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COVID-19 LITIGATION

THE ROLE OF NATIONAL AND INTERNATIONAL COURTS IN GLOBAL HEALTH CRISES

edited by
PAOLA IAMICELI
FABRIZIO CAFAGGI

2024

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FOREWORD[*]

Public health law has always involved a balance of government's powers and duties on the one hand, and its limits and restraints on the other[1]. Courts have long recognized that a government's efforts to protect and promote health must be balanced against other fundamental rights of individuals and communities.

A 1905 United States Supreme Court case, *Jacobson v. Massachusetts*[2], is perhaps the best-known early example of a court adjudicating this balance[3]. In *Jacobson*, a city made smallpox vaccination mandatory for all citizens. Individuals who refused, including the plaintiff in this case, were subject to a fine or imprisonment. The court dismissed the plaintiff's claim that the vaccine mandate violated his right to liberty, finding that the government was permitted to enforce reasonable regulations designed to protect public health. At the same time, the court acknowledged that there could be cases where the government's powers are exceeded – for example if a measure was excessively «arbitrary and oppressive» or where an individual was particularly vulnerable to negative effects from the measure[4].

An appreciation of government's powers, duties, limits and restraints has only become more important, as the scope and volume of public health measures – and public health law – have greatly expanded around the world. A number of trends are transforming public health law, while reinforcing the continued relevance of this approach.

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[*] The authors are staff members of the World Health Organization. The authors alone are responsible for the views expressed in this publication and they do not necessarily represent the views, decisions or policies of the World Health Organization.

[1] L.O. GOSTIN, *A Theory and Definition of Public Health Law*, in ID., *Public Health Law: Power, Duty Restraint*, O'Neill Institute for National & Global Health Law Scholarship Research Paper no. 8, 2008, 3-41, available at *https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1007&context=ois_papers*.

[2] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[3] *Ibidem*.

[4] *Ibidem*.

First, countries have embraced a much wider array of public health measures. For some time, laws relating to infectious diseases, health care, and food and drug law, represented three dominant strands of health law. But over the past thirty years health agencies have increasingly championed other laws seeking to promote health and protect against risk factors for disease. Tobacco control laws are one example, with governments passing laws and regulations to govern labelling, marketing, product constituents and emissions, licensing and an array of other issues. Similar laws can be found governing other risk factors for noncommunicable diseases, such as alcohol and unhealthy diets.

But as was the case for infectious diseases, attempts to broaden the scope of public health laws have been met with legal challenges invoking human and constitutional rights. Tobacco companies have routinely challenged tobacco control laws, arguing that restrictions on marketing or labelling measures violate their right to freedom of expression, that restrictions on use of trademarks violate their right to property, and that tobacco control measures interfere with their right to conduct a business. These arguments frequently turn on the proportionality or reasonableness of the intervention, in light of the evidence of risks to health and the effectiveness of the intervention at achieve health objectives. Similar types of challenges arise increasingly with respect to measures to promote healthy diets or to control alcohol use, with the arguments also falling within a framework of powers, duties and restraints.

Second, as countries have increasingly recognized the cross-border nature of many public health issues, international instruments and bodies now play a larger role in setting health norms. For instance, the International Health Regulations (IHR) (2005) codify binding global commitments for the prevention and control of international public health threats. The WHO Framework Convention on Tobacco Control (2005) creates similarly binding commitments on countries with respect to tobacco control. Numerous other instruments also create norms and standards on a wide range of health issues, from the classification of diseases to the marketing of breastmilk substitutes. And at present, WHO Member States are negotiating a new international instrument to govern pandemics, while also considering amendments to the IHR 2005.

International norms impose new legal duties on states at the international level, with some of those duties being incorporated into domestic law. International norms can also alter the balance of powers, duties and restraints under domestic law, such as where new international norms justify action by national governments in federal systems where the national government may not otherwise have jurisdiction over an issue.

Third, supranational and international bodies also play an increasingly important role in adjudicating public health measures. For instance, regional courts can determine whether public health measures comply with human rights law[5]. Public health measures may also be adjudicated in international courts or through international quasi-judicial dispute settlement mechanisms (e.g. the World Trade Organization Dispute Settlement Body)[6]. A flow on effect can also sometimes be observed in domestic courts, with international decisions relied upon in adjudicating disputes that shape powers, duties and restraints under domestic law.

Whether adjudicated at a domestic, supranational or international level, certain typologies of legal claims against public health measures frequently recur. These include:

- *Constitutional law (or constitutional-like) challenges*. In these claims, the merits of the legislation, regulation or executive action which promulgates the public health measure is challenged on the grounds that it exceeds government powers or violates one or more fundamental rights that act as limitations and restraints on its powers. For example, a claimant might argue that a quarantine order violates her right to liberty.

[5] See, e.g., *Vavřička v the Czech Republic* (European Court of Human Rights, Grand Chamber, Application Nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15, 8 April 2021), which bears similarity to the *Jacobson* case.

[6] See, e.g., *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Reports of the Panels*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (2018), available at *https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/435R.pdf&Open=True*.

- *Administrative law challenges*. In these claims, an action of the executive branch is challenged under the provisions of specific legislation governing executive branch action. Such a challenge might address procedural issues, such as due process, or substantive issues, such as the reasonableness of the action.
- *Liability claims*. These can be directed either at the government/ government officials or at private actors (e.g. employers, business owners, private hospitals, etc.) seeking to hold them accountable for acts or omissions.
- *Requests for injunctive relief or interim measures*. In seeking injunctive relief, an individual or group seeks to prevent or compel government action without adjudicating the merits of the case. Claimants may also seek interim measures, either through injunctive relief or another mechanism, to provide relief while a case is being heard. In these cases, courts typically assess the balance of convenience rather than ruling on the merits of the case.

The type of claim, along with many other factors[7], affects its generalizability, both in terms of its immediate effect and its potential precedential impact (particularly in common law systems). Some cases simply provide relief to the individual or group, while others can significantly reshape or clarify powers, duties and restraints, thereby impacting governments' public health measures.

However, while individual cases vary widely in their particulars and impact, as a whole, judicial decisions have a profound impact on public health practice. By defining or clarifying the scope of legally acceptable public health measures, case law illustrates the boundaries of government interventions and defines the menu of options from which they can choose when considering adopting a health measure.

In responding to the COVID-19 pandemic, governments around the world promulgated an unprecedented volume of public health measures at all levels of government, which impacted a wide array of individuals and groups. Predictably, this led to a substantial number of legal challenges to these measures. Judicial decisions on these challenges provide

[7] Other factors include, e.g., the facts of the case, the venue in which it is adjudicated, the type of legal system (civil or common law), along with numerous other factors.

a unique window into how law shapes government's options in taking measures to protect public health.

This means that by examining legal challenges to public health measures, we can learn a number of important lessons that can help better prepare governments to prepare for, and respond to, future health emergencies. But as the above discussion also illustrates, the COVID-19 case law has implications for public health that go beyond health emergencies. For example, decisions relating to vaccine mandates might influence the lawfulness of vaccine mandates outside of emergencies. Similarly, decisions on access to care might have broad implications for government duties to provide health care.

At the national level, local lawyers are well equipped to examine the impact of domestic case law on public health practice as viewed through the lens of powers, duties and rights. Domestic lawyers can observe the claims adjudicated by the courts through reported cases and to some extent through proceedings of unreported cases. But viewing the issue through a national lens has its limitations. Numerous factors limit which issues are adjudicated by national courts, including rules governing standing and justiciability and the resources required to bring a claim. But more broadly, the extent to which human rights are incorporated into domestic law and the public health interventions implemented by a specific country during the pandemic are not the same across all countries. This means that national litigation will give only a partial picture of the interaction between powers, duties and rights and that a fuller picture can be gained through comparative analysis. In this sense, the volume, and in some cases novelty, of litigation during the COVID-19 pandemic can transform our understanding of health law.

The case summaries in the «COVID-19 Litigation Open-Access Case Law Database» provide an important tool for enabling us to learn these lessons, helping us to address some important questions, e.g.:

1) When a public health measure restricts other fundamental rights, what are the permissible bounds? How can governments ensure measures restrict rights only to the extent necessary in an emergency context?

2) What legal issues are involved in specific public health interventions? What characteristics make them more or less likely to survive a legal challenge?
3) How does the health emergency context affect courts' assessment of a government's duties and restraints? What factors affect this analysis?
4) How can health emergency measures better protect people in vulnerable situations? What particular duties and restraints does a government have in this context?

An analysis of this case law, with these questions in mind, can help policymakers to better guide and develop public health measures.

At the international level, this evidence base can help policymakers and expert advisory bodies to develop instruments, guidelines and other products that better take into consideration protection of human rights and the protection of persons in vulnerable settings across a range of areas from education and schools and prisons and confined settings through to vaccination and access to healthcare. Useful guidance must include an understanding of the restraints, including human rights protections, under which public health policies are made. Recognizing this, WHO guidelines have examined the importance of protecting human rights while promoting health[8]. Robust data on how human rights standards are applied at the national level can be an important tool for further strengthening future guidance.

Equally, these case law summaries can be used at the national level to learn from the experience of other countries. By examining the experience of their peers, national policymakers can better understand the menu of policy options, their potential advantages and disadvantages, and how they can be better tailored to protect human rights and the particular needs of persons in vulnerable settings.

COVID-19 case law has illustrated the importance of public health law in health emergencies, and in some jurisdictions reinterpreted and reshaped the legal landscape. The Case Law Database is a crucial tool

[8] See, e.g., WHO & OHCHR, *Mental health, human rights and legislation: guidance and practice*, 9 October 2023, available at *https://www.who.int/publications/i/item/9789240080737*; WHO & HUMAN REPRODUCTION PROGRAMME, *Abortion care guideline, https://iris.who.int/bitstream/handle/10665/349316/9789240039483-eng.pdf?sequence=1*.

for understanding the lessons and impact of this extraordinary event across countries. Using the evidence in the Database we can learn more about legal and governance frameworks, help to enable governments to develop better and more effective public health measures, thus supporting robust public health practice which is consistent with rule of law and the protection of human rights.

Genève, 18 October 2023

Benn McGrady and Daniel Hougendobler
(World Health Organization)

PART I

THE COVID-19 LITIGATION PROJECT: A RESEARCH AGENDA

DECISION-MAKING IN TIMES OF UNCERTAINTY AND THE PROTECTION OF FUNDAMENTAL RIGHTS: A COMPARATIVE VIEW ON GLOBAL LITIGATION DURING THE PANDEMIC[1]

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

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

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

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

[*] Professor of Private Law, Faculty of Law, University of Trento.

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

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

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

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

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

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

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

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

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

[4] Without ambition for comprehensiveness, a few of these initiatives may be here referred to, such as the Oxford Covid-19 Government Response Tracker: T. HALE et al., *A global panel database of pandemic policies (Oxford Covid-19 Government Response Tracker)*, in *Nature. Human Behaviour, Resource, https://doi.org/10.1038/s41562-021-01079-8* (last visited on 07.01.2024); the Covid-19 Law Lab of the O'Neill Institute at Georgetown University (*https://oneill.law.georgetown.edu/projects/covid-19-law-lab/*, last visited on 07.01.2024); the Oxford Compendium of National Legal Responses to Covid-19 (*https://oxcon.ouplaw.com/home/occ19* last visited on 07.01.2024); S. JASANOFF, S. HILGARTNER, J.B. HURLBUT, O. ÖZGÖDE, M. RAYZBERG, *Comparative Covid Response: Crisis, Knowledge, Politics Interim Report* (available at *https://assets.website-files.com/5fdfca1c14b4b91eeaa7196a/5ffda00d50fca2e6f8782aed_Harvard-Cornell%20Report%202020.pdf*, last visited on 17.02.2024).

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

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

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

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

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

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

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

[9] See, for the USA, the *COVID-19 Litigation Tracker* of the American oversight (available here: *https://www.americanoversight.org/litigation-tracker-covid-19-oversight-hub*); the *COVID Coverage Litigation Tracker* of the University of Pennsylvania, displaying some caselaw analytics in the field of insurance law; for Italy, see the *Osservatorio COVID* set up by Matteo Gnes at the Urbino University (*https://sites.google.com/uniurb.it/osscovid19/home*), including a section on Italian COVID litigation.

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

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

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

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

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

power to the executive was implemented both by legislative and administrative decisions and led to either constitutional or judicial review[12].

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

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

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

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

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

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

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

2. The Database design and the role of comparative law

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

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

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

updates on relevant caselaw, and by a set of materials, built on the project dataset, in the form of both qualitative and quantitative analyses[16].

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

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

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

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

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

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

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

3. An overview on COVID-19 litigation

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

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

[17] See in this Book the contribution of Benedetta Biancardi and Roberto Caranta.

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

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

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

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

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

[19] See § 4 below.

[20] In fact, Database development continues on a rolling basis. At the time this chapter is submitted, the cases uploaded on the Database are 2023.

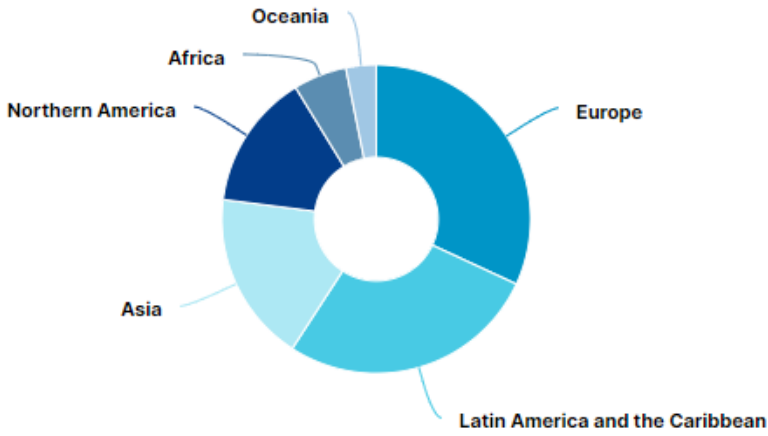
[21] See § 4 below.

(ii) Cases by world region and countries

The intensity of litigation has varied depending on world regions and, within world regions, depending on the legal and political features of the States[22].

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

CASES BY WORLD REGIONS



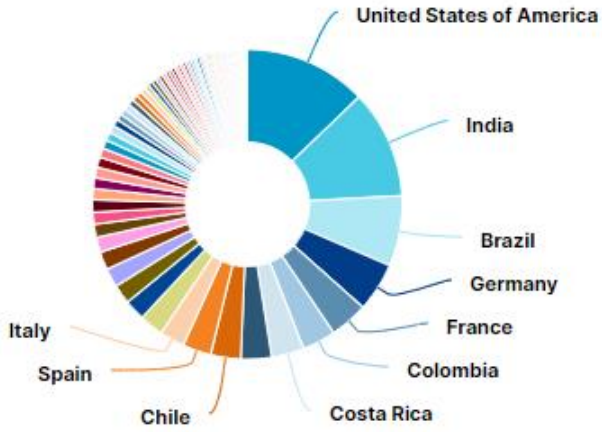
This evidence is not only linked to the number of decisions but also to different accessibility to caselaw, which has been rather difficult in certain regions (e.g. many African and Asian countries). In this regard, the role of project partners proved essential but existing obstacles to

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

accessing court decisions remained for a significant number of jurisdictions (e.g., in Central Asia)[23].

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

CASES BY COUNTRIES



[23] See in this book the specific contributions about Indian litigation and African case law.

[24] Out of the 1973 selected cases (update: December 2022), 253 cases are from the United States and 223 from India.

[25] With 145 cases out of the 1973 selected cases (update: December 2022).

[26] With 101 cases out of the 1973 selected cases (update: December 2022).

[27] With 79 cases out of the 1973 selected cases (update: December 2022).

[28] With 590 cases out of the 1973 selected cases (update: December 2022).

[29] With 51 cases out of the 1973 selected cases (update: December 2022).

[30] With 53 cases out of the 1973 selected cases (update: December 2022).

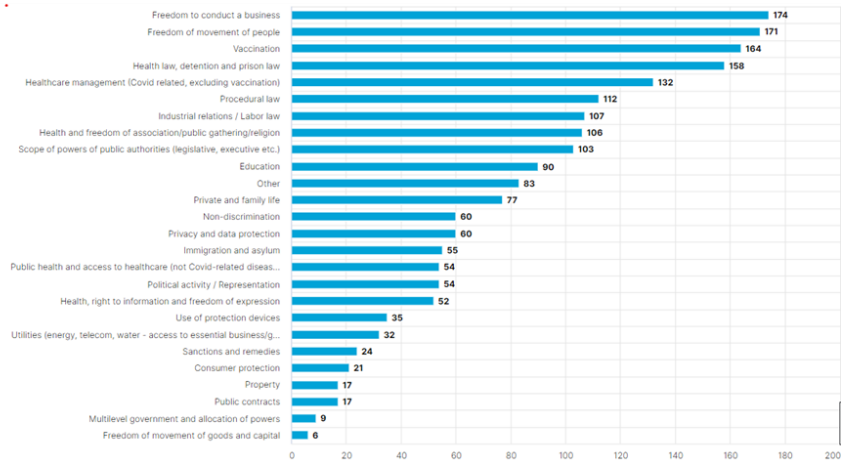
[31] With 25 cases out of the 1973 selected cases (update: December 2022).

[32] With 21 cases out of the 1973 selected cases (update: December 2022).

(iii) Cases by area of litigation

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

CASES BY AREA OF LITIGATION



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

[33] See § 4 below.

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

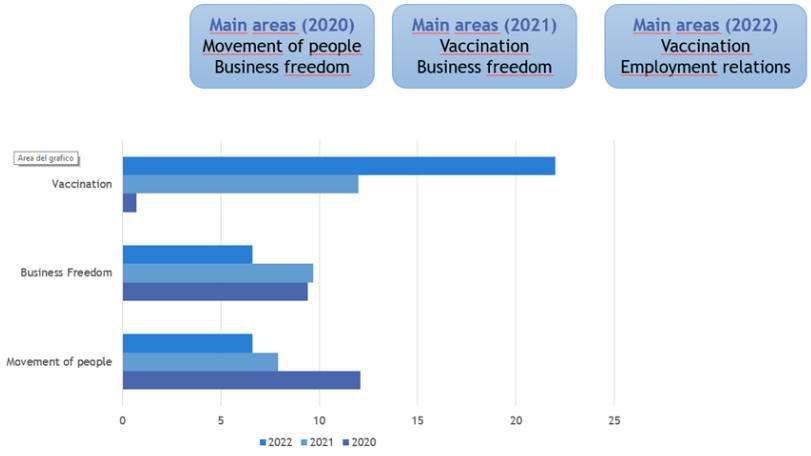
[34] See, among the oldest ones: for the United States of America, United States District Court for the Northern District of California, 2 June 2020, *Altman v. County of Santa Clara*, 464 F. Supp. 3d 1106 (*https://www.covid19litigation.org/case-index/united-states-america-united-states-district-court-northern-district-california-altman-v*);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

[35] See, e.g., Australia, Fair Work Commission, 8 July 2022, [2022] FWC 1774; Singapore, High Court (General Division), 16 June 2022, No. SGHC 141; Switzerland, Federal Administrative High Court, 26 April 2022, A-5017/2021; France, Council of State, 18 January 2022, Council of State decision nº457879; Italy, Constitutional Court, 9 February 2023, n. 15.

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

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

CASES BY AREAS AND BY YEAR



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

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the Russian Supreme Court, emphasizing that constitutionally permissible and necessary temporary restrictive measures were aimed to aid the self-organization of society and represented a form of social solidarity based on the trust between the state and society, considering that restriction on the right to free movement is not equivalent to the restriction of personal rights (Arts. 22(1) and 751 of the Russian Constitution (Russian Federation, Supreme Court of the Russian Federation, 10 February 2022, Case No. АПЦИ21-565)). See Italian Constitutional Court 14/2023 making reference to the constitutional principle of solidarity to found the vaccination mandate for limited categories of professionals (health care workers and teachers). The Italian legislation has been held constitutional in relation to the rule that makes vaccination a legal requirement to exercise the profession.

[38] See, e.g., on freedom of movement: Netherlands, Council of State, 15 March 2023, 202202979/1/A2 (*https://www.covid19litigation.org/case-index/netherlands-council-state-2022029791a2-2023-03-15*); Spain, Supreme Court, 25 January 2022, No. 60/2022 (*https://www.covid19litigation.org/case-index/spain-supreme-court-no-60 2022-2022-01-25*); Germany, Federal Constitutional Court, 19 November 2021, 1 BvR 781/21 Rn. 1-306 (*https://www.covid19litigation.org/case-index/germany-federal-constitutional-court-1-bvr-78121-rn-1-306-2021-11-19*); on business closures: Belgium, Council of State of Belgium, 10 February 2022, Council of State decision nº252.960 (*https://www.covid19litigation.org/case-index/belgium-council-state-belgium-council-st*

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

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

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

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

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

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

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

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

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

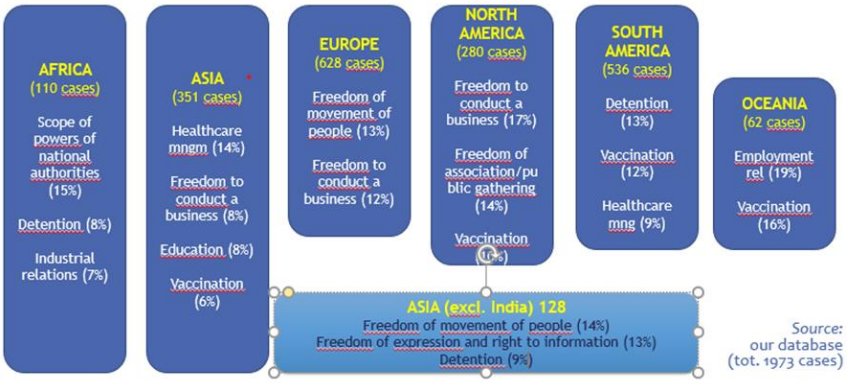
[45] See, e.g., Australia, Federal Circuit Family Court of Australia, 16 February 2022, MLC 8302 of 2020, on parents' decision concerning children vaccination (*https://www.covid19litigation.org/case-index/australia-federal-circuit-family-court-australia-mlc-8302-2020-2022-02-16*).

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

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

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

CASES BY AREAS AND BY COUNTRY



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

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

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

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

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

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

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

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

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

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

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

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

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

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

[55] Spain, Constitutional Court, 2 June 2022, Judgment 70/2022.

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

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

NATURE OF CLAIMANTS: PRIVATE V. COLLECTIVE V. PUBLIC

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

(v) To what extent have claims been upheld?

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

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

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

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

ing public decision-making back on track with respect to fundamental rights, as these have otherwise been systematically violated[59].

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

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

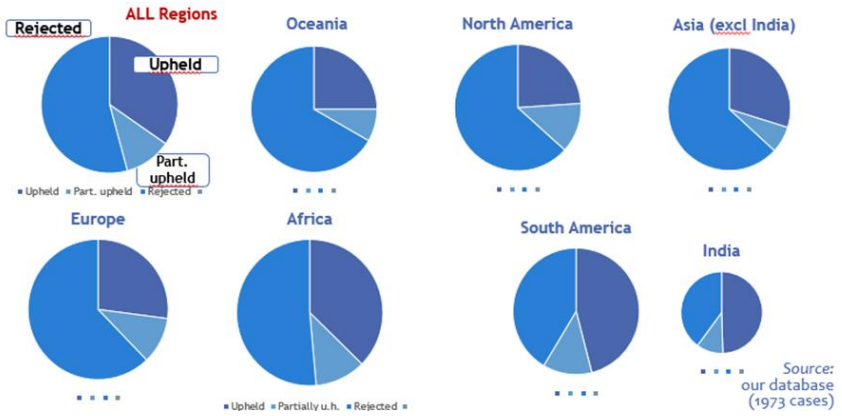
[59] For a broader examination: F. CAFAGGI, P. IAMICELI, *Uncertainty, Administrative Decision-Making and Judicial Review*, cit.

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

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

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

LITIGATION OUTCOME: CLAIMS UPHELD V. REJECTED



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

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

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

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

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

4. How has the litigation evolved?

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

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

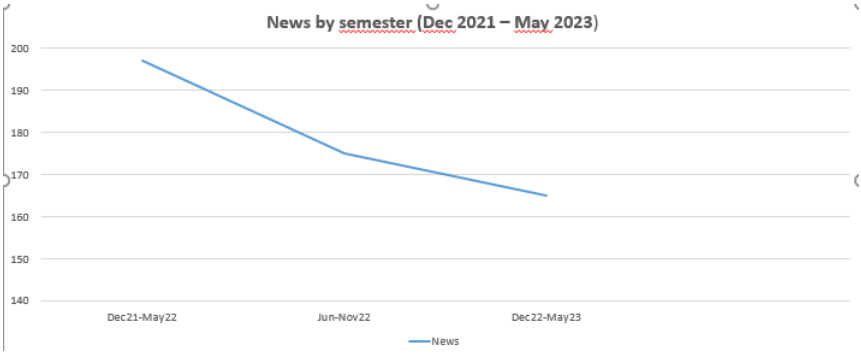
[63] T. GINSBURG, M. VERSTEEG, *op. cit.*

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

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

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

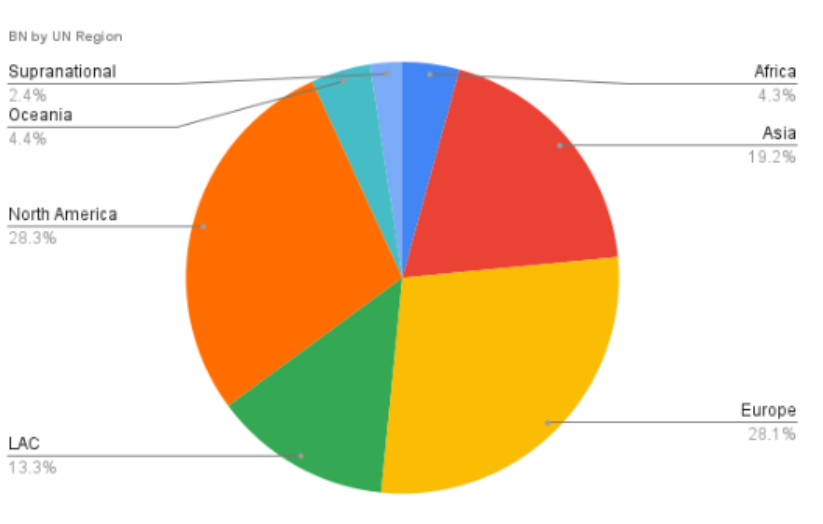
TOTAL NEWS BY SEMESTER



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

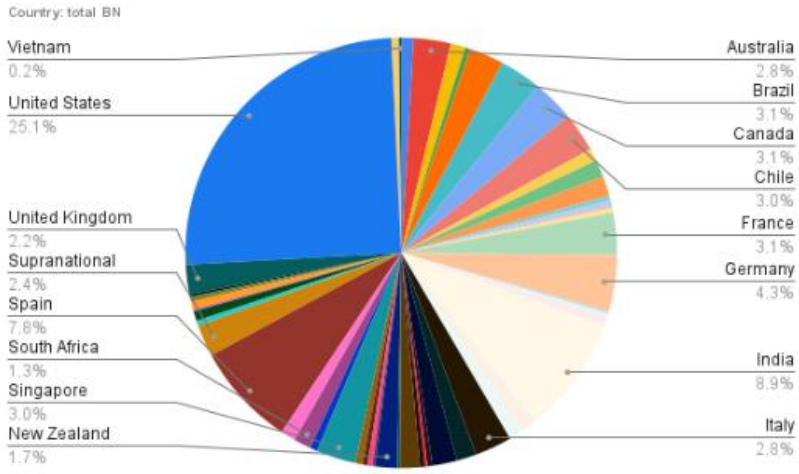
where the litigation has continued though at a different pace and with different features.

NEWS BY WORLD REGIONS



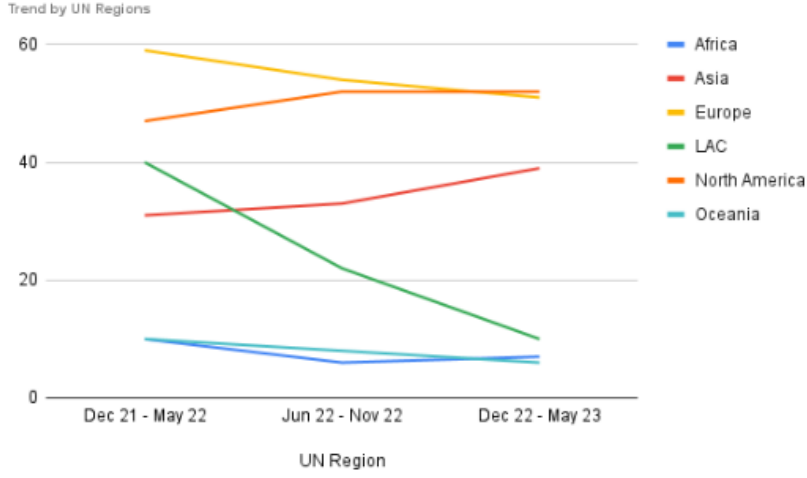
Within world regions, litigation seems to concentrate in the same countries where litigation has been particularly relevant in 2020 and 2021: the United States and India remain the countries with the highest level of litigation; at lower thresholds in the global landscape, stand out, in Europe, Spain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

NEWS BY COUNTRIES



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

TRENDS - NEWS BY WORLD REGION AND BY SEMESTER



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

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

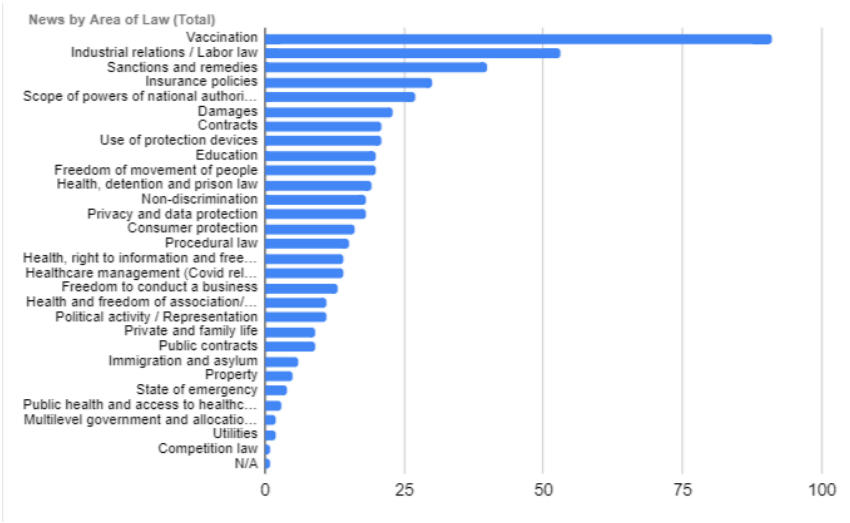
[64] WHO has officially declared the end of the pandemic in May 2023 but several countries have started to lift measures as soon as the contagion declined.

[65] See, for a deeper analysis, the contribution of M. Accetto, in this book, and our considerations in the concluding chapter.

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

Education cases have mostly concerned the recovery of fees claimed during the pandemic when education and related services needed radical changes and limitations[67].

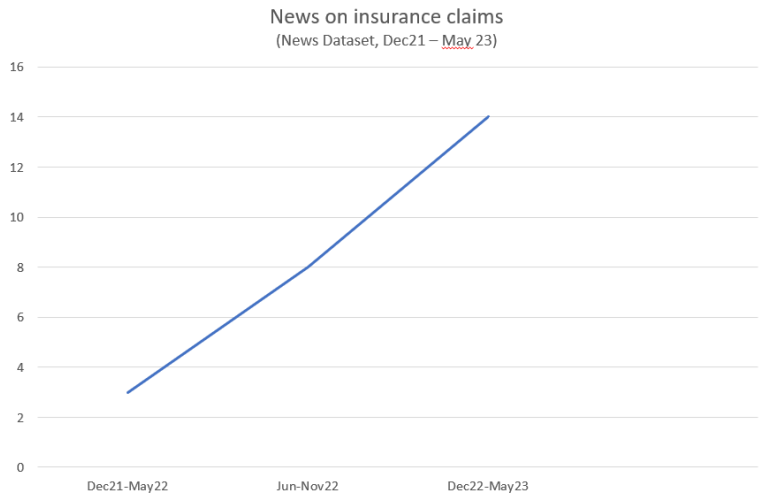
NEWS BY AREA OF LITIGATION



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

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

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



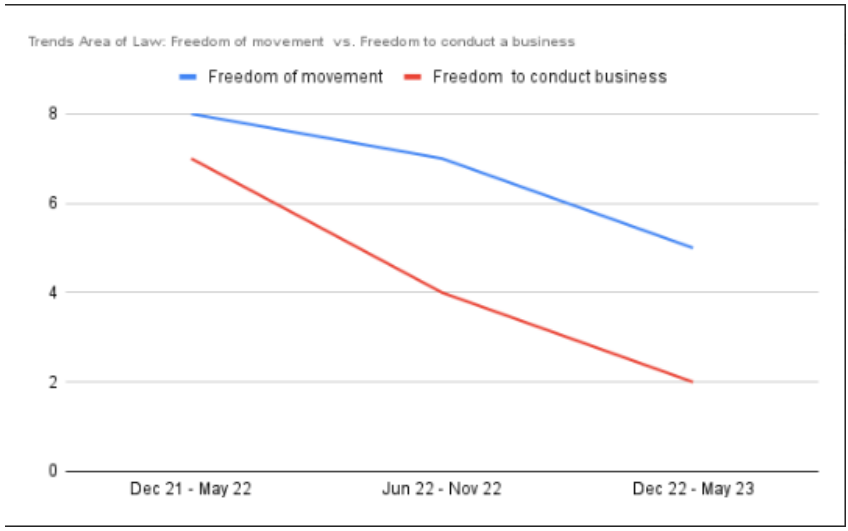
Comparatively, looking at top areas in 2020 litigation, cases on freedom of movement have radically decreased, almost disappearing in 2023[69]; the same applies to cases concerning freedom of business[70].

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

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

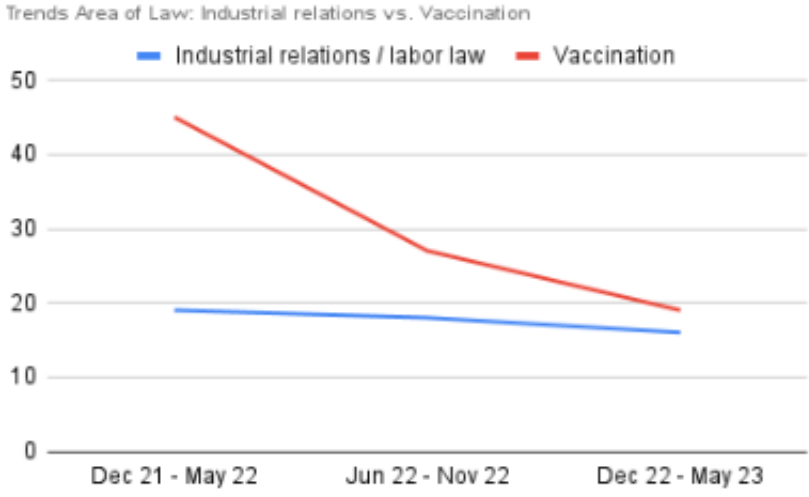
[70] See, e.g., Tokyo District Court, 16 May 2022 (*https://www.covid19litigation.org/news/2022/05/japan-tokyo-district-court-delimits-legality-restrictions-restaurateurs*), declaring unlawful certain restrictions issued against restaurateurs by Tokyo Prefectures and other neighboring districts in March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

TRENDS - FREEDOM OF MOVEMENT AND BUSINESS FREEDOM

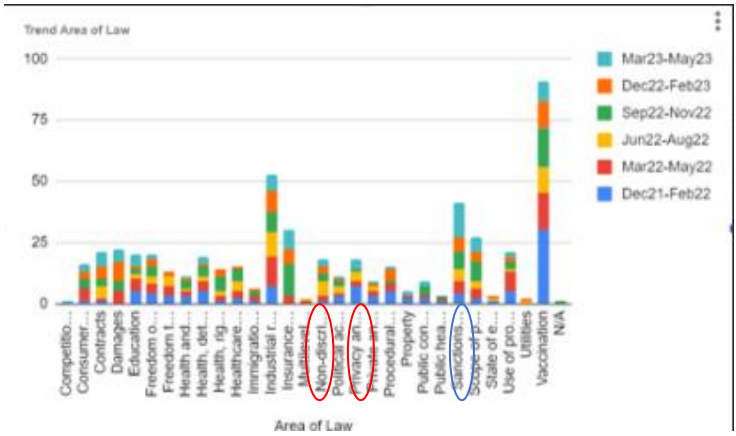


By contrast, litigation on vaccination (mostly on mandates and their impact on employment relationships) has been the most recurrently traced in the News page; interestingly, its share has decreased from late 2021 to 2023.

FOCUS ON VACCINATION AND INDUSTRIAL RELATIONS DURING THE THREE SEMESTERS



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



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

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

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

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

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

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

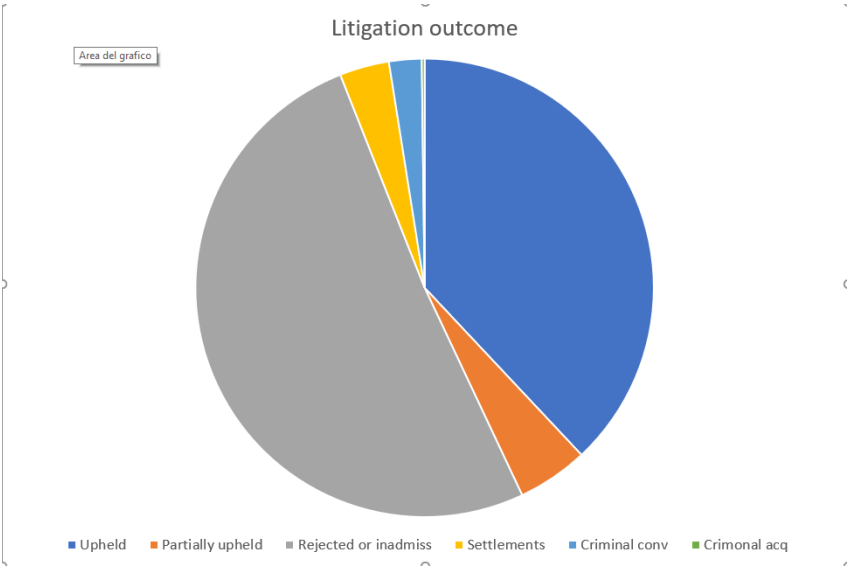
[74] See, e.g., Singapore District Court, 17 May 2022 (*https://www.covid19litigation.org/news/2022/05/singapore-district-court-condemns-new-years-eve-celebrations-violation-restrictions*).

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

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

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

LITIGATION OUTCOME



Neither these values have consistently decreased or increased during the three semesters from December 2021 to May 2023[78].

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

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

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

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

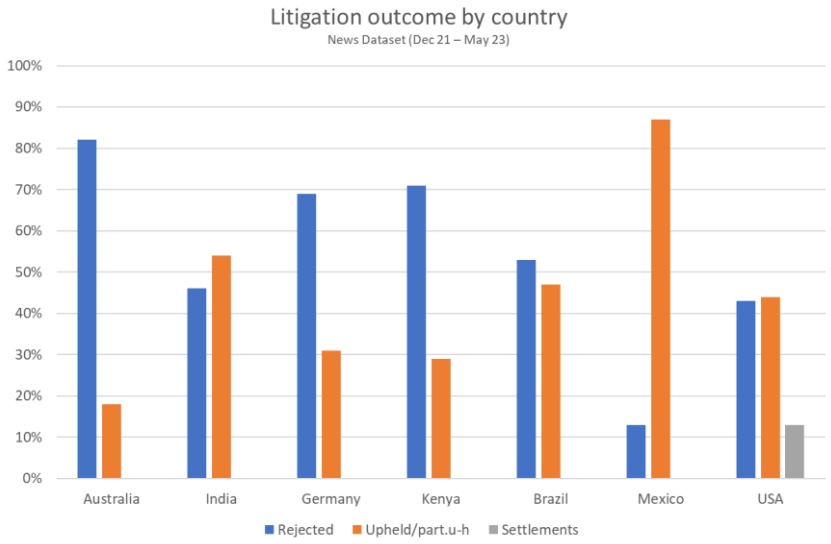
[79] See § 3.

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

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

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

LITIGATION OUTCOME BY COUNTRY



5. The main questions addressed and the book structure

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

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

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

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

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

[83] See, in particular, the analysis developed about Latin American litigation and about Indian case law, in this book.

[84] See, among others, the analysis developed about the Slovenian and the Austrian case law, in this book.

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

[86] A first comparative analysis has been developed in P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic*, cit.

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

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

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

[88] See, e.g., for Spain, Tribunal Supremo, 14 September 2021, 1112/2021.

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

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

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

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

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

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

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

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

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

[94] See, in particular, the contributions of AG Medina and of M. Accetto in this book.

[95] See footnote no. 85 above on the "major questions doctrine" in the US judicial review.

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

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

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

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

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

tific communities, are among the questions examined in the project and therefore in this book[99].

5.1. Navigating through the book

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A METHODOLOGY TO DRAFT A GLOSSARY OF COMPARATIVE (ADMINISTRATIVE) LAW

Roberto Caranta[*] *and Benedetta Biancardi*[**]

There is an understanding
among translators that translation is
not about replacing one word with
another, but rather that it is the meaning that is translated[1]

SUMMARY: *1. Introduction. 2. The methodology for the Glossary. 3. Consequences of harm. 4. Conclusions.*

1. Introduction

The COVID-19 Litigation Project, led by Prof. Paola Iamiceli and Prof. Cons. Fabrizio Cafaggi, traces and makes accessible in a dedicated Database the litigation stemming all over the world from challenges related to public health measures adopted within the pandemic. For each judgment, a series of information must be provided following an articulated questionnaire. To allow meaningful interaction among the many actors, including judges and practitioners from jurisdictions spanning the whole world, the project leaders asked the authors of this chapter to develop a Glossary focusing on administrative law and intended to provide a common vocabulary to respondents, so that they

[*] Professor of Administrative Law, University of Turin, Department of Law.

[**] PhD in Law, University of Turin.

[1] A. DOCZEKALSKA, *Comparative Law and Legal Translation in the Search for Functional Equivalents – Intertwined or Separate Domains?*, in *Comparative Legilinguistics*, 2013/16, p. 66.

could in turn develop a shared understanding of the questions, thus making their answers more easily comparable.

The first draft of the Glossary was prepared by Prof. Roberto Caranta and Dott. Benedetta Biancardi, then both with the University of Turin, who received feedback first from Prof. Cons. Fabrizio Cafaggi and Prof. Paola Iamiceli, and then from project participants from a number of jurisdictions. The authors also acknowledged the useful written comments and suggestions by Markus Thoma (Austrian Supreme Administrative Court) and by Alen Rajko (Rijeka Administrative Court). The methodology and the Glossary were further discussed during an online webinar on March 24th, 2022 convened by Prof. Cons. Cafaggi and Prof. Iamiceli together with Mr. Benn Mc Grady (World Health Organization). To the workshop also participated Professors François Lichère (Université Jean Moulin Lyon 3), Susana de la Sierra (University of Castilla - La Mancha, Toledo), Natalia Rueda (University of Externado, Colombia), Damian Chalmers (National University of Singapore), Paul Craig (University of Oxford), Peter L. Strauss (University of Columbia), Anton Ming-Zhi Gao (National Tsing Hua University, Taiwan), Ittai Bar Siman tov (Bar-Ilan University Faculty of Law), Mario Comba (University of Turin) and Joana Mendes (University of Luxembourg). Interesting comments and criticisms were advanced during the workshop and these will be shortly discussed in the conclusions.

This chapter starts with a general illustration of the methodology for establishing the Glossary (§ 2), followed by a more in-depth analysis of the issues raised by compensation claims following harm (§ 3). The conclusions illustrate the constraints and shortcomings of the Glossary produced and give some indications as to how the work may be expanded and strengthened.

2. The methodology for the Glossary

A short methodological note, explaining how it was imagined and how it should be used, accompanied the Glossary. This paragraph expands on that note.

The late Prof. Rodolfo Sacco clearly pointed out that:

> La traduction comporte sûrement la recherche de la signification d'une phrase juridique dans une première langue, et la recherche de la phrase qui est appropriée pour exprimer, dans une deuxième langue, cette signification[2].

The starting point is therefore that a word by word translation is most of the times meaningless. We need phrases expressing one legal concept or rule in two (or more) different languages. Again, Sacco clarifies that:

> Le problème de traduction est le problème de la correspondance entre deux expressions tirées de deux ou plusieurs langues différentes. La correspondance existe si les deux expressions se rapportent à un seul concept[3].

The fact that bridging by understanding concepts from different legal orders cannot be achieved through a word-by-word translation has been well explained by legal translators (*juristes linguists*) working within the EU. As it was rightfully pointed out:

> translation is made not only between languages but also between cultures […]. This cultural transfer is observed especially when legal texts are translated, since legal translation is performed between legal languages, which are deeply rooted in the legal culture and the legal system of a particular country. Unlike other specialized fields (e.g., science, medicine), law has not developed an international and universal language and terminology […]. Instead, each legal system has its own legal terms, known as system-bound terms, to denote concepts specific to that system. This is evident when legal systems use different languages; however, even in cases where legal systems apply the same ethnic language to create legal texts (for instance, English used by American and British law), the legal systems utilize different terminol-

[2] R. SACCO, *Les problèmes de traduction juridique*, in *Rapports nationaux italiens au XIIe Congrès international de droit comparé*, Sidney, 1986 (Milan, 1986), now available at *https://teseo.unitn.it/cll/article/view/2201*, p. 3.

[3] *Ibid.* at p. 4.

> ogy, or the same terms are applied to denote concepts that are not exactly the same[4].

Again, Sacco wrote that:

> La langue juridique, langue de la science, devrait être axée sur la correspondance entre un mot et une catégorie, définie par l'ensemble de ses caractères constitutifs (= par sa dénotation)[5].

The Glossary had therefore to include concepts and not just words.

So much so that the *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* clearly states that:

> Certain expressions which are quite common in the language in which the text is drafted may not necessarily have an equivalent in other Union languages. In those languages, they can therefore only be translated using circumlocutions and approximations, which result in semantic divergences between the various language versions. Expressions which are too specific to a particular language should therefore be avoided, as far as possible. As regards legal terminology, terms which are too closely linked to a particular national legal system should be avoided[6].

The experience of the EU is clearly relevant, as the EU has 24 official languages, way more than any other polity on Earth. The EU is characterised by its cultural and linguistic diversity and the languages spoken in EU countries are an essential part of its cultural heritage. As part to the Right to good administration, Article 41(4) of the European Charter of Fundamental Rights provides that «Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language». This is an application of the wider mandate for the EU to «respect its rich cultural and linguistic diversity» written into the last phrase of Article 3(3) of the TEU.

As word-by-word translation alone would have not been useful, the approach chosen steered away from just incorporating definitions – in-

[4] See A. DOCZEKALSKA, *op. cit.*, p. 64 – *emphasis added*.

[5] At p. 5.

[6] At 5.31 ff.

cluding legal dictionaries' definitions – from a few jurisdictions or entries from legal dictionaries or *thesauri* focused on a single jurisdiction. Such a rude approach would have not met the objective as contributors to the COVID-19 Litigation Project hailing from the same jurisdictions as the materials chosen would have found the materials to be very basic, not adding to what they already know. For contributors hailing from different jurisdictions, the overall context and implied understandings (criptotypes in Sacco's terminology) would have been totally lost, with the additional risk of false friends providing an ungrounded feeling of understanding.

