countries although differences depended (1) on the adequacy and preparedness of individual health care systems, (2) on the constitutional frameworks within which emergency was addressed, and (3) on the human and financial available resources[12].

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[9] See for example art. 32 of the Italian Constitution, art. 43 of the Spanish Constitution, art. 51 of the Slovenian Constitution.

[10] On their definition see WHO, *Considerations for implementing and adjusting public health and social measures in the context of COVID-19. Interim guidance*, March 2023, available at *https://www.who.int/publications/i/item/who-2019-ncov-adjusting-ph-measures-2023.1*.

[11] See C. EMMONS, *Responding to Covid-19 with States emergency. Reflections and recommendations for future health crises*; A. VEDASCHI, C. GRAZIANI, *COVID-19 and emergency powers in Western European democracies: Trends and issues*, both in J. GROGAN, A. DONALDS (eds.), *Routledge Handbook of Law and the Covid-19 pandemic*, London, 2021, 289 ff., 375 and 388 ff.

[12] The strictness of measures was partly related to the ability of the health care to manage emergency. But also to the potential impact of restrictive measures on the economy.

Specific challenges have concerned the role of courts. They include (a) access to justice, (b) timeliness of judicial intervention, (c) effectiveness of judicial measures and remedies, (d) adequacy and appropriateness of sanctions. The answers varied.

At least three judicial approaches can be identified: one right-based, one power-based, and another one duty-based. The right based approach has characterized the European and Latin America scrutiny. The power approach has been used in the US, applying Jacobson v. Massachusetts[13]. The scrutiny has focused on the exercise of governmental power and its limits testing Jacobson in light of the civil rights jurisprudence[14]. The duty-based approach centres on the responsibility of the restrictive measures addressees and has been used in China and other pacific Asian countries[15].

The judiciaries are complex bodies, and their structures differ across countries. A common feature in COVID-19 litigation has been the relevance of first instance Courts also given the limited temporal duration of the measures. Urgent decisions have been taken with emergency procedures and using interim relief[16]. The use of emergency procedures

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[13] USA, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). See for comprehensive analysis of U.S. litigation 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. For a broader interdisciplinary perspective related to the role of courts in the U.S. see S. STERRETT, *Litigating the pandemic*, Philadelphia, 2023, 158 ff.

[14] See A. GLUCK, J. HUTT, *op. cit.*, 391, «COVID-19 brought with it an initial period of judicial deference to expert leaders who curtailed individual liberties to deal with an unprecedented emergency. But later, the pandemic litigation ushered in a decline in deference that not only reversed many government actions, but also has outlasted and ties into mounting conservative opposition to the modern regulatory state. Courts grappled with deference both to state governments, and the temporary restrictions they imposed on individual liberty, and to major federal executive actions, taken under broad – but sometimes antiquated – statutory authorities».

[15] See 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.

[16] On the relevance of the distinction between emergency relief and plenary review and its impact on the judgment result see for the US, S.I. VLADEK, *Emergency relief during emergencies*, in *Boston University Law Review*, 102, 2022, 1787 ff., part. 1790 ff.

has questioned the adequacy of ordinary procedural laws to face emergency situations.

Comparative research shows that the level of deference to governments has differed between lower and high courts. In the U.S., the Supreme Court has been more deferential to the U.S. government than first instance federal courts and State Courts to State governments[17]. However, the COVID-19 case law of the US Supreme Court confirms and reinforces the path towards a less deferential attitude towards the administrative State[18].

The role of state lower Courts in the U.S. has been remarkable in reviewing restrictive measures and highlighting the different approaches between republican and democratic-run States[19].

In Europe, lower Courts' (first instance) decisions have sometimes been reformed by higher Courts, that have aligned to governmental measures to a greater extent with significant differences between Spain and Austria, on one side, and France and Italy, on the other side[20].

The areas of litigation vary significantly depending on the identity of the litigants and their objectives. At least three macro-areas of litigation can be identified: (1) litigation between private actors and public authorities, (2) litigation between public entities and (3) litigation between private parties. Litigation between private and public authorities concerns the protection of health by governments and public authorities

[17] See K. MOK, E.A. POSNER, *Constitutional Challenges to Public Health Orders in Federal Courts During the COVID-19 Pandemic*, in *Business Law Review*, 102, 2022, 1729 ff., claiming that courts showed insufficient deference to the political branches as the latter attempted to respond to the public health emergency caused by the COVID-19 pandemic. For a comparative analysis between USA and EU, distinguishing between judicial review on *facere* and *non facere* measures, see F. FABBRINI, *Covid-19, Human Rights and Judicial Review in Transatlantic Perspective*, on file with the Author as deliverable no. D6.1 (work-package 6) in the Horizon Europe project (no. 101060825) "Rebuilding Governance and Resilience out of the Pandemic" (REGROUP).

[18] See A. GLUCK, J. HUTT, *op. cit.*, 399 ff.

[19] See S. STERRETT, *op. cit.*, 165 ff.

[20] With the former generally being less deferential than the latter. See, on Austria, the chapter of E. Zeller in this book.

and the balancing between health and conflicting rights[21]. Litigation between public authorities mainly focuses on the allocation of powers, the respect of the principles of delegation to the executive, and the conflict between regulatory approaches between the federal and state level in federal states[22]. The litigation between private parties mainly concerns the contractual and family aspects, with special regard to minors. The database distinguishes judgments according to the identity of the parties and permits a comparison among the three macro-areas though to a different extent[23].

Indeed, among these areas, the COVID-19 litigation Database and the News focus on the first two and considers only marginally the area of litigation between private parties concerning contracts or property whereas more attention is devoted to extra-contractual liability. It can provide a good basis for a more comprehensive analysis that highlights the differences within COVID-19 litigation.

Within private actors suing governments, significant differences emerge between individuals and organizations. The differences between private actors and the protected interests suggest that incentives to litigate and effects of litigation vary depending on whether individuals or organizations bring the claim. Often the nature and type of the challenged act and the content of the requested remedies differ[24]. Based on applicable law, individuals are normally allowed to challenge specific administrative acts and general regulations whereas they can challenge legislation only to the extent that the latter is instrumental to their

[21] See in particular the conflict between the protection of health and that of economic activity. Courts have usually stated that the protection of health should prevail. However, they have applied the principle of proportionality to legislation and to administrative acts holding in some instances that restrictive measures were disproportionate to pursue health protection. Usually balancing by courts has not been carried through a rigorous cost-benefit analysis rather courts have used more intuitive criteria comparing the benefits of health protection and the costs of business closures. The outcomes of balancing have changes over time.

[22] The term federal states include also states with regional or sub regional entities with governmental power like Italy, Spain, Austria, Argentina, India, etc.

[23] A deeper analysis is provided in the Introduction to this book.

[24] See the identity of litigants in par. 3 of the Introduction to this book.

final result of quashing the specific act[25]. Instead, depending on applicable law, organizations may be allowed and have incentives to challenge general acts whose scope and effects are wider and pursue the review of governmental policy. Comparative analysis of judicial decisions promoted by collective entities reveals that significant differences exist between countries where organizations bring claims to quash administrative acts[26] or to seek positive action by government[27] and countries where collective redress is primarily deployed to achieve compensation for liability or restitution[28].

[25] See the analysis developed by M. Accetto on Slovenian judicial review in this book.

[26] See, e.g., in the USA, United States Court of Appeals for the Eighth Circuit, 16 May 2022, *Arc of Iowa et al. vs. Kimberly Reinolds et al.*, available at *https://www.covid19litigation.org/case-index/united-states-america-united-states-court-appeals-eighth-circuit-arc-iowa-et-al-vs*, concerning the claim brought by an advocacy organization supporting people with intellectual and developmental disabilities and seeking a declaration that the Defendants' enforcement of Iowa Code Section 280.31, which allowed schools to operate without use of face masks for protection against Covid-19, violated the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (RA) by preventing schools from providing reasonable accommodations to ensure their children could access the school buildings for in-person learning.

[27] See, e.g., in South Africa, High Court of South Africa (Gauteng Division, Pretoria), 17 August 2023, Case No. 10009/22, available at *https://www.covid19litigation.org/case-index/south-africa-high-court-south-africa-gauteng-division-pretoria-case-no-1000922-2023-08*, a collective NGO submits a request to two public bodies for the disclosure of the content of vaccine procurement contracts negotiated during the pandemic.

[28] An interesting stream of litigation is the one developed in Spain concerning healthcare personnel's claims for damages suffered during the first wave of the pandemic due to lack of protection devices. The Spanish Supreme Court has recently confirmed the lower court's rejection of this claim, whereas earlier courts' decisions had upheld similar claims. See the news in our News Page (*https://www.covid19litigation.org/news/2023/07/spain-supreme-court-denies-compensation-valencian-doctors-lack-medical-supplies-during*).

Some Courts have evaluated the existence of State liability depending on whether the measures were aimed at protecting only the public or also individuals[29].

The judicial decisions differ across jurisdictions. The comparative analysis shows that in some jurisdictions Courts have ordered the administrations to adopt specific actions especially aimed at protecting fundamental rights, whereas, in other jurisdictions, they have simply quashed the measures, leaving to the discretionary power of the administration the task of identifying the content of the new measure[30]. The exercise of courts' power to order administrations what needs to be done has been more frequent in COVID-19 litigation because it is aimed at protecting fundamental rights in times of emergency.

In some countries, the final decisions related to the measures were left to private actors, based on the criteria defined by the administration consistently with the legislative delegation. For example, in some countries private schools and universities were enabled by governments to

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[29] See Austrian Supreme Court, 15 May 2023, 1Ob199/22d (here the News on our News page: *https://www.covid19litigation.org/news/2023/06/austria-state-cannot-be-held-responsible-covid-19-spread-ischgl-supreme-court-states*).

[30] See for example, for Colombia, Council of State, 30 September 2020, in which the Court ordered to the Ministry of Education to deliver teaching materials directly to the claimant's home without charge, in order to ensure continuity in education while being unable to provide adequate access to online teaching through internet connection.

See, for India, *Archana Ajeesh v. Principal Secretary*, Local Self Government, WPC 17105/2021. High Court of Kerala at Ernakulam, 24 August 2021, where in very similar circumstances to the ones described above, the Court leaves to the respondent the task to define the measures to ensure that the petitioners are not sidelined by the digital divide and they are also able to pursue education like other children who have access to internet facilities.