Therefore, while some of the entries (the first ones) into the Glossary started with a tentative word-by-word translation, they already included some caveats as to the shortcomings in the translation, followed by comparative sketches describing the fundamental concepts beyond the words. Still we strongly believe that the word-by-word translation should not be used without before considering the sketches, so that the caveats therein included should be taken very seriously and they are not pretended to be exhaustive.

We can provide as an instance the locution 'abuse of power', the first entry into the Glossary:

> *Abuse of power* [FR *abus de pouvoir* BUT in adm. law *excès de pouvoir*; IT *abuso di potere* BUT in adm. law *violazione di legge* (contrary to the law) OR *eccesso di potere* (contrary to the aim of the law); SP *abuso de poder* BUT in adm. law *desviación de poder* (BUT only if contrary to the aim of the law)].
> Use of power from someone who possesses it in a manner contrary to law and/or to its spirit.
> With specific regard to public authorities exerting discretionary powers, when the authority, which is formally granted a given power, makes an improper use of it going beyond or against the *ratio* and objectives for which it has been granted in the first place (see in detail Discretion; and esp. Abuse of discretion). An improper use of power might ground a challenge of the validity of the adopted measures (see Invalidity (grounds of review)).
> Abuse of power is one of the (many) grounds of review listed Cap. 109B, s 4 of the Barbados Administrative Justice Act 1983.
> In many jurisdictions Abuse of power is a criminal offence.

This is far from the most intractable locution we add to address. However, it already shows some of the difficulties in translation. In this case, many difficulties stem from the fact that in several jurisdictions, such as France, Italy and Spain, «abuse of power» is a generic non-legal term acquiring a specific legal meaning under criminal law, which in turn is not used as such in administrative law (unlike e.g. in the Barbados). What is already clear is that to understand even a rather easy notion, which moreover finds a correspondence in a lay use, cross-reference is needed to a number of fundamental legal notions. And this was an easy one.

Generally speaking, these descriptions are clearly just sketches, because many concepts, such as e.g. «the Rule of law», «legality», «judicial review» and «damages» have already and each of them commanded comparative works, including a number of books, still focusing on a limited number of jurisdictions (usually France and/or Germany for the civil law tradition and England and the US for the common law one). It is simply impossible to distil a detailed digest of these many hundred comparative works.

Still we wanted our descriptions to be comparative, to show how what are often translated into English with the same word are instead frequently diverging concepts or at least discretely diverging concepts. The notion of the «Rule of Law» being a good example of this:

> *Rule of Law/Rechtsstaat*
> A fundamental constitutional/public law principle developed between the XVIII and the XIX century in different European jurisdictions. It is today mentioned among the values the European Union is founded upon (Article 2 TEU - *État de droit* in French). Basically, the Rule of Law implies the supremacy of the law over the King/Queen or more often so the executive power or public authorities generally (see Public authority/agency).
> While in common law jurisdictions this supremacy was understood (Dicey) as the supremacy of the ordinary law of the realm, in civil law countries this more widely means the supremacy of rules (statutes etc.) enacted by Parliament, including rules specifically granting powers going beyond what is allowed to private parties under the common law (*pouvoirs exhorbitants*) to public authorities (see Public authority/agency) as those were interpreted and construed by (administrative) courts.

What is worth noting – beyond that having read again the entry we realised that «exorbitant» is a false friend for *exhorbitant* (the English having a much narrower meaning) so we changed the text accordingly – is that even the official translation in the founding Treaty of the EU cannot avoid masking the deep differences among the two notions, which by the way are at the root of a century long misunderstanding of French administrative law[7].

Through cross references from one entry to the other in the comparative sketches, comparison may be scaled up to what are often at least partial functional equivalents[8]. What we tried to highlight – within the limits of «sketches» – were both similarities and dissimilarities between different legal traditions by comparing notions from some representative jurisdictions (from both the civil and the common law traditions) with no attempt and not even a pretence to be able to cover all the nuances, but still going deep enough to highlight similarities and cautioning about, instead of overlooking, the dissimilarities.

A limited number of more jurisdiction-specific terms were anyway included to avoid the wrong feeling that similarities or functional equivalents are always – and worth – to be found. See for example:

> «Military act»: «An administrative act/action adopted/undertaken by a military public authority». In the US The Posse Comitatus Act (18 U.S.C. § 1385, original at 20 Stat. 152) signed on June 18, 1878, limits the powers of the federal government in the use of federal military personnel to enforce domestic policies within the United States.

Also, such specific terms might be relevant in other jurisdictions the authors of the Glossary are unfamiliar with.

To draft the Glossary, we relied on a number of sources, the most relevant of which are listed at the bottom, but we more generally benefited from the huge comparative work done in the past decades at the Universities of Turin and Trento. This has of course largely precipitated

[7] See the discussion by G. DELLA CANANEA, *A «Common Core» Research on Government Liability in Tort*, in G. DELLA CANANEA, R. CARANTA (eds.), *Tort Liability of Public Authorities in European Law*, Oxford, 2020, p. 7 ff.

[8] M. GRAZIADEI, *The Functionalist Heritage*, Chapter 5 in P. LEGRAND, R. MUNDAY (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge, 2003.

in printed works, but a non-negligible part thereof is consigned to the memory of talks, exchanges and debates in the least formal moments of the meeting we could have before the pandemics.

3. Consequences of harm

To better illustrate the Glossary and the methodology behind it, we look more closely here to one specific, but obviously relevant issue, i.e. the consequences of harm from the management of the COVID-19 pandemics. State action or inaction may have led – we intentionally refrain for using the legally laden word «caused» here – to harm, both to the health (death or injury) or to business interest (e.g. because of lockdowns).

A number of entries in the Glossary are directly focusing on that issue: «Compensation», «Damages and Liability», «Indemnification». Other are less directly relevant, such as «Action (judicial)», «Evidence and Proof» and so on. The attention here will be devoted only to the first class of entries (i.e. directly focusing ones).

Starting with «Compensation», we indicated:

> *Compensation* (while easily translated in the lay languages in many countries - eg FR *compensation* but also *réparation*; IT *compensazione* etc.), - the legal terminology in many civil law jurisdictions distinguishes between different types of compensation - eg FR *dommages et intérêts* are different from *indemnité*; false friends abound - eg IT (legal terminology) *compensazione* is to be translated as set-off.

One more instance of to what extent word-by-word translation is of little use if not misleading and thence the need to refer to the sketch. In the sketch, we define «Compensation» as «Redress provided for wrongs or losses». This is explained by writing that:

> Almost all legal systems consider that compensation should be required under certain circumstances for harm or loss caused by one party to another. However, the circumstances under which such compensation should be granted, as well as the level of compensation that is considered appropriate may differ significantly from one jurisdiction to anoth-

> er, as well as from one type of situation to another. Compensation is a broad notion, which can be used to indicate two major situations, subject to different rules: i.e. it might refer to indemnification or *ex gratia* payments (see Indemnification) or to damages (see Damages). The essential difference between these two instances lies upon the grounds over which compensation is granted. Often an indemnity is due for some lawful but harmful decision or omission. On the characteristics of these two notions, as well as to their payment quantification rules see their respective analysis. A distinction between the two concepts worth mentioning here is that damages usually aim at providing an integral compensation, since they restore an unlawful harm, indemnification often only guarantees a partial restoration. In both instances, however, compensation always implies the idea that what is lost is replaced with something, usually a sum of money, which does not need to be the same as the loss having occurred; and in that compensation differs from the notion of restitution (see *infra* Restitution).

«Compensation» seems to be a (legal) term of art in those jurisdictions giving a pre-eminent place to remedies when trying to put the law in a comprehensible order. This is the case with the common law world, where remedies precede rights. As Helge Dedek wrote:

> If a comparative lawyer were asked to boil down the complexities to a single catchphrase the answer would probably look something like this: in the common law the remedy is said to precede the right, ubi remedium, ibi ius; whereas in the civil law the right is said to precede the remedy, ubi ius, ibi remedium. Despite the apparent triteness of this summary, I maintain that there is not only truth to this aphorism, but that it stands as a synecdoche for a fundamental epistemological difference between the common law and the civil law traditions[9].

A civil lawyer would have probably not chosen «compensation» as an ordering category. S/he would rather have had reasoned of «responsibility» as a source of rights and obligations. This insight might have taken place in the sketch.

Also the sketch above is somewhat slipping on a false friend. The reference to «restitution» is worded having in mind the *restitution in*

[9] H. DEDEK, *From norms to facts: the realization of rights in common and civil private law*, in *McGill Law Journal – Revue de Droit McGill*, 2010, 56, 1, p. 80 ff (references omitted).

integrum, i.e. damages in kind. The entry «restitution» does instead refer to the very different and specific common law concept[10].

As indicated above, «compensation» as a genus includes two species, «indemnification» and «damages». While the former word is hardly a term of art in legal English, the distinction lies in the absence/presence of an unlawful act or omission. This is shortly elaborated upon in the sketch under the entry «Indemnification»:

> While the terminology is shifting from one jurisdiction to the other, we take here indemnification (or indemnity) the compensation (see → Compensation) for lawful infringement on property or other legal asset/ interest etc. This distinguishes indemnification from damages, which are due for unlawful harm (see → Damages). Indemnification is particularly relevant in public law, since public authorities (see Public authority/agency) often have overriding authoritative powers to act to the detriment of individuals in the general/public interest.

Those overriding powers were in full display during the COVID-19 pandemics. Suffice here to recall lockdown and mandatory vaccinations for members of the medical profession. «Indemnification» has other advantages over «damages». Other parts of the sketch clarify that «indemnification» might be available even in cases in which proving all conditions of liability (e.g. causation or negligence) might be too difficult, and so as a way to avoid litigation and its risks. This is the case of

[10] «*Restitution*. It constitutes one of the remedies that might be granted by a Court as a consequence of a specific claim by the party (see Action; see also difference with Compensation). Broadly speaking, in common law jurisdictions the law of restitution concerns actions in which one person claims an entitlement in respect of a gain acquired by another, rather than compensation for a loss. This corresponds to the Roman law *actio de in rem verso*, variously rendered in modern roman languages as eg. *enrichissement sans cause* (today *injustifié*) – Code civil, Article 1303. Restitution is intimately connected with the notion of restoration, i.e. the act of restoring something that was lost. It involves replacing what has been lost or taken, with something that is either the thing itself or something identical or indistinguishable. After restitution the party receiving it should be in the exact position she would have been in had the act leading to the need for restitution or restoration not occurred. In that it differs from compensation (see *infra* damages; if restitution concerns replacing like with like, at best compensation provides a subjectively determined approximation of the value of the thing or person affected or lost)».

indemnity provided for contaminated/infected blood transfusions under Italian law. This is akin to *ex gratia* payment made by public authorities for damages or claims, without the admittance of liability by them. An ex-gratia payment is not legally necessary, it is made to show good intentions. In Australia, at the Commonwealth level, act of grace payments are made pursuant to subsection 33(1) of the *Financial Management and Accountability Act 1997* (FMA Act). Under subsection 33(1) of the FMA Act, the Finance Minister (or his delegate) may authorise a payment if he considers it appropriate to do so because of special circumstances, even though the payment would not otherwise be authorised by law or required to meet a legal liability. The FMA Act does not define what constitutes «special circumstances». However, the Department of Finance and Deregulation has advised that an act of grace payment may be appropriate in relation to special circumstances that have occurred as a direct result of: (a) the involvement of a government agency, where that involvement caused an unintended and inequitable outcome for the applicant; or (b) the application of legislation or policy, which has resulted in an unintended, inequitable or anomalous effect on the applicant's particular circumstances.

On the one hand, *ex gratia* payment schemes are easier and cheaper to manage than individual damages actions[11]. On the other hand, as indicated under «compensation», with «indemnification» redress can fall short of full compensation of the loss. «Good intentions» may only go so far.

The Constitutional Court of Colombia provides a super interesting case from the COVID-19 litigation database[12]. Two organizations of ancestral Afro-Colombian midwives and an NGO filed a protective action against the local and national government arguing that the midwives are part of marginalized groups that have been profoundly affected by the armed conflict and that the COVID-19 pandemic had hampered their work as midwives and impoverished them. They argued that

[11] To give an idea of the number potentially involved, the *ex gratia* scheme set up by the government of India to compensate for COVID-19 deaths had attracted North of 700.000 applications: see India, Supreme Court of India, 24 March 2022, No. 1805/2021 In WP (C) 539/2021.

[12] Colombia, Constitutional Court, 18 April 2022, T-128/2022.

the National Executive order that recognized economic compensation for healthcare workers did not apply to them although – they claimed – they had the right to it. Likewise, they had not been prioritized in the National Vaccination Plan against the virus, nor had they received medical equipment nor formal training to face it. The Constitutional Court affirmed a lower court decision granting the protection regarding the medical equipment and the prioritization in the National Vaccination Plan as midwives provided healthcare services during the COVID-19 pandemic, even to sick people, and therefore had to be considered healthcare staff for these purposes. For the Court, their exclusion from these benefits was arbitrary as they had a high risk of exposure to the virus.

Politics, not law, decides on indemnification. Still, in many jurisdictions, the law may kick in if the provisions for *ex gratia* payments are couched so as to defeat equality, logic or other locally relevant parameters. Damages instead are a matter of rights and obligations. As indicated in the first few lines of the entry «Damages and Liability»:

> Damages are generally described as compensation (see also Compensation) recoverable in court by one who has suffered loss, detriment, or injury to his or her person, property, or rights, due to the unlawful acts – or, on specific circumstances, an unlawful omission (see → Inaction) – and/or negligence of others.

While indemnification is *relatively* straightforward, damages is one of the fundamental remedies in both private and administrative law. The corresponding sketch is 435 words long, but does not even come close to scratching the surface of big issues, such as what are the conditions for liability beyond unlawfulness (e.g. causation, fault, heads of damages) and those conditions vary greatly from one jurisdiction to another[13]. And obviously courts will be ready to award the compensation provided under the law if the administration fails to do so, as in a case in which a public contract was terminated due to the impossibility

[13] Concerning Europe see the reports collected in G. DELLA CANANEA, R. CARANTA (eds.), *op. cit.*

to perform it when the pandemics was raging but the contracting authority failed to answer the request for compensation[14].

How much «compensation» has been featured in the judgments and other judicial decisions so far collected in the COVID-19 project? «Compensations» returns 144 documents, while «damages» 272 (which probably indicates that in many jurisdictions the *genus* is not really referred to, while the *species* is). «Indemnification» only returns one, confirming that this is not much a term of art (*ex gratia* gets six, including a very interesting case from India[15]. «Subsidy» returns 16, further confirming that the choice of «indemnification» was not the best possible), and «liability» 67. We can safely assume that there are some instances where a different term, like «damages» and «compensation» occurred (and indeed a research with the two words retuned 59 matches).

The occurrence of a word is not a 100% sure safeguard that issues of responsibility actually arose in all those cases.

Still, we are probably at about 300 relevant cases, which is a great deal that could be used in very meaningful comparative research, especially when the dust settles and divergent judgments in the same jurisdiction are weeded out through appeal procedures bringing cases to the country supreme court. This research however goes wildly beyond what we can do for this chapter. We would therefore be content with highlighting some interesting cases not only to show the potential of further research, but also to highlight and to support some of the points made in the Glossary[16].

A case from India shows that in some jurisdictions the distinction between damages and indemnification may be less straightforward than assumed in the Glossary. The first instance Orissa Court has held liable a State-run medical facility for medical negligence, which caused the death of two COVID-19 patients and ordered for the payment of *ex*

[14] Spain, Lugo Administrative Court (No. 1), 11 February 2022, Judgement 24/2022.

[15] India, Supreme Court of India, 4 October 2021, Writ Petition (Civil) No. 539 of 2021.

[16] See further P. IAMICELI, F. CAFAGGI, *The Courts and effective judicial protection during the Covid-19 pandemic. A comparative analysis*, in *BioLaw Journal – Rivista di BioDiritto*, 1, 2023 esp. p. 411 ff.

gratia and compensation to the victims and their families based on a lump sum recommended by the Inquiry Authority[17].

A relevant aspect concerns the requirement of unlawfulness for liability and in order to be awarded damages. In an interesting case from Germany, a child attending a day-care centre was ordered a domestic quarantine measure when another child tested positive for COVID-19 even if s/he has tested negative. S/he asked damages for EUR 10,250 plus a 5% of interest for pain and suffering. The Health Authority had recourse to the usual dumb excuse loved by bureaucrats all over the world: they had applied the law. More to the point, the Court stressed that children in the same group as the claimant tested positive, so that, according to the scientific knowledge available at the time as followed by the German Scientific Institute there was high probability that the claimant too could have COVID-19. Therefore, the claim for compensation for pain and suffering had no legal basis because, in the absence of an illegality of the disputed orders, claims for damages are excluded under German Civil Law[18].

Another case, decided by the highest Court in Germany, concerned damages to an economic activity (restaurant) from lockdown measures. Here again any liability was ruled down as the measures taken were considered lawful. This meant that the restaurant owner was only entitled to the emergency aid (again a different word for «indemnification») foreseen by his *Land* (and he had actually been already paid

[17] India, High Court of Orissa, 23 March 2022, W.P. (C) PIL No. 17152 of 2021; remarkably, the Court held that in a welfare state, the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state. Article 21 of the Constitution imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance in the preservation of human life. Failure on the part of a government hospital to provide a timely medical treatment to a person in need of such treatment results in the violation of his right to life guaranteed under Article 21.

[18] Germany, Civil Court Hamburg, 13 April 2022, No.336 O 143/21.

EUR 60,000, but was looking for full compensation of the harm suffered)[19].

Similarly, in Italy damages for harm from lockdown measures hitting specific economic activities open to the public were excluded. The Court found the measures to be based on science. In addition, the Court ruled out fault as the measures were adopted in a context of extreme uncertainty and were inspired by the utmost caution, correctly balancing the protection of public health with the free exercise of economic activities. Finally, the Court highlighted that the companies affected had received some form of «economic relief» («indemnification» according to the Glossary)[20].

A different situation concerns the dismissal of workers who refuse vaccination. A Russian Court rejected a request for damages for lost income and moral damages because dismissal in such a situation was lawful under the applicable legislation[21]. A different Russian Court instead ruled out the legality of a suspension from the job, arguing that a right to refuse vaccination was enshrined in the legislation[22].

Another hurdle difficult to surmount for claimants in liability actions is causation. Both in Germany and in Brazil the Courts seized by workers in the health sector denied damages as the causal link between the occupation and the contagion was not established (and, according to the German Court, could not be established – or be ruled out one has to add)[23]. A particularity of the German case stressed by the Court is that the worker was only employed part time, but still she was not provided protective devices in the early stages of the pandemics. The Brazilian worker was primarily asking for her job position to be «stabilised» and

[19] Germany, Federal Supreme Court, 17 March 2022, No. III ZR 79/21.

[20] Italy, Administrative Regional Tribunal of Lazio - Rome, 5 April 2022, No. 3910/2022.

[21] Russian Federation, Judicial Chamber on Civil cases of the Volgograd Region Court, 10 February 2022, Case 33-476/2022.

[22] Russian Federation, Krasnooktyabrsky District Court of city of Volgograd, 23 December 2021, No.34RS0005-01-2021-005746-62.

[23] Brazil, Regional Labor Court 2nd Region, 7 March 2022, No.1001108-92.2020.5.02.0025; Germany, Labor Court of Siegburg, 30 March 2022, No. 3 Ca 1848/21.

for moral damages due to stressing working conditions and she was denied both.

A totally different approach was followed in Spain in a judgment on an action brought by the trade union for health workers lamenting the lack of personal protective devices in the early stages of the pandemics. The Court considered that it was the responsibility of the Health Authority to protect its workers and that it failed to do so, providing insufficient protective masks etc. On this basis, the Court held that the infringement of the labour risk prevention law had caused (causal link) immaterial damages (suffering and anguish for working in those poor and difficult circumstances). Therefore, the Court awarded damages, varying its amount, to four groups of health professionals: (1) those infected, hospitalized, and on work leave (€ 49,180), (2) those infected, quarantined at home, and on work leave (€ 35,000), (3) those quarantined but not infected (€ 15,000) and (4) those neither infected nor in quarantine (€ 5,000). To grant these damages, the Court used the figures provided for in the Labour Infringements and Penalties Law as a guiding principle. Instead, the Court rejected compensating the trade union for damages.

Concerning the recoverable heads of damages, moral damages have often been sought in COVID-19 litigations. More often than not, those actions have been dismissed. One remarkable exception is the claim brought by the professional body for health workers, which challenged the decision by the regional Health Authority to prioritise vaccination only for those working in the public sector, with the exclusion of those working in private hospitals or clinics. The measure was found to be discriminatory and unlawful and the professional body was awarded EUR 10,000 for moral damages[24].

All in all, liability is not easy to engage, and maybe other compensation mechanisms are better suited to the scale of harm brought about by the management of the COVID-19 pandemics[25].

[24] Spain, Alicante First Instance Administrative Court No. 3, 13 January 2022, No. 3 Judgement.

[25] See F. CAFAGGI, P. IAMICELI, *op. cit.*, p. 411 ff.

4. Conclusions

As is well known, a most relevant Glossary was the one established by Jacopo Facciolati and his pupil Egidio Forcellini. In 1719 Facciolati published a revised edition of the *Lexicon Septem Linguarum*, a Latin dictionary in seven languages, called the «Calepinus», from the name of its author, Ambrogio Calepino. The labours – not just «work», mind the terminology – on the «Calepinus» convinced Facciolati of the need of a totally new Latin *lexicon*. Facciolati and Forcellini read through the entire body of Latin literature, as well as the whole collection of Latin inscriptions, including those on coins and medals. Their great lexicon, which bore the title *Totius Latinitatis Lexicon*, was published in four volumes in 1771 by Giovanni Manfrè, printer at the Paduan seminar (church school) after the death of both the editors.

As it has been often the case with the COVID-19 pandemics, we did not have the leisure of time. The template for describing the relevant judgments or other judicial decisions had already been set and contributors had already started working when we were asked to contribute a Glossary. The need for a Glossary became evident in these first phases.

In an ideal world a Glossary would be probably developed together with the template, but unless he is Pangloss any reader will agree that there would be no such a thing as COVID-19 in an ideal world. Having started with the template, the choice of words was in the first place dictated by the template itself. What we added – and always keeping in mind that the clock was ticking – were some words related to wider concepts we deemed necessary to have a wider and clearer picture of the litigation.

The limited time was not the only good excuse for the limits and shortcomings in the Glossary. Another obvious limit was the very small two people team, with ensuing linguistic and jurisdiction knowledge, which could only be to some extent be compansated by contributions from Prof. Cons. Cafaggi and Prof. Iamiceli and from other members of the COVID-19 litigation team and from the colleagues having taken part in the already mentioned workshop. However, as it was rightly remarked in the workshop, the Glossary is deeply steeped in the Western legal tradition and in its best-known jurisdictions.

Still it was an intense and rewarding exercise. What the Glossary does not show is the number of times information was moved from one entry to the other, new entries were created and others were consolidated. The challenge has been to decide where to put information that could be more naturally sought by contributors to the project. We did this through a series of trial and errors that do not show.

Would it be sensible to (possibly) rethink, expand and deepen the Glossary? What would this require?

Starting from the last question, the obvious answer is a larger and much diverse group. So far, the Glossary is mainly focusing on administrative law and a few jurisdictions. And we were of course much conditioned by what we know and even more by what we do not know. Prof. Strauss was right in remarking that – rather in keeping with a European administrative law tradition – we focused much on what in the US is adjudication. However, in many countries, regulation was more relevant in dealing with the COVID-19 pandemics. In turn, what is in the US treated as regulation, in many other jurisdictions, possibly including India, would be considered legislation, and it will be analysed under constitutional rather than administrative law. Probably nothing less than a Glossary covering the whole of public law could encompass and try explaining this complexity. So we come to the first question. It would be sensible to rethink, expand and deepen it. Just for one moment, reconsider compensation issues again: to a minimum, entries on the (possible) requirements for liability (fault, causation, heads of damages etc.) will have to be added.

A great *lexicon* might take less than 50 years, but for sure it will need many more people and many resources.

PART II

THE ROLE OF SUPRANATIONAL COURTS

JUDICIAL PROTECTION AND THE ROLE OF THE COURTS IN THE PANDEMIC: PERSPECTIVES FROM THE EUROPEAN COURT OF JUSTICE

Laila Medina[*]

SUMMARY: *1. Health emergency and democracy. 2. Pandemic and challenges to the Court's administration of justice. 3. COVID-19 pandemic relevant EU case-law. 3.1. COVID-19 pandemic, «force majeure» and derogation from secondary EU law. 3.2. COVID-19 pandemic and impact on rights of package travellers. 4. Concluding remarks.*

1. Health emergency and democracy

The COVID-19 pandemic was a *megacrisis*[1] and the measures adopted to respond to this emergency had an unprecedented impact on all sectors of the worldwide economy, as well as on politics and society at large. The pandemic was also a *stress-test*[2] for the law and its enforcement. Well established concepts, such as *force majeure* had to be applied in a novel context, but also new legislation had to be drafted, implemented, and applied under circumstances of extreme uncertainty.

However, a crisis is also an opportunity, and COVID-19 allowed democracy to demonstrate its strengths. The circumstances posed by COVID-19 proved that checks and balances are essential to democratic societies. At the beginning of the pandemic, amid high scientific and social uncertainty, political decisions had to be made in stressful condi-

[*] Advocate General at the Court of Justice of the European Union. All opinions expressed are personal.

[1] E. MORIN, *Changeons de voie, les leçons du coronavirus*, Paris, 2020.

[2] C. TWIGG-FLESNER, *The COVID-19 Pandemic – a Stress Test for Contract Law?*, in *Journal of European Consumer and Market Law (EuCML)*, 9, 2020, pp. 89-92.

tions, when people's welfare and health were under immediate threat[3]. Under such circumstances characterised by extreme complexity, it is possible, and even likely, that the wrong decisions will be made. Therefore, it was and is still important that decision-making is subject to debate and to contestation, even if *a posteriori*. These decisions should be subject to judicial review. The circumstances of this emergency clearly revealed that it is of utmost importance to adhere to strong democratic traditions, to protect democratic values, and to preserve the rule of law.

Indeed, the resilience of democracy can be strained by global threats to states. A crisis of such magnitude as COVID-19 bears the risk of a slippery slope leading to authoritarianism. The aim of protection of public health and the right to life may create the political sentiment that the aim excuses all methods. Let us recall the maxim of *Ciceron* from *De legibus* «ollis salus populi suprema lex esto»; for them (the Consuls) the health of the people should be the supreme law. *Salus populi* may allow extraordinary powers in case of extraordinary threats, but it also provides a limit[4]. COVID-19 is a virus but the crisis it created questioned the ability of democracy to resolve challenges within the boundaries of the rule of law. Those boundaries and the formal rules of democracy do not hinder the handling of the crisis. Democracy and the rule of law are the pillars for the protection of fundamental rights and intend to prevent the possible misuse of political power.

Three years after the outbreak of the pandemic, where scientific knowledge has allowed governments in the European Union to lift almost all restrictions related to COVID-19, it is time to draw lessons from what was learned and to build back better. In this context, I would like to recall some conditions and basic principles of constitutional im-

[3] See J.C. RICCI, *Le droit à l'épreuve de la Covid-19*, in A. LAMI (dir.), *La pandémie de Covid-19. Les systèmes juridiques à l'épreuve de la crise sanitaire*, Brussels, 2021, pp. 15-26, p. 25.

[4] D. MANTOVANI, *Quand la santé devient politique*, *Fondation Collège de France*, May 2020, available at *https://www.fondation-cdf.fr/2020/05/13/quand-la-sante-devient-politique/*. See also F. VIALLA, *Ollis Salus Populi Suprema Lex Esto*, in A. LAMI, *op. cit.*, footnote 4, p. 27, who recalls from J. SELDEN's *Table Talk* (1696) that «There is not anything in the World more abused than this Sentence. Salus populi suprema lex […]».

portance through which democracy and the rule of law provide a path to overcome crises[5].

Legality and parliamentary oversight. Governmental measures must observe the principle of legality, particularly with regard to restrictions on human rights. The government's mandate and scope should directly flow from the legislator's will and should be subject to the legislator's oversight. State of emergency and restrictions may only be introduced for a fixed term.

Society's involvement and ex-post control. In order to adopt qualitative decisions and to identify vulnerable groups and affected areas, experts and civil society from different areas must be involved in the preparation of proposals and decisions. There must be effective control and transparency of governmental actions to prevent corruption and abuse of power.

Necessity and proportionality. Measures adopted to combat the pandemic should target clearly defined and actually existing dangers. Only restrictions directly linked to the containment of the spread of the virus are admissible. This means that the pandemic should not be instrumentalised for reaching other objectives. The duration and scope of restrictions should be appropriate to the prevailing conditions and they must be reviewed regularly.

Prohibition of discrimination and protection of fundamental rights. The measures adopted against the pandemic must observe absolute fundamental rights and all decisions must comply with the requirements prohibiting discrimination.

Meeting international commitments and collaboration. During a state of emergency, states must respect the international commitments they have assumed, and should foster international cooperation and exchange of information in the defined frameworks of international organisations.

Ensuring effective judicial protection. The continuous operation of courts and individual access to courts must be ensured during a state of emergency. The impact of a crisis on the function of courts should be

[5] L. MEDINA, *Covid-19 ierobežošana demokrātijas apstākļos* (Restrictions of COVID-19 in a democratic society), *Jurista Vārds*, 2021, Nr. 7, p. 1169.

limited to the extent possible, in particular, in cases pertaining to deprivation of liberty, infringements of human rights, and the interests of vulnerable persons, including children.

The uncertainty and stress caused by COVID-19 posed evident remarkable challenges to the functioning of courts and the safeguarding of access to justice. Against that backdrop, the competences of the judiciary had to be preserved in order to render justice and the court system had to remain functional and thereby afford the same level of procedural guaranties to all parties. While the means may have differ, the level of protection for all parties before the court should remain unaffected.

During the COVID-19 pandemic, courts had more than one role to play. They were both the guardians of individual rights in cases of administrative acts and revealed possible systemic deficiencies in the executive decision-making process. In addition, courts exposed possible gaps in legislation by applying existing legal concepts under pressure from the crisis, thus giving novel interpretation to certain established legal concepts through dispute resolution.

On this basis, courts could provide *double level guidance*. The first level is the immediate test of the legitimacy of governmental measures challenged by addressees of the measures before the courts. The second level consists in long-term advice to the other two branches of power by highlighting *red lines* in the execution of legislative and executive power. Although legislative and executive branches have a large margin of discretion to act in times of crisis, there are definite limits. The task of the national courts was to hold the other two branches accountable, ensure observance to the rule of law, protect fundamental rights, and control the limits of actions taken by executive branch within the boundaries of democratic values.

2. Pandemic and challenges to the Court's administration of justice

The pandemic has been a challenge to institutions and courts not only at the national, but also at the EU level. With regard to EU institutions, at the time of the pandemic, they had to display a «remarkable

capacity to adapt and innovate»[6], in the space of just a few weeks. The Court of Justice was no exception. The rules and functioning of the Court of Justice were the object of «a number of significant adjustments… to ensure that they could continue to fulfil their essential mission»[7]. The ECJ took measures to mitigate the impact of COVID-19 on legal processes and resorted to technological means in order to allow access to justice at the EU level. As it was the case with many jurisdictions, the Court continued to function remotely. The most important challenge to accessing justice concerned the organisation of hearings. The institution deployed 'considerable human, technical and financial resources' in order to enable the parties to plead remotely, by videoconference[8]. However, the Court never adopted fully remote-based hearings. The Members of the Court were always physically present at the bench but the parties had the possibility to plead by videoconference depending on certain conditions.

After the restrictive measures were lifted, the Court returned to the previous method of conducting hearings. However, the acquis of videoconferencing is undeniable. Apart from allowing hearings to take place during the pandemic, the use of digital tools promoted openness of the judiciary and people centred justice[9]. As mentioned, times of crises test the efficacy of existing systems to serve their purpose and deliver justice, and can also serve as long awaited stimulus to implement new solutions.

It is evident that the COVID-19 pandemic paved the way for digital solutions to enter the usually conservative judicial world. Digital communication, video presence in the courtroom, and websites providing guidance, are just few examples. If used wisely, digitalisation can provide access to the activity of the courts or other means of delivering justice to everyone.

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[6] M.A. GAUDISSART, *Annual Report of the Court of Justice 2020*, p. 199.

[7] *Ibid.*

[8] *Ibid.*, p. 200.

[9] See L. MEDINA, *People-centred justice and the European Court of Justice*, in *Lex & Forum*, 1, 2023, pp. 5-10.

3. COVID-19 pandemic relevant EU case-law

Though the case-law of the Court relevant to the COVID-19 pandemic is rather recent, the cases cover a broad range of fields in EU law, particularly in the context of the preliminary ruling procedure. Therefore, it is not possible to identify one *line* of COVID-19 case-law but rather different lines developed within different areas of EU law. Pending or recently decided cases concern the fields of free movement of people[10], the interpretation of internal market directives and more particularly package travel (see below), employment rights[11], social security[12], asylum law[13], or data protection[14]. In the context of direct

[10] See Case C-128/22, *NORDIC INFO*, concerning the action for damages by a travel operator against Belgium, because of the measures restricting the free movement of persons due to the pandemic. At the time this article was written, Case C-128/22 was pending. The Court has since held (in its judgment of 5 December 2023) that in a pandemic situation, a Member State may prohibit non-essential travel to other Member States classified as high-risk zones on the basis of the health situation prevailing in those States. It may also impose on persons entering its territory the obligation to carry out screening tests and to observe quarantine. However, such rules must set out the reasons on which they are based, be clear, precise, non-discriminatory and proportionate. They must also be open to challenge.

[11] See Opinion of Advocate General Pikamäe in *Sparkasse Südpfalz* (C-206/22, EU:C:2023:384). The Advocate General proposes to interpret Article 7 of Directive 2003/88 and Article 31(2) of the Charter as not opposing to regulation or national practice according to which paid annual holiday afforded to a worker, which coincides with a period of confinement imposed by a public authority due to the worker being in contact with a person contaminated by the virus, cannot be carried over to another period than the one originally fixed.

[12] See judgment of 15 June 2023, *Thermalhotel Fontana Hotelbetriebsgesellschaft* (C-411/22, EU:C:2023:490). The Court ruled in that judgment the principle of free movement of workers under Article 45 TFEU and Article 7 of Regulation No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, must be interpreted as precluding legislation of a Member State under which the granting of compensation for loss of earnings suffered by workers as a result of isolation ordered following a positive COVID-19 test result is subject to the condition that the imposition of the isolation measure be ordered by an authority of that Member State under that legislation.

[13] See judgment of 22 September 2022, *Bundesrepublik Deutschland (Administrative suspension of the transfer decision)* (C-245/21 and C-248/21, EU:C:2022:709). The

actions, pending or recently decided cases concern challenges to the authorisation of COVID-19 vaccines[15], the EU Digital COVID-19 Certificate[16], EU measures relating to the conduct of clinical trials in relation to COVID-19[17] or to measures adopted by the Parliament in order to restrict access to its buildings in relation to the pandemic[18].

Court ruled that Article 27(4) and Article 29(1) of the Regulation 604/2013 (Dublin III Regulation) must be interpreted as meaning that the time limit for transfer provided for in the latter provision is not interrupted where the competent authorities of a Member State adopt, on the basis of Article 27(4), a revocable decision to suspend the implementation of a transfer decision on the ground that such implementation is materially impossible because of the COVID-19 pandemic.

[14] See judgment of 30 March 2023, *Hauptpersonalrat der Lehrerinnen und Lehrer* (C-34/21, EU:C:2023:270). The judgment concerned the interpretation of Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation - GDPR) in the context of an action against a system for the live streaming of classes by videoconference introduced in schools without the prior consent of the teachers concerned. In the context of mobile applications in the COVID-19 pandemic see Case C-683/21, *Nacionalinis visuomenės sveikatos centras prie Sveikatos apsaugos ministerijos* and Case C-659/22, *Ministerstvo zdravotnictví*. At the time this article was written, C-683/21 and C-659/22 were pending. The Court has since ruled in both cases. The Court held in Case C-683/21 (judgment of 5 December 2023), that an administrative fine pursuant to Article 83 of the GDPR, may only be imposed where it is established that the controller has, intentionally or negligently, committed an infringement of Article 83(4) to (6) of that regulation. In Case C-659/22 (judgment of 5 October 2023), the Court held that the verification, by means of the mobile app, of the validity of the COVID-19 certificates represents a 'processing' in the sense of the GDPR.

[15] See, for instance, orders of 14 January 2022, *Alauzun and Others* v *Commission and EMA* (T-418/21, EU:T:2022:39), and of 13 April 2022, *Alauzun and Others* v *Commission* (T-695/21, EU:T:2022:233).

[16] Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (OJ 2021, L 211, p. 1). See, in particular, Orders of the Court of 5 October 2023 in Case C-43/23 P, *Heidmann* v *Parliament and Council*, and of 16 November 2023 in Case C-17/23 P, *Asociación Liberum and Others* v *Parliament and Council*.

[17] Regulation 2020/1043 of the European Parliament and of the Council of 15 July 2020 on the conduct of clinical trials with and supply of medicinal products for human

The Court was also invited to rule on a challenge to the validity of conditional marketing authorisations granted for vaccines intended to prevent infection with and the spread of COVID-19 in the context of national legislation of compulsory vaccination of health professionals. In its judgment in *Azienda Ospedale-Universita di Padova*[19], the Court ruled that the reference for preliminary ruling in the case was inadmissible. More particularly, the Court found that there were no sufficient elements in the reference on conditional marketing authorisation of COVID-19 vaccines to allow such an appreciation[20]. The Court made clear that conditional marketing authorisations pursuant to Regulation 507/2006[21] do not entail an obligation to vaccinate and the national court did not establish any link between the authorisations and the contested national legislation[22]. With regard to the compatibility of national law with Regulation 2021/953 on the EU Digital Covid Certificate, the Court pointed out that that regulation is intended to facilitate free movement and not to define criteria for assessing the appropriateness of the health measures adopted by the Member States to deal with the COVID-19 pandemic where those measures restrict freedom of movement[23]. It was therefore not possible for the Court to identify the link between the questions asked and EU law.

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use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease (COVID-19) (OJ 2020, L 231, p. 12). See order of 15 September 2022, *CNMSE and Others* v *Parliament and Council* (C-749/21 P, EU:C:2022:699).

[18] Judgment of 16 November 2023, *Roos and Others* v *Parliament* (C-458/22 P, EU:C:2023:871).

[19] Judgment of 13 July 2022, *Azienda Ospedale-Università di Padova* (C-765/21, EU:C:2023:566).

[20] Ibid, paragraphs 33 and 34.

[21] Commission Regulation (EC) No. 507/2006 of 29 March 2006 on the conditional marketing authorisation for medicinal products for human use falling within the scope of Regulation (EC) No. 726/2004 of the European Parliament and of the Council (OJ 2006, L 92, p. 6).

[22] Judgment of 13 July 2022, *Azienda Ospedale-Università di Padova* (C-765/21, EU:C:2023:566, paragraphs 36, 37 and 42).

[23] Ibid., paragraphs 50 and 51.

The Court has recognised the *systemic nature* of the extraordinary circumstances linked to the outbreak of the COVID-19 pandemic «which have affected, generally, the operation and administration of the courts»[24] including, more specifically, the temporal interruption of procedural periods at the beginning of the pandemic.

The following sections will present a selection of central themes from the case-law concerning the concept of *force majeure* in the context of the pandemic and the impact of this case-law on the relationship created by package travel contracts.

3.1. COVID-19 pandemic, «force majeure» and derogation from secondary EU law

The pandemic posed major challenges for current legal systems, inviting us to reconsider well-known concepts under novel circumstances. One of those concepts is *force majeure*. As defined in EU case-law, the concept refers to circumstances beyond the control of the party claiming *force majeure*, which are abnormal and unforeseeable and the consequences of which could not have been avoided despite the exercise of all due diligence[25]. An important matter, particularly at the beginning of the pandemic, was the impact of COVID-19 related restrictions on contractual relationships and the conditions under which parties could rely on *force majeure* in order to be excused from their contractual obligations. Researchers studying the impact of COVID-19 on consumer law and policy have developed the concept of *societal force majeure* in order to reflect the «collective impact of the pandemic on all the involved interests»[26]. The essence of that concept is that the pandemic had a se-

[24] Judgment of 15 September 2022, *Uniqa Versicherungen* (C-18/21, EU:C:2022: 682, paragraph 33).

[25] Judgment of 8 June 2023, *UFC - Que choisir and CLCV* (C-407/21, EU:C:2023: 449, paragraph 54).

[26] COVID-19 CONSUMER LAW RESEARCH GROUP, *Consumer Law and Policy Relating to Change of Circumstances Due to the COVID-19 Pandemic*, in *Journal of Consumer Policy*, 43(3), 2020, pp. 437-450.

vere and unexpected impact on both consumers and businesses, and thus became a matter of concern for society as a whole[27].

The pandemic affected not only individuals but also states and their capacity to cope with this unprecedented situation, which thereby raised the issue of the extent to which Member States could invoke the pandemic as a ground to derogate from secondary EU law.

The judgments in *UFC-Que choisir and CLCV*[28] and in *Commission* v *Slovakia*[29] are the first precedents on this matter. Both cases concern the compatibility between EU law and national legislation allowing the issuance of mandatory travel vouchers in the case of cancellation of a package travel contract. Due to massive cancellations at the beginning of the pandemic, many Member States issued legislation providing for the possibility of organisers to derogate from the obligation provided under Article 12(4) of Directive 2015/2302 to refund travellers within 14 days of the cancellation. In that context, the Commission issued a recommendation on vouchers setting out the characteristics these vouchers should have in order to ensure their compatibility with EU law[30]. The most important feature was that vouchers should be optional for the consumer.

There were at least two central issues that the Court was invited to decide on in these cases. The first issue was whether the pandemic as a state of *force majeure* is of such magnitude that it goes beyond the scope of the *unavoidable and extraordinary circumstances* within the meaning of Article 3(12) of Directive 2015/2302, thus questioning the right of the traveller to terminate the contract pursuant to Article 12(2). The second issue was whether Member States may invoke the pandemic and adopt

[27] See Opinion of Advocate General Medina in *UFC - Que choisir and CLCV* (C-407/21, EU:C:2022:690, point 69).

[28] Judgment of 8 June 2023, *UFC - Que choisir and CLCV* (C-407/21, EU:C:2023:449).

[29] Judgment of 8 June 2023, *Commission* v *Slovakia (Right of termination without fees)* (C-540/21, EU:C:2023:450).

[30] Commission Recommendation of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic, C/2020/3125 (OJ 2020 L 151, p. 10) («the Commission Recommendation on vouchers»), points 9 and 15.

legislation allowing organisers to suspend the reimbursement of all payments made by the traveller depending on certain conditions.

On the first issue, the Court, concurring essentially with my Opinion in the case[31] ruled that the concept of *unavoidable and extraordinary circumstances* can cover an outbreak of a global health crisis[32]. Invoking the pandemic, therefore, enables the right to terminate package travel contracts. In the context of Directive 2015/2302, the concept of *unavoidable and extraordinary circumstances* gives concrete expression to the concept of *force majeure*[33]. That Directive makes it clear that the rights granted to travellers are imperative without providing any exception to the rule of reimbursement[34]. Therefore, the Court decided that Member States might not, even if only temporarily, release package travel organisers from their reimbursement obligation, on the grounds of force majeure[35].

On the second issue, I proposed in my Opinion that in very exceptional circumstances, such as the ones of an unprecedented health emergency, Member States should be entitled to exceptionally derogate from secondary EU law, where it is objectively impossible to comply with EU law and where such derogation is limited in scope, temporary, and necessary. In that regard, I took into account two different lines of case-law. The first one is the judgment in *Billerud* from which it follows that:

> even in the absence of specific provisions (…) recognition of circumstances constituting force majeure presupposes that the external cause relied on by individuals has consequences which are inexorable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations[36].

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[31] Opinion of Advocate General Medina in *UFC - Que choisir and CLCV* (C-407/21, EU:C:2022:690).

[32] Judgment of 8 June 2023, *UFC - Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraph 45).

[33] *Ibid.*, paragraph 54.

[34] *Ibid.*

[35] *Ibid.*, paragraph 57.

[36] Judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 31).

The second one is the Court's case-law in infringement proceedings from which it follows that:

> a Member State which encounters temporarily insuperable difficulties preventing it from complying with its obligations under European Union law may plead force majeure only for the period necessary in order to resolve those difficulties[37].

Either of those lines of case-law could be considered directly applicable when a Member State adopts legislation allowing individuals to derogate from their obligations under secondary EU law. However, I considered, that if a Member State faces temporarily insuperable difficulties that go beyond internal difficulties in applying a provision transposing secondary EU law to its national legal order, it should also, exceptionally, be entitled to plead *force majeure*.

In its judgment, the Court took into account the second line of case-law applicable in infringement proceedings in a situation of *force majeure*. However, it follows from the Court's reasoning that in this particular case it was not necessary to answer the question of whether Member States should be allowed to argue that national legislation's non-conformity with EU law is justified on grounds of *force majeure*. The Court found it clear that national legislation releasing all package travel organisers from their reimbursement obligation in a generalised manner could not, by its very nature, be justified by the constraints resulting from a health crisis on the scale of the COVID-19 pandemic. Indeed, the generalised temporary suspension of the reimbursement obligation established by the national legislation was not confined solely to cases in which financial constraints had actually occurred but extended to all contracts terminated during the reference period set out by that legislation, without taking into account the specific and individual financial situations of the travel organisers concerned. Moreover, in line with my Opinion regarding suitable alternatives available to Member States, the Court pointed out that the financial consequences of the contested legislation could have been avoided by the adoption of state aid

[37] Judgment of 19 December 2012, *Commission* v *Italy* (C-68/11, EU:C:2012:815, paragraph 64 and the case-law cited).

measures available for authorization under Article 107(2)(b) TFEU. Finally, the Court found that the releasing of package travel organisers from their reimbursement obligation was clearly not framed in such a way as to limit its effects to the period necessary to remedy the difficulties caused by the event capable of constituting *force majeure*. Under such circumstances, the Court decided that the French legislation was not compatible with EU law[38].

On the basis of the same reasoning, the Court concluded in the aforementioned judgment in *Commission v Slovakia* that that Member State failed to fulfil obligations by introducing legislation, which in a generalised manner, released all package travel organisers from their reimbursement obligations laid down under Article 12(2) to (4) of Directive 2015/2302.

The case-law of the Court on COVID-19 travel vouchers gives a strong message on the need to comply with EU law and respect consumer rights in the circumstances of the COVID-19 pandemic. Everyone was affected by the pandemic and governments had to make crucial decisions about how to preserve the economy and avoid massive failures. However, in such situations, the solutions should be fairly balanced so that the consequences of the disruption of contractual relationships «should not be at the sole risk of one party, in particular of a consumer or SME»[39]. As I stated in my Opinion in *UFC-Que choisir and CLCV*, the *too big to fail* argument should not be accepted where it results in the sole disadvantage of the consumer citizen.

3.2. COVID-19 pandemic and impact on rights of package travellers

The issue of the legality of vouchers discussed in the previous section is only one among the many legal questions that arose due to disruptions to travelling and more specifically, to package travel contracts, caused by the COVID-19 pandemic. At the time of writing, there are a number of pending cases before the Court on the impact of the pandem-

[38] Judgment of 8 June 2023, *UFC - Que choisir and CLCV* (C-407/21, EU:C:2023:449).