See also Colombia, Constitutional Court, 3 February 2022, SU 032/2022; India, Supreme Court of India, 29 November 2021, No. 4/2020; Supreme Court of India, 26 August 2021, SMW-C-No. 4/2020; High Court of Delhi, 4 May 2022, W.P.(C) 5927/2021 & CM APPL. 18696/2021; Slovenia, Constitutional Court of the Republic of Slovenia, 16 September 2021, Decision No. U-I-8/21; South Africa, High Court of South Africa (Gauteng Division, Pretoria), 17 August 2023, Case No. 10009/22, *https://www.covid19litigation.org/case-index/south-africa-high-court-south-africa-gauteng-division-pretoria-case-no-1000922-2023-08*, ordering to the South African State the disclosure of vaccine procurement contracts.

decide when and for how long teaching should be performed on line; in other countries, instead, the government directly determined the conditions concerning on line teaching without leaving any discretion to the schools and universities[31]. The differences stem from the regulatory approaches and are reflected in the intensity of judicial review.

The Courts have faced new problems posed by the combined aspects of emergency and uncertainty. They include procedural and substantive challenges[32]. Emergency, either formally introduced by statute or even not explicitly declared, has resulted in a redistribution of powers and translated into limitations of fundamental rights in the interest of the community and the State that would not have been constitutionally permissible in ordinary times. The power shift towards the executive has increased Courts' responsibility to ensure that the respect of rule of law's principle in emergency times[33]. Hence not only have Courts warranted the protection of collective health, but they have also balanced the concentration of power in the hands of the executives with the need to ensure fundamental rights protection. Constitutional jurisprudences have developed a sophisticated set of theories concerning when and how fundamental rights can be limited by governmental measures in time of emergency as supposed in ordinary times[34].

This development has been more remarkable in Europe than in other continents where, nonetheless, human rights have played a significant

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[31] Based on an OECD/UNESCO/World Bank Survey on COVID (2021), during the first period of school re-openings, less than half of the students came back to school in Chile, Colombia, the Czech Republic, Denmark, UK, Lithuania, the Slovak Republic, Slovenia and Spain, and in only two countries, the decision was made at schools/district/most local levels of governance at their own discretion. See OECD, *The State of School Education. One Year into the COVID Pandemic*, p. 14, available at *https://doi.org/10.1787/201dde84-en*.

[32] Scientific uncertainty and the uncertainty about the effects of restrictive measures clearly represents a feature that distinguishes the SARS-CoV-2 previous health crises or other types of crises like the financial crises and the crisis associated with terrorism.

[33] On the rule of law and pandemic see J. GROGAN, J. BEQUIRAJ, *The rule of law as the perimeter of legitimacy for COVID-19 responses*, in J. GROGAN, A. DONALDS (eds.), *op. cit.*, 201 ff.

[34] See, for Spain, Constitutional Court, 27 October 2021, No.183/2021 (*https://www.covid19litigation.org/case-index/spain-constitutional-court-no-1832021-2021-10-27*).

role. In the European context the distinction between the essence or core and other dimensions of a fundamental right has been redefined to determine the extent of permitted limitations of fundamental rights during emergency[35].

The limitation of fundamental rights by governmental intervention is usually subject to a stricter judicial test than the ordinary limits of governmental power[36]. The scrutiny has focused on the limits of delegation and its scope, ensuring that governments adopted measures that effectively addressed the pandemic without misusing their delegated powers by pursuing different purposes.

Courts have reviewed administrative action in condition of uncertainty related to both the causes and consequences of the restrictive measures. The level of uncertainty related to the consequences of the measures may affect the balancing of conflicting interests carried by the administrations; identical or similar restrictive measures, held legitimate in conditions of high uncertainty, have been subsequently quashed by courts when new evidence showed that alternative measures could be more consistent with proportionality[37]. This comparative assessment

[35] On the case law of the European Court of Human Rights and of the European Court of Justice, see the contributions of L. Medina and B. Zalar in this book. See also K. LENAERTS, *Limits on Limitations: The Essence of Fundamental Rights in the EU*, in *German Law Journal*, 20, 2019, 779-793; T. TRIDIMAS, G. GENTILE, *The Essence of Rights: An Unreliable Boundary?*, in *German Law Journal*, 20, 2019, 794-816, *https://doi.org/10.1017/glj.2019.63*.

[36] For example, the standard in the US defined by *Jacobson v. Massachusetts* 197 U.S. 11, 12-13 (1905) goes beyond rational basis. The US Supreme Court stated in Jacobson: «[T]he police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression».

[37] One of the problems with conventional proportionality analysis has been the identification of alternative measures and their comparability. Often knowledge concerning the existence or the effects of alternative measures was not available. However, *ex post*, when the effects of the measure could be analyzed, courts have imposed administrations to consider the effects and internalize them in the proportionality test. For example, the reduction of contagion determined by school closures has been used by courts to evaluate closures in the fall of 2020 when the pandemic increased again or when variants developed. See, for Austria, Federal Constitutional Court, 29 September

has typically concerned the alternative between total closures or limiting access (religious events) or, in education, between total closures of schools or the redefinition of spaces for class-rooms and other activities, or between in person and distance teaching.

Protecting rights when there is uncertainty over the causes and consequences of violations requires a different approach from protection where there is certainty. The test of proportionality and reasonableness is influenced by the uncertainty related to the effects of the measure. Not only have Courts checked the initial appropriateness of measures but also their effectiveness over time when, for example, a measure did not deliver the expected results or produced unexpected negative consequences. This is certainly a significant feature of judicial review during emergency, uncommon in ordinary times.

The collected data in the COVID-19 database suggest that institutional dynamics in times of emergency differ from those in ordinary times and that Courts gain relevance as custodians of fundamental rights when the distribution of powers is redefined to ensure prompt and effective answers to the spread of pandemic[38].

2. Linking regulatory approaches to judicial review

Regulatory approaches to contrast SARS-CoV-2 have differed across countries. The alternative between suppression and mitigation has characterized the choice between the main regulatory options concerning preventive measures[39]. The North American and European strategies have been characterized by mitigation, with significant dif-

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2021, V155/2021-8; for France, Council of State, 8 December 2020, Ordonnance n°446715, *https://www.covid19litigation.org/case-index/france-council-state-ordonnance-ndeg446715-2020-12-08*, on closure of all activities in traditional restaurants and drinking establishments; here the judge has applied a proportionality check, assessing the necessity of the measures and their strict proportionality with regard to the objective of protecting public health, in particular by considering less restrictive alternatives.

[38] This conclusion matches with the analysis concerning the role of courts in other emergencies like those created by international terrorism. See F. FABBRINI, *op. cit.*

[39] See J.D. SACHS et al., *op. cit.*, 1238 ff.

ferences both within the US and Europe. In contrast, the western pacific region has endorsed a suppression strategy (China and South Korea)[40].

The comparative analysis of the case law reveals that differences across countries are significant within and between continents[41]. They partly reflect the role played by courts in constitutional and administrative review in ordinary times, but partly reflect the differences in regulatory approaches to contrast the pandemic[42]. A significant factor, that explains some distinctions in judicial approaches, is the difference among governmental strategies, whether interventionist or relatively passive, leaving to individuals and to communities the choices about prevention[43].

The differences in regulatory approaches to contrast the pandemic depend on both institutional and factual conditions. Of particular relevance have been (1) the pre-existing institutional conditions, (2) the degree of preparedness of the health care systems, (3) the introduction of a state of emergency legislation and its consequences on the allocation of powers[44], (4) the impact of the spreading of contagion, its speed

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[40] See J.D. SACHS et al., *op. cit.*, 1238 ff., where the comparison between western pacific and other areas shows the effects of the suppression and the mitigation strategy in terms of mortality rates.

[41] See P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit. See also, our elaboration in the Introductory chapter to this book.

[42] See C. COGLIANESE, N.A. MAHBOUBI, *Administrative Law in a Time of Crisis: Comparing National Responses to Covid-19*, in *Administrative Law Review*, 73, 2021, 3; F. CAFAGGI, P. IAMICELI, *Uncertainty, Administrative Decision-Making and Judicial Review: The Courts' Perspectives*, in *European Journal of Risk Regulation*, 2021, 1-33, doi:10.1017/err.2021.47; S. JASANOFF, S. HILGARTNER, *A stress test for politics. A comparative perspective on policy responses to Covid-19*, in J. GROGAN, A. DONALDS (eds.), *op. cit.*, 289 ff.

[43] See for example the Indian Supreme Court that can intervene *suo motu* or through public interest litigation. It should however be mentioned that often the Supreme Court recommends solutions rather than imposing them. See G. MANIMUTHU, T. SEBASTIAN, K.R. RAJASATHYA, *Response of higher judiciary to covid-19 disruptions in India*, in this book, referring to Supreme Court, 5 May 2021, *Union of India v. Rakesh Malhotra & anr*, SLP (C) No. 11622/2021.

[44] See M. DIEZ CREGO, S. KOTANIDIS, *States of Emergency in Response to the Coronavirus Crisis: Normative Response and Parliamentary Oversight in EU Member*

and severity, (5) the ability of institutions to persuade communities of the necessity to comply with both the restrictive measures and vaccination, and the level of trust generated by the authorities[45].

Different regulatory approaches have resulted (1) in the adoption of various instruments and measures: prohibitory, requiring the adoption of precautions, or purely persuasive, or a combination of them; (2) in the diverse level of strictness of hard law measures (curfews, lockdowns, closures, stay-at-home, quarantines); (3) as regards closures, in the distinction between economic and non-economic activities and, in relation to the former, in the distinction between essential and non-essential economic activities; (4) in the different degrees of private actors' involvement in regulatory and enforcement mechanisms; (5) in the diversity of compliance monitoring systems, especially related to contact tracing with various degrees of private actors' involvement; (6) in the choice between administrative and criminal sanctions for violations or a combination of them; (7) in the different practices of enforcement.

The regulatory approaches have changed over time to reflect the nature of the emergency correlated to the capacity of health care systems to react and manage the peaks. The evolution of litigation has usually followed that of the pandemic and the measures taken by governments over time[46]. Hence streams of litigation have not occurred simultaneously in all countries affected by the pandemic, but according to the specific stage of the pandemic in each country[47].

States during the First Wave of the Pandemic, in *European Parliament Research Service*, December 2020.

[45] The collaboration of individuals and communities is necessary to ensure the effectiveness of policies. Individual and collective collaborative behaviour has not directly been subject to judicial control but may affect how courts evaluate the context within which the proportionality and effectiveness of a measure are scrutinised.

The Lancet Commission has listed a number of actions comprised within prosocial behaviour (see J.D. SACHS et al., *op. cit.*, 1230).

[46] See I. BAR-SIMAN-TOV, I. COHEN, C. KOTH, *Covid-19 Litigation in Israel*, in *The Journal of the Global Pandemic Network*, 2021, 271-278; B. FAVARQUE-COSSON, *How did French administrative judges handle Covid-19*, in E. HONDIUS et al., *Coronavirus and the Law in Europe*, Cambridge, 2021, 88 ff.

[47] See C. COGLIANESE, N.A. MAHBOUBI, *op. cit.*

The examples of UK and Brazil suggest that various, at times opposite, strategies have been deployed, combining soft restrictive policies with compulsory vaccination in Brazil[48] or no measures to achieve herd immunity with restrictive measures including lockdowns in the UK[49]. A comparative analysis should therefore focus not only on synchronic but also on diachronic regulatory differences and how countries have modified the approach according to the results of the adopted strategies and the evolution of the pandemic[50]. Differences among countries persist even in the exit strategies and on the combination between vaccination and protective measures after the declaration of the end of the pandemic[51].

In such a diversified regulatory environment, international regulatory cooperation has proven difficult and coordination among countries has been limited to regulate the circulation of people and goods and,

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[48] See S. FASSIAUX, *Vaccination litigation and impact of government measures on fundamental rights*, University of Trento, 2023, Covid-19 Litigation Legal Briefs Series, available at *https://dx.doi.org/10.15168/11572_37108* and *https://www.Covid-19 litigation.org/resources*. See compendium, Brazil.

[49] See J. GROGAN, *(Un)Governing the COVID-19 Response in the UK*, in J. GROGAN, A. DONALDS (eds.), *op. cit.*, 60 ff.

[50] Changes in regulatory strategies have occurred both in relation to both restrictive measures and to vaccination. The more radical changes relate to restrictive measures. In relation to vaccination, mandates have been introduced for specific professional categories and in particular health care professionals and school and university teachers. These obligations were stated in legislations and enforced by courts. Usually these mandates have been rather general without distinguishing between the different subcategories. For an examination of the constitutionality of this legislative technique see the Italian Constitutional Court, no. 185/2023.

[51] See WHO, *From emergency response to long-term COVID-19 disease management*, cit., 49: «As of May 2023, COVID-19 vaccination had been implemented in nearly every country in the world, and over 13 billion doses had been administered. Sixty-six per cent of the global population had completed the primary series and 23% in low-income countries. This has been the fastest and the most complex global vaccine campaign in history. An estimated 19.8 million deaths were averted in 2021 alone. However, coverage of high-priority groups is still too low in some countries. While 89% of health care workers in 139 reporting countries have completed primary series, this figure is only 52% in low-income countries (LICs). Similarly, while 83% of older populations in 156 reporting countries have completed primary series, this is only 34% in LICs».

only to a limited extent, to the production and access to vaccines[52]. International regulatory cooperation should promote institutional learning. It should focus on common indicators to monitor the emergence and the evolution of the pandemic, and the effectiveness of the restrictive measures. Given that the development of the pandemic has not occurred at the same time in every country, institutional learning was extremely important to avoid mistakes previously made by other countries[53]. Judicial cooperation should also be promoted to share knowledge about the solutions determined by Courts when exercising judicial review of governmental measures.

Regulatory differences have had an impact on the content of judicial review and have influenced its scope and intensity.

The data show that the content of litigation has changed over time, playing a different role depending on the impact of the pandemic and its evolution in each country[54].

Monitoring the measures' effectiveness was usually entrusted to the government but private actors have also been involved in the monitor-

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[52] J.D. SACHS et al., *op. cit.*, 1238: «National governments have failed to perceive, or to articulate, the core logic of a weakest-link game: to successfully control the transmission of the virus, each country is dependent upon the actions of other countries, so a cooperative approach is necessary to achieve the desired outcome. Instead, national governments generally took actions on their own with disregard for any effects on, or from, other countries».

[53] For a discussion of the weakest link game as an obstacle for international regulatory cooperation see J.D. SACHS et al., *op. cit.*, 1230, indicating what global cooperation should focus upon: «Global cooperation should include standardisation of evidence based public health and social measures to suppress viral transmission and to address other dimensions of the pandemic response, including disease surveillance with genomic monitoring for new variants, the sharing of epidemiological and genomic data, early warnings of outbreaks, and the pooling of resources to ensure universal and affordable access to drugs and vaccines».

[54] See P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit.

For a comparative analysis of US and EU judicial decisions see F. FABBRINI, *op. cit.* With a dataset based on the COVID-19 database Fabbrini shows that in the area of freedom of religion and freedom of movement Courts have initially been deferential and subsequently struck down closures on the basis of proportionality or functional equivalent principles.

ing process and asked to check compliance with green passes or vaccination status. For example, employers have been burdened with control duties over employees and have been given the power to adopt precautionary measures in case of their failure to comply[55]. These measures did not have sanctioning nature but were aimed at preventing the spreading of contagion. In some countries the control over the compliance with vaccination mandates or alternative measures (e.g., Green pass) was left to private actors like professional associations. The involvement of private actors in monitoring compliance has been significant and the features of delegation to them have been debated.

Significant differences concerning the scope and intensity of vaccine mandates have characterized the scrutiny in the US, in Latin America, and in Europe where different judicial approaches have been remarkable[56]. Technology has played an important role for monitoring the spread of contagion and the transmission of the virus[57]. The limits of the use of technology grounded on data protection laws have differed leading to different governmental policies concerning tracing and testing tested by Courts[58].

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[55] For example, employers in the health care sectors in Italy have been charged to check whether employees had vaccinated and in case of non-compliance to suspend them from the job and from the payment of salary. The law required vaccination for both professionals that have direct contacts with the public and those who perform administrative work. The Italian Constitutional Court has stated that the legislative mandate for health care vaccination was partly justified by the necessity for private parties to monitor compliance with the obligations. See the Italian Constitutional Court judgments no. 185/2023 and no. 186/2023.

[56] See S. FASSIAUX, *op. cit.*

[57] See J.D. SACHS et al., *op. cit.*

[58] Cf. Supreme Court of Israel sitting as High Court of Justice, 1 March 2021, HCJ 6732/20, *https://www.covid19litigation.org/case-index/israel-supreme-court-israel-sitting-high-court-justice-hcj-673220-2021-03-01*, where the court decided that the ISA surveillance violated the right to privacy, being disproportionate and unreasonable to use the tool without adopting measurable criteria to determine the scope of the use of the ISA tool and ensuring that this will be only used as a complementary tool; Court of Justice of the European Union, President of the General Court, 30 November 2021, T-710/21 R, *https://www.covid19litigation.org/case-index/supranational-court-justice-european-union-president-general-court-t-71021-r-2021-11-30*, upholding the decision to impose the display of the EU digital COVID certificate for anyone accessing the Par-

3. The scope and the intensity of judicial review

Courts have scrutinised both the choice and the content of measures. However, they have been more deferential to the choice of instrument (hard or soft law) than to its content (stricter or laxer measures). In theory the use of soft law has reduced but not eliminated the Courts' oversight[59].

Not only judicial decision making has been backward but also forward looking. Some Constitutional or Supreme Courts exercising constitutional review have also provided guidance to the administration for future decisions, defining principled frameworks within which the administrative decision-making power should be exercised[60]. In these cases, a true constitutional jurisprudence of emergency has emerged, and it will constitute the starting point for the future should similar events occur[61]. Recently higher Courts have also provided lower courts with

liament's premises (in Brussels, Strasbourg, and Luxembourg) since claimants did not demonstrate that their fundamental right to data protection was affected; Slovenian Constitutional Court, 14 April 2022, *https://www.covid19litigation.org/news/2022/05/slovenia-government-decrees-imposing-health-passes-not-constitutional-court-holds*, declaring the decrees requiring the use of Covid passes as unconstitutional and in violation of the EU General protection regulation.

[59] However, no explicit judicial review of the governmental or legislative choice between hard and soft law can be found in the database. Given the lack of comprehensiveness, it may well be that some judgments on the matter exist. Indirectly those judgments concerning the proportionality of hard law measures have considered also the alternative of soft law measures. Whereas the importance of the alternative and complementary use of hard and soft law in health emergency is of high importance its scrutiny by courts has been very limited. One possible explanation is that the instrument's choice has been considered within the sphere of political discretion more than the content of measures.

[60] See the role of the Austrian Constitutional Court in the first period of the pandemic when many governmental acts were declared unconstitutional. Austria, however, represents an exception since a more common trend has been the increasing strictness with the availability of new scientific evidence. For an in-depth analysis, see the contribution of E. Zeller in this book.

[61] On the other hand, the specificity of emergency implies that judicial decisions related to emergency cannot have any persuasive precedential value in ordinary times.

guidance to ensure uniformity when reviewing restrictive measures[62]. The effectiveness of judicial guidelines depends on the internal consistency and ultimately on legal certainty.

The distinction concerning the scope of review lies between those systems where courts have partaken in the governance process, steering the administrations, and those systems where courts have simply limited the potential arbitrariness of governmental measures, using the principles of proportionality and reasonableness[63].

In most jurisdictions, the protection of fundamental rights is at the core of judicial review. Courts have protected not only the right to health but also those rights conflicting with measures aimed at reducing the spread of pandemic. It has stimulated a jurisprudence on the governmental duty to act and provided effective protection, especially to the vulnerable in those systems that have failed to adopt effective measures to contrast the pandemic[64]. The case law related to prisoners and the measures of protection for inmates shows that a duty to adopt precautionary measures consistent with the objective of prevention and mitigation has been enforced by Courts[65].

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[62] Guidance was also provided by the Court of Justice of the European Union to national courts. See see CJEU, 5 December 2023, C 128/22, *Nordic Info BV*, ECLI:EU: C:2023:951, para. 110: «In that regard, the Court, when giving a preliminary ruling on a reference, may give clarifications to guide the national court in its decision (see, to that effect, judgment of 5 May 2022, *Victorinox*, C-179/21, EU:C:2022:353, paragraph 49 and the case-law cited)».

[63] Some Courts like the Italian Constitutional court links the two principles. See the Italian Constitutional Court, decisions no. 14/2023 and no. 185/2023, considering that the assessment of reasonableness requires the application of a proportionality test, aimed at ascertaining that the contested measure is necessary and adequate for pursuing the given objectives and, among several adequate measures, is the least intrusive and does not impose disproportionate burden. Other courts use them alternatively. For a wider comparative analysis, see P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit.

[64] See the contribution of N. Rueda in this book.

[65] Compare for example US case law with Latin American case law related to the failure to protect inmates from contagion.

For the USA, see *Polanco v. Diaz*, Ninth Circuit Court, 7 August 2023 holding that no immunity could be granted to prison officers based on the novelty of the pandemic. Hence the suit will continue to evaluate their liability for the deaths of inmates. For

There is a clear distinction between legal systems that allow courts to take an active role to protect health, and systems that leave the choice to intervene to the political and administrative discretionary powers and limit their intervention to the scrutiny of existing measures[66].