[39] European Law Institute, *ELI Principles for the Covid-19 Crisis*, Principle 13, paragraph 3.

ic on package travel. Although it is clear that a global health crisis such as the pandemic must be regarded as capable of falling within the concept *of unavoidable and extraordinary circumstances* within the meaning of Article 3(12) of Directive 2015/2302,[40] the rights of a traveller and, more broadly, the impact of the disruption caused by COVID-19 on the contractual obligations, will depend on the conditions set out in the specific provisions of that directive.

There are already examples from case-law of the impact of the pandemic on the travel contract and travellers' rights. In the judgment in *FTI Touristik*[41], the Court ruled that, pursuant to Article 14(1) of Directive 2015/2302, a traveller's right to a price reduction for his or her package holiday is not affected by the fact that the travel services do not conform with the agreed upon package because of restrictions imposed at the travel destination, in an attempt to fight the spread of an infectious disease. However, the reduction of the price must be appropriate and such assessment must be carried out objectively, taking into account the organiser's obligations under the package travel contract.

With regard to the implications from the classification of the pandemic as *unavoidable and extraordinary circumstances*, a key right of the traveller is the termination of the travel contract in the event of such circumstances occurring at the place of destination or its immediate vicinity, significantly affect the performance of the package, pursuant to Article 12(2) Directive 2015/2302. At the time of writing, there are several cases pending before the Court on the issue of interpretation of that provision in the context of the pandemic. The Case C-299/22, *Tez Tours*, a reference for preliminary ruling from the Supreme Court of Lithuania, raises a number of questions. Those questions seek to establish, on the one hand, the probative value of official travel advice and, on the other hand, the parameters of the assessment of unavoidable and extraordinary circumstances characterizing the pandemic that significantly affected the performance of the package. With regard to the assessment, the questions raised pertain to the consideration of the objec-

[40] Judgment of 8 June 2023, *UFC - Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraph 45).

[41] Judgment of 12 January 2023, *FTI Touristik (Package travel to the Canary Islands)* (C-396/21, EU:C:2023:10).

tive or subjective nature of factors (such as the state of health or age of the travellers, or whether they belong to a category of *risk*); the possible application of a criterion of reasonable foreseeability; as well as the relevance of circumstances occurring at the place of departure (such as isolation measures).

The joined Cases C-414/22, *DocLX Travel Events*, and C-584/22, *Kiwi Tours*, are references for preliminary ruling from the Austrian and German Supreme Courts respectively. They relate to the determination of the moment in time when *unavoidable and extraordinary circumstances* must be assessed and, more specifically, whether the right to terminate depends on an *ex ante* assessment of the possible impact of those circumstances on the performance of the contract or also on an *ex post* assessment of such events effectively occurring after the termination of the contract. The context of the COVID-19 pandemic adds additional complexity due to the scientific uncertainty, particularly at the first stages of the pandemic, which necessitates an assessment of the level of knowledge and the data available to the relevant authorities at the moment they had to make a decision.

While three years after the start of the COVID-19 pandemic, memories of the restrictions imposed by the states are slowly fading away, both national courts and the European Court of Justice are still seized to determine the impact of those measures, both with respect to rights of individuals, as well as with regard to legal systems of states. One should not underestimate the significance of the case-law. As I mentioned at the beginning, one of the roles of the judiciary is to provide guidance on what requirements the rule of law imposes on the management of a crisis of this magnitude.

4. Concluding remarks

During the past decade, Europe and its citizens have faced a series of crises: the financial crisis, the COVID-19 crisis, and now the energy crisis. The common characteristics of those crises are that their effects are cross-sectoral. They have brought about profound changes in society and the law. They have also demonstrated that Member States' coop-

eration is the only way to find solutions, which must be constructed with due respect to the rule of law and democratic values.

The pandemic raised new challenges for democratic values and exacerbated existing problems created by previous crises. The best way to prepare for the future is to strengthen our democratic institutions, adhere to fundamental rights and the rule of law, and further invest in EU cooperation.

PUBLIC HEALTH AND FUNDAMENTAL RIGHTS BETWEEN OLD AND NEW VULNERABILITIES: IS A CONCILIATION POSSIBLE?

Boštjan Zalar[*]

SUMMARY: *1. Introduction. 2. Approach of the General Court of the EU. 3. Approach of the Court of Justice of the EU. 4. Approach of the European Court of Human Rights.*

1. Introduction

This contribution will address case law of the courts of the EU and of the European Court of Human Rights in the context of COVID-19 litigation with the purpose to identify eventual patterns in dealing with COVID-19 cases and methodologies used by those courts to reconcile protection of public health policy on one side and fundamental rights of individuals on the other side[1]. I will add to the aforementioned methodological elements some comparative remarks concerning methodology used in COVID-19 disputes before the Administrative Court of the Republic of Slovenia[2].

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* This is a revised version of the contribution that was in a shorter version presented at the panel 4 of the conference «COVID19 Litigation: the Role of National and International Courts in Health Crisis Management», 29 November 2022, University of Trento, Faculty of Law. Boštjan Zalar is a Senior High Court Judge at the Administrative Court of the Republic of Slovenia and ad hoc judge of the European Court of Human Rights.

[1] For this purpose, I found and checked eight judgments of the courts of the EU and around thirty decisions or judgments of the European Court of Human Rights.

[2] The Administrative Court of the Republic of Slovenia adjudicated 153 COVID-19 cases during pandemic time. In 44% of decided COVID-19 cases the Administrative Court granted the lawsuits, quashed the contested administrative decisions and sent cases back to the administrative authorities.

2. Approach of the General Court of the EU

Among examined judgments only one case of the General Court of the EU relates to the issue of conciliation of a dichotomy between public health on one side and fundamental freedoms of individual who complained against COVID-19 measures on the other side. This is the case *Roos v. European Parliament* from 27 April 2022, where the contested decision was a measure imposed by the administration of the European Parliament to present a valid EU digital COVID-19 certificate to be allowed to access the Parliament's buildings[3]. The applicant in this case claimed protection of the right to freedom and independence of members of the Parliament, protection of personal data, right to privacy, personal integrity and non-discrimination. The methodological approach of the General Court in dealing with the aforementioned dichotomy was the following.

First, the General Court acknowledged that there are two legitimate aims behind the contested measure: these are uninterrupted activity of the Parliament and protection of health and security of people working and visiting the Parliament. The General Court relied on data provided by the health service of the Parliament and on some expert opinions[4]. It recognised discretion of the administration of the Parliament, but it pointed out that its discretion is limited[5]. The first test used by the General Court was whether the contested measure was «obviously inappropriate»[6]. In the second stage, the General Court checked whether the contested measure does not affect the mandate of members of the Parliament in «disproportionate» or in «unreasonable manner»[7] and that it does not harm «the very essence» of that right[8].

There is nothing special in this proportionality test except that the General Court could have more precisely defined the relation between proportionality and reasonableness, as well as the one between necessi-

[3] T-710/21, T-722/21 and T-723/21, 27 April 2022.

[4] *Ibid.*, paras. 102-103, 108, 222, 229-235.

[5] *Ibid.*, para. 101.

[6] *Ibid.*, para. 104.

[7] *Ibid.*, para. 105.

[8] *Ibid.*, para. 105-106.

ty and proportionality (in its narrow sense). This relates to protection of freedom and independence of members of the Parliament[9].

What is worth noting is the reasoning of the General Court that the administration of the Parliament must monitor and review the contested measure regularly and must take into account eventual developments of the health situation[10]. The General Court also took into account that the contested measure regulated some exceptions, when submission of COVID-19 certificate is not a necessary requirement to enter the Parliament[11]. The General Court also took into account that those who do not have COVID-19 certificate have been properly informed about the conditions that they must fulfil and that the administration of the Parliament facilitated access to frequent testing – also free of costs[12]. The General Court used the precautionary principle within the proportionality test by saying that when risks for public health are uncertain, preventive measures can be adopted even before the seriousness of risk is fully proved[13].

Up to this point, the approach of the General Court is in some elements similar to the approach that was adopted by some national courts in EU Member States, including in Slovenia. However, distinctions can be drawn, e.g. with the approach taken by the Administrative Court of Slovenia. In similar cases to one addressed by the General Court, the Administrative Court of the Republic of Slovenia made a clear distinction in administrative disputes between tests of reasonableness and proportionality and between necessity and proportionality in its narrow sense. In comparison to the approach of the General Court, the Administrative Court in COVID-19 cases was stricter as regards the requirement that, within the proportionality test, the Government must rely on findings and recommendations of the scientific body, which was established for that particular purpose by the Government.

A further difference between the approaches of the General Court of the EU and that of the Slovenian Administrative Court was that the

[9] See *ibid.*, paras. 105, 223, 240-246.

[10] *Ibid.*, paras. 109, 251, 254.

[11] *Ibid.*, para. 114.

[12] *Ibid.*, para. 117.

[13] *Ibid.*, para. 217.

General Court used the argument of burden of proof in the sense that the applicant did not propose any alternative measure that would be less intrusive for the freedoms of members of the Parliament, but which could nevertheless effectively address legitimate aims[14]. The Administrative Court did not put that kind of burden of proof on applicants in COVID-19 related cases. The Administrative Court was also open to accept alternative scientific evidence as a counterpart to the evidence submitted by the Government.

Furthermore, the General Court in the case of *Roos v. Parliament* used the concept of applicant's choice, but in a different way as this was done by the Administrative Court in Slovenia. The General Court in one paragraph says that it is not the contested measure that causes effects on individuals, but rather individuals' own choice not to submit COVID-19 certificate[15]. This approach raises some doubts concerning the scope of freedom of choice within human rights[16].

There is another potential difference between the approaches of the General Court of the EU and that of the Administrative Court as regards the balancing test. The General Court, before going into proportionality test, checks whether the limitation respects the essence of the right at stake and only if it is established that the essence of the right is protected, then the court proceeds with proportionality test[17]. In this respect a question arises on whether it is possible to define the essence of a particular right and then to proceed with proportionality. Perhaps, it is more practically feasible that the assessment of the essence of the right is a part of proportionality test, because the essence of the right is often very much a fact-sensitive question.

[14] *Ibid.*, para. 111; compare this with para. 214.

[15] *Ibid.*, para. 113.

[16] Compare para. 113 with para. 201 of the judgment in the case of *Roos v. Parliament*.

[17] *Ibid.*, paras. 195, 208.

3. Approach of the Court of Justice of the EU

Among the judgments of the CJEU, the preliminary ruling of the Grand Chamber in the case of *Nordic Info Bv* from 5 December 2023 brings in the methodological approach of the CJEU in COVID-19 cases. This preliminary ruling also sets an elementary legal framework for a conciliation between protection of public health and fundamental rights of individuals for legislators and how it should be checked by courts in the EU[18]. This case concerns questions whether certain articles of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States must be interpreted as precluding legislation of general application of a Member State which, on public health grounds connected with combating the COVID-19 pandemic, (i) prohibits Union citizens and their family members, whatever their nationality, from engaging in non-essential travel from that Member State to other Member States classified by it as high-risk zones on the basis of the restrictive health measures or the epidemiological situation in those other Member States, and (ii) requires Union citizens who are not nationals of that Member State to undergo screening tests and to observe quarantine when entering the territory of that Member State from one of those other Member States.

Within this framework the CJEU considered the measures of general application (irrespective of behaviour of particular individuals) which do not encompass only total or partial bans on entering or leaving the national territory, but also measures which have the effect of impeding or rendering less attractive the right of the persons concerned to enter or

[18] Other examined cases related to COVID-19 litigation before the CJEU do not relate to the issue of conciliation between public health and fundamental rights in the context of old and new vulnerabilities. For example, the case of *TF* (C-206/22) from 14 December 2023 relates to impossibility to carry over the paid annual leave granted for a period coinciding with a period of quarantine. In another case of *RK* (C-659/22) from 5 October 2023, the CJEU decided that the concept of processing personal data referred to in the Regulation (EU) 2016/679 includes the verification, using a national mobile application, of the validity of interoperable COVID-19 vaccination, test and recovery certificates in order to facilitate free movement during the COVID-19 pandemic.

leave that territory, such as an obligation for travellers entering that territory to undergo screening tests and to observe quarantine[19].

After examining the text of the Directive 2004/38, including its recitals, the CJEU established a link with general principles of law by saying that measures restricting freedom of movement on grounds of public policy, public security or public health must in particular comply, first with the principle of legal certainty, which requires that legal rules be clear and precise and that their application be foreseeable by those subject to them, so that those concerned may know precisely the extent of the obligations which the legislation in question imposes on them and that they may be able to ascertain unequivocally what their rights and obligations are and take steps accordingly. Secondly, that Member State must comply with the general principle of EU law relating to good administration, which lays down, inter alia, the obligation to state reasons for acts and decisions adopted by national authorities. Thirdly, and in accordance with Article 51(1) of the Charter of Fundamental Rights, it must respect the right to an effective judicial remedy enshrined in the first paragraph of Article 47 thereof, which provides, inter alia, for the right of access to a court or tribunal with the power to ensure respect for the rights guaranteed by EU law and, to that end, to consider «all the issues of fact and of law that are relevant» for resolving the case. This is relevant for restrictive measures adopted both in the form of individual decisions and in the form of acts of general application. Specific and full public health grounds relied on must be transparent[20]. In order to comply with the procedural safeguards, the act of general application must be open to challenge in judicial and, where appropriate, administrative redress procedures. Where national law does not allow persons covered by a situation defined in general terms by that act to challenge directly the validity of such an act in an independent action, it must at least provide for the possibility of challenging that validity incidentally in an action the outcome of which depends on whether that act is valid. The public must be informed, either in the act itself or by means of official publications or websites which are free of

[19] C-128/22, *Nordic Info BV*, 5 December 2023, paras. 49, 59, 63-67.

[20] *Ibid.*, paras. 69-71.

charge and easily accessible, of the court or administrative authority before which the act of general application may, where applicable, be appealed and of the time limits for the respective appeals[21]. The principle of the prohibition of discrimination laid down in the Charter and the proportionality which «constitutes a general principle of EU law» and is binding on Member States when they are implementing a Union act are applicable, as well[22]. The requirement of proportionality specifically requires verification that measures are appropriate for attaining the objective of general interest pursued, in this case the protection of public health; in the second place, they 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, in the third place, 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[23].

Very interesting is the part of the test where the CJEU says that in order to assess whether a Member State has observed the principle of proportionality in the area of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the TFEU and that «it is for the Member States to determine the degree of protection which they wish to afford to public health and the way in which that degree of protection is to be achieved. Since that level may vary from one Member State to another, Member States should be allowed some measure of discretion. Consequently, the fact that a Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate»[24].

With this, the CJEU come a little closer to the principle of subsidiarity under case law of the ECtHR[25]. Further important methodological aspects of this preliminary ruling are the following.

[21] *Ibid.*, paras. 72-73.

[22] *Ibid.*, para. 74-76.

[23] *Ibid.*, para. 77.

[24] *Ibid.*, para. 78.

[25] For more on the principle of subsidiarity, see the next section of this chapter.

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. But, Member States must be able to adduce «appropriate evidence» to show that they have indeed «carried out an analysis of the appropriateness, necessity and proportionality of the measures at issue and to present any other evidence substantiating their arguments». Such a burden of proof cannot, however, extend to creating the requirement that the competent national authorities must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions[26].

Although it is the task of the referring court which has sole jurisdiction to assess the facts of the main proceedings and to interpret the national legislation, to verify whether the restrictive measures referred to satisfied the requirement of proportionality, the CJEU has provided "guidance" based on the documents relating to the main proceedings and on the written observations which have been submitted to it, in order to enable the referring court to give judgment[27]. According to the CJEU the referring court should take into account the following factors:

- the disease is classified as a pandemic by the WHO;
- the scientific data commonly accepted at the time of the facts in the main proceedings;
- the trend in cases of infection and mortality due to that virus and in view of the degree of uncertainty that might prevail in that regard;
- the national healthcare system being overwhelmed or the risk thereof; the summer period (in July 2020) characterised by an increase in leisure travel and tourism, which are conducive to an increase in infections to contain or curb the spread of that virus within the population of the Member State concerned, as the scientific community, the EU institutions and the WHO appeared to accept;
- the fact that the restrictive measures at issue in the main proceedings

[26] C-128/22, *Nordic Info BV*, para. 80.

[27] *Ibid.*, para. 81.

were adopted in the context of similar measures adopted by the other Member States, accompanied and coordinated by the European Union under its supporting competences, under Article 168 TFEU, in relation to monitoring, early warning of and combating serious cross-border threats and major health scourges;

- restrictive measures can be regarded as capable of ensuring the public health objective pursued only if they genuinely reflect a concern to attain it and are implemented in a consistent and systematic manner[28].

The CJEU expressed the view that the restrictive measures at stake in this case appear to have addressed the concern to achieve that objective and have been implemented in a consistent and systematic manner in so far as it is not disputed that all non-essential travel was in principle prohibited between Belgium and any other Member State classified as a high-risk zone according to criteria applicable without distinction to those States and in so far as any traveller entering Belgian territory from such a Member State was required to undergo screening tests and to observe quarantine[29]. As regards the question of limiting those measures to what is "strictly necessary", it must be observed that the measure imposing a ban on leaving the national territory concerned not all travel by the persons concerned, but only non-essential travel by those persons, and solely to Member States regarded as high-risk zones, the list of those countries being, as is apparent from the order for reference, "frequently updated" in the light of the latest data available at the time[30]. Furthermore, the CJEU also takes the view that the screening and quarantine measures imposed on any traveller entering the national territory from a Member State classified as a high-risk zone appear to have been limited to what was "strictly necessary" in so far as they were aimed, on a preventive and temporary basis, at travellers coming from Member States in which they had been exposed to an increased risk of infection so as to detect, when they entered the national territory,

[28] *Ibid.*, paras. 82-84.

[29] *Ibid.*, paras. 85-86.

[30] *Ibid.*, para. 88.

infected persons and to prevent the spread of the virus by potentially contagious persons[31].

The important question is at which point if ever at all the CJEU gives a certain discretion to the Member States? A discretion is given at the point (in relation to the precautionary principle) of whether measures that were less restrictive but equally effective existed[32]; and at this point the CJEU says that «the referring court must confine itself» to ascertaining whether «it is evident» that, in the light, in particular, of the available information on the COVID-19 virus at the time of the facts in the main proceedings, measures such as the obligation to maintain social distancing and/or to wear a mask and the obligation for any person to regularly carry out screening tests would have sufficed to give the same result as the restrictive measures on entrance, exit and ban for non-essential travel[33]. This relates to the epidemiological situation at the time of the facts in the main proceedings, the extent to which the health system was overstretched or overwhelmed, the risk of an uncontrollable or severe presumption of infections in the absence of the restrictive measures, the fact that certain persons carrying the disease could be asymptomatic, incubating or testing negative in screening tests, the need to target as many people as possible in order to curb the spread of the disease within the population and to isolate infected persons and the combined effects[34].

Then comes the part of the judgment where the CJEU refers for the first time to "the proportionality in the strict sense"[35]. It seems that according to the CJEU "proportionality in the strict sense" is one part of the principle of proportionality, which constitutes a general principle of EU law. The general principle of proportionality is set in paragraphs 76-

[31] *Ibid.*, para. 89.

[32] *Ibid.*, para. 90.

[33] *Ibid.*, para. 90. In this respect paragraphs 90 and 87 should be read together. In paragraph 87, the CJEU says that the referring court will have to ascertain whether those measures were limited to what was strictly necessary and whether there were means less prejudicial to the free movement of persons but equally effective for achieving that objective.

[34] *Ibid.*, para. 91.

[35] See *ibid.*, para. 92.

77 of that judgment. But, up to the point where proportionality in the strict sense is mentioned, the balancing test between protection of public health and fundamental rights was not mentioned[36]. Under the principle of proportionality in the strict sense the referring court has to ascertain whether measures were disproportionate in relation to the public health objective pursued, having regard to the impact that those measures may have had on the free movement of Union citizens and their family members, on the right to respect for their private and family life guaranteed by Article 7 of the Charter and on the freedom to conduct a business, enshrined in Article 16 thereof, of legal persons such as *Nordic Info*[37]. The CJEU underlines that the objective of protecting public health may not be pursued by a national measure without «having regard to the fact that it must be reconciled with the fundamental rights and principles» affected by that measure as enshrined in the Treaties and the Charter, by "properly balancing" that objective of general interest against the rights and principles at issue, in order to ensure that the «disadvantages caused by that measure are not disproportionate to the aims pursued». Thus, the question whether a limitation on the rights guaranteed in Articles 7 and 16 of the Charter and on the principle of freedom of movement enshrined in Article 3(2) TEU, in Articles 20 and 21 TFEU, as implemented by Directive 2004/38, and in Article 45 of the Charter «may be justified must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the objective of general interest pursued by that limitation is proportionate to that seriousness»[38].

Even in that part of the judgment, which refers to proportionality in the strict sense, the CJEU gives very concrete "guidance" by asserting that the restriction imposed on freedom of movement and on the right to respect for private and family life did not prevent all exits from Belgian territory; the ban was limited solely to non-essential travel, such as leisure travel or tourist trips; it did not prohibit travel justified by imperative family reasons and that the exit bans were lifted as soon as the

[36] A small exception is paragraph 87, where the term 'free movement of persons' is briefly mentioned.

[37] *Ibid.*, para. 92.

[38] *Ibid.*, para. 93.

Member State of destination concerned was no longer classified as a high-risk zone on the basis of a regular re-evaluation of its situation[39].

As regards the balancing test between protection of public health and the freedom to conduct a business of a legal person the fact that the CJEU in the context of the principle of proportionality uses the term "(un)reasonableness"[40], remains to be seen whether this has any special methodological meaning or not. The CJEU takes a determinative view that as regards proportionality of the compulsory screening given the rapidity of those tests the measures were liable to encroach only to a limited extent on the right to respect for the private and family life of those travellers and on the right of free movement whereas those measures helped to identify persons carrying the COVID-19 virus; furthermore, in the opinion of the CJEU, the compulsory quarantine imposed on every traveller entering Belgian territory from a Member State classified as a high-risk zone, whether or not that traveller had been infected by that virus, severely restricted the right to respect for private and family life and the freedom of movement which that traveller in principle enjoys in pursuance of the exercise of his or her right of free movement. However, such quarantine appears, subject to verification by the referring court, to be also proportionate in the light of the precautionary principle, in so far as (i) there was a significant probability that such a traveller would carry the same virus and, in particular where he or she was incubating or asymptomatic, would infect other persons outside his or her household in the absence of such quarantine and (ii) the screening tests may have proved to be falsely negative[41].

No doubt that with this methodological approach and with the aforementioned concrete assessments, which may be considered as being more than just "guidance" in concrete application of principle of proportionality, the CJEU has put (in principle) very strict, sufficiently clear and comprehensive limitations to executive and legislative branches of governments in their (potential) activities which aim to protect public health and which will necessarily cause interferences in fun-

[39] *Ibid.*, para. 94.

[40] See *ibid.*, para. 95. 'Reasonableness' usually means less stringent test from the necessity test.

[41] *Ibid.*, para. 97.

damental rights of individuals. The question is whether courts of the Member States will faithfully implement this methodological approach in their future practices. In that part of the preliminary ruling the CJEU did not expressly develop any new concept of vulnerability. In its reasoning the CJEU referred to seven other previous judgments of the CJEU, among them four were not related to the issue of (public) health at all.

In the second part of the preliminary ruling in the case of *Nordic Info BV* the CJEU developed an interpretation on situations when controls carried out to ensure compliance with COVID-19 measures can (not) be regarded as having had an effect equivalent to border checks, prohibited by Article 23(a) of the Schengen Borders Code[42]. In this context, the CJEU once mentions the notion of "vulnerability". The CJEU states that a pandemic of a scale such as that of COVID-19, characterised by a contagious disease capable of causing death among various categories of the population and overstretching or even overwhelming national healthcare systems, is liable to affect one of the fundamental interests of society, namely that of ensuring the lives of citizens while preserving the proper functioning of the healthcare system and the provision of care appropriate to the population, and also affects the very survival of a part of the population, "in particular the most vulnerable". In those circumstances, such a situation may be classified as a serious threat to public policy and/or internal security within the meaning of Article 25(1) of the Schengen Borders Code[43].

4. Approach of the European Court of Human Rights

Concerning the number of COVID-19 judgments, case law of the ECtHR is richer than case law of the courts of the EU. However, in terms of standards for domestic courts and limitations imposed on domestic authorities and legislators of the Contracting States case law of the ECtHR is less strict than the case law of the CJEU. The analysis of

[42] *Ibid.*, paras. 115-126.

[43] *Ibid.*, para. 127.

case law of the European Court of Human Rights (hereinafter the ECtHR) shows that this is a result of the approach adopted by the ECHR in relation to the principle of subsidiarity in COVID-19 litigations.

Up until October 2021, around forty COVID-19-related complaints were submitted to the ECtHR and in no case a violation of the ECHR was found[44]. From October 2021 until October 2022, no COVID-19-related case was decided in favour of the applicant with the exception of the case *Communauté genevoise d'action syndicale c. Suisse* from March 2022, which was a dispute about protection of public health on one side and freedom of assembly on the other side. But, in that case a violation of the ECHR was found by 4 votes against 3, the judgment was not final[45] and was not upheld by the later Grand Chamber's judgment[46]. From October 2022 until December 2023 the great majority of complaints were declared inadmissible or no violation was found.

Among the later group of cases with short and simple reasoning on manifestly ill-founded applications based on Article 35(3) and (4) of the ECHR, the following cases can be mentioned.

In the case on the requirement to wear a face mask in public buildings, the ECtHR had briefly examined and decided that domestic courts did not acted in arbitrary or unreasonable manner in assessing the evidence, establishing the facts or interpreting the domestic law, so that the application was manifestly ill-founded[47].

The ECtHR also decided that the fact that the applicant in detention for three months could not use the gym or attend mass, while still having access to Chaplain, cannot be considered to have caused him dis-

[44] In *Feilazoo v. Malta* (App. no. 6865/19) from 11 March 2021 the ECtHR did find a violation of Article 3 of the ECHR in respect of conditions in detention. But, in this case the fact that the applicant was moved to living quarters where new arrivals (of asylum seekers) were being kept in COVID-19 quarantine, while there was no indication that the applicant was in need of such quarantine, was only one among several other facts taken into considerations to enable the ECtHR to conclude that there has been a violation of Article 3 of the ECHR.

[45] Req. no. 21881/20, 15 mars 2022.

[46] *Communauté genevoise d'action syndicale v. Switzerland*, App. no. 21881/20, 27 November 2023.

[47] *Makovetskyy v Ukraine*, App. no. 50824/21, 19 May 2022, paras. 6-9; see also: *Mittendorfer v Austria*, App. no. 32467/22, 4 July 2023, paras. 35-38.

tress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention during a pandemic; similarly, as he was limited on his family contacts while he had been allowed to call his family via skype once a week and he could contact them over the phone regularly, conditions of detention were not in breach of Article 3 of the ECHR[48].

The ECtHR also examined briefly and decided that the fact that the rejected asylum seeker in detention had not the opportunity to attend the oral hearing due to COVID-19 preventive measures did not mean a violation of his right from Article 5(4) of the ECHR, because the applicant benefitted from adversarial proceedings during which he was assisted by a lawyer, who made submissions in writing on his behalf and attended the hearing by telephone and that domestic courts took into account some other elements including the general interest of public health[49].

In the case of *Reila v. Italy* the ECtHR concluded that the applicant has not provided sufficient evidence that the domestic authorities have failed to protect him in prison from the risk of contracting COVID-19 and that, as a consequence, he was exposed to a serious risk of death (Article 2 of the ECHR)[50].

The ECtHR recognised that COVID-19 restrictions could have had an adverse effect on the length of the impugned proceedings[51].

This group of cases does not bring in any particular methodological aspects relevant for the future in respect of the conciliation between protection of public policy on health and protection of fundamental rights of individuals. However, they show a certain pattern.

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[48] *Fenech v Malta*, App. no. 19090/20, 1 march 2022, paras. 96-97.

[49] *Bah v the Netherlands*, App. no. 35751/20, 22 June 2021, paras. 31-47.

[50] *Reila v Italy*, App. no. 17378/20, 9 November 2023, paras. 18-22; see also and compare this case with: *Hafeez v the United Kingdom*, App. no. 14198/20, 28 March 2023, para. 69. For a brief, but substantial examination of a complaints that applicants were held in detention, alleging that the hospitals they had been held in were dedicated to COVID-19 pandemic treatments and which considered themselves at risk due to their fragile state of health caused by their hunger strike, see *Ünsal and Timtik v Turkey*, App. no. 36331/20, 8 June 2021.

[51] *Q and R v Slovenia*, App. no. 19938/20, 8 February 2022, para. 80; *Rybar and Veselska v Slovakia*, Req. no. 60788/21, 31 August 2023.

Among the reasons for inadmissibility decisions, it is worth mentioning that the ECtHR established that COVID-19 complaints were either made *in abstracto* (*actio popularis*) or that the applicant could not establish that he/she is a "victim" in the sense of Article 34 of the ECHR[52]. In one case, the ECtHR also established that the Article 7 of the ECHR is not applicable, since an offence for not wearing a face mask while entering a supermarket could not be converted into deprivation of liberty in the event of non-payment. The claim did not involve a determination of a criminal charge, so the application was incompatible *ratione materiae*[53]. There were a lot of cases where the applicants did not exhaust domestic remedies in the sense of Article 35(1) and (4) of the ECHR[54]. There were also applications, which were recognised by the ECtHR as abusive in the sense of Article 35(3)(a) of the ECHR[55]. For example, in the case *Terhes*, the ECtHR decided that the application is inadmissible *ratione materiae* (Article 35(3) and (4) of the ECHR), since the degree to which the applicant's freedom of movement was restricted was not so great as to support a finding that the blanket lockdown imposed by the authorities amounted to a deprivation of liberty[56].

[52] *Mailloux v France*, Req. no. 18108/20, 5 November, 2020; *Zambrano v France*, Req. no. 41994/21, 21 September 2021, paras. 39-47; *Arus v Romania*, Req. no. 39647/21, 30 May 2023, paras. 15-16; *Piperea v Romania*, Req. no. 24183/21, 5 July 2022; *Magdić v Croatia*, App. no. 17578/20, 5 July 2022; *Pernechelle and others v Italy*, App. no. 7222/22, 31 October 2023. For the details on the test whether the applicant has a victim status in relation to COVID-19 measures that interfere with the right to freedom of assembly, see Grand Chamber judgment in the case of *Communauté genevoise d'action syndicale v Switzerland* (paras. 105-126) and decision in the case *Mittendorfer v Austria* (App. no. 32467/22, 4 July 2023, paras. 27-32), which relates to compulsory vaccination.

[53] *Makovetskyy v Ukraine*, paras. 10-12.

[54] See, for example: *Zambrano v France*, Req. no. 41994/21, 21 September 2021, paras. 23-30; *Rus v Romania*, Req. no. 2621/21, 9 may 2023; *Rybar and Veselska v Slovakia*; *Thevenon v France*, Req. no. 46061/21, 13 September 2022, para. 57-65. For the details on the test whether the applicant has exhausted domestic remedies in relation to COVID-19 measures, see Grand Chamber judgment in the case of *Communauté genevoise d'action syndicale v Switzerland*, paras. 138-165.

[55] *Zambrano v France*, paras. 31-38; see also: *Toromag, S.R.O. v Slovakia and 4 other applications*, App. no. 41217/20, 28 June 2022.

[56] *Terhes v Romania*, App. no. 49933/20, 13 April 2021, paras. 38-47.

In relation to non-exhaustion of domestic remedy as this being a very important criterion for inadmissibility, it is worth noting that although the argument of "democratic legitimation" is usually not part of the general definition of the principle of subsidiarity[57], the ECtHR in the context of COVID-19 litigation used the argument that the fundamentally subsidiary role of the Convention system recognises that «the national authorities have direct democratic legitimation in so far as the protection of human rights is concerned. Moreover, by reason of their direct and continuous contact with the vital forces of their countries, they are in principle better placed than an international court to evaluate local needs and conditions»[58]. This argument was used even in the seminal judgment of the Grand Chamber in the case of *Communauté genevoise d'action syndicale v. Switzerland*[59]. Therefore, the argument of "democratic legitimation" was used in COVID-19 cases on the point of examination of admissibility criterion despite the fact that the argument of "democratic legitimation" is usually part of substantial examination of the applicant's claim under the test whether interference in a particular human right from the ECHR is necessary in a democratic society[60] or whether the measure is prescribed by law[61].

This tentatively leads towards a conclusion that the ECtHR relying on the principle of subsidiarity did not want to interfere substantially in national policies on COVID-19 measures. Nevertheless, in October 2022, there were pending COVID-19 cases against 12 European states. Until October 2022, there were 370 interim measures requested in rela-

[57] For a general definition of the principle of subsidirity and admissibility criterion on the need to exhaust domestic remedy, see judgment of the Grand Chamber in the case of *Vučković and others v Serbia*, App. Nos. 17153/11 and 29 others, 25 March 2014, paras. 69-77.

[58] *Zambrano v France*, para. 24; *Thevenon v France*, para. 59.

[59] App. no. 21881/20, 27 November 2023, para. 138.

[60] See, for example, *Dubská and Krajzová v the Czech Republic*, App. no. 28473/12, 15. November 2016, paras. 174-175; *Varvička and others v the Czech Republic*, App. no. 47621/13 and 5 others, 8 April 2021, para. 274.

[61] *Vistinš and Perepjolkins v Latvia*, App. no. 71243/01, 25 October 2012, paras. 95-99; compare also with the older case: *Hatton and others v the United Kingdom*, App. no. 36022/97, 8 July 2003, paras. 97-130; *Maurice v France*, Req. no. 11810/03, 6 October 2005, paras. 117, 125, 140.

tion to COVID-19 crisis in the proceedings before the ECtHR. These were mainly brought by persons detained in prisons or kept in reception detention centres for asylum seekers and migrants. The majority were rejected or decided as being out of the scope of application of Rule 39 on interim measure. But, in some cases the Rule 39 was applied by the ECtHR in cases of very vulnerable persons, such as unaccompanied minors, persons with serious medical conditions, pregnant women[62]. Between March 2020 and January 2023, the ECtHR processed nearly 380 interim measures requests related to the COVID-19 health crisis lodges against states such as Greece, Italy, Turkey, France, Belgium, Bulgaria, Cyprus, Germany, Malta, Romania, Russia. While requests under Rule 39 usually concern deportations or extraditions, those received since mid-March 2020 are mainly from applicants requesting the ECtHR to take interim measures to remove them from their place of detention and/or to indicate measures to protect their health against the risk of being infected by COVID-19. The ECtHR also received requests for interim measures concerning vaccination schemes, lodged by medical professionals, employees working in medical facilities and firefighters, who challenged the compulsory vaccination. The requests were rejected for being out of scope of application of Rule 39. In a number of other requests, applicants challenged the use of COVID-19 certificates which stipulated that only people in possession of the certificates would be allowed to attend public places and, in some cases, to use public transport. The requests were also rejected for being out of scope of application of Rule 39[63].

As regards the judicial method for conciliation or balancing public health on the one side and individual freedoms of applicants on the other side, four judgments are relevant: *Constantin Lucian Spinu c. Romanie* from October 2022, which deals with public health and the right to attend religious service of the applicant who was in prison; *Communauté genevoise d'action syndicale c. Suisse* from March 2022, which dealt with public health and a freedom to assembly, but which was not upheld by the Grand Chamber. A relevant case is also *Vavrička v. Czech*

[62] COVID-19 Health Crisis, Factsheet, ECtHR, October 2022, 12.

[63] COVID-19 Health Crisis, Factsheet, ECtHR, January 2023, 12-13.

Republic, which deals with the right to privacy and sanctions for refusal to comply with statutory child vaccination duty; parents were fined and their children were excluded from preschool. This case was not about COVID-19, but was delivered by the ECtHR in April 2021 during the global health crisis. There is also a judgment in the case of *Fenech v. Malta*, which is relevant, because it briefly deals with the concept of vulnerability in the context of detention during pandemic[64].

In relation to the balancing method of the ECtHR and the concept of vulnerability, the following elements or criteria can be summarised based on the aforementioned four cases.

From the standpoint of COVID-19, measures that affect human rights need not to be regulated in primary law of the Contracting States, that is in statutes adopted in the Parliament. What matters for the ECtHR is the question of whether that particular law, which may be an executive rule, fulfils certain quality criteria[65]. The legitimate aim in those cases is «a protection of life and health» of those within jurisdiction of that state from Article 2 and Article 8 of the ECHR[66]. Among the legitimate aims the ECtHR mentions also major disruption to society caused by serious disease, public safety, prevention of disorder, the economic well-being of the country[67].

As regards the approach to the doctrine of margin of appreciation, the margin is narrow where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights, when, for example, individual's existence or identity is at stake. On the other hand, where there is no consensus within the Contracting Parties to the Convention, either as to the relative importance of the interest at stake or as to the

[64] *Fenech v Malta*, App. no. 19090/20, 1 March 2022, para. 106. This case also shows that a person can claim to be a victim of human rights violation in the future if he/she provides reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur (*ibid.*, para. 101).

[65] *Constantin-Lucian Spinu v Romanie*, Req. no. 2944/20, 11 October 2022, paras. 59-62; *Communauté genevoise d'action syndicale v Switzerland*, paras. 77-80; *Vavrička v Czech Republic*, paras. 266-271.

[66] *Ibid.*, para. 282; *Constantin-Lucian Spinu v Romanie*, para. 84. See also Article 9(2) of the ECHR and *Communauté genevoise d'action syndicale v Switzerland*, para. 63.

[67] *Vavrička v Czech Republic*, para. 272.

best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin of appreciation will be wider[68]. The margin is wider, because domestic authorities are best placed to assess priorities, use of resources and social needs[69] and because knowledge on characteristics and danger of virus at the early stage of pandemic was limited[70]. Furthermore, margin of appreciation is usually wide if it is required to strike a balance between competing private and public interests or Convention rights[71]. However, this does not mean that margin of appreciation does not have its limits. In the aforementioned Swiss case, the ECtHR found violation of the right to peaceful assembly, because domestic courts did not effectively provide judicial protection in those cases and because, in contrast to peaceful assembly, some other specific type of public gatherings were not restricted, and sanctions for violation of restrictions to peaceful assembly were very harsh; they were criminal in nature, the restrictions were general and long lasting and were not proportionate[72]. However, the Grand Chamber in its judgment from 27 November 2023 disagreed with the reasoning and decision of the judgment of the small chamber from 15 March 2022, which found violation of the ECHR. The Grand Chamber draws attention to its "fundamentally subsidiary role" and decided the application to be inadmissible for the reason of non-exhaustion of domestic remedies – the issue which was also linked to the admissibility criterion on victim status[73].

In the case of *Vavrička*, the ECtHR did not find violation of private life, freedom of thought and prohibition of discrimination. As regards freedom of thought, the ECtHR simply acknowledged that critical opinion on vaccination of applicants was not such as to constitute a conviction or belief of sufficient cogency, seriousness, cohesion and im-

[68] *Ibid.*, para. 273.

[69] *Ibid.*, para. 274.

[70] *Constantin-Lucian Spinu v Romania*, para. 70; *Communauté genevoise d'action syndicale v Switzerland*, para. 84.

[71] *Vavrička v Czech Republic*, para. 275.

[72] *Communauté genevoise d'action syndicale v Switzerland*, paras. 85-92.

[73] *Communauté genevoise d'action syndicale v Switzerland*, paras. 125, 160, 166.

portance to attract the guarantees of Article 9 of the ECHR on the right to freedom of thought or conscious[74].

As regards interference with private life, the ECtHR in the case of *Vavrička* used the standard of pressing social need. But, in this case, the ECtHR was able to rely on relevant and reliable data from national and international experts, which justify pursuing compulsory vaccination, because vaccination has been already proved to be safe and effective[75]. The elements that are relevant for the balancing test between public health and privacy of applicants (in favour of the former) were the following: the possibility for an exception as regards the duty in respect of children with permanent contraindications; vaccination was not forcibly administered; sanctions were relatively modest and were essentially protective rather than punitive in nature; the fine was imposed only once[76]; there were sufficient procedural safeguards and an effective legal remedy was available against contested measure[77]; an important element for the balancing test was also social solidarity[78].

In the case of *Vavrička*, the ECtHR also mentions that those who cannot be vaccinated or who are vulnerable with respect of certain diseases are in a state of a particular vulnerability[79]. As regards the best interests of a child it seems that the ECtHR has rejected the argument of the applicants that it must be primarily for the parents to determine how the best interests of the child are to be served and protected, and that the State's intervention can be accepted only as a last resort in extreme circumstances[80]. In this respect, the Administrative Court of the Republic of Slovenia has followed the approach of the ECtHR. In a dispute concerning the requirement of presenting a negative test on COVID-19 for entering school, the Administrative Court of the Republic of Slovenia adopted the view, which may be understood in the sense that it is not

[74] *Vavrička v Czech Republic*, para. 335.

[75] *Ibid.*, paras. 285, 291.

[76] *Ibid.*, paras. 291-294.

[77] *Ibid.*, paras. 295-296.

[78] *Ibid.*, paras. 306, 279. See also: *Constantin-Lucian Spinu v Romanie*, para. 68.

[79] *Vavrička v Czech Republic*, paras. 272, 279.

[80] *Ibid.*, paras. 286-289.

only in extreme circumstances that the court or the State can step in and apply the best interests of a child against the will of parents[81].

As regards the concept of vulnerability, in the case of *Fenech*, the applicant claimed special health conditions and to be vulnerable in detention, because he had only one kidney. He relied on a report of a Consultant Surgeon from the start of the pandemic, which stated that the applicant would be at risk of more serious complications if he were infected with the virus. The ECtHR first pointed out that according to WHO as of 21 February 2022, worldwide there have been 423,437,674 confirmed cases of COVID-19, including 5,878,328 deaths. Hence, the ECtHR cannot consider that individuals are a victim of an alleged violation of Article 2 without substantiating that in their own circumstances the acts or omissions of the State have or could have put their life at real and imminent risk[82]. The ECtHR has put that any vulnerability is relative[83] and that the applicant despite the passage of time has not relied on any studies or relevant materials capable of giving clear picture of the chances that a man of his age, lacking a kidney, «would certainly or quite likely die» of the disease, had to be infected (pre or post vaccination). Thus, the ECtHR cannot speculate as to whether his condition in such case would be of a life-threatening nature which would therefore attract the applicability of Article 2 of the ECHR[84]. However, in one aspect the judgment in the case of *Fenech* stands out as an example of very detailed assessment of facts about whether the protective measures of the management of the prison facilities against the spread of COVID-19 have satisfied positive obligations under Article 3 of the ECHR[85].

Instead of concluding remarks on the approach of the ECtHR it is relevant to mention a dissenting opinion of five judges in the Grand

[81] Judgment of the Administrative Court of the Republic of Slovenia I U 1721/2021, 07.01.2022, para. 101.

[82] *Fenech v Malta*, para. 104.

[83] *Ibid.*, para. 106.

[84] *Ibid.*, para. 106.

[85] See, various and numerous factors that have been taken into consideration by the ECtHR in this respect (*ibid.*, paras. 129-142). See summary of those factors in the case *Faia v Italy*, para. 19.

Chamber case of *Communauté genevoise d'action syndicale v. Switzerland*. In their dissenting opinion, judges put the following:

> at the culmination of the pandemic, and at a time of great scientific uncertainty about the COVID-19 virus – Switzerland, like other member States, took radical measures to prevent the disease from spreading. In such situations, the role of the courts is crucial. It is their task to ensure that the regulations adopted by the Government do not go beyond what is necessary and that they comply with the principle of proportionality. In a democracy, the possibility of free discussion remains paramount. Hence the importance of freedom of expression and freedom of assembly in this context. It is admittedly true that the Court must respect the member States' margin of appreciation in weighing up the requirements of combatting a pandemic on the one hand, and fundamental freedoms on the other. However, no such margin of appreciation exists with regard to the availability of judicial remedies. We regret that the Grand Chamber has not acknowledged that the principles which are at the heart of a democratic society are vulnerable in times of crisis, in terms both of procedure and of substance. It has thus passed up an opportunity to develop crisis law in the context of our Convention, once again leaving to the Contracting States a margin of improvisation which is fraught with danger and the risk of abuse, and which will find expression in a future global crisis[86].

No doubt that at least for the Member States of the EU the very strict and detailed methodology introduced by the Grand Chamber of the CJEU in the case of *Nordic Info BV* for a conciliation between policy for protection of public health and protection of fundamental rights of individuals goes in the direction that is advocated in dissenting opinion of judges of the Grand Chamber of the ECtHR in the case of *Communauté genevoise d'action syndicale v Switzerland*.

[86] *Communauté genevoise d'action syndicale v Switzerland*, Joint dissenting opinion of judges Bošnjak, Wojtyczek, Mourou-Vikström, Ktistakis and Zünd, paras. 9-10.

PART III

COUNTRY SCENARIOS AND THE ROLE OF NATIONAL COURTS

THE PANDEMIC AND THE SLOVENIAN CONSTITUTIONAL JURISPRUDENCE

Matej Accetto[*]

1. Introduction

The Slovenian Constitutional Court belongs to those with extensively defined competences and a demanding docket. It is competent to decide on constitutional complaints against the decisions of the ordinary courts, on petitions brought by anyone with a requisite legal interest challenging general legal acts (often joined to a constitutional complaint) and on requests for constitutionality review brought by an extensive list of privileged applicants. It receives about 2000 cases a year, the vast majority of them in the form of constitutional complaints against the decisions of ordinary courts, and most of them raising distinct issues requiring individual assessment[1]. Accordingly, with no discretion as to the selection of the cases to be admitted for review, the workload of the Court is heavy, both at the stage of the initial evalua-

[*] President of the Slovenian Constitutional Court.

[1] Sometimes, several identical or nearly identical cases are also brought by more individual applicants.

tion and as concerns the decisions on the merits, which (practically) always have to be adopted in the plenary[2].

As elsewhere, the pandemic has also not avoided the Slovenian Constitutional Court: it necessitated drastic measures restricting fundamental rights, which in turn raised a number of constitutional challenges in determining the proper conditions and limits of these measures, both procedural and substantive in nature.

Since the onset of the pandemic, the Slovenian Constitutional Court has received around 900 applications that have directly concerned Covid-19. In contrast to the usual structure of the docket, most of these applications were petitions directly contesting the constitutionality of various measures of general application adopted by the legislative and (in particular) the executive branches of government. Discounting the (nearly) identical cases[3], there were still over 200 distinct cases that at least potentially raised precedential issues of constitutional review.

Noting the significance of these cases in the specific context of the disruptive reality of the Covid-19 pandemic and the partly uncharted waters of the extensive restrictive measures it necessitated, the Court has decided to treat the Covid-19 cases with priority. While that has had a negative impact on the other pending cases on the docket, it did mean that the Covid-19 cases have been resolved relatively fast. By early 2022, most of them have already been decided. The majority have not led to a decision on the merits, either because of procedural defects that warranted their dismissal or because in the evaluation of the Court they have not satisfied the substantive conditions for such a decision. However, a significant minority have been admitted for review and have addressed a number of challenges posed by the pandemic. The paper

[2] For at least fifteen years, the Court has been highlighting the need to reconsider the legal regulation of its competences and operation in order to be able to perform its core duties – setting down the precedential standards of constitutional review – without undue delay.

[3] Notably, there have been almost 500 practically identical applications challenging the constitutionality of the measures imposing the requirement of being recovered, vaccinated or tested for various public-space activities.

offers a summary account or these cases and how the Court has dealt with the challenges they raised[4].