As seen above, there are sharper differences across legal systems concerning judicial review of the 'if' (whether states should act) than of the 'how' question (which measures should be adopted)[67].

The review of both legislative and administrative measures has been based on proportionality. The principle has been used both in common and civil law jurisdictions with some differences to review governmen-

Latin America see, e.g., Costa Rica, Supreme Court of Justice, Constitutional Chamber, 4 October 2021, Resolución No. 22207 – 2021, *https://www.covid19litigation.org/case-index/costa-rica-supreme-court-justice-constitutional-chamber-resolucion-no-22207-2021-2021-10*, in which, on the one hand, the Court declared a violation of the fundamental rights to health and human dignity of the inmates and ordered the Ministry of Justice and Peace to reinstate their rights by transferring them to a proper facility, but, on the other hand, it recognized the de facto impossibility of this measure being fulfilled by public authorities, considering the general problem of prison overcrowding which was aggravated by the pandemic.

[66] These distinctions emerge, e.g., in the area of education and health. In some countries (India, Argentina, Brazil) Courts have ordered schools to redesign their spaces and to redefine the organizational models, including the special case of disable students. In other cases, Courts have simply evaluated the adequacy of governmental restrictive measures without providing the administration with specific instructions on what was needed.

Courts have been more specific when fundamental rights were violated. Not only have they quashed measures that violated the rights but have also ordered actions in case of omissions.

See for example, in Argentina, First Instance Administrative and Tax Law Judge No 2, 8 June 2020, EXP 3264/2020-0, *https://www.covid19litigation.org/case-index/argentina-first-instance-administrative-and-tax-law-judge-no-2-exp-32642020-0-2020-06-08*, where the Court orders that vulnerable students are provided with tablets and portable computers to continue their school program after in-persons classes had been suspended without any measure in place for vulnerable groups of students.

[67] See above, par. 1.

tal measures and to identify the most appropriate remedy for constitutional violations[68].

Courts have also evaluated the time duration of measures based on the proportionality principle[69]. Some restrictive measures have been held disproportionate when their duration exceeded the necessary time[70]. Compared to ordinary times the proportionality analysis has

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[68] For the use of proportionality concerning remedies for constitutional violations related to governmental measures in the USA, see Supreme Court of North Carolina, *Corum v. University of North Carolina*, 413 S.E. 2d 276 (1992), 330 N.C. 761, a landmark sovereign immunity case, stated: «When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, (…) the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government – in appearance and in fact – by seeking the least intrusive remedy available and necessary to right the wrong. 330 N.C. at 784, 413 S.E. 2d at 291». *Corum* has been the precedent for constitutional review of COVID-19 related disputes in North Carolina.

For the use of proportionality in the European Union see CJEU, 5 December 2023, cit., para. 77, where the Court has expressly stated: «The requirement of proportionality specifically requires verification that measures such as those at issue in the main proceedings, first, are appropriate for attaining the objective of general interest pursued, in this case the protection of public health, second, are limited to what is strictly necessary, in the sense that that objective could not reasonably be achieved in an equally effective manner by other means less prejudicial to the rights and freedoms guaranteed to the persons concerned, and, third, are not disproportionate to that objective, which implies, in particular, a balancing of the importance of the objective and the seriousness of the interference with those rights and freedoms (see, to that effect, judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 42 and the case-law cited)». See also paras. 94 and 95 on the application of proportionality (and reasonableness) to the distinction between essential and non-essential travel.

[69] See, in relation to Slovenia, the contribution by M. Accetto, and, in relation to Austria, the one by E. Zeller in this book.

[70] See, e.g., Switzerland, Administrative Court Canton Zürich, 6 April 2021, VB.2020.00590, *https://www.covid19litigation.org/case-index/switzerland-administrative-court-canton-zurich-vb202000590-2021-04-06*, where the extension of a ban against visit in a detention center was deemed disproportionate if alternative less restrictive measures had not been considered. On the duration of the state of emergency, see

permitted evaluating the impact of measures on fundamental rights to a greater extent.

Judicial review has focused not only on proportionality but also on effectiveness. Effectiveness of governmental measures has been at the core of the protection of fundamental rights. To justify restrictions, measures have to be effective. Some Courts have imposed governments a duty to monitor the effectiveness of measures and to modify them when it became sufficiently clear that they would not produce the expected consequences[71].

The scope of judicial review has not been limited by COVID-19 legislations. In relation to the restrictive measures, taken by governments, the role of Courts has differed from that related to vaccination given the limited number of countries that have adopted mandatory vaccination.

The differences in intensity and scope of judicial review are also related to the structure of welfare states that affect the incentives to litigate. When States have subsidized enterprises and individuals to compensate the losses stemming from closures and lockdowns the incentives to litigate against restrictive measures with economic impact were reduced. Clearly the effects of restrictive measures change if there is a strong health care system that protects individuals or a weak system that cannot provide universal care.

4. Judicial decision making under uncertainty and the provision of scientific evidence

The relevance of scientists, in the case of pandemic that of medical doctors and health care professionals, has increased compared to the previous pandemics and other health crises, but their participation in the definition of measures has varied across countries. Their advisory role often allows to shield them from any liability, that rests, instead, on those who decide the adoption or not-adoption of (advised or not advised) restrictive measures.

Spain, Constitutional Court, 27 October 2021, No.183/2021, *https://www.covid19litigation.org/case-index/spain-constitutional-court-no-1832021-2021-10-27*.

[71] See the final considerations of Judge M. Accetto in his contribution to this book.

Administrative and constitutional review have ensured the application of the principle of legality and, to the extent compatible with emergency, of legal certainty. The challenge of legality violations in the context of scientific uncertainty has received significant attention by Courts. Constitutional courts have been directly involved in litigation, especially when individual petitions are permitted (Germany, Austria, Slovenia, Colombia, Ecuador, Mexico, Costa Rica and others).

The COVID-19 litigation is the widest laboratory to evaluate how uncertainty related to the effects of measures has influenced both legislative and administrative decision-making and how Courts have incorporated uncertainty in their review.

The relevance of judicial oversight in the crisis management related to SARS-CoV-2 is clear. Not only have Courts contributed to the appropriate balance between individual and collective right to health and with other fundamental rights, but they have also monitored the relationship between governmental measures and scientific evidence, ensuring their solid and possibly shared scientific grounds. The scientific grounds of measures impact on the trust of their addressees and on the level of compliance.

Courts' oversight has reduced the degree of legislative and administrative arbitrariness in the adoption of precautionary measures by requiring an evidence-based approach to contrast pandemic when adopting restrictive measures[72].

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[72] See CJEU, C-128/22, cit., paras. 79-80, on the relevance of uncertainty for the application of the precautionary principle: «It is also apparent from the Court's case-law 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. In particular, Member States must be able to take any measure capable of reducing, as far as possible, a health risk (see, to that effect, judgments of 1 March 2018, *CMVRO*, C-297/16, EU:C:2018:141, paragraph 65 and the case-law cited, and of 19 November 2020, *B S and C A (Marketing of cannabidiol (CBD))*, C-663/18, EU:C:2020:938, paragraph 90). Furthermore, 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

This approach has followed the scientific evolution of COVID and the impact of measures over the spread of contagion[73]. Hence, the requirements to support the governmental choices with scientific evidence have become stricter with the increase of knowledge about the causes and the consequences of the pandemic[74]. The scientific grounds have also guided Courts when evaluating the behaviour of the addressees of the measures, citizens and organizations, and the adequacy and proportionality of the fines imposed on them[75].

It is important to distinguish between judicial scrutiny of administrative decisions based on scientific evidence and the use of scientific evidence to provide the foundations of the judicial decisions. In the former the courts scrutinize the relationship between legislative acts or administrative decisions and their scientific basis, in the latter they make di-

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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, to that effect, judgment of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraphs 54 and 55 and the case-law cited)». At the national level see, for example, the Italian Constitutional Court judgments no. 14/2023 and no. 15/2023.

[73] See in particular the contributions of M. Accetto, E. Zeller, M.B. Lokur, M. Gandhi in this book.

[74] F. CAFAGGI, P. IAMICELI, *Uncertainty, Administrative Decision-Making and Judicial Review*, cit. See for example the Indian Supreme Court, in the judgment of 2 May 2022, *Puliyel v. Union of India*, defining the scope of judicial review concerning administrative decisions based on scientific evidence. «As far as judicial review of policy decisions based on expert opinion is concerned, there is no doubt that wide latitude is provided to the executive in such matters and the Court does not have the expertise to appreciate and decide on merits of scientific issues on the basis of divergent medical opinion. However, this does not bar the Court from scrutinising whether the policy in question can be held to be beyond the pale of unreasonableness and manifest arbitrariness and to be in furtherance of the right to life of all persons, bearing in mind the material on record». This conclusion mirrors the words used by Chief Justice Roberts in the U.S.

[75] See, e.g., a recent judgment issued by a Swiss Court, that has annulled a sanction against parents previously fined for not sending their child to school because of the fear for health risks inherent to the mandatory use of masks; in this case the Court has concluded that initial scientific uncertainty about the effects of masks' use could justify parents' decision (Valais Canton Court, 14 August 2023, news available at *https://www.covid19litigation.org/news/2023/10/switzerland-no-sanctions-parents-who-kept-their-child-home-school-prevent-him-wearing*).

rect use of scientific evidence to evaluate the effectiveness of the measures, their reasonableness, and proportionality.

The judicial scrutiny of scientific evidence depends on the source, the accountability and independence of the scientific bodies in charge of providing the evidence. Scientific bodies have operated in a framework of limited knowledge and the necessity to advice governments in the context of emergency. The degree of their independence may have been influenced by media pressure and the interest groups that were affected the measures.

What relationships have been established between scientific advisory and administrative bodies at international and national level?

There are two dimensions: the vertical dimension between international and national scientific institutions and the horizontal dimension between scientific bodies and governments. During the pandemic the Strategic group of experts (SAGE) performed advisory functions to WHO, whereas the National Immunization Technical Advisory Committees (NITAGs) operated at the country level. Clearly the rules concerning scientific evidence in policy making reflect the different national regulatory approaches. For this reason, NITAGs have been necessary to adapt locally the guidance provided by SAGE. The relationship between scientific and administrative bodies is affected by the level of communities' trust in the scientific expertise and in political decision making. In some cases, the decision making has remained in the hands of political actors, in other cases a significant delegation to advisory bodies with scientific expertise has occurred.

A difficult balance between independence and accountability of scientific bodies had to be assured. Courts have shielded scientific advisors from political interferences but, at the same time, they have ensured that scientific advice would not replace administrative decision making. Conflicts between scientific and political bodies have emerged and courts have taken different views[76].