2. Covid-19, the legislative context and the response by the political branches of government

The Covid-19 pandemic is an unwitting (and unfortunate) example of the slogan «united in diversity» favoured by the European Union. All around the world, the countries had to grasp with the reality that, despite having experienced the historical (notably the three plague pandemics of 541-755, 1330-1830 and 1855-1959)[5] and the more recent (SARS, MERS, Ebola, swine flu, avian flu and the Zika virus) antecedents, they were ill-prepared for the disruptive reality of a highly contagious disease and the challenges for public-law responses it brought. Thus, legislation on communicable diseases and expert bodies designed to provide guidance on public health measures notwithstanding, the early challenges were often defined by the scrambling of the authorities to determine the legal framework, the organizational structure and the substantive aspects of the pandemic response. The challenges were often the same, the responses sometimes varied.

In Slovenia, at the onset of the Covid-19 pandemic, the relevant law was the Communicable Diseases Act (hereinafter CDA)[6], first adopted in 1995[7] and amended in 2005. Of particular relevance to the Covid-19 pandemic was Article 39, which provided for the possibility of restric-

[4] I have already written on the pandemic jurisprudence of the Court (e.g. in M. ACCETTO, *Pandemic and the Rule of Law*, in R. ARNOLD, J. CREMADES (eds.), *Rule of Law and its Challenge by Pandemia - Contributions to the World Law Congress 2021 in Barranquilla*, Cham, forthcoming), and am drawing here on the same text, in particular when presenting the jurisprudence of the Court.

[5] On this see e.g. F.M. SNOWDEN, *Epidemics and Society: From the Black Death to the Present*, New Heaven, 2019.

[6] Zakon o nalezljivih boleznih [*Communicable Diseases Act*] (Official Gazette RS No. 33/06).

[7] Replacing the earlier legislation on communicable diseases adopted at the state and federal level in the previous regime in the 1980s.

tive measures adopted by the Government and (for most of the relevant period)[8] read as follows:

> When the measures determined by this Act cannot prevent the introduction of certain communicable diseases into the Republic of Slovenia and the spread thereof, the Government of the Republic of Slovenia can also impose the following measures:
> 1. the determination of the conditions for travelling to a state in which there exists a possibility of infection with a dangerous communicable disease and for arriving from these states;
> 2. the prohibition or limitation of the movement of the population in infected or directly jeopardised areas;
> 3. the prohibition of the gathering of people in schools, cinemas, bars, and other public places until the threat of the spread of the communicable disease passes;
> 4. the limitation or prohibition of the sale of individual types of merchandise and products.
> The Government of the Republic of Slovenia must immediately notify the National Assembly of the Republic of Slovenia and the public of the measures determined by the previous paragraph.

Some pertinent provisions on specific issues were also contained in other legislative acts. Thus, for instance, following the swine flu scare, in 2009 the Courts Act was also amended by including a new Article 83a which provided for the exceptional operation of the courts in the case of an «irregular event», such as a major natural disaster or a major epidemic[9]. Also, in light of Article 39 CDA, in 2017 the Government of the Republic of Slovenia Act was amended to include a provision empowering the Government for crisis management and governance in the event of a complex crisis of a national or international scope, with the term «complex crisis» comprising both man-made events and natural disasters posing challenges that transcend the usual capabilities of the individual ministries, governmental bodies or national security ser-

[8] Prior to the pandemic, the provision authorised the minister responsible for health to adopt the listed measures, but this was amended early on in April 2020 to vest the authority (and the duty of notification) in the Government instead. In other respects, the provision remained the same.

[9] See Zakon o spremembah in dopolnitvah Zakona o sodiščih (ZS-I) [*Act Amending the Courts Act*] (Official Gazette RS No. 96/09).

vices[10]. In the field of public health, including communicable diseases, the central role was to be played by the National Institute of Public Health, formally established in the current form in 2014 but following in the footsteps of its predecessors operating since 1923.

The Covid-19 pandemic spread into Slovenia in the early days of March 2020 and soon tested the preparedness and the suitability of the legislative framework as well as organisational structures designed to deal with the challenges of a highly contagious and dangerous disease. Over the following years, as elsewhere, the pandemic necessitated a great number of measures to be adopted and continually reassessed. As far as the particularities of the Slovenian experience is concerned, the following points may be most pertinent by way of a summary.

Firstly, while Article 92 of the Constitution allows for a state of emergency to be declared by the National Assembly on the proposal of the Government «whenever a great and general danger threatens the existence of the state», in Slovenia the state of emergency was not declared during the pandemic. Accordingly, the pandemic response was regulated, implemented and assessed under the ordinary operation of the legal order. Twice, however, the Government did formally declare an epidemic to have occurred: the first time, the epidemic was formally declared on 12 March 2020, and then declared over on 31 May 2020; the second time, the epidemic was formally declared on 18 October 2020 and concluded on 15 June 2021. While the declaration of an epidemic was related to the periods with particular surges in the spread of Covid-19, it was not a precondition for restrictive measures to have been adopted.

Secondly, while in many other countries the legislature was actively involved in the drafting of the restrictive measures themselves as well as refining and further elaborating the legislative framework authoris-

[10] See Zakon o spremembi Zakona o Vladi Republike Slovenije (ZVRS-I) [*Act Amending the Government of the Republic of Slovenia Act*] (Official Gazette RS No. 55/17). On this as well as some historical antecedents to regulations on communicable diseases, see P. PAVLIN, *Nomotehnični instituti v posebnih situacijah [The institutes of nomotechnics in special circumstances]*, in S. ZAGORC, S. BARDUTZKY (eds.), *Ustava na robu izrednega stanja* [*Constitution on the verge of the state of emergency*] (Pravna fakulteta Univerze v Ljubljani, forthcoming 2023).

ing the measures of the government, in Slovenia the major actor in the drafting of the pandemic response in the first years was the Government itself, with the National Assembly playing a lesser role. While, over time, a number of legislative act were also adopted that dealt with particular issues, the general legislative framework regulating the adoption of restrictive measures also remained the same. Accordingly, most restrictive measures were introduced through the ordinances adopted by the Government on the basis of Article 39 CDA, helped in assessing the situation by the National Institute of Public Health and a special expert group assembled for the purpose.

It was in this context that the Constitutional Court had to perform its role when called upon, by various applicants, to review the constitutionality of the adopted measures.

3. Pandemic and the challenges of constitutional review

As said above, the Covid-19 pandemic was a disruptive reality, rattling the political branches of government and other relevant authorities in drafting an appropriate regulatory response. Consequently, its disruptive features – or in some cases at least the scope in which they manifested – also challenged the established standards of judicial review. Below, I provide an account of – in my view – the most pertinent of these challenges and how the Slovenian Constitutional Court has met them.

3.1. The procedural challenges

The first type of the challenges concerns the procedural requirements for a case to lead to a decision on the merits. As explained above, the Court receives many cases and has traditionally (had to have) been very mindful of the procedural preconditions to admit an application for substantive review. Both the relevant legislative framework and the developed jurisprudence of the Court remained relevant for the review of the many Covid-19 cases, but there were two issues of particular significance in which the pandemic challenged the ordinary assessment of

the Court: one concerned the applicants' standing, i.e. whether individual non-privileged applicants could seize the Court directly by means of a petition challenging acts of general application without having first made use of the judicial proceedings before ordinary courts; the other focused on the limited temporal validity of the acts challenged and on the issue whether a decision of the Court is warranted even when the act challenged had ceased to be in force. It is significant to add that both of these issues had already been addressed before, prior to the pandemic cases, but the pandemic brought them into sharp relief.

3.1.1. Standing and direct access to the Court

Most cases come before the Court in the form of constitutional complaints against individual acts by which the ordinary courts or other authorities decide on their rights, obligations or legal entitlements. As can be seen from the Court's annual reports[11], constitutional complaints would typically represent between 80 and 90 percent of the Court's docket[12]. In 2020 and 2021, there was a slight but noticeable increase in the other major type of proceedings, the requests and petitions to initiate the constitutionality review[13], in particular the petitions[14].

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[11] The English versions of the annual reports are available at <*https://us-rs.si/publications/?lang=en*>.

[12] With this year (preparing the annual report for 2022), the Court has decided to more clearly reflect in the statistics the parallel numbers depending on whether (nearly) identical cases are accounted for or not, and to the extent possible the numbers for previous years have also been revised. Not counting identical (like) cases, in the years prior to Covid-19 the Court typically received some 200 requests and petitions for constitutionality review and between 1000 and 1300 constitutional complaints. In 2019, it received 1283 constitutional complaints (or 1740 counting identical or like cases) and 165 requests and petitions for constitutionality review (or 474 counting identical or like cases).

[13] In addition to the two major groups, the remaining few cases comprise the other types of proceedings envisaged by the Constitutional Court Act (jurisdictional disputes, impeachment proceedings, reviews of the acts and activities of political parties, electoral disputes and reviews of treaties for conformity with the Constitution) or other legislation (such as reviewing the decision of the National Assembly that a particular law is to be excluded from the possibility of calling a legislative referendum under Ar-

When it came to petitions challenging the constitutionality of the contested Covid-19 measures, most adopted as Government ordinances, it had to be determined whether the circumstances allowed for petitions by private individuals challenging these acts to be lodged directly before the Constitutional Court.

The pertinent basic rule is as follows: as per Article 24(1) and (2) of the Constitutional Court Act (hereinafter the CCA), a petition may be lodged by a person demonstrating the requisite legal interest, which is deemed to be present if the act of general application directly interferes with that person's rights, legal interest or legal position. Where the general acts do not have such direct effect but require implementation through individual acts addressing the petitioner, the petitioner may only lodge a petition to initiate the constitutional review of the general act together with a constitutional complaint against the individual act implementing it.

If the challenged acts introducing the restrictive measures to combat Covid-19 were held not to have the requisite direct effect, petitions challenging them should be dismissed. However, the Court also had to take note of the precedent, established in a number of earlier cases since 2018, that where the decisions of the ordinary courts may only be provoked by a deliberate action of the petitioner in contravention of the extant legislation which exposes them to liability, the requisite condition of legal interest does not require them to act contrary to the law in order to be able to challenge the general act by provoking the adoption of the individual act.

The Court found this to apply in the case of statutory limitations in the Book-Entry Securities Act of the costs of account management that may be charged, where judicial review could otherwise only be attained by intentionally entering in contractual relations whose essential terms

ticle 90(2) of the Constitution in accordance with the provisions of the Referendum and Popular Initiative Act).

[14] In 2020 and 2021, there were 257 and 299 requests and petitions, not counting identical cases (or 489 and 851 including such cases), while the number of constitutional complaints was a little lower than in the preceding years.

would be in contravention of the law[15], and in a case concerning the Health Care Services Act where the Court held that the petitioners who held a concession to perform a public health care service were not required to provoke judicial review by acting in contravention of the rules in a way that could lead to the revocation of their concession[16]. Most pertinently, the same principle was also applied to cases where misdemeanour penalties were to be engaged for acting in contravention of the contested general act – the Court found that it would be contrary to the principles of legal certainty and legal security if petitioners were forced to commit a misdemeanour in order to be able to contest a general act[17].

When confronted with the pandemic cases that comprised direct challenges against the restrictive measures, where the judicial proceedings before ordinary courts could only be pursued by the applicants by violating the measure they wished to challenge, the Court held that this same principle could also be applied to the petitions challenging the governmental ordinances dealing with Covid-19[18].

3.1.2. Justiciability of challenges against acts no longer in force

The second challenge concerned the act rather than the agent, specifically the issue of whether constitutionality review was still warranted in the case of direct challenges against the acts of general application which have since ceased to be in force. The issue was brought to the fore because many of the measures adopted to combat Covid-19 have been periodically replaced, revised or re-enacted by the adoption of new acts, so the act originally challenged by the petition would sometimes expire in a matter of weeks, long before the Court could conclude

[15] Decision No. U-I-192/16 of 7 February 2018 (Official Gazette RS No. 15/2018 and OdlUS XXIII, 2), ECLI:SI:USRS:2018:U.I.192.16, para. 19.

[16] Decision No. U-I-194/17 of 15 November 2018 (Official Gazette RS No. 1/2019 and OdlUS XXIII, 14), ECLI:SI:USRS:2018:U.I.194.17, para. 13.

[17] Decision No. U-I-107/15 of 7 February 2019, ECLI:SI:USRS:2019:U.I.107.15, para. 17.

[18] See e.g. the first Order No. U-I-83/20 of 16 April 2020 (Official Gazette RS No. 58/2020), ECLI:SI:USRS:2020:U.I.83.20, para. 18, admitting the petition for review on the merits.

the proceedings and adopt a reasoned decision on the merits. The practical difficulties in obtaining judicial control of such measures, however, had to be confronted with the general rule limiting the review in such cases.

Namely, per Article 47 of the CCA, in the event that the act challenged is no longer in force, the review is usually only possible on the condition that the consequences of the contested general act's unconstitutionality (or unlawfulness) were not yet remedied as far as the petitioner is concerned, which it is for the petitioner to demonstrate. In practical terms, this condition poses no obstacle in those cases where the petition accompanies a constitutional complaint against an individual act that has very clearly had the allegedly unconstitutional effect on the applicant[19]. In those cases where the petition has been lodged directly against a general act deemed to have had the requisite direct effect, and where it is not accompanied by a constitutional complaint against an individual act, however, the fact that the general act in question has since expired might render the constitutionality review moot.

Here, too, the Court has already previously crafted an exception to the general rule. In a case reviewing two budgetary acts[20], with the final decision delivered after the onset of the pandemic but prior to the first pandemic cases, the Court decided on the merits of the application even though the acts have since expired, noting that the case concerned acts whose validity or effects were designed to be of limited duration and that the Court could thus be precluded from ever deciding on the constitutionality of such acts if the usual conditions of Article 47 CCA were to apply. Per the Court's reasoning, such an effect would not be warranted in those cases that raise particularly important precedential constitutional questions of a systemic nature which the Court had not yet addressed but which may reasonably be expected to arise again with

[19] If the applicant has already been convicted of a misdemeanour on the basis of an act no longer in force, for instance, a decision on this act's alleged unconstitutionality, if other procedural requirements are met, does not lose its practical significance for the applicant whose conviction may still be quashed.

[20] Specifically, the Amending Budget of the Republic of Slovenia for the Year 2019 (AB2019) and the Implementation of the Republic of Slovenia Budget for 2018 and 2019 Act (IRSB1819).

regard to general acts of equal nature and content, periodically adopted in the future[21].

The same exception was also applied in the pandemic cases, reaffirming that in such instances, applying the usual limitations of Article 47 CCA would be contrary to the requirements of legal predictability and the protection of human rights and fundamental freedoms, which the jurisprudence of the Constitutional Court is also intended to ensure[22].

Importantly, however, this exception did not mean that all such applications would dictate a decision on the merits. In some cases, its application did lead to important decisions of the Court on the merits of applications challenging general acts of very limited duration that have expired and then been replaced with new acts enacting the same or comparable measures designed to combat Covid-19 but allegedly also unduly infringing fundamental rights. In others, the Court has nevertheless dismissed the applications, holding that they did not raise important precedential issues or that it was not reasonable to expect that the issues raised would arise again in the same shape and form.

In the good two years of the pandemic jurisprudence, many of the cases did not meet the threshold to be admitted for review on the merits. A number did, however, and the new exception allowed (or required) the Court to adopt some important decisions setting out the precedential constitutional standards of human rights.

3.2. The substantive challenges

In the good two years in which the bulk of the pandemic jurisprudence has been developed by the Court, most the cases did not meet the conditions or the threshold to be admitted for review on the merits. A number did, however, and these cases required the Court to develop or reassess constitutional standards of human rights. I will highlight here two issues of general significance. The first, although it came second in

[21] See Decision No. U-I-129/19 of 1 July 2020 (Official Gazette RS No. 108/2020 and OdlUS XXV, 17), ECLI:SI:USRS:2020:U.I.129.19, para. 43.

[22] See e.g. 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, para. 27.

chronological terms, concerns the decisions of the Court on the issue of legality. The second, which started to be developed first, concerns the issue of whether and how the proportionality assessment may need to be adapted to the particular circumstances of a pandemic.

3.2.1. The requirement of legality

In time, one of the biggest concerns and a common refrain of the Court's Covid-19 jurisprudence has been the need to respect the principle of legality. This principle has an important role in the Slovenian constitutional order, as can be seen from an early decision of the Court[23]:

> Respect for the principle of legality is essential for the relationship between the legislative and executive branches of power in parliamentary democracies. The principle of legality also determines the relationship between the Parliament and the Government as the highest administrative authority. Legal theory defines the principle of legality by defining the relationship between the legislative and executive branches of power by means of the obligation of the executive branch to comply with laws from a substantive point of view. Laws have to constitute the substantive basis for implementing regulations and individual acts issued by the executive branch of power, i.e. the Government and administrative authorities (whereby express statutory authorisation is not required), and such activity also has to remain in its entirety within the statutory framework as regards its content.

Legality is relevant in all contexts, but perhaps particularly so where a possible interference with human rights and fundamental freedoms is concerned. While permissible restrictions of rights are envisaged and allowed by the Constitution, the Constitution vests the authority and the responsibility for setting out the criteria for their limitations in the legislature[24].

[23] Decision No. U-I-73/94 of 25 May 1995 (Official Gazette RS No. 37/95 and OdlUS IV, 51), ECLI:SI:USRS:1995:U.I.73.94, para. 17, in that case reviewing provisions of a regulation concerning registration of industrial design.

[24] See a relatively early expression in a case concerning criminal procedure in Decision No. U-I-25/95 of 27 November 1997 (Official Gazette RS No. 5/98 and OdlUS VI,

When it came to restrictive measures necessitated by Covid-19, this issue became particularly relevant in the Slovenian context due to the fact that the bulk of the pandemic response, including restrictive measures severely affecting fundamental rights of the entire population or its significant portions, was regulated through Government ordinances, while the National Assembly neither took a particularly active role in the adoption of the measures nor reassessed and revised the legal basis for regulation by the executive branch, most significantly the provisions of Article 39 CDA.

While the first decision of the Court, just as that application itself, did not deal with the issue of legality, the issue was raised in a number of applications and addressed by the Court. In the first such decision, adopted in May 2021[25], it found (in crucial parts of the decision with a narrow majority of five votes against three) that points 2 and 3 of Article 39(1) CDA were unconstitutional as they left too much discretion to the Government when adopting restrictive measures.

The decision warrants a closer look. The case concerned a number of restrictive measures, adopted as a Government ordinance, which included the limitations of the freedom of movement and the right of assembly and association enshrined in Articles 32 and 42 of the Constitution. While the Constitution itself envisages the possibility for these rights to be limited, including to prevent the spread of communicable diseases (see Articles 32(2) and 42(3), respectively), these limitations should normally be introduced and specifically determined by the legislature. Could, then, they also be introduced by inferior legislation adopted by the executive branch?

The Court reiterated, drawing on the jurisprudence of the European Court of Human Rights (ECtHR)[26], that this statutory interference must be sufficiently clear, formulated with sufficient precision, accessible,

158), ECLI:SI:USRS:1997:U.I.25.95, paras. 31 and 61-62, in which the reviewed statutory provisions were found not to be sufficiently defined.

[25] Decision No. U-I-79/20 of 13 May 2021 (Official Gazette RS No. 88/2021), ECLI:SI:USRS:2021:U.I.79.20.

[26] Quoting the ECtHR judgments in cases *Zakharov v. Russia* of 4 December 2015, paras. 228 et seq.; *Stafford v. the United Kingdom* of 28 May 2002, para. 63; *Dragin v. Croatia* of 24 July 2014, para. 90; and *Chumak v. Ukraine* of 6 March 2018, para. 39.

and foreseeable[27]. However, the Court was not oblivious to the realities of the pandemic requiring a swift response and relaxed the «ordinary» requirements of legality, noting that the legislative process may be too lengthy and inflexible and that in such circumstances it might exceptionally be permissible to leave it to the executive branch to prescribe restrictive measures and ensure the fulfilment of the positive obligations stemming from the Constitution[28]. Nevertheless, it went on,

> […] the law must determine the purpose of these measures or their purpose must be clearly evident therefrom. Furthermore, the law must determine with sufficient precision the admissible types, scope, and conditions regarding the restriction of the freedom of movement and of the right of assembly and association, as well as other appropriate safeguards against the arbitrary restriction of human rights and fundamental freedoms. If there is no substantive basis in the law, it is not possible to speak of a limitation of human rights and fundamental freedoms by law[29].

Even in such exceptional circumstances, therefore, the law must determine the purpose and the types of restrictive measures, the scope and the conditions for them to be introduced, as well as safeguards limiting the discretion of the Government in adopting the concrete measures.

Reviewing the two challenged provisions of Article 39 CDA, on the basis of which the contested Government ordinance had been adopted, the Court found that they failed to provide required guidance on the criteria concerning the type, geographic scope and duration of the measures, as well as on the duty of obtaining scientific guidance and informing the public, and thus gave the Government too broad a discretion in deciding on the types, scope and duration of restrictive measures to be adopted[30].

The Court thus concluded that the challenged provisions were inconsistent with the Constitution. Such a conclusion would usually lead to the annulment of the contested statutory provisions. However, the

[27] Decision No. U-I-79/20, n. 25 above, para. 77.

[28] *Ibid.*, para. 83.

[29] *Ibid.*

[30] *Ibid.*, para. 96.

outright annulment would remove any legal basis that would allow for restrictive measures to be adopted, which might jeopardise the ability of the state to fulfil its positive constitutional obligation to protect the health and life of people[31]. The annulment of the statutory provisions might thus lead to an even greater unconstitutionality. For that reason, the Court has only adopted a declaratory decision, finding the provisions to be unconstitutional but leaving them in force until such time that the legislature amends the law in line with the constitutional decision.

The Court called upon the legislature to do so in two months. Unfortunately, however, the legislature failed to amend the legislation, not only in the two months following the decision (with one failed attempt) but all the way up to the parliamentary elections in April 2022, almost a year after the decision was adopted, and the issue was only more seriously addressed after the start of the new term of the National Assembly.

The legality problem thus remained unresolved over the entire period of the pandemic, and was certainly one of the key issues addressed by the Court. The Court referred to or followed the reasoning in Decision No. 79/20 in several other cases.

Thus, for instance, in a decision from October 2021 concerning an application lodged by several providers of services, the Court found (again with a narrow majority of five votes against three) that point 4 of Article 39(1) CDA was also unconstitutional on the same grounds, adding that in any event the provision could only constitute a basis for the adoption of measures limiting trade in goods and products, and not also concerning the exercise, provision, and offering of services[32]. In a partial decision in the case involving the closing of schools and the introduction of distance learning, the Court also found (with five votes against four) that the statutory provision of one of the legislative acts adopted to introduce special measures to fight Covid-19[33], which au-

[31] *Ibid.*, para. 101.

[32] Decision No. U-I-155/20 of 7 October 2021, ECLI:SI:USRS:2021:U.I.155.20, paras. 36-38.

[33] Specifically, Article 104 of the Act Determining Temporary Measures to Mitigate and Remedy the Consequences of COVID-19.

thorised the minister of education to institute distance learning, did not meet the stated conditions and was thus unconstitutional[34]. Similarly, in a case challenging the constitutionality of the measures regulating the mandatory use of protective masks and disinfection of the hands, in a decision from June 2022, the Court found (with six votes against three) that the challenged measures (which have ceased to be in force but were deemed to have raised a significant constitutional question) lacked an appropriate legal basis[35]. The Court also noted that the decision on the legality did not prejudge the issue of proportionality of the measures, had the appropriate legal basis existed[36].

3.2.2. The pandemic and the proportionality test

Not all cases concerned – or ended with – the appraisal of the legality requirement. On the one hand, several applications themselves did not challenge the constitutionality of the statutory basis on which the contested acts were adopted, and in such cases it might arguably even not be proper (and certainly not required) for the Court to conduct the legality review of the statutory basis of its own motion. On the other hand, after the first legality decision, which has declared the legal basis to be insufficient but, for reasons explained above, intentionally left it in force, subsequent Government ordinances were «insulated» from constitutional challenges on that ground[37]. For both of these reasons, in a number of cases the Court also had to address the proportionality of the measures enacted.

In fact, such was also the very first decision adopted by the Court in August 2020. The petition in that case challenged a governmental ordi-

[34] Partial Decision U-I-8/21 of 16 September 2021 (Official Gazette RS No. 167/2021), ECLI:SI:USRS:2021:U.I.8.21, paras. 26-34.

[35] Decision No. U-I-132/21 of 2 June 2022 (Official Gazette RS No. 89/2022), ECLI:SI:USRS:2022:U.I.132.21, paras. 19-37.

[36] *Ibid.*, para. 38.

[37] As it was already clear that the legal basis was unconstitutional, but that in the Court's estimation it was preferable to keep it in force to serve as a flawed legal basis for restrictive measures rather than to render any governmental response to Covid-19 impossible until the law was remedied, subsequent governmental measures adopted could not be challenged on the grounds that they lacked a sufficient legal basis.

nance – but not Article 39 CDA as its legal basis – adopted on 29 March 2020 and coming into force the following day, which introduced very restrictive limitations on the freedom of movement (including the general prohibition of leaving one's municipality of residence), and it also called for a temporary suspension of the implementation of the ordinance.

As one of the earliest applications, and accompanied with a request for the interim measure, this petition came to be the first Covid-19 case reviewed by the Court. In this case, the Court adopted the initial order to admit the petition for review on the merits quickly and (just) prior to the ordinance being abrogated by the adoption of a new ordinance, some good two weeks later, so the exception outlined above concerning the temporal validity was not yet applicable. The Court did note, however, that the contested ordinance was about to be abrogated, but explained that the Court's decision was nevertheless warranted since the case raised important constitutional issues[38]. While admitting the case for review, the Court denied the motion for the temporary suspension, except in one part: it suspended the operation of its provision which allowed for the indefinite duration of the ordinance's validity, ordering the Government to review and provide the reasons for the continued operation of the ordinance every seven days[39].

When the Court adopted its decision on the merits, in August 2020, it developed general criteria for measures to be considered proportionate in the specific context of the pandemic. Setting out the general standards of this assessment, the Court stressed the significance of considerable uncertainty facing the authorities when deciding on the appropriate response to the pandemic, in particular at the onset of Covid-19, with very little scientific and medical research. In the assessment of the Court, this provided for a wider margin of appreciation for the authorities in selecting the appropriate measures, as long as these measures were based on verifiable reasons, expert advice and forecasts which already existed and which the authorities were obligated to actively seek to obtain, and as long as the relevant information was ap-

[38] See Order No. U-I-83/20, n. 18 above, para. 19.

[39] *Ibid.*, paras. 25-29.

propriately communicated to the public[40]. In assessing proportionality *stricto sensu*, it also established as a relevant criterion whether the measures were time-limited[41].

Having applied these criteria to the case at issue, the Court found (with a narrow majority of five votes against four) that in the relevant circumstances of the case, the measures under review satisfied the conditions of this somewhat relaxed proportionality test and that the challenged ordinance was therefore consistent with the Constitution.

While the general standards of constitutional review elaborated in this decision were largely confirmed by the Court in its subsequent decisions, the outcome of the assessment has sometimes led to a different ruling on the constitutionality of the contested provisions.

In a case decided in June 2021, the Court had to review several ordinances which were in force since February 2021 and which interfered with the right of peaceful assembly and public meeting guaranteed by Article 42(1) of the Constitution, in some periods completely prohibiting public protests and in others limiting them to no more than ten participants. By an order adopted in April 2021[42], the Court (unanimously) admitted a part of the petition for review on the merits and (with a narrow majority) temporarily suspended the implementation of one of the contested provisions. Then, in a decision on the merits in June 2021, shortly after the «legality decision» in case U-I-79/20, the Court reiterated that the ordinances at issue, adopted on the basis of point 3 of Article 39 CDA, which was already declared to be unconstitutional by Decision U-I-79/20, lacked a sufficient statutory basis, but nevertheless went on to assess the proportionality of the contested provisions to set precedential standards for future cases, and found (with six votes against two) that they were also disproportionate as the Government failed to demonstrate the necessity of the measures imposed[43].

[40] Decision U-I-83/20, n. 22 above, para. 50.

[41] *Ibid.*, para. 56.

[42] See Order No. U-I-50/21 of 15 April 2021 (Official Gazette RS, No. 60/2021), ECLI:SI:USRS:2021:U.I.50.21.

[43] Decision No. U-I-50/21 of 17 June 2021 (Official Gazette RS No. 119/2021), ECLI:SI:USRS:2021:U.I.50.21, paras. 36-51.

Specifically, the Court found that the Government failed to consider other measures by which it might be possible to prevent the spread of communicable diseases at public protests but which would interfere to a lesser extent with the right of peaceful assembly and public meeting than the complete prohibition of public protests or the limitation thereof to a maximum of ten people, such as the distribution of face masks and hand sanitizers to protesters, the closing of public spaces and roads to ensure sufficient space for social distancing between protesters, the issuance of clearly determined permits for public protests that are in conformity with epidemiological recommendations, and organising the protesters in multiple smaller groups from ten to twenty people, many of which were considered or applied in other countries[44].

In a decision from September 2021, focusing on the closure of schools and distance learning as far as children with special needs were concerned[45], the Court also found that – in addition to the legality issue – the measures were disproportionate, in this case because they failed to meet the requirement of proportionality *stricto sensu*. Specifically, the Court found that the negative effects of the general closure of educational institutions for children with special needs on the exercise of the right of these children to education and training (including the significance of therapeutic treatments and social contacts for such children)[46] were greater than their benefits for the protection of the health and lives of people threatened by Covid-19[47].

Three important cases also concerned the measures related to the so-called Recovered-Vaccinated-Tested requirement (the «RVT requirement») for the performance of different tasks or activities, and one of them, addressing the challenge to the general RVT requirement raised in several hundred applications, was decided with reference to the proportionality test.

[44] *Ibid.*, para. 40.

[45] Decision No. U-I-445/20, U-I-473/20 of 16 September 2021 (Official Gazette RS No. 167/2021), ECLI:SI:USRS:2021:U.I.445.20.

[46] *Ibid.*, para. 28.

[47] *Ibid.*, para. 42-51.

In a decision from February 2022[48], the Court decided on the merits of two of the many applications lodged that challenged the legal basis and the constitutionality of the RVT requirement, alleging that they impermissibly interfered with the rights to personal integrity, freedom of movement, health care, parental rights and free enterprise. In a unanimous decision, the Court found that the measures did have a sufficient statutory basis[49] and that the relatively mild interference with asserted rights (occasioned by the requirement to get tested as the less restrictive of the two voluntary options of meeting the requirements) was not disproportionate to the benefits pursued by the measures[50].

The other two RVT decisions, in contrast, centred on the assessment of the measures in light of the principle of legality. In a decision from November 2021, the Constitutional Court thus reviewed a governmental measure, addressed to the state administration employees with regard to the performance of their tasks at their workplace, which no longer allowed for testing but required the employees to be either recovered or vaccinated[51]. Deciding on the request of a police officers' trade union, the Court found that this requirement entailed a condition under labour law to perform work and would thus fall under the situations covered by specific provisions of the CDA regulating the vaccination as a condition under labour law to perform various types of work and professions. However, the contested measure was not adopted on that legal basis but on the basis of a law determining the general competences of the Government with respect to the organisation of work in state administration in connections with the provisions of the Health and Safety at Work Act which concern the adoption of internal measures by employers that are related to the type and nature of an individual activity and are in conformity with the safety statement of an individual employer. The Court found (with six votes against three) that the contested measure was thus not adopted in conformity with the pro-

[48] Decision No. U-I-793/21, U-I-822/21 of 17 February 2022 (Official Gazette RS No. 29/2022) ECLI:SI:USRS:2022:U.I.793.21.

[49] See *ibid.*, paras. 54-58, identifying several pertinent provisions of the CDA.

[50] *Ibid.*, paras. 62-79.

[51] Decision No. U-I-210/21 of 29 November 2021 (Official Gazette RS, No. 191/21), ECLI:SI:USRS:2021:U.I.210.21.

cedure and conditions specified by the relevant provisions (Article 22 in conjunction with Article 25) of the CDA regulating the vaccination and was thus unconstitutional.

Finally, deciding on the request of the Information Commissioner, the Court reviewed the governmental measures regulating the manner of verifying the compliance with the RVT requirement[52]. The Court, agreeing with the arguments of the Information Commissioner, found that those measures, which included the use of a special application, entailed the processing of individuals' personal data that should have an appropriate statutory basis clearly specifying the personal data that may be collected and processed as well as the purpose for this processing. Notably, the Court could not accept the Government's submission that the use of such measures was envisaged by the CDA, adding that in any event a sub-statutory instrument cannot autonomously regulate the processing of personal data which Article 38(2) of the Constitution vests exclusively in the legislator[53]. For similar reasons, the Court could also not accept the submission that the processing of data was authorised by the provisions of General Data Protection Regulation (GDPR)[54], specifically Articles 6(1)(a), 9(2)(a) and 9(2)(i), or by the reference in the governmental ordinance to the consent of the individuals concerned[55]. It further noted[56] that in the circumstances of the measures introduced and their impact on the social, political and religious life of the individuals concerned, the consent could in any event not be deemed to have been freely given[57].

[52] Decision No. U-I-180/21 of 14 April 2022 (Official Gazette RS, No. 60/2022), ECLI:SI:USRS:2022:U.I.180.21.

[53] *Ibid.*, paras. 44-46.

[54] Regulation (EU) 2016/679 of the Parliament and Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4 May 2016, pp. 1-88).

[55] See Decision No. U-I-180/21, paras. 47-50.

[56] Referring also to recitals 42 and 43 of the GDPR.

[57] See Decision No. U-I-180/21, paras. 51-53.

4. Reviewing the pandemic: Notes on the margins

The outline above highlighted some of the most significant decisions adopted by the Court when reviewing the constitutionality of the pandemic response. It provides a broad overview while glossing over the finer details that distinguished or further complicated many of these cases, many of which have contained not only the decision of the Court but also several separate opinions further elaborating on the positions of individual judges. A broad overview may very well be in order for such a paper. Nevertheless, let me add a few further remarks on the pandemic jurisprudence of the Court.

The first is that in many of the cases highlighted above, the Court rendered a majority decision in a divided Court. This does not mean that the Court was divided across the board: as with the docket generally, most of Covid-19 decisions, in particular those where applications were dismissed or not admitted for review on the merits, were unanimous. However, most of those cases which did result in decisions on the merits resulted in a split vote, the majority decisions garnering the support of five to seven votes among the nine judges. The split was not unchangeable over time and, while some judges were more likely to find the contested measures to be unconstitutional, the majority was not always composed of the same judges. In any event, the pandemic jurisprudence is another example of the significance of the operation of apex courts as collegiate bodies wherein the decisions are adopted by (the majority of) the college of judges with different judicial positions and temperaments.

Over time, the positions adopted by the Court and outlined in the previous section, on the procedural as well as substantive issues, have certainly been reaffirmed and solidified in principle. How these standards were to be applied to – or assessed in – the circumstances of specific cases, however, was still open to interpretation and could be assessed differently even by judges who agreed with the elaboration of the standard in principle.

That certainly applied to the adapted proportionality test, which in principle could be held to be supported by all the judges, but where in the first decision applying it the narrow majority found the contested

measures to have satisfied that test, while in subsequent cases the majority sometimes found the measures to have been disproportionate. The views also differed, even among the judges who supported the finding of an insufficient statutory basis for restrictive measures to be introduced by means of governmental ordinances, whether the Court should always of its own motion conduct the constitutional review of an ordinance with the review of the constitutionality of its statutory basis, even when reviewing applications that alleged an interference of a measure with fundamental rights but did not themselves challenge its statutory basis. And the same could be said of the way that the Court was to apply the doctrine allowing the review of acts no longer in force, which perhaps warrants a closer look.

A case offering a useful illustration of the nuances in the Court's evaluation of this doctrine is an application contesting a number of acts adopted in late 2020 and early 2021 that regulated the closing of schools and for instruction to be organised in the form of distance learning. In this case, three important decisions were adopted by the Court. In April of 2021, the Court admitted most of the application for review on the merits even though with respect to the Governmental ordinances it concerned provisions that have ceased to be in effect, noting that the application raised several particularly important precedential constitutional questions of a systemic nature regarding the closure of schools and organisation of distance (home) learning that warranted constitutional review[58]. In September of 2021, the Court adopted a partial decision, already mentioned above, dealing with an article of a pertinent law (which was still in force) that the Court found to be unconstitutional[59]. Finally, in June 2022, the Court dismissed the remainder of the application[60].

As in several of the pandemic cases, the Court adopted these decisions with a narrowly split vote, with slightly different distribution of the votes. As one of the two judges who supported all three decisions, I wrote a separate opinion to the last decision, explaining my understand-

[58] Order U-I-8/21 of 1 April 2021, ECLI:SI:USRS:2021:U.I.8.21, paras. 25-32.

[59] See Partial Decision U-I-8/21, n. 34 above.

[60] Ruling No. U-I-8/21 of 2 June 2022, ECLI:SI:USRS:2022:U.I.8.21.

ing of this doctrine and why in my view it no longer applied to the case discussed at the time of adopting the third decision[61].

In my view, considering the doctrine as developed by the Court, for the exception to be applicable three important conditions must be fulfilled: (1) the time-limited validity of the challenged regulations; (2) the raising of particularly important precedential constitutional questions of a systemic nature; and (3) a reasonable expectation that the same questions may arise again in the future in connection with the periodically adopted acts of the same (or significantly comparable) nature and content. While I found the second condition to still be met, in my opinion the third condition was no longer fulfilled in the case under review: in light of the developments that followed, the evolving views of the expert bodies and the fact that schools were no longer closed in subsequent waves of the pandemic, even while other measures were reintroduced, I no longer found it reasonable to expect that the same issues would be raised by future measures. This was all the more relevant because the application did not call for a principled evaluation of a question in the abstract, that is, whether the schools may at all ever be closed due to a pandemic, but required a decision on the proportionality of the challenged measures in the concrete factual and legal circumstances in which they were introduced. In such a review, the circumstances matter and a decision on the past measures may be of little guidance for the future measures introduced in substantially different circumstances. Since the doctrine is relevant for those cases where the usual conditions of Article 47 CCA for review of acts not longer in force – that the past consequences of the contested act's unconstitutionality have not yet been remedied – are *not* met, the reasons justifying its application must also be directed at the future, not the past.

The last remark "on the margins" is the fact that the Court's jurisprudence, while often critical of the concrete measures adopted by the Government (and of the fact they were adopted by the Government with insufficient input from the National Assembly), was cognizant of the difficult position for the authorities in drafting – and continually

[61] Concurring separate opinion of Judge Accetto to the Ruling No. U-I-8/21 of 2 June 2022, ECLI:SI:USRS:2022:U.I.8.21, paras. 4-9. This is not to say that other judges voting the same way necessarily shared this understanding.

refining – the pandemic response. It was certainly apparent to the Court that (some) restrictive measures had to be adopted, which led it to limit its decision on the legality of the statutory basis to a declaration of its unconstitutionality but leaving it in force, allowing for measures to still be adopted and effectively even insulating them from the same challenge until such time that the National Assembly amended the act[62]. It may also partly help to explain why the first decision of the Court focused on assessing the proportionality of the measure enacted rather than on the legality of its statutory basis – the substantive requirements for restrictions to be found proportionate certainly offered useful guidance in the drafting of subsequent measures, even though these still sometimes failed to meet them. The jurisprudence of the Court was never directed at preventing the pandemic response, but merely at ensuring that it was conducted in accordance with the constitutional requirements.

5. Conclusion

In Slovenia, as elsewhere around the globe, the Covid-19 pandemic was a major challenge for the state authorities, the courts included. In the case of the Slovenian Constitutional Court, not only did the pandemic give rise to a high number of cases challenging various measures, but these cases included novel challenges that sometimes required the usual standards of constitutional review to be reassessed.

The preceding sections attempted to provide an account of the most salient features of the Court's pandemic jurisprudence. Notably, in substantive terms, it showed that the specific circumstances of the pandemic, perhaps in particular the necessity to act in the face of a double uncertainty – uncertainty as to the severity of the threat posed by the pandemic as well as the utility and effectiveness of the measures contem-

[62] I will not speculate whether that fact contributed to the National Assembly not remedying the problem before the next elections. It can be appreciated that, at the time, the National Assembly itself was deeply divided and in a political deadlock, even if providing for a suitable legislative framework allowing for an effective pandemic response is an issue that should transcend the political divisions in the legislature.

plated in response – required an adaptation of the proportionality test. This did not mean that any measure would be found constitutionally permissible as long as it was pursuing the protection of public health or the individual rights to health and life, i.e. that these would operate as constitutional values of a higher order in such a manner that any other fundamental right should automatically be subordinate to them[63]. It did, however, mean that, given the double uncertainty, the usual proportionality test was rendered at least difficult if not altogether impossible. Thus, the usual balancing was substituted by a more stringent requirement of grounding the restrictive measures on the best possible scientific advice and continually reassessing the need to keep them in force.

And yet, I would posit that this constitutional jurisprudence was a reaffirmation of the traditional value and aptitude of the constitutional order, including the role of the Constitutional Court as its guardian, to shepherd and control the exercise of governmental power. Most, if not all, of the novel challenges brought by Covid-19 could be resolved by recourse to established tenets of constitutional review – even in those cases highlighted above, for instance, where the circumstances of Covid-19 required a departure from the ordinary assessment of procedural requirements, there were precedents established in cases prior to the pandemic decisions that the Court could follow and apply to the pertinent circumstances of Covid-19. In my view, the pandemic experience reinforced the significance of constitutional review rather than challenged it.

There is another sense in which I find stressing this point important. As elsewhere, in Slovenia the Court was sometimes criticized for its decisions on the Covid-19 pandemic, both by those who would wish for the Court to curtail government intervention and by those who claimed that (any) substantive constitutional review was jeopardising the effec-

[63] I would posit that this much, namely that even in such disruptive times of a pandemic the states should not neglect the interdependence of human rights and ensure that any measures taken are proportionate so as to ensure an appropriate protection of all human rights, was in principle largely accepted in the international community – see e.g. UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *Statement on the Covid-19 Pandemic and Economic, Social and Cultural Rights*, 6 April 2020, UN Doc E/C.12/2020/1, paras. 3 and 11.

tiveness of the pandemic response. This latter criticism was sometimes extended to the requirements of the principle of the rule of law in general. In such extreme circumstances as present in the case of Covid-19, the argument would go, the positive obligation of the state to protect the rights to health and life should take absolute precedence, while the vagaries of the rule of law and the limitations it imposes should be relaxed and not used as formalistic obstacles hindering the effective response to the pandemic.

It is emphatically my view, and I think the jurisprudence of the Court confirms it, that this is not the case. The requirements of the rule of law did not render the pandemic response ineffective, but allowed for the particular circumstances of the pandemic to be taken into account. In fact, I would posit that the opposite holds true: that even in such a case respecting the rule of law not only does not preclude the pandemic response but remains a precondition for it to be appropriate and effective. While the pandemic was a disruptive reality and certainly had painful implications for many states and individuals across the globe, it also reaffirmed the significance of the rule of law, including the need to pursue legitimate aims without sacrificing the duty to ensure due respect for (all) fundamental rights. The commitment to the protection of human rights is particularly relevant precisely in those circumstances where this protection is not straightforward. The specific context of the Covid-19 pandemic, which rendered finding the appropriate balance more difficult, should thus be seen as the type of a situation which, if anything, should call for a reaffirmation of this commitment and the respect of its significance.

JUDICIAL REVIEW IN AUSTRIA AND THE ROLE OF AUSTRIAN COURTS IN THE COVID-19-PANDEMIC

Edith Zeller[*]

1. Introduction

It is a necessity for a democratic state to provide the executive branch with sufficient powers to ensure the proper management of all the tasks entrusted to that authority.

It is also a necessity for a democratic state to control the exercise of these powers so that they cannot be used arbitrarily, disproportionately or inefficiently. Hence, effective judicial protection guaranteed by courts is part of the fundament to construct a state governed by the rule of law.

The COVID-19 pandemic spotlighted the strengths and weaknesses of both, namely of our public health systems as well as of the respective legal fundaments guaranteeing on the one side an effective protection of fundamental rights and the rule of law as well as, on the other side,

[*] Judge at Administrative Court of Vienna and former President of the Association of European Administrative Judges.

to manoeuvre citizens through the demands of this exceptional public health crisis.

Thus, a reappraisal of the COVID-19 crisis must be done also from a judicial point of view[1]. This analysis focuses on the Austrian legal structures. Did the courts do their essential role to control governments in their fight against the pandemic? Could they work effectively and what room was there for judicial supervision for courts? Is it justified for courts to intervene in emergency measures[2] taken by the executive and if so to which extent?[3]

Before the pandemic started, the population of Austria was supposed to have a good level of healthcare[4] (relatively many hospital intensive care beds). However, Austria was only medium well off concerning the COVID-19 death rate during the pandemic despite quite long lockdowns and more lockdowns by numbers than the bigger part of European countries. Furthermore, Austria was one of the countries spending more than other countries for public health as well as to absorb economic shocks (being one of the highest deficit spending countries in the EU for these COVID-19 economic measures) for parts of the econo-

[1] Namely with respect to the question if an effective judicial protection in times of this crisis situation was guaranteed.

[2] Public emergency situations cannot only be caused by a pandemic but also e.g. by natural disasters, terrorism, nuclear disasters etc.

[3] For European standards see e.g. *The role of judges in the protection of the rule of law and human rights in the context of terrorism*, CCJE OP No. 8 of 10.11.2006, which emphasises that the judge entrusted with the task of dealing with infringements and protecting the constitutional rights and freedoms of the individual must play an essential role in the legal framework designed by States and have all the necessary powers to carry out these tasks successfully. The measures must be laid down by law, must be necessary and proportionate to the objectives of a democratic society and must be subject to control and control by the judges who, in accordance with the legal traditions of the various States, normally have jurisdiction over the law in question in terms of legitimacy. These measures must under no circumstances violate citizens' rights and freedoms to such an extent that the fundamental principles of democratic societies themselves are jeopardised.

[4] F. BACHNER et al., *Austria, Health System Review*, in *Health Systems in Transition*, 20(3), 2018, 23, available at *https://www.researchgate.net/publication/328049335_Austria_Health_System_Review/link/5bbb0b3e299bf1049b749975/download* (accessed on 21.02.2023).

my[5]. In addition, Austria was one of the very few countries worldwide to introduce a law on mandatory COVID-19 vaccination. From a legal point of view a discussion and reappraisal of the pandemic has started[6].

Hereinafter, a brief overview on the general legal structure in Austria, followed by legal protection and judicial review systems specifically with respect to COVID-19 measures will be explained. When possible, reference will be made to the German structures and practise of German courts.

2. Some remarks on rule of law and separation of powers in crises situations

It is a rather shared consideration that the pandemic has put democracies in distress. The legislature was in retreat, the executive branch was advancing[7]. This phenomenon also exists in other public emergencies[8].

In such situations, it is undisputed that states have the obligation to take appropriate protection measures for public health. This was mainly done by the executive power – which has the know-how and ability to

[5] See DIE PRESSE, *Sehr viel Geld für wenig Wirkung*, Austrian daily newspaper of 11.02.2023, *https://www.diepresse.com/6250005/sehr-viel-geld-fuer-wenig-wirkung* (accessed on 21.02.2023).

[6] For example see H. EBERHARD, *Alte und neue verfassungs- und verwaltungsrechtliche Strategien zur Ermöglichung und Bändigung von Verwaltungsspielräumen in der Krise*, in *ZÖR*, 1, 2022.

[7] R. KLAUSHOFER, B. KNEIHS, R. PALMSTORFER, H. WINNER, L. OBERMEYER, *Unions- und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des Covid-19-Virus (III)*, in *ZÖR*, 937, 2022, 1086.

[8] See the study about the practise of some European countries that declared a state of emergency under Art. 15 ECHR with the effect that there was a considerable length of each state of emergency. In addition, with each exception, a considerable increase in government powers and the consequent restriction of individual freedoms and freedoms went hand in hand. Finally, a lack of effective national control mechanisms in relation to the executive was identified as one of the immediate consequences of emergencies. See T. MARINIELLO, *Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system*, in *German Law Journal*, 20(1), 2019, 46-71.

react quickly and adequately. Specifically, the constantly changing pandemic situations and thus changing needs during the COVID-19 pandemic have undisputedly proven that the executive power (i.e. in Austria primarily the Federal Minister of Health) had to (re)act by way of regulations, because the legislative procedure would have not been able to react so quickly[9]. This had the consequence that the executive branch became the "legislator in the substantive sense" and it played a role that should not be underestimated alongside the legislative power.

This also shows the thin line between these two state powers in this crisis, namely to grant but at the same time also to restrain a certain leeway of the administration, i.e. administrative freedom[10].

There is also no doubt that access to justice is essential even in times of emergency measures: the rule of law serves precisely to prevent arbitrariness in the exercise of state authority.

This in turn required that also during the COVID-19 pandemic the judiciary had to control the legality of these measures taken with the aim to protect existing fundamental rights and freedoms and to guarantee compliance[11] with international human rights obligations to the necessary extent. I will scrutinize this aspect in more detail hereinafter[12].

3. Some words on the legal structure in Austria

From the European aspect (ECHR) it is to be stressed that the European Human Rights Convention is part of the Austrian Constitution. This means that all COVID-19 legislation and provisions must be interpreted and checked for compliance with the ECHR. The scope of re-

[9] H. EBERHARD, *op. cit.*, 145.

[10] *Ivi*, 137.

[11] International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration – upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, ICJ, Human Rights and Rule of Law Series, 3, 2011, 57 ff., *https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf* (accessed on 21.02.2023).

[12] For an excellent overview see F. CAFAGGI, P. IAMICELI, *Global Pandemic and the Role of Courts. Opening Survery*, in *Legal Policy&Pandemics. The Journal of the Global Pandemic Network*, 1(1-2-3), 2021, 159-179.

view of legislation or of regulations of the Constitutional Court includes the legal control of these provisions vis-á-vis the ECHR. Austria did not declare a state of emergency according to Art. 15 ECHR. The Austrian Constitution does not provide for a specific constitutional state of emergency in case of unexpected threats like the COVID-19 pandemic[13].

3.1. The legal foundation of the health care system

The underlying fundaments for these specific Austrian legislative structures and competences lie in the Austrian federalism. With federalism, there is a strong cooperation of the federal legislative level with the administration on the state level (*Länder* level). Thus, the Austrian health system is complex and fragmented. Health-related legislation is made on the federal level, usually initiated by the Federal Ministry of Health. The nine *Länder* (states) are responsible for ensuring the availability of adequate hospital capacity, including outpatient care in hospitals, and they finance a major part of inpatient and outpatient care provided by hospitals[14].

On the other side, Germany is also a federal state. Similar to Austria, the state tasks and competences are distributed between the federal and state governments. Germany's health system governance is – similar as in Austria – complex and decentralized, divided between the federal and state levels, and corporatist bodies of self-governance[15]. While the federal level sets the overall legal framework, state governments are responsible for hospital planning and public health services.

Thus, for the purpose of our comparison, Austria as well as Germany as federal states have similar state structures as well legal structures

[13] According to Article 18 § 3 the of the Federal Constitution the State President has certain rights to issue emergencee decrees when the parliament is unable to do so.

[14] F. BACHNER et al., *op. cit.*

[15] M. BLÜMEL, *Germany, Health System Review*, in *Health systems in transition*, 22(6), 2020, 44, available at *https://www.researchgate.net/publication/353097065_Germany_Health_System_Review/link/611e6d061e95fe241ae2de5b/download* (accessed on 07.02.2023).

of the respective health care systems (mixed competences between the federation and the *Länder* (state level) in both countries).

3.2. Austrian judicial review system of COVID-19 measures

Until 15.03.2020 the Federal Epidemic Law[16] was the only legal basis to combat COVID-19. Quickly a new law, the COVID-19 Measures Act, was adopted by the Austrian parliament[17]. This law authorised the Federal Minister of Health to regulate a broad variety of different restrictions of different fundamental rights, like prohibitions to enter public places, certain commercial and service establishments and many other areas of life – in line with most other countries worldwide[18].

In this first phase of COVID-19 (spring 2020) the Federal Minister of Health needed not consult the Parliamentary Main Committee of the Austrian National Council (which was made later on). Furthermore, the recommendations of a newly established advisory body (the way of appointment and selection of experts was also not regulated) of the federal government were not published nor transparent.

It was also criticized that criteria to fight the pandemic were only the hospitalisation rate and percentage of utilized intensive care beds[19]. In addition, the vast powers of the executive organ were criticised[20] – but

[16] Dating back to 1913 and having been re-announced in 1950.

[17] *Covid-19 Maßnahmengesetz* of 16.03.2020, see Federal law gazette BGBl.I Nr. 12/2020.

[18] For a comparison among Member States of the Council of Europe see A. DIAZ CREGO, S. KOTANIDIS, *States of emergency in response to the coronavirus crises*, European Parliamentary Research Service, December 2020, *https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf* (accessed on 21.02.2023).

[19] See for instance B. MUELLER, E. SONNLEITHNER, *COVID-19-Maßnahmen in Österreich: Operation gelungen, Patient tot?*, in *COVuR*, 2021, 84.

[20] E.g. see the press release of the Austrian Umbrella Association of Administrative Judges of 09.04.2020 demanding proportionality of covid-19-measures: *https://uvsvereinigung.wordpress.com/2020/04/09/dachverband-der-verwaltungsrichter-massnahmen-der-regierung-zur-corona-pandemiebekaempfung-muessen-verhaeltnismaessig-bleiben/* (accessed on 21.02.2023).

politicians ignored these arguments[21]. In the second phase of the pandemic (autumn 2020 to 2022) certain adaptations were introduced.

The Austrian judicial reviews with respect to cases of individual persons versus public authorities on COVID-19 measures[22] were predominantly centred on certain types of cases.

First, there was a number of challenges of restrictive measures, affecting fundamental rights (i.e. fundamental rights of economic character and non-economic character). Within this sector, again different avenues of possible legal challenges existed, depending on the kind of restrictive measure. This included challenges of COVID-19 laws and COVID-19 regulations[23] with respect to restrictions of fundamental rights, made by individuals. The Austrian Constitutional Court (see hereinafter in more detail) reviewed these cases. Furthermore, this included challenges of specific individualized measures (administrative decisions of health authorities) to isolate an infected individual person (or who was contact person to an infected person or persons who had travelled and re-entered Austrian territory) and these measures were reviewed by administrative courts. In addition, challenges of prohibitions of public assemblies were also observed; these measures were reviewed by administrative courts as well. Likewise, complaints against individual fines (misdemeanour cases) were also reviewed by administrative courts. Finally, legal review of decisions of administrative authorities on compensation claims of employers for specific single isolation measures of individualized employees were also reviewed by administrative courts.

Second, another type of cases was centred on individual claims of state liability; these cases have recently been settled by the Austrian

[21] The former Federal Chancellor, Mr Kurz, openly washed away criticism with the argument that these regulations would no longer be in force when the Austrian Constitutional Court would decide on their lawfulness (*https://orf.at/stories/3161820/*, accessed on 21.02.2023).

[22] In addition to this overview presented here, there were some criminal cases when a person was alleged to having transmitted the COVID-19 disease on purpose. With respect to civil courts, there was quite a number of court proceedings between private parties concerning demands to waive rental payments for commercial rents and vis major provisions.

[23] The term "regulation" comprises regulations as well as ordinances.

Supreme Court in a landmark decision in which it denied state liability claims by a German tourist against the Republic[24].

Third, in the area of compulsory vaccination measures, administrative courts would have been in charge to do the judicial review in subsequently possible misdemeanour cases (sanction system for non-vaccinated citizens).

[24] Judgment of the Supreme Court of 15.05.2023, no. 1Ob199/22d. Austrian state liability is based on its Constitution: according to Art. 23 of the Austrian Federal Constitution, public bodies can be held liable for damages and these claims resort to civil courts. In these cases damages (only pecuniary compensation) were claimed by a German citizen, having been skiing in Ischgl. He argued that he got infected with COVID-19 with long covid problems, caused by the fact that the organs of the administrative authorities of the Tyrol province did not take appropriate measures in time. Tyrol authorities had publicly announced on 05.03.2020 that Icelandic tourists got infected on the airplane back to Iceland (having skied in Ischgl) but not from Tyrol. This was knowingly – wrong. That it was knowingly false information was now established by the second instance civil court. However, the Supreme Court denied liability as such, arguing that the applicable Austrian law, the "Epidemic Law" serves exclusively the protection of the general public, not that of the individual, The Supreme Court also saw no starting point for possible liability in that piece of incorrect information issued by the state of Tyrol on 05.03.2020 about a sick passenger on the way from Munich to Iceland. The information was "conjunctively" and "vaguely formulated". All 130 individual actions and the class action pending at the *Landesgericht* Innsbruck in the *Causa Ischgl* have now been effectively withdrawn. The judgement was publicly criticized because the Supreme Court had not referred the case to CJEU, showing gaps in the fundamental rights protection, see e.g. comment by Professor PETER HILPOLD in daily newspaper *Die Presse* on 21.08.2023 ("Ischgl: Hat wieder wer das Licht ausgemacht?").

An option for legal protection, following the dismissal of the actions by the Supreme Court, may be due to a lack of referral to the CJEU by state liability lawsuit, which was filed in September 2023. However, since the Supreme Court gives a justification on this point in the judgment, it is also unlikely that judicial liability could be at stake. In the case in question, a complaint was also lodged with the ECtHR.

4. Specific analysis of judicial reviews on COVID-19-measures with respect to guarantees of fundamental rights

4.1. Austrian Constitutional Court

As a rule, the Constitutional Court cannot take action on its own but only when it is called on to do so by a permissible application. These are different political groups or state organs or courts – on the state level as well as on the federal level. A review of legislation is only possible for the Constitutional Court *ex officio* while reviewing a particular individual complaint case and the competent judge has doubts as to the constitutional validity of the law (or legality of the regulation) which is to be applied in a specific court case. Decisions of administrative courts[25] can be challenged before the Constitutional Court by an individual complainant who was party to that case (before the administrative court).

Thus, the Austrian system of control of constitutionality of laws as well as whether regulations are in line with the laws (in all areas of law) is centralized with the Constitutional Court. The Constitutional Court is not a permanently sitting court but there are sessions, i.e. deliberations four times per year (for a period of three weeks each time). Somewhat the judicial office as a constitutional court judge is still perceived as being a part-time activity. This organ is qualified to be a kind of "border organ", i.e. to be the central organ to be placed between justice and politics (in a broader sense) and it is perceived to be the "negative legislator". Normally, when individuals are subject to unconstitutional legislation or illegal regulations, the Constitutional Court can be addressed by individuals only via detour of administrative court[26] proceedings. Only in restricted cases individuals can lodge directly a complaint with the Constitutional Court – questioning the constitutionality (or legality) of norms – when these individuals are «directly and individually affected» (to this in more detail below).

[25] Since 2015 parties to cases before civil and criminal courts can file a complaint on unconstitutionality of a law to the Constitutional Court during pending civil or criminal proceedings.

[26] As well as since recently also in pending civil and criminal proceedings.

It is important to emphasize again that also in the COVID-19 litigation context the system of controls of constitutionality remained unchanged and only the Constitutional Court in Austria could do the direct legal control of all regulations. Unlike in Germany, Austrian administrative courts were and are not involved in the direct legal control of regulations (only by way of a specific reference to the Constitutional Court during pending administrative court proceedings)[27].

Furthermore, this pattern of a judicial protection system has the effect that in pending court cases the (administrative) courts must not leave unconstitutional provisions unapplied but have to refer the question of constitutionality (legality) of a legal norm to the Constitutional Court in case the judge has doubts about the constitutionality (legality) of a legal provision in a specific case[28]. This structure applied also for COVID-19 litigations – despite the specific demands of this specific kind of crisis with rapidly changing regulations (with the practical consequence that in principle each single regulation must be referred for the central control of legality).

Secondly, a specific point to be raised is that – unlike in Germany – there exists no emergency procedure or interim relief procedure ("urgent proceedings") for cases pending before the Austrian Constitutional Court (unlike the German Federal Constitutional Court, *Bundesverfassungsgericht*)[29].

[27] In addition to the German Federal Constitutional Court – as well as several Constitutional Courts of the *Länder* in certain areas of law – also administrative judiciary is involved in the direct legal control of regulations.

[28] There exist different types of proceedings before the Constitutional Court. Relevant for our purposes are the competences of the Constitutional Court to control the constitutionality/legality of legal norms based on the request of certain public organs, e.g. National Council or on the basis of an individual complaint against a judgement of administrative courts (apart of references of courts in pending proceedings). In addition, under specific circumstances an indivual request to control the constitutionality/legality of norms can be presented directly before the Constitutional Court – without the "detour" to start administrative proceedings in order to challenge the final decision of the administrative court in case of "direct and invididual concern".

[29] The German *Bundesverfassungsgericht* does have a specific interim relief procedure on the basis of Art 32 of the Federal Constitutional Court Act. See e.g. *https://*

Overall, Austrian case law is not very rich, because all relevant litigation on COVID-19 measures stems only from the Constitutional Court. The vast majority of decisions of the Constitutional Court were issued when the attacked restrictive measures (laws, regulations) were no longer in force.

4.2. Jurisprudence of the Austrian Constitutional Court on COVID-19 measures

Similar to adaptations of other Constitutional Courts in Europe, the Austrian Constitutional Court had to decide specifically on individual complaints, which were filed to challenge the constitutionality or legality of COVID-19 restrictions[30]. Content of all complaints was to challenge that the power had been exercised lawfully, fully respecting the rule of law and fundamental rights impacted by a specific government decision. The bigger parts of its jurisprudence balances fundamental rights and freedoms in the light of general principles (such as proportionality, reasonableness, etc.). Overall, the Constitutional Courts' reasonings seemed to follow rooted methodologies. Hereinafter some basic lines of jurisprudence will be briefly summarized.

4.2.1. On the admissibility of direct and individual complaints

As mentioned above, "individual and direct concern" – i.e. being directly and individually affected by a legal norm – is the formal prerequisite to lodge a direct complaint with the Constitutional Court. In the course of COVID-19 pandemic these formal criteria were seen less restrictively than before.

In previous judgements it was made clear that a direct concern in the legal sphere on the basis of an individual application[31] existed when the legally protected interests of the applicant were still currently affected

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www.bundesverfassungsgericht.de/DE/Verfahren/Wichtige-Verfahrensarten/Einstweiliger-Rechtsschutz/einstweiliger-rechtschutz_node.html (accessed on 16.02.2023).

[30] This was the only available timely judicial review option for individual citizens.

[31] This is based on Art. 139 §1 subpar. 4 of the Austrian Federal Constitutional Law.

at the time of decision of the Constitutional Court. There existed only some few exceptions of this rule once there were legal (post) effects of the regulation after it had expired.

In our context, the regulations were in force at the time of submissions of the individual applications but expired soon afterwards. It was clear that timely no decision of the Constitutional Court could be made before expiry of these regulations. With expiry, also the key effects of these regulations became obsolete and thus such applications would have been rejected in line with constant jurisprudence.

Thus, the Constitutional Court developed its previous jurisprudence so that in these cases the legal interest of the applicants to obtain a binding decision on the legality of the contested provisions goes beyond the very short period of their entry into force[32].

Furthermore, in these first decisions in July and October 2020, the Constitutional Court also stressed that the underlying legal reason for the COVID-19 laws was the control of the disease. This required a quick action of the Federal Minister of Health, adapted to the respective temporal and local conditions. The rapidly changing conditions and the obligation of the legislator to adapt the measures resulted in a rapid sequence of modifications of individual regulation provisions[33]. Furthermore, the Constitutional Court stressed that the meaning of the rule of law principle culminated in the fact that a system of legal protection mechanisms guarantees that all state acts are based on the law and ultimately on the Constitution. Insofar these individual complaints should guarantee legal protection[34].

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[32] See inter alia, Judgement of Constitutional Court of 14.07.2020, no. G 202/2020 and others.

The Constitutional Court held that the effectiveness of contested provisions of the ordinance and thus the legitimation of the complaint, notwithstanding the fact that the ordinance in question had already expired, is valid in the case of period-related regulations, as they continue to apply for the corresponding period; the complaints were admissible; see decision no. V428/2020 of 01.10.2020.

[33] See judgement of the Constitutional Court of 14.07.2020, no. V363/2020, § 25 and summary provided by M. KOHLER-SCHLOEGL, *Die Covid-19-Judikatur des VfGH und deren Folgewirkungen für die Verwaltungsgerichte*, in *ZVG*, 5, 2020, 355.

[34] *Ibidem*.

4.2.2. Some main lines of jurisprudence on COVID-19 regulations

The Constitutional Court did not criticise that the government had the power to rule on the matter as well as had no objections to the COVID-19 Measures-Act (the law) with regard to the principle of legality[35]. The Constitutional Court stressed that according to this principle of legality the legislator can leave a margin for the administration for balancing and forecasting as long as the situation-related concretization of the law can be deduced from the authorizing regulation in their overall context with sufficient clarity. It depends on the matter to be settled and the regulatory context, which determination requirements the Austrian constitution imposes on the administrative authority[36].

However, at the beginning of the pandemic quite some regulations were declared to have been unconstitutional (illegal) because of formal flaws: namely because the reasoning of the rule-makers (executive power, mainly the Federal Minister of Health) were not (sufficiently) clear. This means it was not so clearly demonstrated why a regulation needed to be issued.

In fact, hardly any or no justification grounds were provided by the Federal Minister of Health in the restricting COVID-19 regulations in the first wave of the pandemic (spring and summer 2020). We can conclude that in these cases (first wave of COVID-19 pandemic) the judicial review of the Constitutional Court has mostly aimed at the scope of

[35] Art. 18 § 2 of the Federal Constitution; see decision of the Constitutional Court of 14.07.2020, no. V363/2020.

[36] In this context, the Constitutional Court has also stated on several occasions that the principle of pre-determination of administrative actions must not be overstretched in cases where rapid access and consideration of a wide range of local and temporal differences are essential for a meaningful and effective regulation, which also allows for a purpose-oriented determination of the administration by vague legal concepts and general clause-like regulations. The Constitutional Court has also pointed out that in relevant constellations the purpose of the standard can also require that a measure that was urgently necessary at the time of its adoption – possibly under facilitated conditions – becomes unlawful and has to be repealed, if the reason for the adoption ceases to exist. See again e.g. decision of the Constitutional Court no. V363/2020.

powers exercised by the executive authority, their legal grounds and procedural compliance[37].

The comparison with Germany shows that similar considerations were made and requirements were recognized by the courts. However, it must be stressed again that the control of legality of regulations was done also by administrative courts. Some other regulations and laws were reviewed by the German Federal Constitutional Court and for all these judicial reviews in all cases interim relief ("urgent proceedings") was available and used[38].

Several judgements of the Constitutional Court dealt with equal treatment questions with respect to different regulations for similar situations in life (or similar economic or cultural activities)[39]. Also for the German courts often, the general principle of equality and prevention of unequal treatment were relevant benchmarks for quashing several COVID-19 measures[40].

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[37] Generally, the scope of powers of the executive power were seen in the light of a wider discretion assigned to the executive power by the emergency legislation.

[38] In more detail with further reference to jurisprudence see F. SCHOCH, *Der Prüfungs- und Entscheidungsmaßstab im Normenkontroll-Eilverfahren*, in *NVwZ*, 2022, 1.

[39] The justification given by the Federal Minister of Health in a regulation restricting the access to certain businesses was based on one brief paper on "Further Roadmap in Corona Crisis", which summed up a series of measures to be taken and mentions the measures at issue here. Here first, the Constitutional Court clearly marked that it was not apparent by the regulation which circumstances with regard to which possible developments of COVID-19 led the administration in particular deciding this challenged provisions of the specific regulation – in which the Minister decided on the 400 m² limit or on different conditions for entering trading establishments. Consequently, the contested provisions of the COVID-19 measures regulation infringed the COVID-19 Measures Act (law) because, firstly, the Federal Minister of Health had completely failed to provide a justification to comprehend why it was necessary to impose these measures by this regulation. Secondly, the contested regulation also violated the COVID-19 Measures Act (law) because it was differentiated in an improper way between commercial establishments whose customer area inside is more than 400 m² and, in particular, construction-and garden-markets (without limitation). See judgments of 14.07.2020, no. V411/2020, and no. V395/2020. Consequently, this jurisprudence had an impact on the policy makers, namely to give comprehendible justifications for each of the regulations.

[40] See in detail with further reference to jurisprudence F. SCHOCH, *op. cit.*

Generally, the Constitutional Court made no objections with regard to constitutionality of COVID-19 measures concerning the right to free movement[41].

In the second stage of judicial reviews (starting in autumn 2020 to summer 2022), it often accepted the justifications provided by the Federal Minister of Health. On this basis the Constitutional Court then balanced affected fundamental rights. In none of the cases the Constitutional Court itself investigated on the provided justifying reasons which were provided by the Federal Minister for Health. Scope of judicial control by the Constitutional Court on these justifying reasons to issue a COVID-19 regulation was to control if the reasons provided by the Federal Minister were by themselves comprehendible and plausible[42].

In these later decisions, the balancing of fundamental rights was in the forefront of the decisions of the Constitutional Court. Here, it relied on science as a priority lens to examine the adequacy, reasonableness and proportionality of public decision-making[43]. This approach is in line with jurisprudence on COVID-19 measures of other courts[44] [45].

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[41] Freedom of movement is not guaranteed without barriers. In line with legal reservations for restrictions on freedom of movement only in one of these cases some provisions of the respective COVID-19 regulation were unlawful because the limits set to the competent Federal Minister of Health by the COVID-19 Measures Act (law) were exceeded. Here, the regulation did not merely prohibit the entry of certain specific places, but the regulation established the principle of a general ban to enter public places whereas the law provided powers to the Minister to limit the access to specific public places.

[42] F. CAFAGGI, P. IAMICELI, *Uncertainty, administrative decision making and judicial review*, in *European Journal of Risk Regulation*, 2022, 13.

[43] By way of example see the decision of the Constitutional Court on covid-measures in schools, where the court assessed proportionality based on the absence of data on infection rates in school districts and the existence of data on masks' effectiveness in limiting the spread of contagion. Decision of Constitutional Court of 10.12.2020, no. V436/2020.

[44] P. POPELIER, B. KLEIZEN, C. DE CLECK, M. LAVINA, W. VAN DOOREN, *The role of Courts in Times of Crisis: A Matter of Trust, Legitimacy and Expertise, European Court of Human Rights*, available at the link *https://www.echr.coe.int/Documents/Intervention_20210415_Popelier_Rule_of_Law_ENG.pdf* (accessed on 21.02.2023).

[45] F. CAFAGGI, P. IAMICELI, *Uncertainty, administrative decision making and judicial review*, cit., 15.

For the period of autumn 2021 and winter 2022 Austria has faced a short period of full lockdown also binding vaccinated persons, followed by a period of selected curfews for those persons who were not vaccinated against COVID-19[46] [47].

There exists some jurisprudence of the Constitutional Court rejecting claims, which had argued that a specific curfew for non-vaccinated persons[48] would be unconstitutional[49].

There is some criticism that the long duration of repeatedly regulated, specific curfews for non-vaccinated (or non-recovered) persons was no longer proportionate[50]. These regulations needed to be re-enacted every ten days and every single regulation needed to be challenged before the Constitutional Court. It became a tricky question to sort out until when the proportionality of a regulation still prevailed and when it would become illegal due to a lack of proportionality[51]. Only much later[52], some of these regulations were declared to be illegal by the Constitutional Court; for instance the specific prohibition to get a service of a hairdresser after several weeks of specific lockdowns[53].

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[46] Or not recovered from COVID-19 disease (within previous180 days).

[47] This started with regulations in November 2021 and were renewed every 10 days until the end of January 2022.

[48] This included also persons who had not recovered from COVID-19 disease recently.

[49] See Austrian Constitutional Court judgement of 30.03.2022, no. V-294/2021, on curfew for unvaccinated persons for the period of 15.11.2021 to 21.11.2021, deciding that that specific COVID-19 protection measures regulation which was in force from 15.11.2021 to 21.11.2021 and which provided for a specific curfew for unvaccinated and not recovered persons as well as a proof of this for certain locations, was neither illegal nor unconstitutional. It was objectively justified and did not violate the principle of equality.

[50] R. KLAUSHOFER, B. KNEIHS, R. PALMSTORGER, H. WINNER, L. OBERMEYR, *Unions und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des Covid-19-Virus (III)*, in *ZÖR*, 937, 2022, 1064.

[51] This even the more because of the factual and constantly changing circumstances, namely changing virus variants with less protection through vaccination.

[52] See the critical assessment of the Austrian system below.

[53] See e.g. the judgement of the Constitutional Court of 30.06.2023, no. V 3/2022-19 by which it declared the regulation in the specific version of BGBl. II 601/2021 to be unlawful. Here the court ruled that the stringing together of COVID-19 measure-

Here again, a comparison with Germany shows that in German federal states different restrictions for non-vaccinated and non-recovered persons were put into effect still during the period of time when these norms were still in effect. Contrary to Austria, in Germany timely decisions of several different administrative courts made clear that these restrictions were illegal[54].

5. Compulsory vaccination against COVID-19 disease

The public discussion in Austria on this topic in 2021/2022 was short and tough. Briefly, it provided for a general civic duty for all persons residing in Austria over eighteen years to be vaccinated against COVID-19 disease. The status of not being vaccinated against COVID-19 disease (namely a vaccination with certain specific vaccines) would have been the physical element of the offence and be punished. Four consecutive penalties per year would have been made possible[55]. These penalties would have been open for judicial review by administrative courts in order to guarantee a right of fair trial and enable legal control. In this respect, several procedural provisions were adapted specifically

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regulations, each with a ten-day curfew due to the resulting exit restrictions for unvaccinated people lasting weeks or months due to the lack of possibility to meet the basic needs of life – which also included a visit to the hairdresser in terms of a certain duration of the continued lockdowns. Thus the regulation turned out to be no longer proportionate and no longer in line with the law. It stressed that there was a proportional effect of the – legally covered – initial regulation for certain population groups ("lockdown for the unvaccinated") based on the epidemiological events and the spread of COVID-19 at the time the regulation was issued. It regarded that the Federal Minister provided sufficient documentation of the lower epidemiological risk of persons with evidence to be vaccinated or recovered.

[54] See e.g. in Bavaria, Baden-Württemberg or Lower Saxony, report in *https://www.welt.de/politik/deutschland/article236465775/Corona-Regeln-Gericht-kippt-2G-Regel-fuer-Einzelhandel-in-Baden-Wuerttemberg.html* and Corona in Deutschland: Gericht kippt 2G-Regel im Einzelhandel in Niedersachsen (*merkur.de*) (accessed on 21.02.2023).

[55] To prevent *ne bis in idem* complaints.

with the purpose to enable court proceedings to «be handled efficiently»[56].

The law came into force on 4 April 2022[57] and was repealed on 28 July 2022[58]. The law entitled the Federal Minister of Health to suspend the enforcement by issuing a regulation – depending on the pandemic situation and the state of science. From the very beginning, the Federal Minister of Health made use of his powers and suspended the enforcement by regulations[59].

In between, the law was challenged several times before the Constitutional Court, which dismissed nearly all of them as inadmissible (reviewing only formal criteria). However, in one judgement[60] the Constitutional Court decided that the (general) obligation to be vaccinated does not violate Art. 8 ECHR and constitutionality of this law on mandatory vaccination against COVID-19 was confirmed. It stressed that vaccination is permitted as a serious interference with the right to self-determination to protect against overloading the health system and according to the options to suspend the execution of the law, the Federal Minister of Health was committed to the continuous evaluation and regular evaluation of the suitability and necessity of the obligation to vaccinate[61].

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[56] In this respect see the comment of the Austrian Umbrella Association of Administrative Judges to the bill on mandatory vaccination against COVID-19 disease: *https://uvsvereinigung.wordpress.com/2022/01/10/dachverband-der-verwaltungsrichter-durchsetzung-der-impfpflicht-wuerde-verdoppelung-der-zahl-der-landesverwaltungsrichterinnen-erforderlich-machen/* (accessed on 21.02.2023).

[57] Law gazette I Nr. 4/2022 of 04.02.2022.

[58] Law gazette I Nr. 131/2022 of 28.07.2022.

[59] So called *Nichtanwendungsverordnungen*, i.e. regulations not to enforce the law.

[60] Judgement of the Constitutional Court of 23.06.2022, no. G37/2022, no. V173/2022.

[61] Among others it was criticized that also in this law on mandatory vaccination the legislature has left the field to the executive power (Federal Minister of Health). In this law, the Federal Minister was also allowed to deviate from the exceptions explicitly provided for by law and to set other conditions than those specified in the law and, in particular, to give him the power to temporarily suspend enforcement of the law. See R. KLAUSHOFER, B. KNEIHS, R. PALMSTORGER, H. WINNER, L. OBERMEYR, *op. cit.*, 1087. Furthermore, the Constitutional Court did not go into further details of similarities or differences with the case *Vavricka and others v The Czech Republic* (judgement

Apart from Austria only one state in Europe (Vatican) and five other states worldwide (Ecuador, Indonesia, Micronesia, New Caledonia, Tajikistan and Turkmenistan) imposed a general obligation to vaccination against COVID-19[62]. Other European states opted for vaccination obligations for specific groups of society only. Here, a comparison with German jurisprudence shows that mandatory vaccinations (or both, either vaccinated or to be recently recovered from COVID-19 disease) were rolled out for persons working in certain healthcare facilities or serving as soldiers in the German army. In these cases, the German Constitutional Court[63] and the German Federal Administrative Court[64] have each upheld the respective provisions providing for mandatory vaccination.

6. Implications of EU law

The EU legal order had only some few direct implications (e.g. only in cases to have the right to enter state territory)[65] and competences of the EU for healthcare are limited[66].

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of ECtHR of 08.04.2021, Appl. no. 47621/13). The question remains if the Constitutional Court would have judged differently if the Federal Minister of Health would not have been granted this competence to suspend execution of the law.

[62] F. CAFAGGI, P. IAMICELI, *Uncertainty, administrative decision making and judicial review*, cit., 8-10 with some comparative considerations and legal analysis.

[63] See decision of the German Federal Constitutional Court of 27.04.2022, 1 BvR 2649/21, in *NVwZ*, 2022, 950.

[64] See decision of the Federal Administrative Court of 07.07.2022, no. 1 WB2.22.

[65] See for instance the case in which a third-country national wanted to re-enter German territory for family reasons, affecting the Schengen regulation (EU) 2016/399 as well as the recommendation of the European Council of 30.06.2020, 2020/0134 (NLE) and the subsequent decision on this application to re-enter in urgent proceedings: decision of the administrative court of Berlin of 24.03.2021, no. 6L161/21 confirmed by appeal administrative court of Berlin-Brandenburg of 28.03.2021, no. 3S28/21.

[66] See a recent judgment of CJEU of 15 June 2023, C-411/22, *Thermalhotel Fontana*, in which the freedom of movement of workers was rightfully questioned, when Austrian authorities first had not imposed isolation measures on tested, posted workers (from Slovenia or Hungary) but simply informed their respective national authorities that these persons were tested positive on COVID-19. Therefore, later Austrian authori-

However, the EU played a central role in the approval and procurement of COVID-19 vaccines. The distribution procedures within national Member States rested in the competence of the respective Member States[67].

At the national level, an expert steering committee[68] was put in place in Austria, which should recommend and coordinate the strategy of the vaccination program. The *Länder* (state level) had the final competence and final responsibility to roll out the vaccination program. Furthermore, a national vaccination board of experts[69] was entrusted to provide standardized recommendations on prioritization for vaccinations. This recommendation was included in a corresponding regulation of the Federal Minister for Health[70] – whereas such regulations on the respective level of the *Länder* (state level) did not exist[71]. It was criticised that the regulation did not meet the constitutional standards of lawfulness and for not being clear and precise by itself[72].

For questions of prioritization and access to vaccines, access to justice to courts did not exist in the Austrian legislation and claims were

ties had denied compensation for the Austrian employer of these posted workers isolation measures, as they had to be in isolation in their home countries. It was also clarified by CJEU that covid-19-compensation payments are not sickness benefits according to Regulation (EC) 883/2004.

[67] See Commission Decision of 18.06.2020 approving the agreement with member states on procuring COVID-19 vaccines on behalf of the Member States and related procedures, C(2020) 4192 final.

[68] The legal qualification and legal basis of this committee remains unclear up to now, see R. KLAUSHOFER, B. KNEIHS, R. PALMSTORGER, H. WINNER, L. OBERMEYR, *op. cit.*, 1021.

[69] This was an expert committee according to Art. 8 of the Federal Ministry Act.

[70] By regulation on the implementation of the vaccination program – which first has issued a prioritization in a series of different age groups of the Austrian population. This was published in Austrian law gazette BGBl. II 34/2021, followed by BGBl. II 458/2021.

[71] However, the Federal Minister of Health issued a by-law saying that this is a binding guideline, see R. KLAUSHOFER, B. KNEIHS, R. PALMSTORGER, H. WINNER, L. OBERMEYR, *op. cit.*, 1023.

[72] *Ivi*, cit., 1025.

barred[73]; also in this respect, the same structural weakness becomes visible, as mentioned above.

7. Critical assessment of Austrian judicial protection mechanisms

On the positive side, it must be mentioned that the scope of judicial reviews as well as competences of courts have remained unchanged during the pandemic. No specific court competences with limited scope of judicial review or diluted protection standards were created[74]. The same can be said for Germany.

Furthermore, the Constitutional Court has widened its jurisprudence of "direct and individual concern" in order to close a gap in the legal protection. It also intensified the period of deliberations (instead of four times with deliberation period of three weeks, now deliberations were held six times per year with also three weeks each).

On the negative side, certain weaknesses of the Austrian structure of the legal protection system became visible.

Time-wise the only possibly effective legal control of these COVID-19 regulations could be pressed via the individual complaint system directly to the Constitutional Court. Administrative Courts – unlike in Germany[75] – did not have a power to do a direct control the legality of regulations[76]. German Administrative courts[77] were competent to de-

[73] A comparison with the German approach shows that the organisational setting to roll out the vaccines were similar. However, access to justice was guaranteed on the prioritizing questions, e.g. see the (urgent proceedings) decision of the Administrative Court of Saarland of 29.03.2021, no. 6L295/21.

[74] Only for the compulsory vaccination cases specific procedural provisions would have been put in place.

[75] Also in France administrative courts were competent to decide in interim relief proceedings for many of the measures which were regulated on the level of departments (by way of legal proceedings of *référé-liberté*). As an appeal instance the Council of State decided in these interim relief proceedings. For certain measures of national-wide importance the Council of State was competent to decide in interim relief proceedings.

[76] Only at a time when the respective covid-19-regulation was no longer in effect – in the misdemeanour cases through references to the Constitutional Court.

cide – mainly in interim relief proceedings – on a wide range of regulations[78]. With a shared competence (similar as in Germany) a more effective protection of fundamental rights – namely by way of less formalities to access a court and with a faster (interim relief) judicial review – could have been reached. Practically spoken, this weakness might have become even more visible because of the fact that the Constitutional Court normally deliberates only in four sessions (each for three weeks) per year only[79].

Furthermore, the lack of interim relief procedures before the Constitutional Court itself is apparent[80]. In October 2022, the Constitutional Court counted already more than 900 applications against COVID-19 measures. In most of these cases, the Constitutional Court decided when the specific measure was no longer in force[81]. By way of example, the decision of the Constitutional Court of July 2020 made clear that the differentiation (namely with which shops with less than 400 square meters of retail space were not allowed to open but home/garden centres were generally allowed to open again) was objectively not unjustified and there was an unequal treatment. However, the Constitutional Court decided on these regulations in July 2020[82] – and thus at a time when they had no longer been in force for almost three months.

[77] As well as the German Constitutional Court; see also the shift to the Constitutional Court during the pandemic because competences to issue restricting regulations were shifted.

[78] Namely those regulations which constituted administrative measures according to Art. 47 of the German administrative court procedure. Standard of legal control is the probability of success of the application and proportionality. See in detail F. SCHOCH, *op. cit.*

[79] The Constitutional Court has increased deliberation times six times in order to decide on COVID-19 measures as timely as possible.

[80] An initiative of one of the Austrian political parties to introduce interim relief proceedings for the Constitutional Court procedures was not followed up, see e.g. *https://uvsvereinigung.wordpress.com/2020/04/27/corona-krise-verfassungsausschuss-vertagt-antrag-zu-eilverfahren-vor-dem-verfassungsgerichtshof/* (accessed on 21.02.2023).

[81] By way of example see the critical assessment in one of the Austrian daily newspapers, Wiener Zeitung of 27.10.2022, *https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2166148-Mehr-als-900-Covid-Antraege-vor-Hoechstgericht.html* (accessed on 21.02.2023).

[82] See judgement of 14.07.2020, no. V411/2020.

Another eye-catching example is the ruling of the Constitutional Court in August 2022 that the ban on entering cultural institutions due to the pandemic was illegal because the exceptions for churches at the same time made it to be contrary to equality. When the Constitutional Court decided in August 2022, it had been possible to visit these cultural institutions again for almost a year[83]. In addition, the judgement on restrictions to get services of a hairdresser for non-vaccinated persons was issued at a time when these restrictions have no longer been in force[84]. Consequently, this shows a weakness in the legal protection system time-wise[85].

The need to provide individuals with effective recourse in the event that the government needs to strongly interfere in their human rights in emergencies like COVID-19 pandemic has also been stressed by the Venice Commission. It highlighted that a Constitutional Court, Supreme Court or a special Chamber, which must have the power to order interim measures[86], should carry out these judicial reviews.

After the COVID-19 pandemic it remains to be questionable if fully effective – namely timely at most – remedies existed for proceedings before the Austrian Constitutional Court[87] to challenge the lawfulness of such fundamental rights restricting measures.

The Constitutional Court argues that its decisions are final and not only interim decisions[88]. In addition, it can be argued that legal certain-

[83] See judgement of 30.06.2022, no. V312/2021.

[84] See judgement of 30.06.2022, no. V3/2022.

[85] As it is not an obligation under Art. 6 ECHR per se; Registry of the European Court of Human Rights, Council of Europe, *Guide on Article 6 of the European Convention on Human Rights- Right to a fair trial (civil limb)*, of 31.08.2022, see §§ 66 and 69; *https://www.echr.coe.int/documents/guide_art_6_eng.pdf* (accessed on 21.02.2023).

[86] See European Commission for Democracy through Law, *Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Reflections*, Council of Europe, Venice Commission of 19.06.2020, Study N. 987/2020, CDL-AD(2020)014, points 87 and 88.

[87] Like "urgent procedures" which exist also for proceedings before the German Constitutional Court.

[88] The Constitutional Court argues that a procedure lasts only four months on average, and the judges deal with around 1,600 cases per year. Although there are urgent proceedings, i.e. accelerated proceedings with a final decision, at the CJEU, however

ty is increased when judicial reviews are done centrally by one (supreme) court only, deciding finally on a question of legality/constitutionality with no deviating jurisprudence and no provisional measure (interim relief) annexed to the main proceedings.

However, again, having a look at German practise, the fact that judicial protection was predominantly guaranteed through interim relief (urgent proceedings) does not seem to have been much of a problem[89]. By way of example, in an interim relief judicial review in 2020 Bavarian administrative courts regarded certain COVID-19 restrictions to be not proportionate. These measures were stopped, hereinafter the Supreme Administrative Court (*Bundesverwaltungsgericht*) confirmed the interim relief decision of the Bavarian courts and only recently the Supreme Administrative Court decided in the merits of this case (namely in line with the former urgent proceedings)[90].

Furthermore, a look at the successful protection of public health shows that Austria is not better off than Germany[91].

Finally, we have to keep the specific COVID-19 situation with rapidly changing conditions in mind. Under these specific circumstances, a timely review to balance fundamental rights was of even greater importance.

Concerns about interim relief proceedings could also be countered with specific procedural provisions and eventual adaptation of internal court organisational rules.

Furthermore, in Austria, a lack of judicial reviews (i.e. access to justice) with respect to broadly introduced state aid measures (consequently going also hand in hand with an increase of corruption risks of the

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«In terms of the rule of law, they have the disadvantage that the parties are only given short deadlines for written comments; member states that are not involved in the matter cannot submit any. The ECJ therefore decides – unlike usual – on a comparatively narrow basis», see interview in *Wiener Zeitung* of 27.10.2022, *https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2166148-Mehr-als-900-Covid-Antraege-vor-Hoechstgericht.html* (accessed on 21.02.2023).

[89] Also the majority of other European jurisdictions provided judicial protection via urgent proceedings.

[90] See press release No. 70/2022 of 22.11.2022, *https://www.bverwg.de/de/pm/2022/70* (accessed on 21.02.2023).

[91] See above § 1.

COVID-19 pandemic) became evident[92]. The Austrian tax courts (or other administrative courts) were not competent to do a legal review in state aid measures – unlike in most other European states[93]. The Austrian parliament designed and founded a legal entity (a limited company) which carried out state aid measures (as grants)[94]. These financial grant programs (subsidies) were generally granted on the basis of only internal by-laws[95]. There was no justiciable individual right to receive a certain amount of state aid or to receive such a grant at all. In addition, there was no parliamentary control about how these grants were distributed. Recently the Constitutional Court has quashed parts of specific legislation on the Federal Covid-19 Financing Agency (COFAG) to be unconstitutional as well as has strictly criticised the lack of access to justice[96]. However, based on Austrian constitutional legislation, the Constitutional Court has granted fifteen months to the Austrian legisla-

[92] Only some areas of law provided access to justice, e.g. the reimbursement for employers when employees had to be isolated and generally, reimbursement claims based on the Epidemic law.

[93] E.g. claims to receive higher grants, e.g. administrative court Würzburg, decision of 24.10.2022, W8K21.1263.

[94] The "ABBAG-law" (law on a federal corporation on the establishment of a federal mining participation) was adapted so that "financial measures" could be taken for companies that have experienced financial difficulties as a result of the pandemic. For this purpose, the Federal Covid-19 Financing Agency (COFAG) was founded and equipped by the federal government in such a way that it can grant financial aid up to a maximum of 19 billion euros. In its activities, COFAG is bound by guidelines that are laid down by decree by the Federal Minister of Finance in agreement with the Vice Chancellor. The Constitutional Court has raised constitutional concerns ex officio in pending proceedings that the processing of the COVID-19 financial aid by COFAG could violate the requirement of objectivity and the constitutional requirement of efficiency. It also appears to contradict the constitutional principles of administration that COFAG's activities are not directly subject to instructions from the Federal Minister of Finance. Furthermore, the law on covid-aid measures could violate the right to property, the rule of law and the principle of equality.

[95] See for instance this guideline of the Federal Minister of Finance: *https://www.aws.at/fileadmin/user_upload/Downloads/Richtlinie/ab_20210528_aws-Investitionspraemie_FINAL.pdf* (accessed on 21.02.2023).

[96] Judgement of 17.10.2023, no. V 145/2022 et al. as well as no. G 172/2022 et al.

tor to repair these constitutional problems – having the effect that the specific Agency (COFAG) continues its work in the meantime.

Recently the Austrian Court of Auditors has harshly criticised this COFAG company, stressing that by far too much state aid was granted (several hundred million Euro too much)[97]. The Court of Auditors recommended to dissolve this state-owned company[98]. Several proceedings started to reclaim paid grants[99] and in these cases, eventually the Austrian republic would need to file a lawsuit before civil courts to regain the unduly paid grants.

8. Concluding remarks

Undoubtedly, it was necessary to restrict fundamental rights in order to fight against COVID-19 and protect public health. Austria acted like most other countries worldwide. However, specifically in such situations of far-reaching encroachments of fundamental rights, interim measures are desirable to avoid irreparable damage to the victim of the alleged violation of rights. Certain weaknesses in the overall judicial protection system became known in Austria.

Furthermore, much of this COVID-19 legislation had to be enacted by the executive power by means of regulations. Precisely because of this inclination of separation of powers[100] there is even more need for a fully effective judicial review[101]. This includes, that in general, in a sophisticated judicial system, interim measures are certainly needed. Without them, justice cannot be done because a case might be closed in

[97] See press release on the report of the Court of Audits of 28.10.2022, *https://www.rechnungshof.gv.at/rh/home/home_1/fragen-medien/Presseinformation_COFAG_BF.pdf* (accessed on 21.02.2023).

[98] *https://kurier.at/wirtschaft/rechnungshof-ortet-ueberfoerderung-und-empfiehlt-aufloesung-der-cofag/402198255* (accessed on 21.02.2023).

[99] *https://www.vienna.at/seniorenbund-vereine-muessen-corona-foerderungen-zu rueckzahlen/7912606*.

[100] See the considerations on rule of law above.

[101] H. EBERHARD, *op. cit.*, 150, and this is a way to compensate these necessary softening of the principle of legality.

reality before the court can open the legal work[102]. A fully effective judicial review implies access to justice in all areas affecting economic and non-economic fundamental rights[103]. Certain weaknesses in the fundamental rights protection became visible during COVID-19 pandemic, which has functioned as magnifying glass in this respect. In some minor parts, the legislator has realized needs to initiate further adaptation; however, a systematic reappraisal is still needed.

[102] J.E. HEGELSEN, *What are the limits to the evolutive interpretation of the Convention - Dialogue between judges 2011*, Council of Europe, ECtHR, 2011, 27 on the ECHR protection system: *https://www.echr.coe.int/documents/dialogue_2011_eng.pdf* (accessed on 21.02.2023).

[103] Again, this must evaluated under these specific circumstances of COVID-19 crisis with broadly needed public grants because of government measures to restrict or forbid economic activities for the sake of public health.

CONSTITUTION UNDER LOCKDOWN. JUDICIAL RESPONSE TO CORONAVIRUS IN INDIA

Madan B. Lokur[*] *and Rupam Sharma*[**]

1. Introduction

India reported 530,771 deaths from COVID-19 between January 2020 and February 2023[1]. These numbers led to a debate on allegations of under reporting of COVID-19 deaths (ratio of excess deaths compared with reported COVID-19 deaths stated to be as high as 9.9) and raised important questions on the institutional response to a global

[*] Judge at the Supreme Court of Fiji, former judge at the Supreme Court of India.

[**] Advocate, Senior Consultant - Regulatory & Development, The Heart Advisors Group, New Delhi, India.

[1] WHO Health Emergency Dashboard (*https://covid19.who.int/region/searo/country/in*) «Excess mortality is defined as the difference in the total number of deaths in a crisis compared to those expected under normal conditions. COVID-19 excess mortality accounts for both the total number of deaths directly attributed to the virus as well as the indirect impact, such as disruption to essential health services or travel disruptions» (*https://www.who.int/data/stories/the-true-death-toll-of-covid-19-estimating-global-excess-mortality*).

health crisis by the world's largest democracy[2]. The COVID-19 Litigation Project ("Project") developed by the University of Trento is an assiduous endeavour to provide an answer. This paper attempts a contribution to the Project's engagement on the complex theme of judicial response to a global health emergency.