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[76] The authorities of CDC in the US has been successfully challenged before the Supreme Court in *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S.Ct. 2320 (2021). On the divergences between the Biden administration and the U.S. Supreme Court related to the regulatory power of CDC see A. GLUCK, J. HUTT, *op. cit.*, 399-400.

Trust of communities on scientific evidence depends on the perceived independence of scientific advisory bodies from policy decision-makers. But the status and the level of independence of scientific bodies with a role in the management of the pandemic varies according to their functions. It is important to clarify that preventive measures were usually recommended by the centres for disease control and prevention (CDC), usually under the control of the executive or acting within the boundaries of legislation, whereas the vaccines were tested and approved by independent administrative agencies[77]. Hence the degree of independence of scientific advisory bodies has not been the same for the various measures and stages of the pandemic.

The adequacy of scientific evidence concerning restrictive measures has been evaluated by European and some Latin American Courts on the basis of the principle of precaution and its relationship with proportionality[78]. Effectiveness and proportionality have been key principles in the judicial review of the use of scientific evidence. Governments have been asked by Courts to verify the effectiveness of measures to decide their proportionality. In the U.S. reasonableness rather than proportionality has represented the key principle to evaluate the evidentiary basis of governmental measures. In other areas, like western pacific, the evidentiary basis of governmental measures has not been questioned before Courts[79].

Judicial oversight over the scientific foundations of measures has significantly contributed to ensure the trust of citizens in governmental action. Judicial scrutiny of the scientific basis has increased the level of trust and as a consequence of compliance. Clearly a difference emerges

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[77] In the U.S. the Center of disease control (CDC) and the food and drug administration (FDA). In European countries the advisory bodies for restrictive measures differed from the drug approval administrative agencies.

[78] On the relationship between the principle of precaution and proportionality see the Italian Constitutional Court, decision no. 14/2023. For a wider analysis on the relationship between the two principles, see P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit.

[79] See also the contribution of D. Chalmers in this book, observing that some North East Asian courts did not engage in balancing fundamental rights affected by anti-pandemic measures as they stated they were unable to calculate the relevant risk to the individual.

between measures over which scientific consensus exists and measures whose positive and negative effects are disputed in the scientific community. Often Courts have had to consider the relevance of dissenting views in the scientific communities and the degree of uncertainty that divergences produce in administrative decision making.

Uncertainty related to the effects of restrictive measures differs from uncertainty concerning vaccines including their negative effects. In the former case the measures had not had any experimental stage when they were adopted, at least not in similar conditions to the ones existing during the pandemic. They were adopted according to simulations designed by mathematicians and statisticians based on the available epidemiological evidence. In relation to vaccines an accelerated procedure by national administrative agencies has permitted to obtain scientific evidence that has led the decisions concerning the targets of vaccination distinguishing between vulnerable, fragile, and the ordinary people.

The design of the measures and its implementation have lacked the insights of behavioural sciences. Especially in conditions of uncertainty behavioural sciences can provide insights on potential reactions to measures restricting freedoms to protect health[80]. Public policies should have been supported by behavioural analysis concerning the expected reactions of individuals and communities to the introduction of restrictions to individual and collective freedoms or to changes in the educational and working environment[81]. Behavioural support would also

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[80] See R. ROMANIUC et al., *COVID-19 Vaccination: Exploring the Behavioural Determinants and Interventions through a Literature Review*, Publications Office of the European Union, Luxembourg, 2023, doi:10.2760/028810, JRC133066, available at *https://publications.jrc.ec.europa.eu/repository/handle/JRC133066*.

[81] See J.D. SACHS et al., *op. cit.*, 1225: «Epidemic control was seriously hindered by substantial public opposition to routine public health and social measures, such as the wearing of properly fitting face masks and getting vaccinated. This opposition reflects a lack of social trust, low confidence in government advice, inconsistency of government advice, low health literacy, lack of sufficient behavioural-change interventions, and extensive misinformation and disinformation campaigns on social media. Public policies have also failed to draw upon the behavioural and social sciences; doing so would have led to more successful implementation of public health interventions and helped to increase social trust, prosociality, equity, and wellbeing. In many cases, policies and

have increased the trust in vaccination since conflicting views within the population have emerged in many countries.

5. Judicial innovations in times of pandemic

Emergency has triggered legal innovations. Among the most relevant judicial innovations certainly stands out the jurisprudence of constitutional and ordinary Courts on the evaluation of legislation and administrative acts expired at time of the judicial decision (so called mootness)[82]. The necessity to frequently modify the restrictive measures has led authorities to replace, revise, and modify the acts which, at time of the judicial decision, were no longer in force[83].

Many courts have proceeded on the assumption that their rulings could guide the governments should the issues arise again and have relaxed the requirement that the challenged act must be in force when the judicial decision is taken[84]. This approach is particularly useful

decision making have not been informed by robust and continuously updated evidence syntheses».

[82] See, e.g., Slovenian Constitutional Court, Decision No. U-I-83/20 of 27 August 2020 (Official Gazette RS No. 128/2020 and OdlUS XXV, 18), ECLI:SI:USRS:2020:U.I.83.20, on which extensively the contribution by M. Accetto in this book.

[83] See in the U.S. *Case v. Ivey*, Case No. 21-10191-CC, 2021 WL 3124014 *2 (M.D. Ala June 1, 2021). «On March 13, 2020, the President of the United States declared COVID-19 a national emergency. That same day, Governor Ivey issued her own proclamation declaring that a state public health emergency existed in Alabama due to the presence of COVID-19 (Doc.# 40-1.). Following Governor Ivey's initial declaration, Defendants issued a string of proclamations and orders that imposed various restrictions and offered nonbinding guidelines to combat the spread of the virus. Due to the fluidity of the pandemic, and as more information about COVID-19 came to light, the substance of Defendants' proclamations and orders evolved with the passage of time».

See Colombian judgment no. SU109/2022 (*https://www.corteconstitucional.gov.co/relatoria/2022/SU109-22.htm*), where the constitutional court has struck down a statute after expiry concerning restrictive measures of people of 70 years and above. The Constitutional Court held that the measures were conforming but disproportionate.

[84] See the differences between US and some European courts like Slovenia and Austria analyzed in this volume by M. Accetto and E. Zeller.

when the evolution of the pandemic, the level of contagion, and the emergence of variants require the adoption of different measures over short periods of time.

The decision to issue judgments even when the act is not in force shifts the function of the Courts towards a more active role in designing the principles for legislative and administrative decision making and determining the measures' effectiveness over time. The institutional dialogue between administrations and courts has been fostered in those countries where the judiciaries have decided to evaluate the conformity of acts after they were not any longer in force. Less relevant the dialogue has been when Courts have declared inadmissible the complaint when the challenged act was no longer in force.

Courts have shown the ability to deal with emergency by using conventional procedural instruments in creative and innovative manners. For example, they have defined the effects of judgments limiting the retroactivity of annulments to avoid both disruptive effects on the administration and increasing its liability costs[85]. Another area of procedural innovation has been that of interim measures and the use of emergency procedures[86].

Courts have also changed their internal organizations to ensure prompt and effective responses to the challenges they received. In some instances, like France, the Council of State created a special taskforce to address COVID-19 cases. In other cases, like that of Colombia, the Constitutional Court dedicated an entire session to evaluate the consti-

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[85] See M. Accetto describing the approach of the Slovenian Constitutional Court.

[86] F. CAFAGGI, P. IAMICELI, *Uncertainty, Administrative Decision-Making and Judicial Review*. For the U.S. see A. GLUCK, J. HUTT, *op. cit.*, 393 («Almost none of the Court's major COVID-19 cases arrived on the ordinary procedural path, in which cases typically take years to be fully litigated in the lower courts before they arrive for Supreme Court review. Instead, the COVID-19 era also marked the ascendance of the so-called "shadow docket", through which the Court gives expedited review to an issue that is presented not on the merits, but as an application for emergency relief (often after an injunction is issued by a lower court). Unlike a typical Supreme Court case, cases presented via the shadow docket usually do not have full merits briefing, oral arguments, or a final decision from the courts below. Decisions are often issued without a signed opinion»).

tutionality of the governmental measures that did not benefit from the parliamentary control.

6. A comparative analysis of the principles applied by national Courts

Courts have never substituted the executive in case of governmental nonfeasance or misfeasance but have contributed to interpret the balancing criteria and imposed continuous monitoring duties on governmental entities about the restrictive measures[87].

Judicial oversight has correlated the use of the precautionary principle or its functional equivalents with that of proportionality and changed the balancing analysis over time according to the availability of scientific evidence[88]. Initially the limited knowledge of the pandemic's causes and consequences has justified the adoption of strict measures. Subsequently, when more scientific knowledge of the causes and the consequences of the pandemic became available, the limitations of fundamental rights, like the right to education or the right to engage

[87] See, for Colombia, Constitutional Court, Auto 2365, 3 October 2023, ordering the Mayor's Office of Bogotá, through the District Health Secretariat, to set up health brigades in all temporary detention centres in the district, as a measure to protect the rights of people in preventive detention (see, in our News Page at *https://www.covid19litigation.org/news/2023/10/colombia-constitutional-courts-interlocutory-decision-address-unconstitutional*).

For Slovenia, Constitutional Court of the Republic of Slovenia, 16 September 2021, Decision No. U-I-8/21, *https://www.covid19litigation.org/case-index/slovenia-constitutional-court-republic-slovenia-decision-no-u-i-821-2021-09-16*, holding the unconstitutionality of a statutory regulation authorizing the Minister of Education to order the performance of educational work at a distance in different educational institutions and ordering that the National Assembly should remedy the established inconsistency within two months.

[88] This correlation is particularly relevant in Europe, less relevant in other continents where the precautionary principle is not applied or plays a different role. See K. MEßERSCHMIDT, *Covid-19 legislation in the light of the precautionary principle*, in *Theory and practice of legislation*, 8, 2020, *https://doi.org/10.1080/20508840.2020.1783627*.

in business activities, have been subject to more intense scrutiny[89]. Clearly a different approach to judicial review has been used when restrictive measures had an impact on economic interests or on non-economic interests, like freedom of speech and freedom of religion or the right to education[90].

Mandatory vaccination is usually imposed by legislation. However, in some countries also the executive can impose mandatory vaccination[91].