Several significant questions have been raised by the Project. These include questions of the legal basis of government's responsibility in their response to a health crisis, necessity of declaration of a formal "emergency", judicial review of government's management of a pandemic, role of fundamental rights in judicial assessment of government action, judicial balancing of rights, and ensuring protection and respect for human rights by governments facing unprecedented governance challenges. Each and all these questions are determined by a country's institutional history, political and cultural context, and socio-economic circumstances. Therefore, we have two broad objectives in the present discourse. Firstly, lay down the functional framework of the Supreme Court of India, the apex constitutional court, as far as it is relevant to questions which the Project seeks to probe. Contextualization of the law and legal institutions is vital for any comparative undertaking[3]. Secondly, the actual response of the Supreme Court to governance measures introduced for tackling COVID-19.

2. The Framework

The Supreme Court of India ("Supreme Court" / "Court") has over 1.4 billion (and growing)[4] people under its expansive jurisdiction. It has been accused of judicial activism, judicial overreach; it has been labelled as progressive, transformative for social rights, or even failing

[2] Times of India, *WHO says millions of Covid deaths went unreported in India, Centre questions methodology*, New Delhi, 2022 (*https://timesofindia.indiatimes.com/india/who-says-millions-of-covid-deaths-went-unreported-in-india-centre-strongly-objects-methodology-key-points/articleshow/91349479.cms*).

[3] R. BANAKAR, *Power, Culture and Method in Comparative Law*, in *International Journal of Law in Context*, 5(1), 2009 (revised in 2015), 69-85.

[4] *https://www.worldometers.info/world-population/india-population/*.

civil liberties. Alternatively, it has been viewed as not doing enough to protect and realize the values of the Constitution. Irrespective, it has often been termed as "the most powerful court in the world"[5]. Studies on the Court since its establishment reveal a mosaic of trends and an uneven understanding of its judicial architecture[6]. Each phase in the Court's history is indicative of its attempts to appreciate the needs of society. This assessment has often been influenced by the philosophy and beliefs of individual judges. The Court has always found itself co-operating, confronting, or directing the executive and adapting its position depending on the political, social, and economic exigencies, the government in power, the leadership of the Court, and the dominant social thought[7].

In addition to this persistent repositioning, the Court has always had to indulge in an exercise of balancing of rights faced with the complexity of competing claims in a democracy as diverse as India. Therefore, COVID-19 was not the first time the Court faced novel challenges. The purpose of the present exercise in the specific context of India is to appreciate the contrary. No single instance has been able to clearly define the role played by the Court in protection of rights in India. The Court is known to have committed errors of judgment but has also risen to protect and strengthen Constitutional values.

2.1. Form of governance

The Constituent Assembly was tasked with drafting the Constitution for an independent India and it met for the first time in December 1946. The Constitution drafted by the Constituent Assembly came into force

[5] S. SHANKAR, *Descriptive Overview of the Indian Constitution and the Supreme Court of India*, in O. VILHENA, U. BAXI, F. VILJOEN (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, Pretoria, 2013, 105.

[6] G. ROSENBERG, S. KRISHNASWAMY, S. BAIL (eds.), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change*, Cambridge, 2019.

[7] G. DAS, *Supreme Court: An Overview*, in B.N. KIRPAL, A.H. DESAI, G. SUBRAMANIAM, R. DHAVAN, R. RAMACHANDRAN (eds.), *Supreme But Not Infallible: Essays in the Honour of the Supreme Court of India*, New Delhi, 2004, 17.

on 26 January 1950. It provides for a federal parliamentary form of government. This refers to a division of legislative powers in India, which is a Union of States, between the Parliament of the Union and the Legislative Assemblies of each State of India. The executive is accountable to the elected representatives of the people constituting the House of People or Lok Sabha of the Parliament and to the state Legislative Assemblies. Separation of powers is not rigid under the Constitution of India[8] and often it is said to constitute a quasi-federal structure of governance.

2.2. A Bill of Rights

Part III of the Constitution is the Bill of Rights. These fundamental rights give effect to the Preamble and guarantee to the citizens of India rights like those perceived essential under declarations of the United Nations, the European Union, the United States, and other Constitutions. The first of the fundamental fights under Part III is the right to equality before the law and equal protection of the laws under Article 14. The fundamental rights guaranteed by Articles 15-17 and in a broader sense by Articles 25-30 emanate from the general principles of Article 14[9]. Article 21 confers on every person the right to life and personal liberty. The Supreme Court has relied on the undefinable nature of the terms "life" and "personal liberty" to read several rights into Article 21 making it a source for freedoms which do not find an express mention in Part III[10].

2.3. The Supreme Court of India

Article 124 of the Constitution establishes the Supreme Court of India. The States have their High Courts and subordinate courts. Under the Constitution, the Supreme Court is the highest court of appeal (both civil and criminal) in India. It has original jurisdiction under Article 32

[8] H.M. SEERVAI, *Constitutional Law of India*, 4th ed., Vol. 3, Mumbai, 2021, 2617.

[9] O.C. REDDY, *The Court and the Constitution of India: Summits and Shallows*, Oxford, 2009, 85.

[10] *Maneka Gandhi v Union of India*, AIR 1978 SC 597.

for the protection of Fundamental Rights. Article 32 has been described as the «heart and soul of the Constitution without which the Constitution would be a nullity»[11]. Making the remedy for breach of fundamental rights a fundamental right itself emphasises the significance granted to them under the Constitution[12].

2.4. Public Interest Litigation

Emergence of "public interest litigation" (PIL) or as Baxi[13] prefers, "social action litigation" in India considerably expanded the scope of judicial review. PIL is an innovative technique adopted by the Court to redress fundamental right violations, particularly of the vulnerable and downtrodden sections of society. As the Supreme Court held[14]:

> Any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provisions.

2.4.1. Expansion of judicial review

The origins of the PIL jurisdiction in India began with the horrific *Bhagalpur Blinding* case[15] when seventeen prisoners in the Central Jail at Bhagalpur complained of being blinded by the police while they were in custody following their arrest in connection with certain criminal cases. This, and other cases, diluted the rule of *locus standi*, encouraged PILs and brought about a marked change in the nature of litigation before the Supreme Court and the High Courts.

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[11] B.R. AMBEDKAR, Constitution Assembly Debates, Vol. VII, 953.

[12] M.P. SINGH, *VN Shukla's, Constitution of India*, 13th ed., Lucknow, 2017, 341.

[13] U. BAXI, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in *Delhi L. Rev.*, 8-9, 1979-80, 91.

[14] *SP Gupta v. Union of India*, AIR 1982 SC 149.

[15] *Khatri (I) v. State of Bihar* (1981) 1 SCC 623 and subsequent orders passed in this case.

With several shocking instances of human rights violations being brought to the notice of the judiciary, the government and its agencies came under intense public scrutiny. PILs became instrumental for the Supreme Court stepping in at times of crisis of public confidence. Articles 14 and 21 witnessed considerable expansion, the Court relied on media coverage and engaged in inquisitorial proceedings to correct executive failures[16]. Occasionally matters in which no fundamental rights were involved but issues of grave public concern had arisen, were entertained, heard and grievances redressed by the Court[17]. Another dimension was added to this when the Court entertained PILs relating to the environment, social justice concerns, and eventually to matters of good governance and accountability[18].

2.4.2. Continuing mandamus

The Court was aided in its proactive approach by the device of continuing *mandamus*[19]. Simply put, continuing *mandamus* ensures that a petition remains before the Court even after substantive judicial directions. The Court assumes a supervisory role as it monitors compliance and ensures enforcement of its directions by concerned state authorities. Continuing *mandamus* has been explained by the Court as[20]:

> the principle of continuing mandamus is now an integral part of our constitutional jurisprudence. There are any number of public interest petitions in which this Court has continued to monitor the implementation of its orders and on occasion monitor investigations into alleged offences where there has been some apparent stonewalling by the Government of India (…).

Socio-economic rights have particularly benefited with continuing *mandamus* as they have a manifest remedy gap under the Constitution.

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[16] *Supra* note 9, 38-39.

[17] *Yashpal v. State of Chandigarh*, AIR 2005 SC 2026.

[18] S.P. SATHE, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 2nd ed., New Delhi, 2003, 209-10 and 219.

[19] *Vineet Narain v. Union of India* (1998), 1 SCC 226.

[20] *Swaraj Abhiyan v. Union of India*, AIR 2016 SC 2953.

3. A health emergency: COVID-19

3.1. Silence in the Constitution

The first confirmed case of COVID-19 in India was in January 2020[21]. The first national lockdown in India was declared on 24 March 2020[22] but before this a few States had introduced lockdown measures. The Constitution envisions three kinds of emergencies, and a health emergency is not one of them[23]. Neither does the right to health find explicit mention under Part III (fundamental rights) but the Supreme Court has read the right to health as part of right to life under Article 21[24]. A reference to health is made in Directive Principles of State Policy under Part IV. For instance, Article 47 envisages raising level of nutrition, standard of living of the people, and improving public health as the State's primary duties.

3.2. Absence of specific public health legislations

The Constitution bestows legislative competence on States for «health care, sanitation, hospitals, dispensaries, and prevention of animal diseases»[25]. Legislative competence for «health profession and the

[21] M.A. ANDREWS et al., *First Confirmed Case of COVID-19 Infection in India: A Case Report*, in *Indian Journal of Medical Research*, 151(5), 2020, 490-492.

[22] Order No. 1-29/2020-PP (Pt. II) dated 24 March 2020. Before this, the Prime Minister announced the "Janata Curfew" in a televised request on 19 March 2020, stating «This Sunday, that is on 22nd March, all citizens must abide by this people's curfew from 7 AM until 9 PM. During this curfew, we shall neither leave our homes, nor get onto the streets or roam about our localities. Only those associated with emergency and essential services will leave their homes» (*PMIndia.gov.in* 2020).

[23] Part XVIII Emergency Provisions (Articles 352, 353, 360), Constitution of India.

(i) National emergency: if the security of the country is threatened on the grounds of war, external aggression, or armed rebellion.

(ii) State emergency: if there is a constitutional breakdown in a State; and

(iii) Financial emergency: if the financial stability of the country is threatened.

[24] *Consumer Education and Research Centre v. Union of India*, AIR 1995 SC 922; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* (1996), 4 SCC 37; *Parmanand Katara v. Union of India*, AIR 1989 SC 2039.

[25] Entry 6 of the State List, Seventh Schedule, Constitution of India.

prevention of transmission of contagious diseases or pests affecting people, animals, or plants» has been bestowed on both the Union and the States[26]. Recommendations have been made in the past to expressly make the right to health a fundamental right under the Constitution. Governments have attempted to introduce public health legislations but have been unable to enact the same. The failed Public Health (Prevention, Control, and Management of Epidemics, Bio-fear based oppression, and Disasters) Bill 2017 is notable as it defined epidemics, isolation, quarantine, public health emergency, and social distancing. This Bill also provided for Union and State collaboration mechanisms in public health crisis.

3.3. COVID-19 management in India: realm of the executive

COVID-19 was notified a "disaster" on 14 March 2020[27]. National lockdown was declared under the Disaster Management Act, 2005 ("DMA"). The DMA, as the title suggests, lays down provisions for «effective management of disasters and connected or incidental matters». Powers under the DMA are not limited by time, nor are they necessarily subject to any oversight by Parliament. A "disaster" under the DMA is a broad definition[28] and does not expressly include an epidemic. The National Disaster Management Authority ("NDMA") established under the DMA as an executive body with the Prime Minister as its Chair. NDMA enjoys overriding powers over States and District

[26] Entries 26 and 29 of the Concurrent List, Seventh Schedule, Constitution of India.

[27] Letter from Ministry of Home Affairs, Government of India, to Chief Secretaries (all States), Items and Norms of assistance from the State Disaster Response Fund (SDRF) in wake of COVID- 19 Virus Outbreak, 14 March 2020 (*https://ndmindia.mha.gov.in/images/COVID-19.pdf*).

[28] The Act defines "disaster" u/s 2(d): «"disaster" means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or manmade causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area».

authorities and is authorised[29] to issue directions or guidelines to Ministries or Departments of the Government of India, the State Governments, and the State Authorities in response to a disaster. In 2008, the NDMA had formulated Guidelines on management of biological disasters which include epidemics[30]. National Disaster Management Plan 2019 also includes biological and public health emergencies[31].

Acting under the DMA, the States and Union Territories were directed by the Central Government to invoke the Epidemic Diseases Act (EDA), 1897 for implementing the Central Government COVID-19 advisories[32]. The archaic EDA, containing four provisions, was enacted when the bubonic plague had spread in Maharashtra and the then colonial administration in India had called for the people to «trust the discretion of the executive in the grave and critical circumstances»[33]. After the national lockdown, the EDA was amended significantly to add punitive provisions[34]. Another legal provision invoked for ensuring social distancing was section 144 of the Code of Criminal Procedure, 1973 which empowers the District Magistrate (the executive authority heading each District) to issue orders to any person(s) or to the public at large, to abstain from acting in any manner which may cause *inter alia* «danger to human life, health or safety»[35]. Temporary action under this

[29] NDMA has a National Executive Committee ("NEC") headed by the Home Secretary, Government of India. Refer to s. 10, DMA.

[30] National Disaster Management Guidelines: Management of Biological Disasters, 2008. Available at: *https://nidm.gov.in/PDF/pubs/NDMA/5.pdf*.

[31] National Disaster Management Plan 2019, National Disaster Management Authority, Government of India, Available at: *https://www.thehinducentre.com/the-arena/current-issues/article32504959.ece/binary/ndmp-2019.pdf*.

[32] Hindustan Times, *What is 1897 Epidemic Act that Centre Wants States to Invoke to Tackle Coronavirus?*, 12 March 2020, available at *https://www.hindustantimes.com/india-news/what-is-1897-epidemic-act-which-government-proposes-to-invoke-to-tackle-coronavirus/story-A063TFrMf8bDobyG0kB0qL.html*.

[33] K.K. GOWD, D. VEERABABU, V.R. REDDY, *COVID-19 and the legislative response in India: The need for a comprehensive health care law*, in *Journal of Public Affairs*, 2021.

[34] Epidemic Diseases (Amendment) Act, 2020.

[35] For instance, Order No. 40-3/2020-DM-I(A) dated 27 January 2021 in force until 28 February 2021 (extended till 31 March 2021 by Order dated 26 February 2021).

provision enables the District administration to manage immediate danger in urgent cases within its territorial jurisdiction.

Conventionally, the Parliament conducts three sessions (the Budget Session, the Monsoon Session, and the Winter Session) during a year. This convention is also followed by the State Legislative Assemblies. Upon imposition of a national lockdown in March 2020, the Parliament was adjourned *sine die* after having sat for 23 days. The next Parliamentary session was for 10 days in mid-September 2020. During this time, only one Bill, the Epidemic Diseases (Amendment) Act, 2020, passed by the Parliament pertained substantively to the pandemic. The Winter session of the Parliament in December 2020 was cancelled despite the government's decision to remove most movement and gathering restrictions by this time. The opposition parties insisted that this was an evasion of accountability by the Government in the face of most pressing issues requiring its immediate engagement. COVID-19 management in India was mainly an executive exercise under these broad legislations and implementation supported by invocation of the criminal law mechanisms (for instance, s. 188 of the Indian Penal Code)[36]. Almost 1000 "major" notifications on the pandemic were issued by the Central Government[37].

Absence of targeted legislative provisions meant that the executive consistently engaged in such law making, usurping the domain of the Legislature. Further, the Central Government continued COVID-19 management through its periodic advisories despite 'public health' being a legislative domain of the States[38].

[36] S. 188, IPC specifically deals with the offence of disobedience to an order duly passed by a public servant.

[37] PRS Legislative Research 2020 database.

[38] M.B. LOKUR, *Silences and Other Sounds: The Indian Parliament in the Pandemic*, in R.L. EISMA-OSORIO et al. (eds.), *Parliaments in the COVID-19 Pandemic: Between Crisis Management, Civil Rights and Proportionality Observations from Asia and the Pacific*, Singapore-Cebu, 2021, available at *https://www.kas.de/documents/278334/278383/Parliaments+in+the+Pandemic+Publication.pdf/a54722fa-2ab5-93d1-1139-ff65efbef7d9?version=1.0&t=1633595178192*.

4. Rights impact

4.1. The first wave

The Supreme Court transitioned into a virtual mode and heard only "extremely urgent cases" through video conference after the first national lockdown was declared in March 2020. Before the lockdown, the Court had reduced its hearing to urgent matters after an advisory by the Government of India cautioning against mass gatherings[39]. This section briefly discusses few important petitions before the Court. This is not an exhaustive attempt at analysing all petitions filed during the pandemic. We seek to indicate the general trend in Court's reasoning in two very different phases of COVID-19 in India.

At this stage, it is important to mention that pandemic in 2020 was not as severe or widespread as in 2021. The policy of the Government in 2020 was that the adverse impact of the pandemic could be controlled by a lockdown. India had the strictest lockdown in the world[40]. It was believed that the impact of the pandemic could be limited by resorting to administrative measures only (disaster management through subordinate legislation and notifications, schools and workplace closures, restrictions on public gatherings, closure of public transport, domestic and international travel restrictions, social distancing, frequent hand washing, wearing face masks, etc.). Wide publicity was given to these measures.

[39] Supreme Court Notification dated 13 March 2020 (*https://main.sci.gov.in/pdf/Notification/13032020_120544.pdf*). Also refer to R. KRUTHIKA, *The Year That Was #1: Supreme Court Response to COVID Crisis in 2020*, in *Supreme Court Observer*, 2021 (*https://www.scobserver.in/journal/the-year-that-was-1-the-supreme-court-during-a-pandemic/*).

[40] India: Government Stringency Index (*https://ourworldindata.org/coronavirus/country/india#government-stringency-index*).

4.1.1. Plight of migrant workers

Immediate aftermath of the sudden declaration[41] of first lockdown measures in India was the plight of internal migrant workers stranded in different parts of the country. Several industries in India depend upon migrant workers and the country also sees enormous seasonal migrations across different States. Lack of formalisation of these industries and absence of proper labour records make it difficult for workers to access healthcare, education, food security, job security, and even wages at the best of times.

Kneejerk lockdown measures under inconsistent executive orders implemented with a degree of highhandedness by law enforcement during early phases of the pandemic resulted into a mass exodus of migrant workers due to loss of employment and fear of the unknown[42]. The media reported dire circumstances of migrant workers compelled to walk long distances (in many instances along with their families) to reach their homes as modes of transportation stood suspended. Several writ petitions were heard by the Supreme Court on issues of immediate relief for stranded workers. For instance, the Court took *suo motu* cognizance of a letter addressed to it by a Member of Parliament urging the Court to take notice of the humanitarian crisis and issue directions to the government for food, shelter, and wages. This petition was dismissed, and the Court gave no reasons for the dismissal[43].

Around the same time, another set of petitions filed in public interest by advocates practicing before the Court were heard. These petitions sought similar judicial interventions (food, government shelters, medicines) to ensure immediate relief for migrant workers. The Central Government filed a status report before the Court. The report indicated various steps taken by the government (announcement of a relief pack-

[41] The Prime Minister announced a near total country-wide lockdown with barely four hours' notice in a nationally televised speech at 8:00 PM (*PMindia.gov.in* 2020).

[42] A. TIWARI, A. SENGUPTA, *Migrant Workers' Exodus During Lockdown: A Tragedy Of Mass Scale*, 2022 (*https://www.outlookindia.com/national/migrant-workers-exodus-during-lockdown-a-tragedy-of-mass-scale--news-83110*).

[43] *Mahua Moitra v. Union of India*, Writ Petition (Civil) No. 470/2020 (Order dated 13 April 2020).

age, institution of an expert group, institutional response for pandemic management, relief camps with basic amenities). The Solicitor General of India made a statement before the Court that there are no migrants on the road and media reports are "fake news". The Court recorded its "satisfaction" with the response of the government that all migrant workers who were on the road have been shifted to relief camps. The media was reminded of its responsibility to not convert the pandemic into an "infodemic" by ensuring that no fake news is disseminated. Further, the media was directed to "refer to and publish the official version". This order also mentions punitive provisions of the DMA and the IPC and directs all federal authorities to comply with the central government's advisories[44]. Judicial criticality was found lacking in other petitions on similar or related issues of relief for migrant workers and their family.[45] During this period the Court maintained a position of non-interference with policy decisions. Undoubtedly, such self-restraint is part of a long-standing judicial review precedence in India. The Court has on multiple occasions reiterated limitations on its powers while deciding challenges to administrative actions, especially, economic policies and decisions based on expert opinions[46]. An often-quoted sentiment is that the "Court cannot interfere with the soundness and wisdom of a policy". In other words, executive decision-making ought not to be replace by judicial decision making. We would like to emphasise the term "self-restraint" as the Constitution itself does not contain an express bar. On the contrary, the right to move the Court for enforcement of the fundamental rights, that is, Article 32 is itself a fundamental right under the Constitution. A consistent balancing act by the Court has resulted into a voluminous (and highly subjective and at times contradictory) jurisprudence on judicial review where the Court

[44] *Alakh Alok Srivastava v. Union of India*, Writ Petition (Civil) No 468/2020 (Order dated 31 March 2020).

[45] *Harsh Mander & Anr v. Union of India*, Writ Petition (Civil) Diary No. 10801/2020; *Swami Agnivesh & Anr v. Union of India & Ors*, Writ Petition (Civil) Diary No. 10802/2020; *Jagdeep S Chhokar & Anr v. Union of India*, Writ Petition (Civil) Diary No. 10947/2020.

[46] *M/S NG projects limited v. M/S Vinod Kumar Jain & Ors*, Civil Appeal No. 1846 of 2022, 21 March 2022.

tests administrative actions on their compliance with the fundamental rights and other Constitutional provisions[47]. The critique faced by the Court is therefore on its failure to undertake (substantively and not mechanically) the latter exercise of examining state administration of the pandemic on their adherence with the constitutional provisions, in particular, the fundamental rights. The Court had sufficient evidence in public domain which pointed at the use of force by the police, and full body chemical spraying of the migrants workers and their families including children travelling long distances on foot[48].

Judicial deference to the executive in the peak of human rights crisis aggravated due to governance and transparency failures and became palpable as the Court later turned full circle. Subsequently, it issued notices to the Union, all States, and the Union Territories[49]. Its order records accounts of workers' hardship and called upon greater «succour and help by respective Governments»[50]. In June 2020, two UN Special Rapporteurs raised concerns regarding the «well-being of more than 100 million internal migrant workers suffering hardship after COVID-19 measures forced them to travel long distances home, many on foot»[51]. Data on the total number of migrant workers who had moved back to their homes was formally disclosed by the Government only during a short session of the Parliament in September 2020.[52] A detailed judgment was pronounced by the Court only in June 2021. This

[47] For instance, refer to State of *Tamil Nadu & Anr v National South Indian River Interlinking Agriculturist Association*, Civil Appeal No. 6764 of 2021, dated 23 November 2021.

[48] Press release, Office of the High Commissioner of Human Rights, *COVID-19: UN human rights chief "distressed" over plight of India's internal migrants, welcomes measures to limit impact*, 02 April 2020.

[49] *In Re: Problems and Miseries of Migrant Labourers, Suo Motu* Writ Petition (Civil) No. 6 Of 2020 (Order dated 26 May 2020).

[50] *Ibidem.*

[51] *Researching the Impact of the Pandemic on Internal Migrant Workers in India* (*https://www.un.org/en/academic-impact/researching-impact-pandemic-internal-migrant-workers-india*).

[52] Ministry of Labour and Employment 2020, *Answer dated 14 September 2020 to Unstarred Question No. 174 raised in the Lok Sabha* (*http://164.100.24.220/loksabhaquestions/annex/174/AU174.pdf*).

judgment focuses on implementation of worker welfare legislations and policies (such as registration of unorganised workers) in the long run. The migrant workers' crisis is viewed as not only governance but also a grave judicial failure. The Court abdicated its constitutional responsibility to redress a human rights crisis in early days of the pandemic. The Court was uncritical of the government's submissions before it, dismissive of the plight of thousands of stranded citizens[53], indifferent to public outrage and information in public domain, and unmindful of its own proactive record in socio-economic rights as it delayed its *suo motu* cognizance where it finally began an assessment of actual implementation of welfare legislations and schemes.

4.1.2. Free testing

An early engagement of the Supreme Court was on the issue of COVID-19 testing. The Court directed free testing in private labs but silence or absence of due clarification in the order on the bearer of this cost led to a controversy. The Court retracted and clarified that only people covered under a national public health insurance fund of the Government of India would be eligible for free COVID tests from private laboratories[54]. Decision to extend this benefit to other sections of the society was left to the wisdom of the government observing that formation and implementation of a scheme is the domain of the executive. An interesting discussion on "health" being a State legislative subject finds place in an order by the Court hearing a petition on obligation of the central government to regulate the cost of COVID-19 treatment[55]. The Court observations hint at the failure of the States to act despite legislative competence and the 'inability' of the Union to act due to lack of legislative competence.

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[53] Legal Correspondent, The Telegraph Online, *If meals are given…: Supreme Court's query*, 2023 (*https://www.telegraphindia.com/india/if-meals-are-given-why-do-they-require-wages-supreme-courts-query-during-coronavirus-lockdown/cid/1762977*).

[54] *Shashank Deo Sudhi v. UOI & Ors.* WP (Civil) Diary No 10816/2020 (Order dated 13 April 2020).

[55] *Sachin Jain v. Union of India* Writ Petition (Civil) No. 863 of 2020 (Order dated 31 August 2020).

4.1.3. The PM CARES Fund

The Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund was created on 27 March 2020, following the COVID-19 pandemic in India. A public interest writ petition was filed before the Court seeking directions to the Central Government for preparation of a National Plan specifically for addressing the pandemic and laying down of minimum standards of relief to persons affected with COVID-19. This petition also sought that all contributions or grants from individuals or institutions received by the PM CARES Fund be transferred to the National Disaster Response Fund under the DMA. The Court dismissed the petition holding that the existing National Plan, guidelines, and powers under the DMA sufficiently enable pandemic management by concerned authorities. The judgment records that the government is meeting its obligation by disbursing sums to the States under State Disaster Response Fund and neither the PIL petitioner nor the Court would sit judgment over financial decisions of the government[56]. There exists lack of transparency around the PM CARES Fund which has been termed as a "financial blackhole" as no information on its contributions and spendings has been made public despite the Prime Minister being its chairperson and senior cabinet ministers its trustees. The fund uses government infrastructure and features the national emblem[57].

4.1.4. Labour rights

With a view to mitigate their hardships, the Court upheld workers' rights when it quashed a notification issued by the state of Gujarat under the Factories Act. The notification sought to exempt all factories from complying with humane working conditions and adequate compensation for overtime to ameliorate the financial exigencies caused by the pandemic. The Court concluded that the impugned notification was

[56] *Centre for Public Interest Litigation v. Union of India* Writ Petition (Civil) No. 546 of 2020.

[57] Deccan Herald, *PM CARES not for transparency*, 2022 (*https://www.deccanherald.com/opinion/first-edit/pm-cares-not-for-transparency-1148238.html*).

not justified as the pandemic did not meet the legislative requirement of a being a "public emergency" caused by an "internal disturbance" of a gravity resulting into a threat to the security of the state. The Court observed that «the brunt of the pandemic has been borne by the working class and the poorest of the poor. Bereft of social security, they have no fall-back options». Articles 21, 23 and the Directive Principles of State Policy were invoked to justify (an otherwise restrained) judicial review in matters of economic policy[58]. This judgment by the Court becomes a part of few other notable exceptions to judicial deference to the government during the pandemic. For instance, the Court took *suo motu* cognizance and passed directions to decongest jails, correctional homes, and detention centres[59].

4.1.5. Education

Duration of school closures in India was among the longest in the world. Schools started reopening only around August 2021 since their closure in March 2020. It is estimated that this education crisis in the wake of the health crisis has affected 250 million children in India, with a disproportionate impact on the poor and girls[60]. Right to education has been added as a fundamental right in Part III. The Constitution (Eighty-sixth Amendment) Act, 2002 inserted Article 21-A in the Constitution of India to provide free and compulsory education of all children in the age group of six to fourteen years as a fundamental right in such a manner as the State may, by law, determine. The Right of Children to Free and Compulsory Education (RTE Act) in effect from 1 April 2010, represents the legislation envisaged under Article 21-A.

[58] *Gujarat Mazdoor Sabha & Anr v. The State of Gujarat* Writ Petition (Civil) No. 708 of 2020.

[59] *In Re: Contagion of Covid 19 Virus in Prisons, Suo Motu* Writ Petition (Civil) No. 1 of 2020. Also refer to a critique by M. DESAI, *COVID-19 and the Indian Supreme Court*, 30 May 2020, available at *https://cjp.org.in/covid-19-and-the-indian-supreme-court/*.

[60] M. KALRA, S. JOLAD, *Regression in Learning: The High Cost of COVID-19 for India's Children*, in *ORF Issue Brief*, 484, 2021, available at *https://www.orfonline.org/wp-content/uploads/2021/08/ORF_IssueBrief_484_CovidEducation.pdf*.

In another *suo motu* cognizance by the Supreme Court[61], several directions were passed ensuring relief for children impacted by COVID-19 (*inter alia* identification and rehabilitation, video recording of statements of child victims or witnesses, formulation and implementation of welfare schemes, maintenance of records on a government portal). Discontinuance of education was one such issue before the Court. While focus of the court was on children who had lost one or both of their parents, subsequent orders also covered disruption in education (due to dislocation of parents and loss of livelihood of parents or guardians) and deficiencies in online teaching[62].

The Court expressed its concern over information submitted by different States in India reflecting large numbers of school dropouts. Specific directions were issued by the Court including compliance by the States with the SOP in consultation with NCPCR and compliance with NCPCR suggestions[63]. Orders included direction of fee waivers by private schools for the academic year for children who lost either parent or both parents after March 2020. It was clarified that in case the private institutions are unwilling, the State Governments shall shoulder the burden of the fee. In respect of children registered under the PM CARES for Children Scheme, it is open to the State Governments to request the Government of India to bear the fee and other expenses pertaining to their education for the current academic year[64]. The Court is monitoring compliances of its order under this petition.

More specifically, on the issue of a digital divide in education in India, the Court is hearing three appeals against a judgment of the Delhi High Court. The impugned judgment came to the aid of children by directing that once a school has voluntarily selected Synchronous Face-to-Face Real Time Online Education as its mode and method of imparting education, private unaided schools and government schools must, under the RTE supply the gadgets and equipment of an optimum configuration as well as an internet package (free of cost) for that purpose

[61] *In Re: Contagion of COVID Virus in Children Protection Homes, Suo Motu* Writ Petition (Civil) No 4 or 2020 and 6 of 2021.

[62] Order dated 02 May 2022, *ibidem*.

[63] Order dated 09 May 2021, *ibidem*.

[64] Order dated 26 August 2021, *ibidem*.

to economically weaker section and disadvantaged group (EWS/DG students) enrolled by them. This was subject to the right of institutions to claim reimbursement from the State under the RTE[65]. The Union of India, Government of NCT of Delhi and Action Committee of Unaided Recognized Private Schools all filed appeals before the Court challenging the High Court judgment and the Court stayed the operation of the High Court judgment[66]. In an order passed in the last appeal admitted for hearing, the Court observed that the issue is of utmost importance and requires early resolution as the digital divide has produced stark inequality in terms of access to education. Further, the Court observed that want of resources cannot be a ground for the State to wash its hands off the obligation imposed particularly by Article 21-A of the Constitution[67]. No substantive orders have been passed in this petition yet even as the Delhi High Court decision remains under the Supreme Court granted stay order.

Another instance of the Court's failure to recognise socio-economic realities and difficulties faced by students is evident in its judgment hearing challenges against the University Grants Commission (UGC) guidelines which directed institutions of higher education to conduct final semester examinations before 30 September 2020, that is, at a time when COVID-19 cases under the first wave had by no means subsided. We will not get into Court's reasoning on the constitutional question of UGC's competence to pass these guidelines but it is important to note that the Court's appreciation of the question of equality and life under Articles 14 and 21 disregarded not only the serious health risks faced by millions of students and staff before and after mandatory examinations but also the disparate impact considering significantly differing

[65] WPC No. 3004/2020 before the Delhi High Court (Order and Judgment dated 18 September 2020).

[66] SLP(Civil) No. 13267 of 2020 and SLP(Civil) No. 14901 of 2020 (Order dated 10 February 2021).

[67] *Action Committee Unaided Recognized Private Schools v. Justice For All & Ors*, Special Leave to Appeal (Civil) No. 4351/2021 (Order dated 08 October 2021).

and unequal means of affording or finding safe transportation, lodging, and other logistics[68].

4.2. The second wave

The second COVID-19 wave in India lasted for approximately four months from its onset in March 2021. It was devastating and witnessed a breakdown of the health infrastructure (including in the capital which was one of the hardest hit regions) as more patients needed intensive care, transmission rates increased and so did the death toll[69]. Persistent rule of law failures marked by an absent Legislature and an executive working under sweeping legislative provisions is blamed for the severe under preparedness of the country during this time[70].

In addition to violations of principles of separation of powers and non-adherence with constitutionally provided legislative domains, the Government was charged with a serious lack of foresight[71]. This was despite due warnings and advice from its own experts such as Indian SARS-CoV-2-Genetics Consortium. The Government was forewarned on the risks posed by the new variant. Similarly, the Government's attention was drawn to an urgent need to supplement existing health infrastructure with increased medical oxygen supply, hospital beds, testing facilities, and healthcare workers. This was considering relaxed lockdown measures, the festive season in India, and expert evidence on

[68] *Praneeth K and Ors v. University Grants Commission* Writ Petition (Civil) No 724 of 2020 (Judgement dated 28 August 2020).

[69] P. TENDULKAR et al., *Comparative Study Between First and Second Wave of COVID-19 Deaths in India - A Single Centre Study*, 2022 (*https://doi.org/10.1101/2022.05.09.22274860*).

[70] The International Commission of Jurists (ICJ), *Failed Preparations and Fatal Denials: How India's Executive Contributed to the Devastation Wrought by the Second Wave of COVID-19*, 2022, available at *https://icj2.wpenginepowered.com/wp-content/uploads/2022/02/India-second-wave-of-covid-19-publications-briefing-2022-ENG.pdf*.

[71] PTI, *Health Minister "Harsh Vardhan says India is in the endgame of Covid-19 pandemic"*, in *Hindustan Times*, 2021, available at *https://www.hindustantimes.com/india-news/harsh-vardhan-says-india-is-in-the-endgame-of-covid-19-pandemic-101615128329364.html*.

a virulent new strain[72]. Pandemic management by the Central Government was marked with delayed interventions such as failing to impose a timely lockdown, allowing mass gatherings for electoral and religious purposes, failing to ensure adequate oxygen supply and coordination among States coupled with a slow vaccination progress[73]. Government denials of the risks and reality made the second COVID-19 wave catastrophic.

4.3. Dialogic review

4.3.1. The Social Justice Bench

The Supreme Court of India has frequently resorted to non-adversarial proceedings to bridge the remedy gap for socio-economic rights under the Constitution. These proceedings emphasise dialogue and collaboration rather than conventional dispute resolution mechanisms and remedies. The Social Justice Bench constituted in 2014 by the then Chief Justice of India encouraged continuing mandamus to this end. We discussed earlier in this chapter that the mechanism of continuing mandamus now forms an integral part of India's constitutional jurisprudence. It has permitted deeper deliberations and collaborations between state organs on social justice issues. It provided an avenue to resolve the problem of mechanical compliances with court orders as the Court continued its supervision, monitoring, evaluation, and dialogue with stakeholders. In other words, parties, including respondent state entities, were encouraged to take a conciliatory and solution-oriented approach in their pleadings rather than "putting up a defence" before the Court. The Social Justice Bench also considered practical problems being faced by the State in matters under its consideration. The objective

[72] Department-Related Parliamentary Standing Committee on Health and Family Welfare, *One Hundred Twenty Third Report: The Outbreak of Pandemic Covid-19 and its Management*, Rajya Sabha, Parliament of India, 2020, available at *https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/14/142/123_2020_11_15.pdf*.

[73] *Ibidem*.

was to realise the welfare objectives under the Constitution while accounting for socio-economic realities faced by the state.

4.3.2. A dialogic review

The Court assumed a similar "dialogic review" of the government's pandemic management amidst widespread anguish during the second wave, terming it an "humanitarian crisis". The Court explained its process as[74]:

> This Court is presently assuming a dialogic jurisdiction where various stakeholders are provided a forum to raise constitutional grievances with respect to the management of the pandemic. Hence, this Court would, under the auspices of an open court judicial process, conduct deliberations with the executive where justifications for existing policies would be elicited and evaluated to assess whether they survive constitutional scrutiny.

Panic caused by the rising mortality rates and crumbling health infrastructure resulted in various petitions before the State High Courts including Delhi, Bombay, and Calcutta. The Supreme Court in its *suo motu* petition observed that directions on issues such as essential supplies by different State High Courts may result into truncated pandemic management while the need of the moment is a national plan for essential supplies and services. Notices were issued to Central and State governments to show cause why the Court ought not pass uniform orders in connection with four important issues, namely, supply of oxygen, essential drugs, method, and manner of vaccination; and declaration of lockdown. The Central Government was also called upon to report on coordination efforts with the federal governments[75].

In its subsequent order, the Court clarified that the purpose of its *suo motu* cognizance under Article 32 is not to "supplant or to substitute" the exercise of jurisdiction by various State High Courts hearing similar issues under Article 226. The Court acknowledged that the State High

[74] *In Re: Distribution of Essential Supplies and Services During Pandemic*, *Suo Motu* Writ Petition (Civil) No 3 of 2021 (Order dated 31 May 2021).

[75] Order dated 22 April 2021, *ibidem*.

Courts are in a better position to understand ground realities in different parts of the country and clarified that the purpose of its own cognizance of the matter is to complement rather than substitute the High Courts. The Court insisted its participation is mandated as a safeguard of the fundamental rights under the Constitution and the Court cannot be a silent spectator in times of a national crisis. Need for concerted national efforts for management of the pandemic was reiterated. This second substantive order involved a directed line of inquiry for the central government on the broad themes mentioned in the first order. Specific directions were passed on expanding the existing vaccination coverage and clarifications on its various aspects (including vaccine pricing) were sought from the central government. The Court ensured better dissemination of information by directing that a panel of medical experts be nominated by the central government for this purpose[76]. Interestingly, the next order by the Court, in addition to continuing specific directions and inquiries on the abovementioned themes also included a direction to the police «that any clampdown on information on social media or harassment caused to individuals seeking/delivering help on any platform will attract a coercive exercise of jurisdiction by this Court»[77]. Two reasons were behind this direction. First, the Court observed that sharing information widely is important for combating public tragedies. Information sharing is in the interest of the people and the country's democratic structures. Second, reason stated by the Court was that allowing public information sharing is vital for creation of "collective public memory" of the pandemic[78]. By May 2021, the Court had focused its attention to the vaccination programme in the country[79]. The intent of the Court to assume a "dialogic role" is well demonstrated from a reading of these orders where the Court inquired and sought information from the executive, made recommendations and requested the executive to consider certain policy proposals, and passed specific directions including a warning of invocation of its coercive power against non-complying authorities.

[76] Order dated 27 April 2021, *ibidem*.

[77] Order dated 30 April 2021, *ibidem*.

[78] Order dated 30 April 2021, *ibidem.*

[79] *Supra* note 72.

The central government's affidavit before the court highlighted that the government requires exercise of discretion to combat an unprecedented situation. It was also submitted that the Court ought not to intervene when executive policies are based on expert scientific opinion and devoid of manifest arbitrariness. The government submitted[80]:

> Any over-zealous judicial intervention, though well-meaning, in the absence of expert advice or administrative experience may lead to unintended circumstances where the executive is left with little room to explore innovative solutions.

Considering the above submissions by the government, the Court clarified its jurisdiction in relation with the principle of separation of powers, acknowledging that the principle is a part of the basic structure of the Constitution. It recognised policy making as the exclusive domain of the executive but also pointed to the Court's authority to judicially review said policies in following words:

> Our Constitution does not envisage courts to be silent spectators when constitutional rights of citizens are infringed by executive policies. Judicial review and soliciting constitutional justification for policies formulated by the executive is an essential function, which the courts are entrusted to perform.

The Court invoked the proportionality standard of review in this context and stated that it will respect the wisdom of the executive, but the executive decisions will be open to judicial review on grounds of reasonableness, manifest arbitrariness, and protection of the right to life.

4.3.3. A brief on the proportionality standard

For decades, the proportionality principle has featured in the Court's rights adjudication. Judicial review of measures restricting fundamental rights has always been on the principle that the restrictive measure

[80] Excerpts from Union of India affidavit dated 09 May 2023 in the Order dated 31 May 2021, *ibidem*.

ought to be proportional to the right. However, characteristic of India's constitutional jurisprudence, there has been significant incoherence in applying the principle. The last few years have witnessed an attempt towards imparting a structure to the principle and establishing a streamlined proportionality standard of review. Specifically, in 2016, the Court cited Aharon Barak in reference to the four sub-components of proportionality[81]. Several subsequent landmark judgments on fundamental rights adjudication by the Court added their own layers to the proportionality test[82]. Constitutional law scholars critique the approach of the Court as inconsistent and incoherent. The Court has attempted to lay down substantive constituent standards in the proportionality test by resorting to an exercise in comparative constitutional law, but these substantive tests are at a variance with the evidential standards applied by the Court[83]. The Court's substantive proportionality standards points to a high normative importance accorded to the fundamental rights under the Constitution. This does not align with its deferential stance resulting from application of weak evidential standards in judicial review of rights restricting measures. The Court has repeatedly omitted to engage with the "necessity" test under the proportionality doctrine[84]. This assertion finds support in the Court's role during the first pandemic

[81] *Modern Dental College and Research Centre v. State of Madhya Pradesh* (2016) 7 SCC 353.

«(i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ('proportionality stricto sensu' or 'balancing') between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right».

[82] For instance, the three judgments arising from the *Aadhaar challenge (Binoy Viswam v. Union of India* (2017) 7 SCC 59; *Puttaswamy (I) v. Union of India* (2017) 10 SCC 1; and *Puttaswamy (II) v. Union of India* (2019) 1 SCC 1).

[83] See A. CHANDRA, *Proportionality in India: A Bridge to Nowhere?*, in *University of Oxford Human Rights Hub Journal*, 3(2), 2020 for a detailed analysis and critique of the proportionality principle under Indian Constitutional jurisprudence (*https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-Proportionality-in-India-1.pdf*).

[84] *Ibidem*.

wave in India. The detailed order by the Court on dialogic review clarifies its role last year by stating

> in the context of the public health emergency with which the country is currently grappling, this Court appreciates the dynamic nature of the measures. Across the globe, the executive has been given a wider margin in enacting measures which ordinarily may have violated the liberty of individuals but are now incumbent to curb the pandemic. Historically, the judiciary has also recognized that constitutional scrutiny is transformed during such public health emergencies, where the executive functions in rapid consultation with scientists and other experts.

The Court cites the US Supreme Court decision in Jacobson v Massachusetts[85] in support. Perhaps as an indication of correcting the weak evidential standards applied by the Court during the first wave, the Court expresses an intent to hold the executive accountable for arbitrariness and irrationality in decision making. The Court emphasises that the government measures will be judged on tests of necessity and rational nexus to determine their proportionality to the rights[86]. Thus, the deference that the courts gave to the executive in 2020 gave way to more active judicial interventions in 2021.

The first pandemic wave was marked with severe restrictions on rights by the state. This nature of pandemic management was mistakenly viewed to be a success for the country. The second wave revealed that restrictions on individual rights unsupported by scientific evidence and strengthening of public infrastructure cannot successfully manage a pandemic. Perhaps the judiciary realised this as it took better charge during the second wave. With a dialogic review initiated by the Court, the state was compelled to be more transparent about its pandemic management policies. Thus, greater state accountability and lesser public uncertainty with respect to the pandemic. For instance, in 2022, the Court reviewed the policy mandate of the government in a petition filed by a member of the National Technical Advisory Group on Immunization. The Court expressly holds that a wide executive latitude exists in policy decisions based on expert opinion. The Court does not have the

[85] 197 US 11 (1905).

[86] *Supra* note 74.

expertise to «appreciate and decide on merits of scientific issues on the basis of divergent medical opinion»[87]. This statement is qualified by the Court as it states that it can scrutinise the material on record to determine if the policy is unreasonable or arbitrary. The Court's conclusions in this petition make references to scientific evidence presented before it. This is a marked shift from 2020 when assertions of the state were accepted as sufficient evidence. A reference to proportionality along with the two tests of "legality" and "need" is made to hold that invasion of individual rights will have to pass constitutional scrutiny based on these standards of judicial review.

5. Conclusion

Management of the pandemic by the Central Government under DMA and EDA allowed for a greater degree of discretion (both from the parliament and the judiciary). No doubt the executive is best placed to manage a health crisis of the nature of coronavirus as rapid and dynamic administrative measures are the need of the hour. The objective of the present discussion has been to study the role of the Supreme Court in the specific constitutional framework of India and assess whether it fulfilled its constitutional obligations. The pandemic did not prevent important questions of fundamental and socio-economic rights being raised before the Court, particularly those arising from the pandemic. The response of the Court was that of great deference to the executive. It is vital to point out that the Court has, in the past, maintained such deference to policy decisions by the government. However, it has not been silent when executive discretion has encroached on fundamental rights or caused a human rights crisis in the country. Moreover, the Court has precedent in being transformative for socio-economic rights in recognition of welfare and social justice values of the Constitution. Viewed in this backdrop, interventions by the Supreme Court in the first wave of COVID-19 were dismal. A shift is discernible in the sec-

[87] *Jacob Puliyel v. UOI & Ors.* Writ Petition (Civil) No. 607 of 2021 (Judgment dated 02 May 2022).

ond wave. This demonstrates the usual play of important features of the Indian apex court, such as, the Court being polyvocal, and its constitutional jurisprudence being influenced by its leadership. Nature of relief sought from the Court (from essential supplies and services to requests for school fee refunds) is demonstrative of the relationship between the Court and the citizens. It can safely be asserted that the unique nature of public interest litigation before the Court in India has brought it closer to the people whose rights and freedoms it safeguards. There has been no specific judicial scrutiny of grave executive failures in pandemic management, but the Court eventually did assume a central role in engaging, supervising, and coordinating with the government. Long term impacts of judicial intervention are expected to come in the form of continuance of a dialogic review on the same lines as the device of continuing *mandamus* in protection, expansion, and balancing of rights and constitutional values.

RESPONSE OF HIGHER JUDICIARY TO COVID-19 DISRUPTIONS IN INDIA

Manimuthu Gandhi[*]*, Tania Sebastian*[**] *and Rajasathya K. R.*[***]

1. Introduction. Landscape of the COVID-19 litigation before higher courts in India

The impact of the COVID-19 pandemic in India was felt intensely with the imposition of a nationwide lockdown. This raised new challenges against all three organs of the government. In this paper, we examine the legal challenges that arose from the COVID-19 disruptions, involving a variety of issues including constitutionally protected human rights and access to justice. We look at the response of higher courts to government action and inaction, specifically in the context of fundamental rights including public health, the right to education, rights of

[*] Vice President of Indian Society of International Law, New Delhi & Adjunct Professor, School of Law, Vellore Institute of Technology, Chennai, Tamil Nadu, India.

[**] Assistant Professor, School of Law, Vellore Institute of Technology, Chennai, Tamil Nadu, India.

[***] Assistant Professor, Dr Ambedkar Government Law College, Puducherry, Tamil Nadu, India.

migrant labourers, privacy, etc. Challenges made against executive directions under several statutes have also been discussed[1].

We observe that courts have been proactive in issuing directions to the appropriate authorities using two distinct ways, namely *suo motu*[2] action[3] and Public Interest Litigation[4]. The Supreme Court of India took *suo motu* action, especially on weighty matters like fundamental rights violations and/or scrutinizing government (in)action. This was achieved without undermining state efforts to put reasonable restrictions for controlling the spread of the COVID-19 pandemic. In addition to the fundamental rights, special circumstances arose out of the pandemic that necessitated enforcing certain otherwise unjustifiable Directive Principles of State Policies[5] through Court directions.

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[1] The Disaster Management Act, 2005, the Epidemic Diseases Act, 1897, the Epidemic Diseases (Amendment) Act, 2020, The Indian Penal Code, 1806, The Unorganised Workers' Social Security Act, 2008.

[2] *Suo motu* action, i.e., on its own motion without any petition being filed or interest being brought before the courts. In SC 20 December 1979, *Sunil Batra v. Delhi Administration* (1978) 4 SCC 409, the court acted upon a letter addressed to a Judge, to secure the fundamental rights of prisoners, without a petition being filed before the Court. The court acted upon the letter received by a Judge to provide a remedy.

[3] The magnitude of Indian court cases relating to COVID-19 challenges has been very high as compared with other regions in the sub-continent including Bangladesh and Sri Lanka.

[4] SC 29 July 1980, *Municipal Council, Ratlam v. Shri Vardhichand & ors*, 1980 AIR 1622. This is the first Public Interest Litigation in India. *Ratlam* case was followed in SC 9 March 1979, *Hussainara Khatoon & ors v. Home Secretary, State Of Bihar*, 1979 AIR 1369, a case dealing with the inhuman conditions of prisons and under-trial prisoners, and other cases. The court for the first time diluted the concept of *locus standi* and entertained the petition filed by a lawyer on behalf of the under-trial prisoners to protect their personal liberty under article 21. The lawyer, Kapila Hingorani, filed the case based on a newspaper article explaining the plight of the under-trail prisoners.

[5] SC 22 May 1958, *In Re: Kerala Education Bill*, AIR 1958 SC 956, Das C.J. observed that «Nevertheless, in determining the scope and ambit of the Fundamental Rights relied upon by or on behalf of any person or body, the court may not entirely ignore these Directive Principle of State Policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible». In another case of SC 29 September 1969, *Chandra Bhavan Boarding and Lodging, Bangalore v. State of Mysore*, AIR 1970 SC 2042, the

The second form of litigation came *via* Public Interest Litigation, a relaxation of the rule of *locus standi* when it relates to litigation undertaken to secure public interest and demonstrates the availability of justice to socially-disadvantaged parties[6]. The focus of the higher judiciary throughout was to ensure that the governments (central and/or state) do not resort to any action outside the parameters of directions issued by the competent authority under the Disaster Management Act, 2005, and the Epidemic Diseases Act, 1897 and also to ensure the protection of the vulnerable groups of the population including migrants, the elderly population, women, and children.

Other than these two forms of cases, litigation continued through the route of writ petitions. The earliest cases before the higher courts in India centered around balancing non-citizen rights with state sovereignty, and other issues like loan moratoriums, and access to essential commodities. Cases involving the failure of state mechanisms in securing financial assistance to people affected by temporary loss of employment during the pandemic were also part of the litigation scene. With the passing of time, new challenges emerged in the form of privacy concerns and vaccinations.

With the dwindling of COVID-19 casualties, issues based on compensation for COVID deaths remain pending[7]. Most importantly, courts have been cautious to issue caveats that certain decisions cannot be

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Supreme Court held that Fundamental Rights and Directive Principles of State Policy are complementary and supplementary to each other.

[6] *Supra* n. 4.

[7] For example, see, PTI, *Supreme Court directs states to pay compensation to family members of Covid-19 victims without wasting time*, in *Times of India*, 18 July 2022, *https://timesofindia.indiatimes.com/india/supreme-court-directs-states-to-pay-compensation-to-family-members-of-covid-19-victims-without-wasting-time/articleshow/92952128.cms*. See also, M. PRASAD, *Constable died during Covid-19 duty, Delhi Govt's rejection of compensation to wife 'untenable': Delhi HC*, in *Times of India*, 21 February 2023, *https://indianexpress.com/article/cities/delhi/constable-died-covid-19-duty-delhi-govts-rejection-compensation-wife-delhi-hc-8455952/* and other cases to address the grievance of the petitioner for getting a job, PTI, *Consider plea for job to wife of Covid-19 victim: Madras HC*, 4 December 2022, in *Indian Express*, *https://indianexpress.com/article/cities/chennai/plea-job-wife-covid-19-victim-madras-hc-8304841/*.

used as a precedent for future purposes, as it was the result of the special circumstances prevailing during the pandemic.

2. Fundamental rights

Old challenges of enforcing fundamental rights *vis-a-vis* state actors remained a mainstay in the litigation landscape during the pandemic period in India. The protection of these fundamental rights formed a majority of the cases before the higher courts of India, involving life and personal liberty, speech, expression, religion, and restriction on movement.

2.1. Right to life and personal liberty

The right to life and personal liberty is guaranteed under article 21 of the Constitution of India, subject to reasonable restrictions.

Article 21 of the Constitution says «No person shall be deprived of his life or personal liberty except according to procedure established by law».

It is pertinent to mention here that in the past decades, higher courts in India have incorporated, where necessary, other rights which are not enumerated in the Fundamental Rights Chapter to fall within the scope of article 21 including the rights to privacy, health, education[8], etc. In this section of the paper, we look at the higher judiciary's response to the deprivation of these rights.

2.1.1. Vulnerable category

The Supreme Court of India's first concern was regarding the vulnerable category of prisoners, and the containment of the spread of the COVID-19 virus in prisons. The Supreme Court issued notices to the Chief Secretaries/Administrators, Home Secretaries, Directors General of all the Prisons, and the Department of Social Welfare of all the

[8] This will be discussed in sections 2.1.2, 2.1.3 and 2.1.5 of this chapter.

States and the Union Territories, to show cause why directions should not be issued for dealing with the health crisis arising out of COVID-19 in the country in the context of prisons and prisoners[9].

The next category of vulnerable population that received the attention of the Supreme Court was migrant workers. The announcement of the lockdown by the Prime Minister of India (under section 6 (2) (1) of the Disaster Management Act, 2005)[10] saw an exodus of migrant workers[11] from cities in India to their hometowns and villages in rural India as a result of the closing of state borders and the halting of transport[12].

[9] SC 23 March 2023, *In Re: Contagion of Covid-19 Virus in Prisons, Suo Motu* WPC No. 1/2020. See also, HC (Raj.DB) 17 May 2020, *Suo Motu v. State of Rajasthan*, WPC No. 5618/2020. One measure to contain the spread of COVID-19 in overcrowded prison was to release them on emergency parole or interim bail. As the pandemic situation improved, directions were issued for those released on emergency parole or interim bail to surrender before the concerned prison authorities within 15 days from the date of the order, SC 24 March 2023, *In Re: Contagion of Covid-19 Virus in Prisons, Suo Motu* WPC No. 1/2020.

[10] MINISTRY OF HOME AFFAIRS, *Government of India issues Orders prescribing lockdown for containment of COVID-19 Epidemic in the country*, 24 March 2020 (*https://pib.gov.in/PressReleasePage.aspx?PRID=1607997*). The emergency powers mentioned in the Constitution of India were not used by the government of India, rather the Disaster Management Act, 2005 (DM Act) was brought into force. The nationwide lockdown and the directions and guidelines that followed, all flow from the DM Act, as the pandemic was declared as a disaster. Directions and guidelines were issued to State Governments for dealing with the pandemic through a nationwide lockdown under the DM Act. The State Governments, on the other hand, were the authorities under the Epidemic Diseases Act, 1897 to pass any decrees «necessary to prevent the outbreak or spread» of an epidemic disease.

[11] The first stretch of lockdown in India was for a period of 3 weeks beginning from 25th March (after an initial 24-hour lockdown on a Sunday in March 2022). The mass movement of people across the country as a result of the lockdown measures and the closing of businesses is stipulated as the largest since the partition of India in 1947. See, EXPRESS WE CHECK, *The long walk of India's migrant workers in Covid-hit 2020*, in *The Indian Express*, 25 December 2020 (*https://indianexpress.com/article/india/the-long-walk-of-indias-migrant-workers-in-covid-hit-2020-7118809/*). See also, VIKAS PANDEY, *Coronavirus Lockdown: The Indian migrants dying to get home*, in *BBC News*, 20 May 2020 (*https://www.bbc.com/news/world-asia-india-52672764*).

[12] HC (Manipur) 13 May 2020, *The Human Rights Alert & ors v. The State of Manipur & ors*, PIL No. 11/2020. See also SC 27 April 2020, *Vyjayanti Vasanta Mogli v. State of Telangana & ors*, WPC No. 74/2020.

What followed next was thousands of migrant labourers taking to the streets and walking hundreds of kilometers (kms), some of them, including women and children, walking over 600 kms on foot to reach their homes in villages[13].

The problems and miseries of the migrant workers who were stranded in different places as a result of the lockdown and the magnitude and intensity of the movement resulted in various directions being issued by the Supreme Court. States were directed to ensure that transport and food are made available to migrant workers and that periodic inaction by any state remains under judicial scrutiny[14]. This came after an initial response from the government that there was no migrant movement in the country that was caused by the pandemic[15]. However, where necessary, courts were quick to issue directions for the states to provide assistance to migrant workers. Directions for the rehabilitation of migrant workers who returned to the state and planning to reduce migration to other states also followed[16]. As time progressed, the Supreme Court was satisfied with the actions of the governments requisitioning private properties including hotels, apartments, etc. for public purposes as and when required, to have the migrant workers[17].

Towards the beginning of the deadly second wave in India (peaking in April 2021)[18], with a spiraling number of hospitalization and deaths,

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[13] *Supra* n. 10.

[14] SC 3 April 2020, *Alakh Alok Srivastava v. Union of India*, WPC No. 468/2020. See also SC 15 May 2020 and 22 May 2020, *K. Ramakrishna v. Union of India & ors*, WP(PIL) No. 101/2020.

[15] A. MATHUR, *Coronavirus Lockdown: No Migrant Worker on Road Now, Govt tell Supreme Court*, 31 March 2020 (*https://www.indiatoday.in/india/story/coronavirus-lockdown-no-migrant-worker-on-road-now-govt-tells-supreme-court-1661723-2020-03-31*).

[16] SC 29 June 2021, *In Re: Problems and Miseries of Migrant Labourers, Suo Motu* WPC No. 6/2020 available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-suo-motu-wpc-no-60-2020-wpc-no-916-2020-2021-06-29*.

[17] SC 3 April 2020, *Alakh Alok Srivastava v. Union of India*, IA No. 48227/2020 and WPC 468/2020. See also SC 15 May 2020 and 22 May 2020, *K. Ramakrishna v. Union of India & ors*, WP(PIL) 101/2020.

[18] PRAGYA AGARWALA, ANUDITA BHARGAVA et al., *Epidemiological Characteristics of the COVID-19 Pandemic During the First and Second Waves in Chhattisgarh,*

the migrant issues reemerged[19]. Directions were issued by the court to the Chief Secretary, Government of National Capital Territory of Delhi (GNCTD) to simplify the registration process of all migrant workers of Delhi under Section 10 of The Unorganised Workers' Social Security Act, 2008[20]. This also included directions to provide free medicines and medical facilities to the migrant workers and to consider providing the payment of *ex gratia* amount to the unorganized workers and the migrant workers[21].

Next, the court's attention was on children. The government policies for providing nutritional food to the children and nursing and lactating mothers, under the court order, was sustained while preventing the spread of COVID-19[22]. The court reiterated the focus on children *suo motu* through directions to the authorities[23] to take precautionary

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Central India: A Comparative Analysis, in *Cureus*, 14(4), 3 April 2022, 24131, doi: 10.7759/cureus.24131.

[19] S. JOY, *5.15 lakh migrant workers returned home during second Covid-19 wave; Ministry says migration in first and second waves different*, Deccan Herald, 8 August 2021 (*https://www.deccanherald.com/national/north-and-central/515-lakh-migrant-workers-returned-home-during-second-covid-19-wave-ministry-says-migration-in-first-and-second-waves-different-1017499.html*). See also, S. PALIATH, *Second Wave of Covid-19 has left Migrant Workers in India with no Saving and few Job Opportunities*, in *Scroll.in*, 2 June 2021 (*https://scroll.in/article/996337/second-wave-of-covid-19-has-left-migrant-workers-in-india-with-no-savings-and-few-jobs*); A. TIWARI, A. SENGUPTA, *Migrant Worker's Exodus during Lockdown – A Tragedy of Mass Scale*, in *Outlook*, 5 February 2022 (*https://www.outlookindia.com/national/migrant-workers-exodus-during-lockdown-a-tragedy-of-mass-scale--news-83110*). See also, PTI, *COVID-19 Third Wave: Media Reports on Mass Exodus of Migrant Workers False: Government*, in *The Hindu*, 3 February 2022 (*https://www.thehindu.com/news/national/covid-19-third-wave-media-reports-on-mass-exodus-of-migrant-workers-false-government/article38370412.ece*).

[20] SC 3 May 2021, *Abhijeet Kumar Pandey v. Union of India & ors*, WPC No. 5101/2021.

[21] *Ibidem*.

[22] SC 18 March 2020, *In Re: Regarding Closure of Mid-Day Meal Scheme, Suo Motu* WPC No. 2/2020, available at *https://www.covid19litigation.org/case-index/india-patna-high-court-no-7124-2020-2020-09-18*.

[23] Child Welfare Committee, Juvenile Justice Board, and Children's Homes, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-smwc-no42020-2021-08-26*.

measures to stop the spread of COVID-19 in Child Care Institutions[24]. The government's role was deemed extensive in this regard- from raising awareness and providing counselling to ensuring that quality face masks, disinfectants, adequate food and drinking water, and other necessities are made available to them[25].

Children were uniquely affected as a result of the demise of one or both parents. The High Court of Patna raised questions regarding the care of child orphans[26]. The Supreme Court directed the state governments to ensure that the education of children, who became orphans after the onset of the pandemic in March 2020, in private schools continues without disruption at least during the present academic year[27]. The District Magistrates / District Collectors were directed to ascertain the educational status of those children who are eligible for the benefits under the "PM Cares For Children Scheme"[28] and to consider the applications of such children expeditiously and forward the same to the Government of India[29].

In other categories of vulnerable populations, the court limited its intervention in determining whether to include low-income group persons along with socially backward within the *Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana* so that COVID-19 testing is afforda-

[24] SC 26 August 2021, *In Re: Contagion of Covid-19 Virus in Children protection homes, Suo Motu* WPC No. 4/2020, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-smwc-no42020-2021-08-26*.

[25] *Ibidem*, § 6.

[26] India, Patna High Court, 18 September 2020, No. 7124 of 2020, *https://www.covid19litigation.org/case-index/india-patna-high-court-no-7124-2020-2020-09-18*.

[27] SC 26 August 2021, *In Re: Contagion of Covid-19 Virus in Children protection homes, Suo Motu* WPC No. 4/2020, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-smwc-no42020-2021-08-26*.

[28] Official website: *https://pmcaresforchildren.in/*.

[29] Another scheme is the personal accident cover of Rs. 50 lakhs, under the "*Pradhan Mantri Garib Kalyan* Package: Insurance Scheme for Health Workers Fighting COVID-19".

ble to all as it was stated to be the prerogative of the government rather than the court[30].

2.1.2. Right to Health

The right to health is implied under article 21[31], and numerous cases were brought within its expansive scope during the pandemic. Referring to various Supreme Court judgments that have interpreted article 21 to expand the meaning of the right to life to also include the right to health, high courts have held that no popular government can afford to negate the basic human right to health[32].

The legal issues pertaining to health emerged soon after the first confirmed case of COVID-19 was reported in India on January 27, 2020. This was when a female returned home to Thrissur, Kerala from Wuhan, China with a one-day symptom of sore throat and dry cough[33]. At the same time, countries other than the country of origin of coronavirus, China, were recording their first cases of COVID-19 in the South-Asian region[34]. Within two months, on the 11th March, 2020, the World Health Organization declared the coronavirus outbreak to be a pandemic[35].

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[30] SC 13 April 2020, *Shashank Deo Sudhi v. Union of India & ors*, WPC No. 10816/2020, available at: *https://www.covid19litigation.org/case-index/india-supreme-court-india-shashank-deo-sudhi-v-union-india-and-ors-2020-04-13*.

[31] In SC 20 January 1995, *Consumer Education and Research Centre v. Union of India*, AIR 1995 SC 922, court held that the right to health and medical care is a fundamental right under article 21 read with articles 39(c), 41 and 43 of the Constitution of India. See also SC 28 August 1989, *Parmanand Katara v. Union of India*, AIR 1989 S.C. 2039, wherein the Supreme Court held that it is the constitutional obligation of the state to provide medical aid to preserve human life whereby the right to health is implied under article 21.

[32] HC (Telangana, DB) 17 May 2021, *R. Sameer Ahmed v. State of Telangana & ors*, WP (PIL) Nos. 56 and 58/2020.

[33] M.A. ANDREWS et al., *First confirmed case of COVID-19 infection in India: A case report*, in *Indian J. Med. Res.*, 151(5), 2020, 490-492.

[34] Data available at *https://ourworldindata.org/covid-cases.*

[35] Information available at the World Health Organization's official website: (*https://www.who.int/news/item/27-04-2020-who-timeline-covid-19*).

2.1.2.1. Healthcare system

Under the subject matter of health, the first step was the urgent need to revamp the healthcare system to meet the needs of the burgeoning casualties of COVID-19 affected patients. The increase in the hospitalization of patients with COVID-19 led to varied challenges to policy-makers and the courts, more so as both waves had different sets of challenges for India: the first wave brought about unknown and unprecedented health issues, and the second wave brought about a sudden surge in the spread of COVID-19 and a rapid increase in hospitalization[36].

To combat the increasing number of cases, the court directed the authorities to increase the number of dedicated COVID-19 hospitals[37]. This was met in some hospitals during the pandemic. Further, beds with oxygen supply were increased from 250 to 710 due to COVID-19 between January 2020 and June 2022 at the All India Institute of Medical Sciences, National Cancer Institute, Jhajjar, Haryana[38].

At the end of the second wave, a challenge against the demolition of a fruit market was upheld, as it was to construct a Super Speciality Hospital with the understanding that the market will be shifted to a different location. The Court declared that the action was not illegal, arbitrary, or an infringement of the right to trade[39].

Another way to tackle the shortages in the healthcare system was to remove the imposition of taxes on oxygen concentrators (given as a gift), by declaring it unconstitutional[40]. Court also ensured that the Cen-

[36] V. KUMAR JAIN et al., *Differences between First wave and Second wave of COVID-19 in India*, in *Diabetes Metab Syndr*, 15(3), 2021, 1047-1048.

[37] HC (Delhi) 12 June 2020, *Kaushal Kant Mishra v. GNCTD*, WPC No. 3506/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-wpc-35062020-2020-06-06*, instead of only reserving 20% bed capacity for COVID-19 patients along with 80% non-COVID-19 patients, as there is a high-risk of infections passing on to non-covid patients.

[38] RTI dated 01.12.2022, on file with the author. Other RTIs state that there was no increase in the number of beds during the pandemic, including the AIIMS in Delhi.

[39] HC (Patna) 21 December 2020, *Parul Prasad v. State of Bihar & ors*, WPC No. 5609/2020.

[40] HC (Delhi) 21 May 2021, *Gurcharan Singh v. Ministry of Finance (Department of Revenue), Government of India* WPC No. 5149/2021 (and CM No. 16554/2021),

tral Government replaces defective ventilators[41]. In another case that involved the lack of medical facilities in far-flung areas, the court gave a deadline for the installation of oxygen plants, as promised by State[42].

In order to avoid multiplicity of petitions, the court dismissed a petition stating that the government is taking measures to protect the people by providing oxygen facility, vaccines drive etc., and that these issues were adequately addressed in numerous litigations on the same subject matter[43].

For non-compliance, a contempt notice was issued by the High Court to ensure that the liquid medical oxygen supply is increased to meet the ground realities of Delhi during the pandemic[44]. The Supreme Court, on the same matter, quashed the contempt notice and suggested that the Central Government place a comprehensive plan for the allocation, supply, and distribution of oxygen to meet the requirements of the GNCTD and do so by a meeting between the Chief Secretary, Principal Secretary, Health of GNCTD with a team of officers of the Central Government[45].

The distress caused by healthcare infrastructure brought about compensation cases of mismanagement and negligence at government hospitals for endangering the lives of Covid-19 positive,[46] and for negli-

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available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-wpc-51492021-cm-no-165542021-2021-05-31*.

[41] HC (Bombay) 12 May 2021, *The Registrar High Court of Judicature of Bombay, Bench at Aurangabad v. Union of India & ors, Suo Motu* (Criminal) PIL No. 02/2021.

[42] HC (Manipur) 26 July 2022, *Naresh Maimom v. Union of India & ors*, PIL No. 26/2021.

[43] HC (Karnataka) 26 May 2021, *Mathew Thomas v. Government of India & ors*, WPC No. 9242/2021.

[44] HC (Delhi) 4 May 2020, *Rakesh Malhotra v. GNCTD & ors*, WPC No. 3031/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-new-delhi-wpc-30312020-2021-05-01* along with HC (Delhi) 25 May 2021, *Aseemit Social Projects Foundation v. Union of India*, WPC No. 5102/2021.

[45] SC 5 May 2021, *Union of India v. Rakesh Malhotra & anr*, SLP (C) No. 11622/2021.

[46] The court directed the state to pay compensation of Rs. 5 lakhs to the legal heir and directed the concerned authorities to take appropriate action on the basis of the report submitted by the collector. See, HC (Bombay bench at Aurangabed) 27 January

gently causing the death of two Covid19 patients, resulting in payment of an *ex-gratia* amount and compensation[47].

2.1.2.2. Vaccination

The first vaccine in India was rolled out a year after the declaration of the pandemic by the WHO[48]. On 1 January 2021, the Drug Controller General of India (DCGI) approved the emergency use of the Oxford-AstraZeneca vaccine (COVISHIELD)[49]. On 2 January, the DCGI also granted an interim emergency use authorization to BBV152 (COVAXIN), a domestic vaccine developed by Bharat Biotech in association with the Indian Council of Medical Research and the National Institute of Virology[50].

The first phase of vaccination involved the introduction of priority vaccination for frontline workers, i.e. health workers, including police, paramilitary forces, sanitation workers, and disaster management volunteers[51]. The court was petitioned to include other professions such as lawyers for priority vaccines as frontline workers, which was rightfully

2021, *Prathibha Shinde & ors. v. Principal Secretary, Public Health Department, State of Maharashtra & ors*, PIL No. 25/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-bombay-pil-no-25-2020-2021-01-27*.

[47] HC (Chhattisgarh) 9 September 2021, *Suo Motu WP (PIL) v. State of Chhattisgarh*, WP (PIL) No. 27/2020, available at *https://www.covid19litigation.org/case-index/india-state-chhattisgarh-wp-pil-no-27-2020-wppil-no-662021-wppil732021-2021-09-09*.

[48] B.A. BOYE, *COVID-19 vaccine launch in India*, UNICEF, 28 January 2021 (*https://www.unicef.org/india/stories/covid-19-vaccine-launch-india*). See also, Covid19 Vaccine, Operational Guidelines (*https://www.mohfw.gov.in/pdf/COVID19VaccineOG111Chapter16.pdf*).

[49] N. PRUSTY, S. JAMKHANDIKAR, *India drug regulator approves AstraZeneca COVID vaccine, country's first*, in *Reuters*, 1 January 2021 (*https://www.reuters.com/article/us-health-coronavirus-india-vaccine-idINKBN296292*).

[50] Ministry of Health and Family Welfare, Press Statement by the Drugs Controller General of India (DCGI) on Restricted Emergency approval of COVID-19 virus vaccine, 3 January 2021 (*https://pib.gov.in/PressReleseDetail.aspx?PRID=1685761*).

[51] COVID-19 Vaccines, Ministry of Health & Family Welfare, Government of India (*https://www.mohfw.gov.in/pdf/COVID19VaccineOG111Chapter16.pdf*).

turned down[52]. With the passage of time, lawyers were also included in priority vaccination for the age groups 18-45 years[53]. States were also directed to ensure the accessibility and availability of vaccines to persons with disability[54]. Court stressed the need for special efforts to ensure that persons with disability in rural areas are inoculated. For transgenders, a special vaccination drive was to be held and cash relief was to be provided[55].

Other directions to the District Disaster Management Authority constituted under the DM Act to spread awareness about vaccinations, maintain records, etc. were also advised[56]. The need for a "Method and Manner of Vaccination" and streamlining the modalities of vaccination, is seen in numerous *suo motu* actions[57]. The cut-off for the age group and determination of categories for the vaccination drive remained a

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[52] HC (Tripura) 15 March 2021, *Tanjim Ahmed v. Union of India & ors*, WPC (PIL) No. 1/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-tripura-agartala-wpcpil-no12021-2021-03-15*. See also, HC (Delhi) 4 March 2021, *Manashwy Jha and ors v. Union of India & ors*, WPC No. 2673/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-new-delhi-manashwy-jha-and-ors-v-union-india-and-ors-2021-03-04*.

[53] HC (Kerala) 4 August 2021, *Benny Antony Parel v. Union of India*, WPC No. 11312/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-kerala-division-bench-benny-antony-parel-v-union-india-2021-06-03*.

[54] HC (Madras) 19 April 2021, *Meenakshi Balasubramanian v. Union of India & anr.*, WPC No. 2951/2021. HC (Guwahati) 28 June 2021, *Ebo Mili v. State of Arunachal Pradesh & ors*, WP (PIL) No. 11/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-assam-pil-112021-2021-06-28*. See also, HC (Madras) 28 July 2021, *M. Karpagam v. Commissionerate for the Welfare of Differently Abled*, WPC No. 11850/2021.

[55] HC (Madras) 2 August 2021, *Grace Banu v. Chief Secretary, Government of Tamil Nadu*, WPC No. 12035 of 2021, available at *https://www.covid19litigation.org/case-index/india-high-court-madras-wp-no-12035-2021-2021-10-02*.

[56] Initiatives and Achievements-2021, Ministry of Health & Family Welfare (*https://pib.gov.in/PressReleseDetailm.aspx?PRID=1787361*).

[57] HC (Chhattigarh) 9 April 2020, *Suo Motu v. State of Chattisgarh*, WPC No. 27/2020. These modalities should include: «to come up publicly in a transparent and fair manner with complete details through print, digital and electronic media with regard to availability and modalities of the required amenities, medication and related infrastructure for the treatment of the COVID-19 patients, who require either facility of covid care centre, hospitalization with oxygen, ventilator, medicines, etc.».

constant issue in this phase with the court directing a committee to be formed to fix an age in an equitable manner[58].

Courts had to step in to address the issue of door-to-door vaccination for the elderly and the disabled, as a few states were reluctant to use this method of administering the vaccine, citing safety issues like maintaining the stability of the vaccine if it's always in transit, and concerns of access to the icebox, etc. A direction was sought for formulating a Standard Operating Procedure (SOP) so as to give immediate effect to door-to-door vaccination and to have a toll-free 24x7 portal for that purpose[59]. Noting that the vaccination process was underway, in the diversity of conditions the Court said:

> At this stage, it will be difficult to issue general directions, especially having regard to diversity of our conditions. Also our directions should not impinge upon the administrative powers of the state governments[60].

Vaccination doses too came under judicial scrutiny. A division bench of the High Court of Kerala interfered with the decision of the single judge with regard to administering the second dose of the vaccination after four weeks of the first dose. The division bench stated that if the CoWIN (Winning Over COVID-19) Portal is to be redefined as directed by the single judge, it can have a national implication, which would derail the activities controlled and regulated by the central and state governments and would be quite detrimental to the interest of the nation[61]. Another high court observed that the requirement to administer two doses of the vaccine and the interval between the two dos-

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[58] *Ibidem*.

[59] HC (Delhi) 13 April 2021, *Mrigank Mishra v. Union of India & ors*, WPC No. 4522/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-mrigank-mishra-v-union-india-wpc-45222021-2021-04-13*. See also, Initiatives and Achievements- 2022, Ministry of Health & Family Welfare (*https://pib.gov.in /PressReleasePage.aspx?PRID=1887285*).

[60] SC 08 September 2021, *Youth Bar Association of India v. Union of India*, WPC No. 619/2021, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-wpc-6192021-2021-09-08*.

[61] HC (Kerala) 3 December 2021, *Kitex Garments Ltd. v. State of Kerala*, WPR No. 16501/2021 (DB case number: WA 1219/2021).

es for better protection from infection can only be considered advisory. Hence, the center's decision to allow early administration of the vaccine, before 84 days to some classes of people is found by the court as discriminatory and the petition was allowed with respect to paid vaccines.

Taking the vaccination was not made compulsory. The government also supported this notion, and authorities were directed to act in pursuance of the state policy. Officials disregarding these policies were to be held accountable[62].

However, in one instance the court has held that in order to receive the benefits of free treatment and/or compensation for death due to COVID-19, either the requirement of vaccination or periodic RT-PCR test is essential. And that the mandate for these requirements by the employer was not discriminatory, as a distinction between vaccinated and un-vaccinated employees was required for accessing free treatment/ compensation[63]. With time, the same court accepted the decision of Symbiosis University to reinstate its unvaccinated employees who were earlier asked to go on unpaid leave till they produced a vaccine certificate, and further directed the University to reimburse the employee's dues and review its COVID-19 vaccination mandate for employees[64]. Other courts have stated that restrictions placed upon unvaccinated individuals *vis-à-vis* vaccinated individuals are arbitrary and not in consonance with the provisions of articles 14, 19, and 21 of the Constitution. And that all allowances available and given to vaccinated persons shall also be made equally applicable to unvaccinated persons[65].

Courts have reiterated that vaccination should not be a precondition for accessing any benefits or services, as it is a violation of the rights of

[62] *Ibidem*.

[63] HC (Bombay) 21 December 2021, *Deepak Kumar Radheshyam Khurana and ors. v. Mumbai Port Trust & anr.*, WPC No. 17123/2021.

[64] HC (Bombay) 13 May 2022, *Subrata Mazumdar v. Dr. Vidya Yeravadekar*, WP (ST) No. 4486/2022 (also cited as WPC No. 6735/2022), available at *https://www.covid19litigation.org/case-index/india-high-court-bombay-no-4486-2022-2022-05-13*.

[65] HC (Gauhati) 2 July 2021, *In Re Dinthar Incident Aizawl v. State of Mizoram & ors*, WPC No. 37/2020. See also, HC (Manipur) 28 July 2021, *Osbert Khaling v. State of Manipur & ors*, WP (PIL) No. 34/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-manipur-wppil-no-34-2021-2021-07-13*.

citizens and is unconstitutional. Rather, steps to be taken to ensure that persons get over their vaccination hesitancy[66]. A corollary to this is that citizens should make an informed decision based on data, and hence directions were issued to the government to disclose the post-vaccination data regarding adverse events. Thus, the Supreme Court issued notice to the Central government in a plea against coercing people to get vaccinated for COVID-19 by imposing it as a condition for access to essential services[67]. Non-vaccinated beneficiaries were not to be denied food grains under the *Pradhan Mantri Garib Kalyan Anna Yojna*[68], and putting restraints on persons yet to get vaccinated from opening institutions, organizations, factories, and shops would amount to denying them their livelihood which would be illegal on the part of the state to do so.

Irrespective of an individual choice to take the vaccine, the Supreme Court observed that everybody should adhere to a national policy prescribed by the government, and since the 84-day gap prescribed between two doses of the COVISHIELD vaccine is a matter of policy based on scientific assessment, the court refused to interfere to reduce the prescribed 84-day gap between the vaccine doses[69].

Once the vaccination doses were complete, litigation regarding adverse reactions and deaths started to emerge. These cases were either regarding compensation for COVID-19 vaccine deaths/injury and lia-

[66] HC (Meghalaya) 23 July 2021, *Registrar General, High Court of Meghalaya v. State of Meghalaya*, WP (PIL) No. 6/2021.

[67] SC 6 September 2021, *Dr. Jacob Puliyel v. Union of India*, WPC No. 607/2021.

[68] *Pradhan Mantri Garib Kalyan Anna Yojana* is a scheme that is part of *Atmanirbhar Bharat* to supply free food grains to migrants and the poor. It was operational in phases, from April, 2020 to September 2022. Under this scheme, the center provides 5kg of free food grains per month to the poor. This is in addition to the subsidized (Rs 2-3 per kg) ration provided under the National Food Security Act (NFSA) to families covered under the Public Distribution System (PDS) (*https://www.myscheme.gov.in/schemes/pm-gkay*).

[69] SC 12 February 2022, *Kitex Garments Ltd. v. State of Kerala*, WPC No. 16501/2001.

bility for these deaths, with the Government stating that these are civil court claims and cannot be entertained through a writ petition[70].

2.1.2.3. Miscellaneous matters – including fines, burials, and responses to other diseases

The uncertainty of the nature of the pandemic resulted in the spraying of disinfectants on human beings, which was struck down by the court as being violative of article 21[71]. This resulted in an advisory from the central government to not spray disinfectants on persons[72]. Other healthcare measures that came under challenge included the mask mandate and the resultant fine imposed for not wearing a face mask inside any metro station in Chennai. Court held that:

> Merely because the State had the authority to impose a penalty, it would not imply that the Chennai Metro Rail Limited could draw therefrom or had the power or jurisdiction to issue the impugned press release, however well-intentioned the same may have been. There can be no doubt that the press release was issued in public interest and in furtherance of public health. However, whatever may have been the pious intention behind the move, when the action is confiscatory in nature as the imposition of a fine or penalty, it has to be backed by due sanction of law. The best-intentioned actions, not backed by the authority of law,

[70] SC 24 November 2022, *Rachana Gangu and Anr. v. Union of India and ors.*, WPC No. 001220/2021 (pending). See also, THE HINDU BUREAU, *Government not liable to compensate for COVID-19 vaccine deaths, injury: Centre tells Supreme Court*, in *The Hindu*, 30 November 2022, *https://www.thehindu.com/sci-tech/health/government-not-liable-to-compensate-for-covid-19-vaccine-deaths-injury-centre-tells-sc/article66202106.ece*. See also, T. BARNAGARWALA, *How India failed those who were harmed by the Covid19 vaccine*, in *Scroll.in*, 2 November 2022, *https://scroll.in/article/1036361/how-india-failed-those-who-were-harmed-by-the-covid-19-vaccine*.

[71] SC 5 November 2020, *Gurusimran Singh Narula v. Union of India*, WPC No. 560/2020, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-no-5602020-2020-11-05*. See also A. TARAFDAR, S. SONKAR, *Dignity and Disinfectant in the time of a pandemic*, in *The Wire*, 5 April 2020 (*https://thewire.in/government/bareilly-bleach-disinfectant-migrant-workers*).

[72] Advisory Against Spraying of Disinfectant on People, Ministry of Health & Family Welfare (*https://www.mohfw.gov.in/pdf/AdvisoryagainstsprayingofdisinfectantonpeopleforCOVID19managementFinal.pdf*).

cannot stand. Court held that the press release was made without authority[73].

In the case of burials, the conflict between religious rituals and state-mandated precautions around the burial of dead bodies emerged as a point of dispute[74]. Court agreed with the middle path suggested by the Parsi Zoroastrian faith to follow the burial restrictions implemented by the state on the one hand and their religious burial rituals on the other[75]. In another case, the court held that the right of the family of a COVID-19 victim to perform the last rites before the cremation/burial of the deceased person is a right akin to a fundamental right within the meaning of article 21 of the Constitution of India[76].

Nevertheless, flouting of health norms is not to be allowed and directions for follow-up actions were issued by the courts to comply with

[73] HC (Madras) 11 November 2021, *R. Muthukrishnan v. Chennai Metro Rail Limited*, WPC No. 17234/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-madras-no-17234-2021-11-11*. See also, SC 20 July 2021, *In Re Alarming News Report About Kanwar Yatra In Up, Suo Motu*, WPC No. 5/2021, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-no-5-2021-2021-07-20*.

[74] HC (Calcutta) 16 September 2021, *Vineet Ruia v. Principal Secretary, Ministry of Health & Family Welfare, West Bengal & ors*, WPA No. 5479/2020 with I.A. No. CAN/1/2020 (Old No. CAN 4144 of 2020), available at *https://www.covid19litigation.org/case-index/india-high-court-calcutta-vineet-ruia-v-principal-secretary-and-others-2020-09-16*.

[75] SC 4 February 2022, *The Surat Parsi Panchayat Board & ors v. Union of India*, CA No. 1067/2022 arising out of SLP (C) No. 17130/2021, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-civil-appeal-no-1067-2022-2022-02-04*.

[76] HC (Calcutta) 16 September 2020, *Vineet Ruia v. Principal Secretary, Ministry of Health & Family Welfare, West Bengal & ors*, WPA No. 5479/2020 with I.A. No. CAN/1/2020 (Old No. CAN 4144/2020), available at *https://www.covid19litigation.org/case-index/india-high-court-calcutta-vineet-ruia-v-principal-secretary-and-others-2020-09-16*. See also, HC (J&K) 10 October 2021, *Court on its Own Motion v. Union Territory of J&K & ors*, WP (PIL)NO. 5/2020, HC (Delhi) 3 May 2021, *Pratyush Prasanna v. GNCTD & other connected matters*, WPC No. 5117/2021. See also, SC 19 July 2021, *In Re: The Proper Treatment of COVID-19 Patients and Dignified Handling of Dead Bodies in the Hospitals etc., Suo Motu* WPC No. 7/2020, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-no-72020-2020-06-19*.

protocols and promises made by governments in a range of areas in connection with COVID-19. For example, election-related COVID-19 protocols were to be followed during the polling of votes. Courts have passed a number of orders to ensure that COVID-19 patients in a state are provided timely treatment inasmuch as they are not subjected to harassment and exploitation.

In matters of health, courts have balanced the public health dilemmas caused by the pandemic against professional benefits or personal interests. For example, the court refused to strike down a public notice that extended the training period of resident doctors pursuing their final year of post-graduate course Diplomate of National Board (DNB) to six weeks, in order to treat patients of COVID-19[77]. Another matter in which the court supported a policy decision of the government in not granting study leave to the doctors working in the hospitals of the GNCTD to pursue Post Graduation courses, in view of the COVID-19 pandemic[78]. Later decisions take an accommodative view as a result of the decline in the number of cases and allowed doctors to take up higher education opportunities that were earlier denied to them as a result of the pandemic and government orders prohibiting study leave[79]. Nevertheless, healthcare providers remained at risk and were to be provided security from attacks on them[80].

There were also discriminatory policies between doctors and other paramedic staff for the grant of COVID-19 *ex gratia* amount by the

[77] High Court (Delhi) 26 May 2020, *Dr. Divyesh J. Pathak & ors v. National Board of Examinations & anr.*, WPC No. 3005/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-new-delhi-wpc-30052020-2020-05-26*.

[78] SC 15 July 2021, *Dr. Rohit Kumar v. Secretary Office of Lt. Governor of Delhi & ors*, SLP (C) No. 3824/2021, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-civil-appeal-no-2739-2021-2021-07-15*.

[79] SC 16 July 2021, *Vijaya Kumar Varada v. Union of India and ors*, WPC No. 750/2021.

[80] HC (Delhi) 17 April 2020, *Yash Aggarwal & anr v. Union of India & ors*, WPC No. 2969/2020, available at *https://www.covid19litigation.org/case-index/india-delhi-high-court-yash-aggarwal-anr-vs-union-india-others-2020-04-17*.

GNCTD that was struck down[81]. In other matters, it was necessitated that doctors and allied medical staff are required to work as a single unit, irrespective of their seniority and differences in core medical specializations in the treatment of COVID-19 patients, as a call of duty[82].

Similar issues reemerged during the second wave. Just before the beginning of the deadly second wave, the Nagaland High Court modified the state government's SOPs to the extent of giving an option to teaching and non-teaching staff for getting compulsorily tested every fifteen days if choosing not to go for vaccination in view of the reopening of schools and colleges in the State, taking into account of the fact that no one can be compulsorily vaccinated[83]. Documentation for vaccination proved to be a challenge with the court seeking information from the Health & Family Welfare Department on how the second dose of vaccination would be given to persons without proper documentation in support of their identification and in what manner[84]. During the second wave, creating an online portal to address the issues relating to the shortage of Remdesivir in Delhi and address the issues of the protocol for the administration of the drug; the allocation of the drug for Delhi and the distribution and sale of the drug were emphasized on[85].

[81] HC (Delhi) 25 January 2022, *Shakuntaladevi v. PNB Housing Finance Ltd & anr*., WPC No. 308/2022, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-wpc-no-3082022-2022-05-25*.

[82] HC (Delhi) 2 June 2021, *Dr. Mohammad Ajazur Rahman v. Union of India & ors*, WPC No. 5462/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-dr-mohammad-ajazur-rahman-v-union-india-others-2021-06-02*.

[83] HC (Guwahati) 28 July, 2021, *In-Re Kohima, Nagaland v. The State of Nagaland & ors, Suo Motu* PIL No. 1/2021.

[84] HC (Guwahati) 30 July 2021, *Sourav Paul v. Union of India & ors*, PIL No. 34/2021.

[85] HC (Delhi) 27 April 2021, *Vinay Jaidka v. Chief Secretary*, WPC No. 5026/2021 & CM APPL. No. 15401/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-vinay-jaidka-v-chief-secretary-wpc-50262021-cm-appl-2021-04-28*.

The pandemic also saw the neglect of other diseases, and once again, petitions before the courts emerged to ensure patients with other ailments like Thalassemia are receiving adequate treatment[86].

And lastly, even cat food and books were considered to be essential items, with courts ruling in favor of the plaintiffs to access these items during the pandemic[87], stating that these are part of a citizen's choice to rear pets that are traceable to his fundamental right guaranteed under article 21[88].

2.1.3. Right to Privacy

Old challenges of privacy reemerged during the pandemic, specifically in the context of personal data that was collected from COVID-19 patients. In 2018, a nine-judge bench of the Supreme Court of India unanimously confirmed the right to privacy as a fundamental right under article 21[89]. The Court then held that the right to privacy was integral to freedoms guaranteed across fundamental rights, and is an intrinsic element to the dignity, autonomy, and liberty of an individual.

In the online world, the privacy of the personal information of COVID-19 patients was an issue. Personal information was shared with a private company to create an online digital software/platform to process and analyze data with regard to patients and those vulnerable and susceptible to COVID-19. The Court directed the Government of Kerala and its concerned departments to anonymize all the data that have

[86] M. JAIN, *Plea in SC seeks adequate medical treatment for all non-COVID patients, at par with COVID patients, at all times including lockdown*, 22 May 2021 (*https://www.livelaw.in/top-stories/supreme-court-covid-medical-treatment-and-facilities-central-government-state-governments-covid-19-174536*).

[87] HC (Bombay) 28 April 2022, *Gautam Navlakha v. National Investigation Agency*, CrA No. 510/2021. While dismissing rights activist Gautam Navlakha's plea for house arrest, the Bombay high court observed that books should have been considered an essential commodity for prisoners during the COVID-19 pandemic.

[88] HC (Kerala) 6 April 2020, *N. Prakash v. State of Kerala*, WPC TMP No. 28/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-kerala-wpc-tmp-28-2020-2020-04-06*.

[89] SC 26 September 2018, *Justice K.S. Puttaswamy v. Union of India*, AIR 2017 SC 4161.

been collected. It was further directed that the government should inform every citizen, from whom data is to be taken in the future, that such data is likely to be accessed by third-party service providers, and their specific consent to such effect shall be obtained. The Court also issued an injunction against Sprinklr (the third-party service provider) for directly/indirectly committing any act in breach of confidentiality of the data entrusted to them for analysis/processing[90]. In another case, directions were made to ensure that the data from the *Aarogya Setu* App, a Government of India initiative, was not collected without consent and no individual was to be denied the benefits of any services that are provided by the Government, on the ground that she has not installed *Aarogya Setu* App[91]. Court also pulled up states for not disclosing correct COVID-19 data[92].

[90] Confidentiality concerns arising out of a contract entered between the Government of Kerala with a company by the name Sprinklr Inc. See also, HC (Madhya Pradesh) 28 May 2020, *Nagrik Upbhokta Margdarshak Manch v. State of M.P.*, WP (PIL) No. 7596/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-madhya-pradesh-two-judge-bench-writ-petition-no-75962020-pil-2020-05-28*, wherein strike by the nurses in the state was declared illegal, more so as a result of the ongoing pandemic, a strike for unmet long-standing demands; HC (Orissa), 16 July 2020, *Ananga Kumar Otta v. Union of India & ors*, WPC No. 12430/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-orissa-two-judge-bench-no-12430-2020-2020-07-16*. HC (Kerala) 21 August 2020, *Ramesh Chennithala v. State of Kerala*, WPC No. 17028/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-kerala-ernakulam-division-bench-ramesh-chennithala-v-state-kerala-writ*. See also, HC (Kerala) 24 April 2020, *Balu Gopalakrishnan & anr. v. State of Kerala & ors*, WPC No. 84/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-kerala-balu-gopalakrishnan-anr-v-state-kerala-ors-2020-04-24*.

[91] HC (Karnataka) 27 January 2021, *Anivar A. Aravind v. Ministry of Home Affairs*, WP (PIL) No. 7483/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-karnataka-two-judge-bench-no-7483-2020-2021-01-25*. See also *https://www.thehindu.com/news/national/nobody-can-be-forced-to-undergo-covid-19-vaccinations-supreme-court/article65375133.ece*; S. PARTHASARATHY et al., *Privacy concerns during a pandemic*, in *The Hindu*, 29 April 2020 (*https://www.thehindu.com/opinion/op-ed/privacy-concerns-during-a-pandemic/article31456602.ece*).

[92] HC (Gujarat) 15 April 2021, *Suo Motu v. State of Gujarat*, WP (PIL) No. 53/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-gujarat-ahmedabad-division-bench-suo-motu-v-state-gujarat-rwrit*.

Privacy concerns emerged due to the local authorities pasting posters outside the residence of COVID-19 affected-persons, in spite of there being no such guideline from the government. Court stated that the state governments and Union Territories can resort to such exercise only when any direction is issued by the competent authority under the DM Act[93].

2.1.4. Mitigation and Access to Justice

The Supreme Court mitigated the impact of the lockdown by extending the limitation period to file cases. The court took *suo motu* cognizance of the difficulties that might be faced by the litigants in filing petitions/applications/suits/appeals and all other proceedings within the period of limitation prescribed under the general law of limitation or under any special laws. The court directed an extension of the period of limitation in all proceedings before the Courts/Tribunals due to the prevalence of the pandemic[94]. However, high courts interpreted the extension of the period of limitation in a varied manner[95], resulting in the Supreme Court intervening to settle the position and stating that «The order was for the benefit of the litigants who have to take remedy in

[93] SC 9 December 2020, *Kush Kalra v. Union of India & ors*, WPC No. 1213/2020, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-kush-kalra-v-union-india-2020-12-09*.

[94] SC 10 January 2020, *In Re: Cognizance for Extension of Limitation, Suo Motu* WPC No. 3/2020.

[95] HC (Madras – Madurai Bench) 8 May 2020, *S. Kasi v. State*, Crl. OP (MD) No. 5296/2020, wherein the court held that default bail cannot be granted as a result of the extension of the limitation period. See also, HC (Madras) 8 May 2020, *Settu v. The State*, Crl. OP (MD) No. 5291/2020, wherein the Madras High Court held the view that the extension of the limitation period can in «no manner be applied on the provisions of Section 167(2) of Code of Criminal Procedure". Similar to the Settu case, other high courts have also decided on bail applications brought before them: HC (Kerala) 20 May 2020, *Mohammed Ali v. State of Kerala & anr.*, BA No. 2856/2020, HC (Rajasthan) 22 May 2020, *Pankaj v. State*, S.B. Cri. Rev. P. No. 355 of 2020, HC (Uttarakhand), 12 May 2020, *Vivek Sharma v. State of Uttarakhand*, BA No. 511/2020.

law as per the applicable statute for a right. The law of limitation bars the remedy but not the right»[96].