In some countries vaccination imposed on some categories by the law has been judicially extended to other professional categories[92]. The

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[89] See F. CAFAGGI, P. IAMICELI, *Uncertainty, Administrative Decision-Making and Judicial Review*, cit.; with reference to national jurisprudence: for Belgium, P. POPELIER et al., *Health Crisis Measures and Standards for Fair DecisionMaking: A Normative and Empirical-Based Account of the Interplay Between Science, Politics and Courts*, in *European Journal of Risk Regulation*, 2021, *https://doi.org/10.1017/err.2021.7*; for Israel, I. BAR-SIMAN-TOV, I. COHEN, C. KOTH, *op. cit.*; for France, B. FAVARQUE-COSSON, *op. cit.*

[90] P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit.

[91] See in USA, 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*, concluding that the mandate's «promulgation grossly exceeded OSHA's statutory authority» because the COVID-19 virus was «beyond the purview» of what OSHA is permitted to regulate via Emergency Temporary Standards given that OSHA could not make the required «findings of exposure – or at least the presence of COVID-19 – in all covered workplaces». Id. at 612-13; and U.S. District Court for the Western District of Louisiana, Monroe Division, 30 November 2021, No. 3:21-CV-03970, *https://www.covid19litigation.org/case-index/united-states-america-us-district-court-western-district-louisiana-monroe-division-no*, issuing a preliminary injunction from a vaccination mandate adopted by the Secretary of Health and Human Services and of the Administrator of the Center for Medicare and Medicaid Services ("CMS"), since the defendants did not have the statutory or constitutional authority to implement such mandate.

See also, USA Supreme Court, 13 January 2022 (on our News Page at *https://www.covid19litigation.org/news/2022/02/usa-federal-court-biden-administrations-vaccine-mandate-federal-workers*), holding that, while the President certainly possesses «broad statutory authority to regulate executive branch employment policies […] a COVID-19 vaccine mandate is not an employment regulation. And that means the President was without statutory authority to issue the federal-worker mandate».

scope of mandates has been defined in light of the contagion rate and the emergency context, as reflected in judicial review[93].

Vaccination has influenced both the content and the scope of litigation. Governmental mandates have been extensively scrutinized by courts with different outcomes in Europe, U.S., Latin America, Australia, and India[94]. The principle of proportionality and reasonableness have been deployed to scrutinize the legislative provisions[95]. Even though in the U.S. one important decision has struck down a mandate, the differences with European and Latin American courts are not striking[96].

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[92] See for example in India where the High Court of Kerala at Ernakulam has extended the mandatory vaccination to lawyers. See WP(C) NO. 11312 OF 2021 August 4th 2021.

[93] See, e.g., in Italy, Constitutional Court, 9 October 2023 (*https://www.covid19litigation.org/news/2023/11/italy-constitutional-court-upholds-vaccine-mandate-health-facility-workers-rejects*), holding that the vaccine mandate established for people working in health facilities is reasonable, regardless of the employees' activities and working arrangements and that the legislative inclusive approach was justified in light of the emergency conditions and the costs and (un)feasibility of control over the specific activities of health care professionals: an automatic and undifferentiated system exonerated the public employer from exercising a burdensome and inappropriate individual control that would have taken resources away from the health emergency.

[94] See Italian Constitutional Court no. 14/2023, 15/2023; Austria, Constitutional Court, 23 June 2022, no. G 37/2022-22; Costa Rica, Supreme Court, 12 November 2021, n°25499; and on COVID-19 passes: France, Constitutional Council, 5 August 2021, n°2021-824 DC; Austria, Constitutional Court, 29 April 2022, no. V 23/2022-25; Czech Republic, Supreme Administrative Court, 2 February 2022, n°8 Ao 2/2022; Argentina, Supreme Court of Buenos Aires, 28 December 2021, n°RR-1064-2021; Canada, Supreme Court of British Colombia, 12 September 2022, n°2022 BCSC 1606.

See, more broadly, S. FASSIAUX, *op. cit.*

[95] See, e.g., Italian Constitutional Court, no. 14 and 15/2023. On the use of reasonableness, see for example *South Australia Employment Tribunal, Teague & Ors v Department for Health and Wellbeing* [2023] SAET 80 (11 September 2023), on our News Page (*https://www.covid19litigation.org/news/2023/10/australia-court-validates-vaccine-mandate-established-public-health-workers*). On the relationship between reasonableness and proportionality, see P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit.

[96] See footnote 91 above; more broadly, S. FASSIAUX, *op. cit.*

Vaccination has brought the focus on the conflict between individual self-determination and collective health protection[97].

Courts have been forced to rethink the rationales of mandatory vaccination deployed in the past[98]. The restrictions imposed upon unvaccinated individuals have been subject to proportionality analysis highlighting the necessity to consider the evolution of scientific evidence over the effects of vaccines[99]. The principle of proportionality has been applied in light of scientific evidence also to strike a balance between

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[97] See the Indian Supreme Court 2 May 2022, *Puliyel v. Union of India*, concluding that the right to bodily integrity and personal autonomy may be limited subject to the threefold requirement of (i)legality, which presupposes the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality, which ensures a rational nexus between the objects and the means adopted to achieve them. See also Italian Constitutional Court, no 14/2023.

[98] See for example the European Court of Human Rights, 8 April 2021, *Vavřička and Others*.

[99] See for example Indian Supreme Court 2 May 2022, *Puliyel v. Union of India*, cit. («no data has been placed by the Union of India or the States appearing before us, controverting the material placed by the Petitioner in the form of emerging scientific opinion which appears to indicate that the risk of transmission of the virus from unvaccinated individuals is almost on par with that from vaccinated persons. In light of this, restrictions on unvaccinated individuals imposed through various vaccine mandates by State Governments / Union Territories cannot be said to be proportionate. Till the infection rate remains low and any new development or research finding emerges which provides due justification to impose reasonable and proportionate restrictions on the rights of unvaccinated individuals, we suggest that all authorities in this country, including private organizations and educational institutions, review the relevant orders and instructions imposing restrictions on unvaccinated individuals in terms of access to public places, services and resources, if not already recalled. It is clarified that in the context of the rapidly evolving situation presented by the COVID-19 pandemic, our suggestion to review the vaccine mandates imposed by States / Union Territories, is limited to the present situation alone and is not to be construed as interfering with the lawful exercise of power by the executive to take suitable measures for prevention of infection and transmission of the virus. Our suggestion also does not extend to any other directions requiring maintenance of COVID-appropriate behaviour issued by the Union or the State Governments»).

public health and the right to work of unvaccinated, when subject to restrictions, including suspension from work and salary[100].

Vaccination has generated the end of many restrictive measures and a radical change in the regulatory approach concerning prevention. In countries with high rate of vaccination restrictive hard measures have been ended, whereas soft measures and recommendations have been kept. This is particularly relevant for those countries that adopted mitigation but less significant for those that adopted suppression.

Vaccination represents the clearest example of how scientific evolution has affected regulatory strategies and choices. Not only litigation has shifted from the contrast to restrictive measures to the alternative between mandatory and voluntary vaccination and the consequences stemming from the failure to vaccinate[101]. But it has also changed with the availability of new scientific evidence concerning the impact of the vaccination and its effectiveness.

7. Liability and immunity of governmental entities for COVID-19 related measures

The latest stream of litigation concerns primarily immunity, liability, and compensation. The scope of immunity and liability defines not only the distribution of the negative economic consequences of governmen-

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[100] This was the case in Italy, where the Constitutional Court declared this regime conforming to constitutional principles: see decisions no. 14 and 15/2023, cit. See also, for a more recent application, Italian Council of State, 25 September 2023, in a case involving an unvaccinated fireman suspended from work (*https://www.covid19litigation.org/news/2023/11/italy-council-state-upholds-constitutionality-green-pass-measures-firemans-challenge*). A similar approach has been taken by the French Administrative Court of Caen in the summer 2023 in a case concerning an unvaccinated nurse suspended from work (*https://www.covid19litigation.org/news/2023/09/france-court-rejects-nurses-reinstatement-appeal-over-covid-19-vaccination-refusal*).

[101] The consequences for workers were usually aimed at preventing them to go to the working place and potentially increased the probability of contagion but countries differed as to the sanctioning nature of the consequences for non-compliance and the use of proportionality. The principle of proportionality leads to different conclusions depending on whether failure to vaccinate leads to sanctions or precautionary measures.

tal restrictive unlawful measures but also determines the role of litigation to respond to the features of decision making in times of uncertainty and emergency.

The role of the insurance industry and that of welfare measures have affected both the incentives and the outcomes of litigation[102].

Although liability claims against governments could be grounded on general tort law and State liability law, courts have been confronted with a fundamental question on whether States could ever be considered responsible for the consequences of decisions aimed at contrasting the pandemic and limiting its impact, or whether some type of governmental immunity could limit or exclude liability. If allowed by law, such immunity could refer to public authorities with regulatory or executive powers, or to other actors (public or private) carrying on general interest activities such as healthcare operators and institutions.

Sovereign immunity is differently regulated across countries; during the COVID-19 specific statutory immunity has been introduced in some countries to temporarily shield governmental entities from liability. In other countries no immunity has been introduced by legislation and the Courts, by way of interpretation, have adapted the governmental liability regimes to decision making in emergency times and conditions of uncertainty.

Countries have adopted different strategies but one of the lessons coming from litigation is that liability, especially when governmental choices are made under uncertainty, may reduce the incentives to adopt strict measures limiting rights and freedoms. Conversely, liability disputes generate high costs for litigants, often leading to unsuccessful actions due to the burden of proof concerning negligence and causality. This is why alternative approaches have been used.

The solutions might result in:

1. total immunity of governmental entities;
2. partial immunity for negligent choices excluding intentional and reckless disregard;

[102] In relation to the U.S. see S. STERRETT, *op. cit.*, 165 ff.

3. absence of immunity and a compensation scheme through which the State, regardless of proof of any fault or liability, would cover losses due to public health measures[103].

Interestingly, immunity regimes concern losses caused by measures taken by the competent authority in condition of high uncertainty and not to damages caused by the failure to adopt identified measures in conditions of more consistent information[104].

Immunity from liability has been occasionally granted to governmental entities and to health care providers[105]. Legislation granting doctors' immunity has been reviewed by Courts trying to strike a balance between effective protection of the victims and the liability of doctors in time of emergency and uncertainty[106]. In the U.S., state legislation

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[103] An example is the USA the Countermeasures Injury Compensation Program (CICP), that, during public health emergencies declared under the Public Readiness and Emergency Preparedness Act (PREP Act), may provide compensation for injuries and deaths resulting from the administration of "covered countermeasures"; this should be distinguished from the more general and pre-existing National Vaccine Injury Compensation Program (VICP). As of February 1, 2023, CICP has received 11,252 claims alleging injury or death relating to COVID-19 countermeasures. Of those, 8,067 claims (71.7%) relate to COVID-19 vaccines. HRSA has not yet compensated any CICP claims relating to COVID-19 countermeasures (see Congressional Research Service, Compensation for COVID-19 Vaccine Injuries, March 31, 2023, *https://crsreports.congress.gov/product/pdf/R/R46982*).

[104] See, e.g., United States Court of Appeals for the Ninth Circuit, *Hampton v. California*, 3 October 2023, cit.

[105] See for instance in the US the Public Readiness and Emergency Preparedness ("PREP") Act, a federal statute which provides immunity (except for willful misconduct) to "covered persons" engaged in the administration of "covered countermeasures" (countermeasures to diseases, threats and conditions representing a present, or credible risk of a future public health emergency).

[106] See, e.g., Brazil, Federal Supreme Court, 21 May 2020, ADI 6421 MC, *https://www.covid19litigation.org/case-index/brazil-federal-supreme-court-adi-6421-mc-2020-05-21*, on the constitutional legitimacy of a Presidential Decree limiting liability of public agents (*agentes públicos*) for Covid-related damages to grossly negligent acts or omissions related to: i) Covid-19 public health emergency; ii) actions to alleviate the socio-economic effects of the pandemic.

See, e.g., United States Court of Appeals for the Ninth Circuit, *Hampton v. California*, 3 October 2023 (*https://www.covid19litigation.org/news/2023/10/usa-federal-appeals-court-clarifies-scope-covid-related-immunity-suit-over-prison*). The Court held that

has introduced specific hypotheses of doctors' immunity[107]. Medical liability is a common law issue, regulated by State laws, many States' governors have issued executive orders immunizing doctors from liability[108]. Compatibility with State Constitutions has then been assessed by

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«the PREP Act provides immunity only from claims that relate to the administration to or the use by an individual of a covered countermeasure – not such a measure's non-administration or non-use». Moreover, at the time of the events, defendants knew or should have appreciated the risks faced by the plaintiff's relative since guidance on the risks associated with the pandemic and on the preventive measures to be adopted in order to prevent the risk of spreading the virus already existed.

[107] See Supreme Court of New York, Appellate Division, Second Department October 4, 2023, *Mera v. New York City Health & Hosps. Corp.* The New York Supreme Court Appellate Division, acknowledged Elmhurst Hospital Center's immunity from liability for any harm the patient allegedly sustained as the result of health-care treatment provided during the early days of the Covid-19 pandemic, according to the New York's Emergency Disaster Treatment Protection Act. The Emergency or Disaster Treatment Protection Act, former Public Health Law §§ 3080-3082, initially provided, with certain exceptions, that a health care facility shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services as long as three conditions were met: the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives; and the services were arranged or provided in good faith. Former Public Health Law § 3082(1). The health care services covered by the immunity provision included those related to the diagnosis, prevention, or treatment of COVID-19; the assessment or care of an individual with a confirmed or suspected case of COVID-19; and the care of any other individual who presented at a health care facility or to a health care professional during the period of the COVID19 emergency declaration. Former Public Health Law § 3081(5).

[108] See for example Connecticut Executive Order No. 7U, Section 1 (Superseded - Protection from Civil Liability for Actions or Omissions in Support of the State's COVID-19 Response), establishing that any health care professional or health care facility shall be immune from suit for civil liability for any injury or death alleged to have been sustained because of the individual's or health care facility's acts or omissions undertaken in good faith while providing health care services in support of the State's COVID-19 response, including but not limited to acts or omissions undertaken because of a lack of resources, attributable to the COVID-19 pandemic, that renders the health care professional or health care facility unable to provide the level or manner of

Courts in cases in which immunity would leave the victim of personal injuries without any remedy[109].

The immunity from liability is correlated not only to emergency but also to uncertainty. Uncertainty plays differently in judicial review and in liability. It has not been considered an obstacle to quash a restrictive measure, whereas it has had an impact on liability: negligence can be excluded if no means to prevent harm exist based on available knowledge, and the causal link between an unlawful act and damages may not be established due to extreme uncertainty[110].

Governmental liability for unlawful measures arises where no immunity has been established.

Governmental liability can refer to both acts and omissions.[111].

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care that otherwise would have been required in the absence of the COVID-19 pandemic and which resulted in the damages at issue. On the scope of the executive order see *Mills v. Hartford healthcare*, Connecticut Supreme Court SC 20763, SC 20764, SC 20765.

[109] See Arizona Court of Appeals, 19 September 2023 (*https://www.covid19litigation.org/news/2023/09/usa-covid-related-immunity-statute-healthcare-providers-unconstitutional-state*) that declared unconstitutional a statute immunizing doctors, for breach of the anti-abrogation clause of the Arizona Constitution, preventing the right of action to recover damages for injuries from being abrogated. In particular, the Court stated that «while the legislature may regulate the cause of action for negligence so long as it leaves claimants "reasonable alternatives or choices" for bringing their claims, [the challenged statute] leaves no such alternative available to those injured by the negligence of medical professionals in providing COVID related treatment. Although the statute does not limit the right to assert a claim for gross negligence, the availability of relief for gross negligence is not a reasonable alternative to a claim for ordinary negligence».

[110] See A. RUDA, *Tort Law and the Coronavirus: Liability for Harm Caused by the COVID-19 Outbreak*, in E. HONDIUS et al. (eds.), *op. cit.*, 321 ff., part. 329 ff.

[111] 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; the Court has concluded that such law protects general interest and not individual rights, therefore its violation may not lead to establish State liability *vis à vis* individuals claiming damages.

Liability of legislators is very rare and limited. 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*), holding that the

The issue of compensation arises for governmental measures declared disproportionate, for the failure by governments to adopt appropriate restrictive measures for those that have contracted COVID and those who died, for the negative effects of vaccination. The first two concern governmental liability, the latter the liability of vaccines' producers when no fault statutes have been introduced to compensate victims for vaccines' negative effects. The differences in intensity and scope of liability are also related to the structure of welfare states. In States with strong and comprehensive health care systems, litigation for compensation has been more limited than those with weak and limited welfare systems[112].

When administrative measures have been quashed, the potential liability of governmental entities has arisen. Often, in case of omission, given the difficulties for courts to oblige the State to act, liability becomes the only source of redress. However, the requirements for governmental liability are such that judgments holding administrations liable for omissions are rare[113].

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contested measures have the force of law from a constitutional perspective, and that, if the rules to which financial responsibility is attributed have the force of law, then the financial responsibility lies with the State as the legislator. However, in the view of the Court, the harms suffered were not illegal because the measures were deemed necessary, adequate, and proportionate to the gravity of the situation, and they applied broadly to the entire society, that had a legal obligation to comply; therefore, if compensation for losses were warranted, it should come in the form of public aid, which was widely granted, rather than through legal responsibility of the State.

[112] In many countries statutory obligations to indemnify individuals that have borne negative consequences for mandatory vaccination reduce the litigation. Recently the right to be indemnify for negative consequences associated to vaccines has been extended in some countries also to those for whom vaccines were recommended. See in Italy, Supreme Court 26615/2023 related to vaccines for ordinary flu but theoretically applicable also to SARS CO-2.

It is important to highlight that indemnities normally apply regardless of liability based on the ascertainment of objective requirements establishing a link between the suffered harm and the public interest measures. On these aspects see also the contribution of R. Caranta and B. Biancardi in this book.

[113] See Austrian Supreme Court, 15 May 2023, 1Ob199/22d, cit., excluding the State liability for errors and omissions given the nature of the pandemic law, whose violation has been claimed, being it direct to protect a public and general interest and

Courts have found prison officers liable for failure to provide adequate conditions to prevent COVID-19 spread in prisons and to administer adequate therapies[114].

Courts have held governments liable for failure to provide protective devices to health care professionals when engaged in medical activities[115]. Governmental liability has been also held when adequate testing was not provided[116].

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not to establish individual rights that may be relevant in the framework of Austrian tort law. See also Criminal Court of Brescia, 7 June 2023 (*https://www.covid19litigation.org/news/2023/06/italy-brescia-criminal-court-acquitted-former-italian-prime-minister-and-minister*), holding that, under Italian criminal law, the crime of fault-based epidemic consists in positive actions, not omissions (for a different perspective, Italy, Court of Cassation, decision no. 20416/2021).

On civil liability for failure to act, see also A. RUDA, *op. cit.*, 321 ff., part. 338 ff.

[114] See, for the USA, Court of Appeals for the Ninth Circuit, 3 October 2023 (on our News Page, *https://www.covid19litigation.org/news/2023/10/usa-federal-appeals-court-clarifies-scope-covid-related-immunity-suit-over-prison*), holding that the claims brought by the heirs of the prisoners deceased as a result of the outbreak are not barred by immunity and that most of the men who were transferred had not been tested for COVID-19 for over three weeks and none of them was properly screened for symptoms before the transfer, neither put on quarantine at their arrival at the prison if tested positive. Conversely, Italy's responsibility in this regard has been recently excluded by the European Court of Human Rights since the claimant failed to prove that his life was put in danger by Italian authorities (European Court of Human Rights, *Riela v. Italy*, 9 November 2023, ECLI:CE:ECHR:2023:1109JUD001737820).

[115] See Administrative Court of Appeals of Paris, 6 October 2023 (in our News Page *https://www.covid19litigation.org/news/2023/10/france-government-ordered-compensate-family-doctor-who-died-covid-19-due-mask-shortage*), ordering the French government to pay compensation to the family of a doctor who died of COVID-19 due to a shortage of masks. This ruling highlights a "loss of opportunity" for individuals who were more exposed to the risk of infection.

See Spanish Supreme Court, 21 June 2023, rejecting the appeal of doctors seeking compensation for the lack of medical supplies during the pandemic, as the Ministry of Health had taken measures to minimize risks (*https://www.covid19litigation.org/news/2023/07/spain-supreme-court-denies-compensation-valencian-doctors-lack-medical-supplies-during*).

[116] See, for Spain, Superior Court of Justice of Madrid, 28 September 2023, condemning the Community of Madrid to pay a €10,000 indemnity for the death of a 79-year-old COVID-19 patient who was treated in the Emergency Department of Ramón y Cajal Hospital in 2020 and reducing the higher claim filed by the plaintiffs, taking into

A breach of the duty of care has been found in relation to residents of homecare facilities[117]. The existence of governmental negligence was evaluated also in the light of the existing scientific evidence at the time the deaths occurred[118].

Governments have been sued for having declared lockdowns, curfews or for failing to do so[119]. In both cases, action and inaction have been scrutinized taking the state of scientific knowledge into account. In some cases, the consequences of unlawful measures have been ad-

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consideration factors like the patient's age, pre-existing health condition, the severity of COVID-19 during that time, and the limited knowledge about the disease (see in our News Page, *https://www.covid19litigation.org/news/2023/10/spain-madrid-held-responsible-covid-19-patients-death-due-negligence*).

See, again in Spain, Administrative Court No. 1 of Pontevedra, 12 June 2023, n°142/2023, *https://www.covid19litigation.org/news/2023/06/spain-court-orders-compensation-patient-forced-seek-private-healthcare-during-pandemic*, ordering the Galician government to pay €7,140 to a patient who had to seek private healthcare in April 2020 for a herniated disc, and holding that the expenses incurred were justified and that the public system would have delayed the operation. The judge also noted that the quick intervention in the private clinic saved resources for COVID patients.

[117] Supreme Judicial Court of Massachusetts, 27 April 2023, *Commonwealth vs. David Clinton*, *https://www.covid19litigation.org/news/2023/05/usa-massachusetts-supreme-court-overturns-dismissal-charges-veterans-home-covid-19*; Ontario Superior Court of Justice, 20 December 2022, *https://www.covid19litigation.org/news/2023/01/canada-ontario-superior-court-justice-certified-class-action-brough-against-minister*.

[118] See, e.g., Superior Court of Justice of Madrid, October 2023, cit.

[119] Criminal Liability for failure to declare red zones in the early stage of the outbreak has been excluded in Italy by the Criminal Court of Brescia, 7 June 2023 (*https://www.covid19litigation.org/news/2023/06/italy-brescia-criminal-court-acquitted-former-italian-prime-minister-and-minister*), holding that based on the very fast evolution of the pandemic and on the instability of available information, it could not be reasonably expected that the Prime Minister could establish red zone restrictions, having moreover regard to the information provided by the Technical Scientific Committee, a scientific advisory board created to provide governmental scientific basis for administrative measures contrasting the pandemic. The Court also excluded that, under Italian criminal law, the crime of fault-based epidemic may be based on omissions (for a different perspective, Italy, Court of Cassation, no 20416/2021).

dressed having also regard to non-economic losses, e.g. those born by minors for unreasonably restrictions of outdoor activities[120].

A related stream of litigation for compensation of economic and non-economic losses concerns, on the one side, insurance companies[121], and, on the other side, social security[122]. In both cases, compensation has been sought to address the consequences of the pandemic and of the related measures.

The issue of compensation arises also in litigation between private parties in contract. Significant differences relate to BtoB and BtoC and the impact of force majeure on existing and future contractual relationships[123]. National contract laws have been modified by statutes and by

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[120] See, e.g., in Italy, the decision of the Administrative Council of Sicily, 23 March 2023, condemning the Region to compensate a minor for non-economic losses due to an over-restrictive lockdown impacting, among other aspects, on minors' right to perform sport activities.

[121] The interpretation of contractual terms of insurance policies varies significantly across the globe and even within each country, such as in the USA, with variations between federal and state courts. See the contribution of G. Sabatino in this book.

[122] See Madrid Social Court, 29 October 2023, awarding 3.800 euro per month as an invalidity pension in favour of a worker suffering from post-COVID19 consequences determining a 71% disability (*https://www.lavanguardia.com/vida/20231029/9337554/juzgado-madrid-concede-pension-mas-3-800-euros-mes-secuelas-covid-agenciaslv20231029.html*).

[123] See, e.g., for BtoB contracts, French Supreme Court, 15 June 2023 (in our News Page, *https://www.covid19litigation.org/news/2023/06/france-supreme-court-rules-commercial-tenant-must-pay-rent-despite-covid-19*), concerning a landlord's claim against, seeking payment of overdue rent, compensation for damages, reimbursement of legal fees, and communication of accounting documents. The Court held that the tenant's inability to operate its business did not exempt it from paying rent during that period. Cf., for Belgium, Belgian Supreme Court, 26 May 2023, *https://www.covid19litigation.org/news/2023/07/belgium-supreme-court-unlocks-commercial-tenants-rights-covid-19-lockdowns-may-allow*, holding that the inability to operate a commercial business due to government measures against the COVID-19 pandemic qualifies as a "temporary impossibility" under Article 1722 (old) Civil Code, rather than a "temporary loss of enjoyment". Therefore, tenants affected by the lockdowns may now claim a reduction or full waiver of rent for the lockdown period(s).

On the impact of the pandemic on BtoC contracts, see, from an EU perspective, the contribution of the AG Laila Medina in this book. On out of Europe caselaw, see the Australian case cited in the footnote here below.

the case law to redefine the notion of force majeure and ensure that parties whose contracts were terminated receive fair compensation.

Litigation between insurance companies and enterprises for the coverage of losses stemming from governmental measures has been very significant with different outcomes[124]. The issue has also arisen in employment contracts when employees have been wrongfully terminated for the consequences of SARS-CoV-2. Other contractual claims have been brought by consumers against tourism operators, such as cruise companies, whose failure to adopt precautionary measures, including cancelling the cruise, has been recently ascertained[125].

A good illustration of contract litigation concerns education and the claims brought by students to receive fees' restitution or compensation for shifting from in person to online teaching. Indeed, these claims are often based on contract and unjust enrichment, not on tort/delict. There are different approaches among countries but even in the same country, as the US, courts have reached different results[126].

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[124] Compare for example US and UK litigation. In the UK, see *The Financial conduct authority v. Arch insurance et al.* [2021] UKSC 1, on appeal from: [2020] EWHC 2448.

[125] See Federal Court of Australia, *Karpik v. Carnival plc*, 25 October 23, *https://www.covid19litigation.org/news/2023/11/australia-federal-court-rules-against-cruise-company-class-action-alleging-negligence*, where the Court found that the respondents failed in their duty of care by neglecting to cancel the cruise, warn passengers of COVID-19 risks, implement temperature screening, inquire about symptoms, encourage physical distancing, limit occupancy, establish effective isolation measures, and provide necessary provisions for isolated passengers, and that the company's failure to warn the passengers that it was no longer able to provide the services or protect the safety of the passengers as originally promised amounted to misleading or deceptive conduction breach of the Consumer Law.

[126] See for example, for the USA, Court of Appeals for the Eleventh Circuit, 31 July 2023, *Dixon v. Miami University*, *https://www.covid19litigation.org/news/2023/09/usa-federal-court-appeals-upholds-universitys-right-deny-facility-use-without*, where the Federal Court of Appeals upheld university's right to deny facility use without violating implied contract for in-person education; cf. District Court of Massachusetts, 16 May 2023, *Omori v. Brandeis Univ.*, *https://www.covid19litigation.org/news/2023/06/usa-district-court-clarifies-some-aspects-covid-related-class-actions-over-universitys*, finding that the contract entered to between plaintiffs (the students) and defendant (the university) did not expressly regulate an occurrence such as the pandemic and its word-

In some jurisdictions an implied in law contractual promise to teach in person was identified and schools and university were charged with compensatory damages[127]. Many settlements have been concluded. In other jurisdictions the existence of a promise implied in law has been denied and universities have not paid either damages or unjust enrichment[128].

8. Which lessons to draw on the boundaries between emergency and ordinary laws?

The lessons to be drawn from the management of SARS-CoV-2 concern both the international and the national levels. Pandemics do not have administrative boundaries and the lack of regulatory cooperation at international level enhances the spread of the contagion. The level of international regulatory cooperation has been significant, but coordination has not always taken place effectively, also given the differences among local regulatory approaches. The guidance of WHO has been relevant but often not as effective to the adoption of common policy measures, where States' autonomy has been fully preserved[129]. New instruments for regulatory cooperation concerning scientific and policy

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ing did not preclude an implied right to in-person education, but denying certification for class action since plaintiffs' motion failed to satisfy the predominance requirement of common questions within the proposed class action; for Brazil, Court of Justice of the Federal District and Territories, AC0707656-60.2021.8.07.0001, 5 April 2022 (in our database, *https://www.covid19litigation.org/case-index/brazil-court-justice-federal-district-and-territories-no-0707656-6020218070001-2022-04*), where the Court, following the precedent of the Federal Supreme Court, heed that applying linear discounts to university students is unconstitutional due to the pandemic crisis and online education.

[127] See District Court of Massachusetts, 16 May 2023, *Omori v. Brandeis Univ.*, cit., where the class action was not certified but the implied contract duty to teach in person was upheld.

[128] See Court of Appeals for the Eleventh Circuit, 31 July 2023, *Dixon v. Miami University*, cit.

[129] On the challenges to international regulatory cooperation see J.D. SACHS et al., *op. cit.*, 1236, where several failures have been identified.

developments are needed to ensure mutual learning and control over the diffusion of the pandemic.

Regulatory and scientific transnational cooperation represents the most important instrument to reduce the effects of pandemics, and to prevent their spread. Regulatory and judicial transnational cooperation are relevant also for sharing data on the effectiveness of measures since countries with late exposure can learn from those with early exposure. The vehicles of communication concerning the effects of measures and vaccination must be improved and the role of WHO must be significantly modified also given the differences in regional developments. It is important that WHO integrates the collection of information concerning the regulatory models with the judicial decisions that contributed to guarantee the respect of fundamental rights and the correct exercise of governmental power.

At national level it is important to define a regulatory framework that allows rapid changes according to the available scientific evidence. The pandemic laid bare lack of preparedness even in the most advanced health care systems and the necessity to rethink emergencies, their occurrences, and the challenges they pose. This implies the possibility that regulatory approaches change fast and that governmental measures are short term. Their review has to be made accordingly, unlike that of ordinary measures, whose duration is usually longer. Hence, flexible regulation and accelerated judicial review procedures should be adopted, with the possibility of ex ante judicial control of measures with great impact on fundamental rights.

Policy making should deal with uncertainty and define the administrative decision tree according to the available scientific information. The decisions have to be evidence-based and the scientific community needs to find better tools to solve internal divergences and propose shared solutions in times of emergency.

The two main pillars of a national institutional strategy addressing future health emergencies concern the relationship between governments and scientific advisory bodies and those between governments and courts.

Litigation can perform different functions: in some legal systems is an instrument to regulate in other legal systems is an instrument to con-

trol the legality of regulatory processes. Clearly the role of litigation in COVID-19 related issues reflect these institutional differences. The relevance of courts in the crisis management clearly emerges in the western context including Latin America to a much higher extent than in Asia but for a few exceptions like India and some Asian Pacific countries.

From an institutional standpoint, the relevance of courts in emergency times not only contributes ensuring compliance with the rule of law and fundamental rights, preserving the democratic allocation of powers, but improves the quality of administrative decision-making especially when the interaction between administrations and courts is repeat. The comparative analysis of institutional responses to the pandemic should therefore include judicial decisions and describe their evolution related to the availability of knowledge about the pandemic and the effects of restrictive measures.