Other than extending the limitation period, in order to ensure that litigants were heard during the lockdown, the e-Committee of the Supreme Court ensured that courts went online. Video conferencing facilities and e-filing were initiated in all district courts[97]. This enabled virtual hearings of the courts and cases were heard across the board.

Courts also took a proactive role in order to assist with compensation claims arising out of a COVID-19 death. The Supreme Court directed all states to give wide publicity through print and electronic media, particularly in vernacular newspapers, to create awareness of how and where to approach to make the claim. And that the state governments should endeavor to pay the compensation within 10 days from the date of receipt of the claims[98].

In another case, when deciding on the financial assistance to be provided by the state to the heirs or next of kin of persons who lost their lives to COVID-19, whether there can be a provision to pay an amount over the minimum compensation amount of Rs. 50,000, the court directed the state to come up with its own guidelines or set of instructions[99], to make the compensation just and adequate[100].

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[96] SC 19 June 2020, *S. Kasi v. State*, CA No. 452 of 2020, arising out of SLP (Crl.) - No. 2433/2020. The same ruling of extending limitation period was also followed in the later case of SC 3 October 2023 *Aditya Khaitan & Ors. v. IL and FS Financial Services Limited*, CA Nos. 6411-6418/2023 arising out of SLP (c). No. 4789-4796/2021.

[97] SC 6 April 2020, *In Re: Guidelines for Court Functioning through Video Conferencing during Covid-19 Pandemic, Suo Motu*, WPC No. 5/2020.

[98] SC 24 March 2022, *Gaurav Kumar Bansal v. Union of India & anr.*, WPC No. 539/2021, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-no-18052021-wp-c-5392021-2022-03-24*.

[99] SC 30 January 2020, *Reepak Kansal v. Union Of India & ors*, WPC No. 554/2021, and *Gaurav Kumar Bansal v. Union of India & ors*, WPC No. 539/2021 available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-no-18052021-wp-c-5392021-2022-03-24*. Recent cases around compensation involve looking into the technicalities of the claim of the insurance (Consumer Disputes Redressal Commission, Gujarat State, Ahmedebad 04 August 2023 *Reliance General Insurance Co. Ltd. v. Soneshbhai Vashrambhai Patel*, Appeal No. 381/2023). See also, P.K. DUTTA, *Decoded Compensation for Covid19 deaths. Why nothing is on paper yet*, in *India Today*,

2.1.5. Right to Education

Article 21 of the Constitution of India guarantees the right to education, impliedly[101]. The scope of the article was expanded in 2002 to include the right to free and compulsory education for children between the age group of 6-14 years, resulting in the insertion of a new article 21-A[102].

2.1.5.1. School education

Education was affected as a result of the shift from the offline to the online, as it brought about numerous challenges for students. The foremost challenge was the inaccessibility of facilities for online classes. Primary school students approached the court stating that they have no facility at their houses to enable them to pursue education which is now being conducted online. The court insisted on the need for the state to intervene in these matters and ensure access to basic educational tools and facilities to be made available to the students[103]. In another case, the Kerala High Court directed the state and concerned authorities to ensure that economically weak students are not side-lined by the digital divide and that they can also pursue education like other students who have access to the gadgets required for the online mode of education[104].

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24 January 2023, *https://www.indiatoday.in/coronavirus-outbreak/story/decoded-compensation-for-covid-19-deaths-why-nothing-is-on-paper-yet-1818623-2021-06-23*.

[100] HC (Madurai Bench, Madras) 22 September 2023, *N. Ponnupillai v. State of Tamil Nadu & Ors.*, WPD No. 8225/2021.

[101] SC 30 July 1992, *Mohini Jain v. State of Karnataka*, 1992 AIR 1858 and SC 4 February 1993, *Unnikrishnan v. State of Andhra Pradesh*, 1993 AIR 217.

[102] 86th Amendment to the Constitution of India, 2002.

[103] HC (Kerala) 31 August 2021, *Devika Ajay & ors. v. State of Kerala & anr.*, WPC Nos. 13129/2021 and 1591/2021 available at *https://www.covid19litigation.org/case-index/india-high-court-kerala-wp-c-nos-13129-2021-and-15971-2021-2021-08-31*.

[104] HC (Kerala) 24 August 2021, *Archana Ajeesh v. Principal Secretary, Local Self Government Department*, WPC No. 17105/2021. See also HC (Delhi) 18 September 2020, *Justice for all v. GNCTD and ors*, WPC No. 3004/2020 available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-30042020-10415-104172020-106752020-12235-122362020-2020-09-18*.

Another concern was the payment of school fees. Parents contented that fees should be reduced due to the financial hardships that cropped up during the pandemic as a result of the loss of jobs or shutting down of their business. The court held that school fees were to be paid, even if it was lower[105].

School examinations were also challenged. In one such instance, the division bench of the court refused to interfere with the conducting of examinations, holding that there was no arbitrariness or illegality on the part of the state[106].

2.1.5.2. College/University education

Higher education also faced similar challenges during the pandemic. A batch of petitions was filed challenging a government order for conducting online examinations during the pandemic. The Government Order also included the requirement to reduce the intake of students during the pandemic. This Government Order was held to be not sustainable in the eye of the law and was set aside. Court stated that the decision-making process is not supported by clear and cogent data and hence it has to be termed as arbitrary[107].

Another state high court upheld the cancellation of an entrance examination, as all other state universities had also canceled the examina-

[105] SC 3 May 2021, *Indian School, Jodhpur & anr. v. State of Rajasthan & ors*, CA No. 1724/2021 available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-indian-school-jodhpur-anr-vs-state-rajasthan-ors-2021-05-03*. See also, A. MANDHANI, *School fees payment plea reaches SC – a look at how 12 HCs ruled on the issue since April*, in *The Print*, 5 July 2020 (*https://theprint.in/judiciary/school-fee-payment-plea-reaches-sc-a-look-at-how-12-hcs-ruled-on-the-issue-since-april/454614/*).

[106] HC (Kerala), 31 August 2021, *Devika Ajay & ors v. State of Kerala & ors*, WPC Nos. 13129/2021 and 15971/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-kerala-wp-c-nos-13129-2021-and-15971-2021-2021-08-31*.

[107] HC (Andhra Pradesh) 06 September 2021, *Central Andhra Junior College v. State of Andhra Pradesh & ors*, WPC Nos. 17559, 17344, 17753, 17849, 18111, 18336, 18372, 18041, 18225 and 18045/2021. Press release dated 20.10.2020 issued by the Secretary, Board of Intermediate Education, Andhra Pradesh, available at *https://www.covid19litigation.org/case-index/india-high-court-andhra-pradesh-writ-petition-no-17559-2021-09-06*.

tion during the prevailing pandemic. In general, examinations were allowed to be continued, with RT-PCR test results being mandatory for the candidates[108].

Tuition fee was also required to be paid as there was a liability on the part of the school to pay its staff[109]. As students went back to Universities, they also began challenging the hostel rent that was collected from them even during their absence in the COVID-19 period. The court granted a relief of 50% reduction from hostel rent during the COVID-19 duration, keeping in view the hardships faced by individuals during the said period[110].

In early 2022, a petition was filed to quash the notification for conducting an examination on the grounds that no proper education was imparted to them during the pandemic. Students claimed that classes are not properly conducted on the prescribed syllabus, and that the University should promote them to the next semester based on their internal marks. In this matter, the single judge quashed the notification and directed the University to promote the students to the next semester. The division bench, however, reversed the decision of the single judge stating that quality education cannot be achieved unless there is an examination system, and issued directions to the university to determine the mode of examination as suggested by the Bar Council of India (BCI) and complete the process of examination/evaluation for the LL. B course.

Educational institutions petitioned the court against the action of the government for not allowing the increase in the intake of students. The court upheld the Government's Order, as a physical inspection of the college (to decide on the increase of intake of students) was a process

[108] HC (Bombay) 5 June 2021, *Herd Foundation v. Union of India*, PIL No. 6466/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-bomb ay-nagpur-bench-no-64662021-2021-06-05*.

[109] HC (Delhi) 24 April 2020, *Naresh Kumar v. Director of Education & ors*, WPC No. 2993/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-wpc-29932020-2020-04-24*. See also, HC (Delhi) 20 April 2020, *Rajat Vats v. GNCTD*, WPC No. 2977/2020.

[110] HC (Punjab & Haryana) 21 November 2022 *Aditya Kashyap and others v. State of Punjab and another*, LPA 716/2022.

halted by the pandemic. The court held that it cannot keep only the interest of the educational institution in mind and that the court is duty-bound to take into consideration the prevailing situation[111].

2.1.5.3. Competitive examination

Competitive examinations for education and jobs came up before the courts. These cases requested the courts for delaying the examinations or extending the number of attempts as a result of the hardship faced during the pandemic. Some cases like the increase in the number of attempts were dismissed by the court as a majority of the aspirants had also faced similar constraints and yet appeared for the examinations[112], and reconducting the exam is a long process that will adversely affect the schedule of the courses and the career prospects of the candidates. In one case, court considered the monumental changes brought about in the structure of the examinations as a result of the pandemic, posing challenges to both students and educational institutions alike as a result of the complete shift to the virtual world. During that time, a momentary lapse on the part of the candidate for uploading the answer script with some kind of an identification (which was not allowed by the administration). As a result, there was a punitive action of disqualification of the candidate which was challenged before the court. Court was bit lenient and did not allow the punitive action of disqualification of the candidate[113]. Nevertheless, the court stressed in another case the need to follow the appropriate COVID-19 protocols during the conducting of examinations[114].

[111] HC (Kerala) 31 May 2022, *V. N. Public Health and Educational Trust v. State of Kerala & ors*, SLP (C) Nos. 14219-14220/2020.

[112] SC 24 February 2021, *Rachna & ors v. Union of India & anr.*, WPC No. 1410 of 2020, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-wpc-no-14102021-2021-02-24*.

[113] HC (Delhi) 30 May 2022 *Samriddhi Khandelwal v. National Institute of Fashion Technology*, WPC 4696/2022.

[114] HC (Kerala) 13 August 2021, *Hariharan v. The Vice-Chancellor*, WA No. 1041/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-kerala-wa-no-1041-2021-2021-08-13*.

Plea for further postponement of examinations on the ground of COVID-19 in 2023 were dismissed by the court. Court held that the decision to conduct examination falls within the domain of academic policy and was not interested in interfering in such policy decisions except in cases of manifest arbitrariness in the decision-making power[115].

2.1.6. Freedoms under Article 19

Article 19 of the Constitution of India lists various freedoms that are available to Indian citizens. Subject to reasonable restrictions, these include:

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions [or co-operative societies];
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; [and]
(f) [deleted]
(g) to practice any profession, or to carry on any occupation, trade or business.

2.1.6.1. Freedom of speech and expression

In the State of Jammu & Kashmir (J&K), as a consequence of the abrogation of Article 370 of the Constitution of India by the Parliament of India, thereby revoking the special status to J&K in August 2019, resulted in a shutdown of internet access[116]. Since the outbreak of the pandemic, non-use of the internet in J&K has been a problem for the

[115] HC (Delhi) 3 May 2023 *Buddhabhushan Anand Londhe & Ors., v. Union of India*, WPC Np. 2886/2023.

[116] It was passed by Presidential Order No. 272 dated 5 August 2019. This was a preventive shutdown imposed in the state which is yet to be lifted entirely. The shutdown in Kargil was lifted on December 2019 but continued in other parts of the union territory. The beginning of the communication blockade saw the restrictions of landlines as well as mobile services. See, BBC NEWS, *Article 370: What happened with Kashmir and why it matters*, 6 August 2019, *https://www.bbc.com/news/world-asia-india-49234708*.

better treatment of COVID-19 patients[117]. Hence, the use of the internet in J&K was to be restored back to normal, subject to a few conditions, under the instruction of the court[118].

Another issue before the courts was the circulation of misinformation on social media. This includes disinformation and misinformation[119], and about undermining the seriousness of the pandemic[120] circulating on social media platforms. In one instance, criminal proceedings against a medical practitioner were quashed as he had only made Facebook posts alleging that deficient protective gear was supplied by the government to its doctors attending COVID-19 affected patients in its hospitals. The harsh attitude of the government was not approved by the court for it was only an expression of opinion and cannot be met with such intimidation by subjecting him to prolonged interrogation, threatening arrest and seizing his mobile phone and SIM card. The court observed thus that the liberty of the person can only be curtailed by orders passed by the court in a properly instituted proceeding. Police authority was directed to immediately return the mobile phone and SIM card of the petitioner[121]. The Supreme Court also voiced a similar opinion in *In Re: Distribution of Essential Supplies and Services During Pandemic,* stating that there should be no clampdown on

[117] Mitigate risks of COVID-19 in Jammu & Kashmir by restoring internet, 19 March 2020, *https://www.amnesty.org/en/latest/news/2020/03/mitigate-risks-of-covid-19-for-jammu-and-kashmir-by-immediately-restoring-full-access-to-internet-services/*.

[118] SC 10 January 2020, *Anuradha Bhasin v. Union Of India*, WPC No. 1031/2019.

[119] SC 30 April 2021, *In Re: Cognizance for Extension of Limitation*, *Suo Motu* WPC No. 3/2021. See also, HC (Delhi) 22 May 2020, *All India Lawyer's Union v. GNCTD & ors*, WPC No. 3234/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-wpc-32342020-2020-05-22*. See also, THE WIRE STAFF, *Delhi HC raps Baba Ramdev for 'misleading' people on allopathy, calling coronil a 'cure' for COVID*, 18 August 2022 (*https://thewire.in/law/delhi-hc-baba-ramdev-allopathy-coronil-covid*). MD.S. AL-ZAMAN, *Prevalence and source analysis of COVID-19 misinformation in 138 countries*, in *IFLA Journal*, 48(1), 2022, 189-204, which states that among the 138 countries that were part of the study, India is the most misinformation-affected country.

[120] HC (Orissa) 28 June 2023, *Swadheen Kumar Rout v. State of Odisha*, CRLMC No. 1247/2020.

[121] HC (Calcutta) 1 April 2020, *Indranil Khan v. State of West Bengal*, WPC No. 5326/2020.

citizens' SOS calls for medical help through social media. And that this could lead to contempt action against states[122].

2.1.6.2. Freedom to assemble peaceably

In the context of allowing public gatherings during the pandemic, especially regarding election rallies, were the matters raised before the Court. In one case, the State Election Commission and the State were directed to ensure that the remaining election process has to be conducted under strict vigilance and that the COVID-19 protocol is to be enforced without further jeopardizing the health of the voters and those on election duty[123]. However, in another instance, the court recorded the appreciation of the effort taken by the Election Commission of India and the Police force in ensuring that there was no violation of the COVID-19 protocols by any political party during election time[124].

Towards the end of the first wave, the court held that not granting permission to hold a public meeting is clearly unsustainable under the law on the ground that there is a possibility of creating a law-and-order problem. However, any form of relaxation ahead of a festival that entails public gatherings, resulting in any untoward spread of COVID-19 disease will result in action taken against those responsible[125]. Further, small-scale elections were allowed by the court stating that the decision, to hold or not to hold an election or allow or not to allow a partic-

[122] SC 10 January 2022, *In Re: Cognizance for Extension of Limitation, Suo Motu* WPC No. 3/2021.

[123] HC (Telangana, DB) 17 May 2021, *R. Sameer Ahmed v. State of Telangana & ors*, WP (PIL) Nos. 56 and 58/2020. See also THE NEWS TEAM, *Modi slammed on social media amid deadly covid-19 surge in India*, in *Aljazeera*, 19 April 2021 (*https://www.aljazeera.com/news/2021/4/19/modi-slammed-over-rallies-festivals-amid-deadly-covid-19-surge*).

[124] HC (Kerala) 7 May 2021, *Dr. Pradeep K. P. v. State of Kerala*, WPC No. 10855 /2021.

[125] SC 20 July 2021, *In Re Alarming News Report About Kanwar Yatra In UP, Suo Motu* WPC No. 5/2021, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-no-5-2021-2021-07-20*.

ular event to take place, are matters of policy and policy matters are best left to the executive wing of the Constitution of India[126].

State high courts quashed criminal cases stating that there was a lack of evidence regarding the violations of prohibitory orders[127].

2.1.6.3. Freedom to move freely throughout the territory of India

In *Harish Vasudevan v. State of Kerala and Ors*[128], the Kerala High Court stated that there was a duty imposed on the state to facilitate movement for persons stranded at the checkpoint that included students, pregnant ladies, and, aged persons. While the court was deciding on restrictions of movement, it observed that individual state government should keep up their efforts to bring back those who are stranded in other states too[129].

Sudden restrictions on movement by prohibiting the use of local trains in the city by non-vaccinated people was challenged in the court. The court responded by granting time to the government to issue fresh

[126] HC (Delhi) 8 April 2021, *Jagmohan Singh & anr. v. GNCTD*, WPC No. 4423/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-wpc-44232021-2021-04-08*.

[127] District Court (Ernakulam, Kerala) 2 August 2023, *State v. Hibi Eden and others, Additional Chief Judicial Magistrate*, CC No. 18/2021. See also, HC (Punjab & Haryana) 24 August 2023, *Sukhbir Singh Badal v. State of Punjab and Anr.*, CRM-M-1672/2023. M. PLUMBER, *Violation of COVID Norms: Karnataka High Court Quashes Criminal Proceedings against workers of Campus Front of India*, in *Livelaw.in*, 4 April 2023, *https://www.livelaw.in/news-updates/karnataka-high-court-banned-campus-front-of-india-covid-criminal-proceedings-225490*; J. PRAKASH DUTTA, *Orissa High Court quashes criminal case against 146 villagers who gathered in church amid COVID restrictions to offer prayers for departed soul*, in *LiveLaw.in*, 5 April 2023, *https://www.livelaw.in/news-updates/orissa-high-court-violation-of-covid-guidelines-church-congregation-spread-of-corona-virus-criminal-intention-225554*.

[128] HC (Delhi) 16 December 2020, *Shri Kailash Nath Khanna v. The Commissioner North Delhi*, WPC No. 9840/2020, State Government directed to ensure that basic facilities are provided to the persons reaching the entry points as is stated in the guidelines specified above and any violations of the same would be viewed by this Court strictly.

[129] HC (Manipur) 16 July 2020, *Hillson Angam v. State of Manipur*, WPC No. 16/2020.

directives deciding on whether the vaccination status will make a difference to travel in local trains[130].

2.1.6.4. Freedom to practice any profession, or to carry on any occupation, trade or business

Deciding on the freedom to practice any profession, occupation, trade, or business, under article 19 (1) (g) of the Constitution of India, a three-judges-bench decision by the Supreme Court held that full payment of wages to the employees of private employers during the period of lockdown has to be made[131]. In another case, the question of financial assistance to private employees (bus drivers) during the pandemic resulted in a direction to constitute a committee to address their grievances[132].

The implication of the lockdown was financial distress resulting in loan waivers[133]. A plea for effective and remedial measures to redress the financial strain faced by the industrial sector due to the pandemic

[130] PTI, *Are restrictions on local trains for unvaccinated people justified in the current scenario, HC asks Maha govt*, in *The Indian Express*, 21 March 2022 (*https://economictimes.indiatimes.com/news/india/are-restrictions-on-local-train-travel-for-unvaccinated-people-justified-in-current-scenario-hc-asks-maha-govt/articleshow/90353231.cms?from=mdr*).

[131] SC 12 June 2020, *Ficus Pax Private Ltd. & ors v. Union of India & ors*, WPC No. 10983/2020, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-ficus-pax-private-limited-vs-union-india-2020-06-12*. See also LIVELAW NEWS NETWORK, *Was Indian Express Justified In Deducting Employees' Salaries During COVID-19 Pandemic? Allahabad High Court Says Labour Court To Decide*, in *Livelaw.in*, 4 March 2023, *https://www.livelaw.in/news-updates/allahabad-high-court-indian-express-covid-19-pandemic-salaries-labour-court-223083*.

[132] HC (Manipur) 14 October 2020, *All Manipur School Student Transporter Association v. The State of Manipur & ors*, WPC No. 459/2020, available at *https://www.covid19litigation.org/case-index/india-high-court-manipur-single-judge-wp-c-4592020-2020-10-14*.

[133] Reserve Bank of India, Notification: Resolution Framework – 2.0: *Resolution of Covid-19 related stress of Individuals and Small Businesses*, 5 May 2021 (*https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12085&Mode=0*).

was allowed to the extent of a government notification[134]. Regarding other matters of waiver of the 10% pre-deposit amount that has been directed to be paid by the Central Government Industrial Tribunal on the basis of commercial activities in all sectors that are facing a backlash on account of the outbreak of COVID-19 and the preventive shut down of commercial activities was directed to be entertained by the concerned authorities[135].

The response of the court to the challenges faced by medical professionals was to ensure that appropriate Personal Protective Equipment (PPE) is made available to all Health Workers[136], and that there is a need for guidelines for providing security to doctors[137].

The slashing of prices of Rapid Antigen test implemented by the government was upheld, stating that the general public was affected as a result of the high prices[138].

Lastly, courts have stressed the importance of health, which is identified as an integral component of the fundamental right to life, than trade or business. Articles 19 (6)[139] and 21 of the Constitution of India,

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[134] SC 23 March 2021, *Small Scale Industrial Manufactures Association (regd.) v. Union of India & ors*, WPC No. 476/2020, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-writ-petition-c-no-476-2020-2021-03-23*. The additional support made in the plea was in addition to the COVID-19 Regulatory Package notified by the RBI with respect to loans, working capital facilities and restructuring of stressed account.

[135] HC (Delhi) 13 July 2021, *M/S Riding Consulting Engineers India Limited v. Assistant P.R. Commissioner, Delhi (North)*, WPC No. 1882/2021 & CM APPL. 5479 /2021, available at *https://www.covid19litigation.org/case-index/india-high-court-delhi-new-delhi-wpc-18822021-cm-appl54792021-2021-07-13*.

[136] SC 8 April 2020, *Jerryl Banait v. Union of India & anr.*, WPC No. 10795/2020, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-new-delhi-no-107952020-2020-04-08*.

[137] *Ibidem*.

[138] However in HC (Kerala) 4 October 2021, *Devi Scans (P) Ltd. v. State of Kerala*, WPC No. 10997/2021, court stated that the rate was to be decided after taking the representatives of private labs to be consulted.

[139] Article 19 (6) of the Constitution of India:

«(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right

do encourage the right to trade and business, however, they are saddled upon the doctrines of reasonable restrictions that can be imposed on trade or business during a pandemic. The Court stated that only if there is health and life, one can engage herself in trade or business, and did not issue any *mandamus* to withdraw the lockdown imposed on weekends[140].

3. Conclusion

The higher judiciary in India has been proactive during the pandemic, in terms of keeping the government on its toes through *suo motu* actions, especially in the context of the vulnerable population. By issuing directions and emphasizing on follow-up through affidavits from the states, courts have ensured compliance by the governments. The courts have also entertained Public Interest Litigation to ensure that the public remains active in bringing in grievances that affect the population before the judiciary.

Courts have no doubt acknowledged that the policymaking relating to the pandemic is the prerogative of the government. However, courts have interfered to the extent needed, when the policies affected the rights of the people. In cases where restriction of movement, maintenance of social distancing, and compulsion of inoculation was the subject matter of a case, decisions were made on the basis of scientific assessments. However, that is not to say that all individual scientific assessment has been categorized as valid, rather multiple organizational

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conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise».

[140] HC (Kerala) 27 July 2021, *Hameed Hajee v. State of Kerala*, WPC No. 14867/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-kerala-wpc-no-14867-2021-2021-07-27*.

scientific assessments is considered. Further, clashes with the policies of the government *vis-à-vis* fundamental rights have received the court's attention. In these cases, the decision was based on ground realities and hence decisions were different from one state high court to another state high court. Courts have rightfully stated that cases are to be decided on a case-by-case basis and cannot have precedential value.

Courts have also been proactive in issuing directions for enforcement of COVID-19 related measures that are founded upon fundamental rights, especially privacy, life, and personal liberty in the midst of a pandemic. Show cause notices were also issued. In other instances, courts have issued contempt notices to states for non-compliance with court orders.

Courts have been careful in considering restriction of state action in the absence of regulatory policy, and issuing directions to the governments to respond in a humane manner. They have also allowed government SOP's regarding burials after careful consideration of religious and other sentiments.

This is the result of the courts learning from their experiences in the first wave, wherein government policies were readily upheld by the Courts[141]. Submitting affidavits by governments to the Courts and obtaining their approvals were the norm of the day during the first wave. During the second wave, courts relooked at some of its earlier stances and made amends, sometimes, by giving a contrasting decision from

[141] As mentioned in the following cases: HC (Patna) 21 December 2020, *Parul Prasad v. State of Bihar & ors*, WPC No. 5609/2020, HC (Kerala) 31 May 2022, *V. N. Public Health and Educational Trust v. State of Kerala & ors*, SLP (C) Nos. 14219-14220/2020, HC (Kerala) 4 October 2021, *Devi Scans (P) Ltd. v. State of Kerala*, WPC No. 10997/2021, court stated that the rate was to be decided after taking the representatives of private labs to be consulted, HC (Bombay) 21 December 2021, *Deepak Kumar Radheshyam Khurana and ors. v. Mumbai Port Trust & anr.*, WPC No. 17123/2021, SC 20 July 2021, *In Re Alarming News Report About Kanwar Yatra In UP, Suo Motu* WPC No. 5/2021, HC (Delhi) 8 April 2021, *Jagmohan Singh & anr. v. GNCTD*, WPC No. 4423/2021, SC 4 February 2022, *The Surat Parsi Panchayat Board & ors v. Union of India*, CA No. 1067/2022 arising out of SLP (C) No. 17130/2021, SC 18 March 2020, available at *https://www.covid19litigation.org/case-index/india-supreme-court-india-civil-appeal-no-1067-2022-2022-02-04*; *In Re: Regarding Closure of Mid-Day Meal Scheme, Suo Motu* WPC No. 2/2020.

the previous one. Court has encouraged the need for SOPs and 'Means and Methods' in a variety of instances, from health care systems to vaccinations.

Certain changes that were brought about by the courts during the pandemic, especially within the internal working of the courts became permanent. Within the court structure, the functioning of e-courts has been retained. Another area where the court decisions made a permanent impact was in the field of education. By giving sanctity to online education, courts have ensured that they can be of regular use as educational institutions have embraced the e-learning mode of teaching without fear of backlash for doing so from the regulators[142].

[142] HC (Kerala) 31 August 2021, *Devika Ajay & ors. v. State of Kerala & anr.*, WPC Nos. 13129/2021 and 1591/2021, available at *https://www.covid19litigation.org/case-index/india-high-court-kerala-wp-c-nos-13129-2021-and-15971-2021-2021-08-31*.

THE POLITICAL ORDERING OF RIGHTS AND BODIES IN SOUTH-EAST AND EAST ASIA

Damian Chalmers[*]

1. Introduction

It is a familiar trope in anthropology that our collective lives consist of three bodies[1]. There are, first, the individual physical bodies, which comprise our lived experiences of ourselves. There is, secondly, the social body. This body is «good to think with» and is therefore often used to «represent other natural, supernatural, social, and even spatial relations»[2]. Societies and populations are thus often seen as both collective bodies and comprising the individual bodies of their members. They are accorded human qualities, such as their own health and education, both to emphasise the significance of their ties and to allow members to map their way in the world. There is, thirdly, the collective political body. Political communities, be these the nation, the public or the people, are cast as a single indivisible human body. This is done to bound a political order, integrate subjects into it, justify government regulation, and identify threats to that order. The Covid-19 pandemic challenged each of these three bodies. The virus threatened our lives and health, raised the possibility of social dislocation, most notably by

[*] Professor of Law, National University of Singapore.

[1] N. SCHEPER-HUGHES, M. LOCK, *The Mindful Body: A Prolegomenon to Future Work in Medical Anthropology*, in *Medical Anthropology Quarterly*, Vol. 1:1, 1987, pp. 6-41.

[2] *Ibid.*, pp. 18 and 19.

depriving many of their incomes or exposing the most socio-economically marginalized citizens most acutely to the virus, and the draconian measures required to contain the pandemic strained governments' political authority.

However, most would see the pandemic's greatest impact as being on the physical bodies of individuals. Its toll has been enormous. At the time of writing, the lives confirmed lost because of the disease are estimated at 6.8 million, with excess mortality rates suggesting the real numbers may be two to four times higher[3]. The much higher numbers of people suffering from long covid are simply not known.

This reveals a paradox. We associate courts with protection of these individual bodies. Parties come before them to protect individual autonomy, dignity and rights from institutional caprice and to ensure a proper balance is maintained between the public interest and the former. However, during the pandemic, courts in South East and East Asia did next to nothing here[4]. They also showed little concern with protecting the second body, the social body. They did not step in, therefore, to address distributive concerns. Significant judicial intervention took place around the third of these, the political body. However, the language invoked was interesting. There was little reference to the imagery of body. Little resort to the terminology of nationhood, people or peoples. Furthermore, whilst many of the judgments did ensure a high degree of executive autonomy, the predominant justification was that of safeguarding a wider public order. This was seen not only as central to overcoming the pandemic but also as something which should not be destabilized by it.

[3] H. WANG et al., *Estimating excess mortality due to the COVID-19 pandemic: a systematic analysis of COVID-19-related mortality, 2020-21*, in *The Lancet*, 2022.

[4] The jurisdictions examined were Hong Kong Special Administrative Region of China, Indonesia, Japan, Laos, Malaysia, People's Republic of China, the Philippines, Taiwan (Republic of China), Singapore, Thailand and Vietnam. There are, of course, great dangers with generalisations, such as those made in this Chapter. The claims made are therefore subject to the caveat that, as with any generalization, they are, at best generally true and allow for individual exceptions. However, the generalization still has value as indicating a trend.

After looking at how the case law in South-East and East Asia has cast collective life in such terms, this essay will draw some conclusions. Its central one is that in these regions the pandemic led to the characterization of individuals as first and foremost political subjects. That is to say their rights were seen as dependent upon the presence and stability of collective political orders. This left relatively limited scope for courts. However, it did lead to judicial intervention to secure some freedom of communication. For these orders relied both on their subjects knowing what they are about and having confidence in that. Reliable information is central to that. The success of such systems relies heavily on citizen trust. Their operation and authority require citizens to have faith in their capacity to protect, secure justice and generate a sense of collective enterprise (the missions of the three bodies set out above). In many instances, this seems to have been present within the region. However, the region also illustrated what happened when this is not present. In some instances, it took the form of political voice and protest. Concerns about the handling of the pandemic coalesced with a more generalized antipathy to the government with the consequence that protest sought a change in the political order rather than the rectification of particular decisions taken during the pandemic. In others, disagreement took the form of exit. Individuals disengaged. They ignored official advice about what to do with their bodies, sought out other sources of information for authoritative advice, and reorganized their social relations in new ways to address the risks they perceived Covid-19 to pose.

2. Public Sway over Individual's Bodies

Covid-19 posed a dual challenge to individual's bodies. Most directly, it threatened these with physical harm and, in some cases, death. However, it also threatened individuals' management of their own bodies, in particular their individual autonomy. Such autonomy has historically been centred, and not just in liberal societies, on the 'harm' principle. Individuals are free to do what they want with their bodies pro-

vided that this neither harms others nor some wider public interest[5]. Such a principle relies on individuals' knowing what their bodies do so that they can identify when they are causing harm. However, a feature of much of the pandemic was that individuals could not do this. They neither knew when they were transmitting the pathogen nor the consequences of transmission.

This dual challenge coalesced most clearly in South East Asian courts around protection of the individual right to health. In a 2021 challenge before the Indonesian Supreme Court, the final court of appeal in Indonesia, the applicant challenged a Jakarta Regulation enabling individuals to be fined if they refused vaccination. The applicant relied, in particular, on Article 28A of the Constitution, which grants all individuals «the right to live and the right to defend his life and existence» and a 2009 law which grants every individual the right to determine the health services necessary for themselves[6]. The court dismissed the application. It reasoned, uncontroversially, that individual rights can be limited where this is necessary to protect the public interest. Of particular interest was the public interest identified by the court to warrant this limitation. The limitations on individual rights were to be justified by the principle of *salus populi suprema lex esto* (the welfare of the people should be the supreme law). The idea of a collective health of the people was thus to take precedence over the rights of individuals to manage and decide their own health needs.

This left the question open of how courts were to balance individual and collective health needs. For even if individuals are not granted the right to manage their own needs, that is not to say that no weight is be attached to the former.

This was done in a variety of ways.

In a 2020 judgment, the Indonesian Constitutional Court indicated officials were to have regard to individual health needs, but there was no duty to protect them, thereby suggesting that they could be accorded no weight. The case concerned a claim by the Indonesian Health Law

[5] Mills' harm principle is well known. For a good discussion see P. TURNER, *«Harm» and Mill's Harm Principle*, in *Ethics*, Vol. 124:2, 2014, pp. 299-325.

[6] 10 P/Hum/2020 *Happy Hayati Helmi vs Governor of Dki Jakarta and Jakarta Regional People's Representative Board*, Judgment of 24 March 2021.

Society claiming that insufficient Personal Protective Equipment had been provided to medical staff during the early days of the pandemic, and that this breached a number of constitutional provisions, notably Article 28D(1) which granted all individuals the right of recognition and guarantees before the law, and Article 34(3), which required, inter alia, the State to provide sufficient medical services. The court recognized these required the government to acknowledge a responsibility to provide such equipment but stated they did not compel the government to provide it as the relevant law granted it some discretion over the matter[7].

Other courts did not engage in balancing as they stated they were unable to calculate the relevant risk to the individual. In the Philippines, a motion for early release of a prisoners on the basis that they might be exposed to greater risk of Covid-19 in prison was denied on the ground that insufficient evidence had been provided of this risk[8]. Equally, the Singapore High Court rejected a challenge to a transfer of a child to the United Kingdom in a custody case on the basis that the higher rates of Covid-19 in the latter State at that time exposed the child to undue risk. The Singaporean High Court noted developments were fast changing, thereby making it difficult to ascertain the level of risk. It was, moreover, sceptical that the long-term welfare of the child should be susceptible to such an unstable basis for making decisions about custody[9]. In similar ilk, the Administrative Court in Taiwan (Republic of China) refused to stay the deportation of a Thai national on the grounds of increased risk of contracting Covid-19 there on the ground that the possibility was inconclusive and speculative[10].

Finally, standing was denied to prevent balancing on the ground that the large number of interests involved meant that there was only a public interest at stake which subsumed individual private interests. The

[7] *Putusan No. 36/PUU-XVIII/202*, Judgment of 25 November 2020 (Indonesian Constitutional Court).

[8] *People of the Philippines v Juan Ponce Enrile* (CRIM Case No. SB-14-CRM-0238 For: Plunder), Judgment of 29 September 2020.

[9] *UYK v UYJ* [2020] SGHCF 9; [2020] 5 SLR 772.

[10] *Sanphophan Yongyut v Ministry of Labor*, Taipei High Administrative Court, 25 March 2020.

Taiwanese (ROC) High Administrative Court therefore refused a lawsuit which sought to compel the government to purchase a WHO certified vaccine in order to protect the individuals' health[11]. The court held that the applicants lacked standing. The court held that diseases taken by the national authorities were, given their structure, object and effect, measures taken in the public interest. As they were general measures taken in the public interest, there was no possibility for parties to compel them.

3. Dissipated social connections

A WHO mantra during the pandemic was that «nobody is safe until everybody is safe»[12]. The mantra suggested physiological interdependence. A threat to one person's body posed a risk to the health of all other bodies. It also suggested, however, a strong ethical commitment to one another. For the sickness and death of other bodies suggested social dislocation and inequality. The ethical responsibilities that flowed from being part of a body such as international or national society (these were after all not organisations) required nobody to be medically or economically abandoned or to be unduly exposed to risk. Within States, this reinforcing relationship between our mutual vulnerability to one another and our mutual commitment to one another was important for enabling collective action. It provided reasons why individuals should take measures to mitigate the risk of infecting others. It also provided reasons for the allocation of protection. Vulnerable and exposed individuals should, first, be offered the vaccination because it was both the right thing to do and more likely to curb the spread of the virus.

Courts protect this social body and the network of commitments associated with it most notably by monitoring the distribution of risks and benefits through both the non-discrimination and proportionality principle. The former ensures an equilibrium of sorts between different

[11] *Administrative Verdict of Taipei High Administrative Court 2021 No. 623*, Judgment of 30 June 2021.

[12] See WHO website at *https://www.who.int/news-room/photo-story/photo-story-detail/No-one-is-safe-from-COVID19-until-everyone-is-safe*.

groups and individuals whilst the latter ensures excessive burdens or costs are not placed in individuals.

These principles exercised little sway, however, in judicial practice in the region during the pandemic.

In a number of jurisdictions, challenges were therefore made against restrictions on the basis that these were discriminatory. In no instance were these challenges successful.

In Singapore, the High Court rejected an application for review of government directives which provided that the government would not pay for the medical bills of those who were unvaccinated and that dismissal of unvaccinated employees would not constitute wrongful dismission on the ground that this breached the constitutional prohibition on discrimination. The court found that the authorities had acted in good faith, relying on proper reasons backed by objective evidence and did not fail to consider relevant considerations. As a consequence, it could not engage in any further substantive review[13]. An Indonesian Circular requiring those using public transport and making long journeys to have a PCR before traveling was argued to discriminate against those who used this transport. The Supreme Court found the circular not to be reviewable[14]. In Hong Kong Special Administrative Reigon of China (HKSAR), the Court of First Instance rejected a claim by a Pakistani citizen that he was subject to racial discrimination as other foreign nationals arriving on the same flight had a choice of where they did their quarantine whereas he was placed in a centre. The court found neither race nor nationality had played a role in the decision[15]. In another Singaporean case, the High Court rejected an argument that a stay of the death penalty for non-Singaporean prisoners convicted of the death penalty and not for Singaporean prisoners constituted unlawful discrimination. It found only one such instance of such a stay and the circumstances of that case were very different from the case in hand.[16] Finally, in Japan, the Osaka District Court refused to suspend operation

[13] *Han Hui Hui and others v Attorney-General* [2022] SGHC 141.

[14] *Sholeh vs Kepala Bnpb Selaku Ketua Pelaksana Gugus Tugas Percepatan Penanganan Covid-19*, Judgment of 14 October 2020.

[15] *Syed Agha Raza Shah v Director of Health* [2020] HKCFI 770.

[16] *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 31.

of three nuclear plants on the ground that nearby residents were subject to more risks from these plants because they could not evacuate as a result of Covid-19 restrictions. The court noted that inspections had found these plants to be safe and the prefectures had put in place safe evacuation measures[17].

There was a similar unwillingness to countenance proportionality. In the HKSAR, where the proportionality principle is widely invoked more generally[18], the Court of First Instance thus rejected a challenge to the HKSAR Vaccine Pass having to be shown to enter shopping malls. The applicant argued that this deprived her of the possibility to purchase food and violated her human dignity. The court noted there were many outlets where food could be purchased without proof of vaccination, and the pass was a proportionate means to protect public health[19].

4. The Political Body and Public Order: Integration and Regulation

The political community is also granted bodily qualities as a way of warranting official action to be taken in its name[20]. Like the body, the political community is fully integrated and indivisible. It also transcends its constituent parts. If the body is thus more than simply one's organs, limbs and brain so a political community comprises its individual subjects and sets out a common subject that is autonomous from them. Alongside this, the political community, like the body, is cast as a lived experience. It is a phenomenological being with its own historical experiences and spatial awareness. Finally, as with the body, the political community's environment is seen as both a lifeforce which must be exploited and cultivated to sustain the community, and a threat which

[17] *Petition for provisional suspension of nuclear power plant operations (Osaka District Ct, No. 2 (yo) 2020)*, Judgment of March 17 2021.

[18] On this, J. CHAN, *Proportionality after Hysan: Fair Balance, Manifestly without Reasonable Foundation and Wednesbury Unreasonableness*, in *Hong Kong Law Journal*, Vol. 49, 2019, pp. 265-294.

[19] *Law Yee Mei v Chief Executive of HKSAR and Others* [2022] HKCFI 688.

[20] On this, E. SANTNER, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*, Chicago, 2011.

can destroy it. All these qualities are used to justify integration of the subject's integration within the political system, to enable her to identify it and grant it authority. They are also used to regulate her. The well-being of the community depends on her contributing to that; its unity depends on her conformity; its ability to manage its relationship with the environment depends upon her subscribing to what counts as a threat to it.

One would have, thus, expected significant judicial deference, therefore, to administrative authorities invoking arguments along this ilk, such as safeguarding the national well-being, the health of the nation, or the life of the people. After all, the pandemic involved both extensive regulation of individuals and depended upon significant political mobilisation insofar as effective action relied on strong compliance with and support for regulatory demands. However, there was little reference to it in the case law.

The only instance of this vision of political community being articulated during the pandemic was by the HKSAR Court of Appeal in *Kwok Wing Hang*[21]. This concerned an order of the Chief Executive in Council which, acting under emergency powers, banned the wearing of masks at public demonstrations. A central argument of those contesting this order was that it was so wide that it should have been passed by the Legislative Council. The Chief Executive was acting ultra vires. The heart of the dispute turned around when there was a public danger as it was agreed that the relevant laws allowed her to act on occasion of such a danger. The Court draw a continuity between the colonial legal notion and that existing in modern Hong Kong. It comprises «serious and immediate threats to Hong Kong and its citizens as a whole which subsist(ed) for a period of time»[22]. Hong Kong was therefore treated as something which comprises and transcends its citizens, unitary in nature, and equally threatened by public disorder and disease. This judgment is an isolated example of this form of reasoning. Even though it was given in April 2020, the context was the prior protests in Hong

[21] *Kwok Wing Hang and Others v Chief Executive in Council (No. 6)* [2020] HKCFA 42.

[22] *Ibid.*, para. 133.

Kong and there is no significant mention of the pandemic in the judgment.

A more common approach revealed by two judgments, one Singaporean and the other Thai, suggested courts were more eager to safeguard a public order seen as both central to combatting the pandemic and enabling a collective way of life.

In Singapore, in *Da Costa*, the Court of Appeal refused to allow individuals to invoke the pandemic to destabilise established visions of political community. A challenge was made against elections being held during the pandemic on the grounds these elections would not be free and fair. In particular, it was argued travel restrictions made it difficult for many Singaporeans living abroad to cast their vote and returning officers were to advise those with respiratory symptoms or who were febrile not to vote because of the risk of covid. The court noted that insofar as a constitutional right to vote comprises a right to free and fair elections, applicants must show that restrictions had tainted the fairness and and/or freedom of these in some constitutionally impermissible manner. What had to be accorded priority, in other words, was this wider constitutional order. Neither elections nor applications to dismiss these elections could be sustained if they destabilized this order. This constitutional order was not about political community but something more prosaic: good governance. The court noted that each institution must be mindful of the province assigned to it and «remain within their respective provinces while respecting the work of the other branches within their provinces»[23]. In this context, if the Constitution did not provide an obligation on the Government to provide a means for every Singaporean living abroad to vote, the court held it could impose such an obligation[24].

In Thailand, the civil court indicated that its constitutional order was not simply a formal order but institutionalised a wider public order. In this instance, a challenge involving 10,000 petitioners, was made to use of 2005 emergency legislation to prevent large protests from taking place. It was argued that this violated the constitutional protections on

[23] *Ibid.*, para. 13(b).

[24] *De Costa Augustin v Attorney-General* [2020] SGCA 60; [2020] 2 SLR 621.

freedom of expression and freedom of assembly. The court upheld the emergency Decree. It noted even if it restricted these freedoms, such a large assembly risked an outbreak of Covid-19 and it was necessary to prevent this for the benefit of the public. It further noted, however, that if health circumstances changed, such restrictions might not be lawful in the future[25]. The constitutional order is interpreted here to serve a public purpose, namely to protect that public. However, the public order described is a sparse one. The language is not one of transcendental collective identities. Instead, it is a more interest-based public order which serves the interests of individuals not getting the disease. It protects them from outbreaks of this rather than indefinitely insulating some notion of prior political community from protest.

Three features of this public order can be discerned.

First, it provided for extensive rule by law. There was thus judicial sanction of wide-ranging new laws or the extensive application of existing laws to deal with various dimensions of the pandemic[26].

These included powers over the body. Such powers included extensive powers of detention. In HKSAR, the Court of First Instance rejected an argument that the Chief Executive in Council did not have the power to issue a decree placing those arriving in HKSAR in quarantine. It noted the public health emergency provided a legitimate reason for such a power as the emergency required the mobilization of the whole government[27]. They also included powers to administer treatments without prior informed consent. In Indonesia, the Supreme Court held that vaccinations could be implemented without the consent of those concerned. This was constitutionally justified as restrictions could be imposed on individual freedoms to protect the freedoms of others[28]. In Malaysia, the High Court refused to support an application against a particular vaccine being used on teenagers without a comprehensive

[25] *Sithijirawattanakul v Chan-o-cha*, Judgment of 29 October 2021, No. Por 5080/2564.

[26] On this, L. CHUA, J. LEE, *Governing through Contagion*, in V. RAMRAJ (ed.), *Covid-19 in Asia: Law and Policy Contexts*, New York, 2021, pp. 115-132.

[27] *Grant and Others v Chief Executive of the HKSAR and Others* [2020] HKCFI 90.

[28] No. 19 P/HUM/2021 *Oichida v President of the Republic of Indonesia*, Judgment of 6 May 2021.

disclosure of the risks or consideration of pending alternative vaccines on the grounds that the choice of vaccines was non-justiciable and the authorities were already making the necessary disclosures[29].

Judges also sanctioned powers to confiscate or destroy property. In the People's Republic of China, the High Court ruled that an individual's house could be demolished to allow the construction of a medical centre facility to address the health demands of the pandemic. This was because the relevant legislation on the prevention and treatment of infectious diseases allowed authorities to take those measures necessary to control the epidemic, and urgent construction of medical facilities was one such measure[30].

Secondly, this public order involved extensive executive autonomy from judicial checks. The Malaysian High Court held that the extension of a State of Emergency until 21 August 2021 which suspended any meeting of Parliament or State Legislative Assemblies was not susceptible to judicial review as the intent of the relevant provisions of the Malaysian Constitution was to exclude judicial review of a state of emergency and ordinances adopted under it[31]. In Thailand, a court held that it was unable to review an order only allowing residents of Phanf Nga to be tested for Covid-19 there on the ground that the legislation authorizing emergency decrees ousted administrative courts and the law on public administration from applying to it[32]. Similarly, a challenge against the authorities on the ground that the vaccination roll-out had been too slow and no free active screening had been provided was rejected. The Central Administrative Court refused to entertain the claim, stating that to do so would violate the separation of powers as it would mean its trespassing into the executive's power[33]. Finally, in Japan,

[29] *Ng Chii Wei & Others v Menteri Kesihatan & Others* [2021] MLJU 2198.

[30] *Jing Yukuan v Government of Linghe District, Jinzhou City*, Judgment of 16 April 2021 (Liaoning Administrative Appellate No. 102).

[31] *Datuk Seri Salahuddin bin Ayub & Others v Perdana Menteri Tan Sri Dato' HJ Mahiaddin bin Md Yasin & Another* [2021] MLJU 967.

[32] *Jantira v Governor of Phang Nga*, Judgment of 26 August 2021 (Phuket Administrative Court Case No. 71/2564).

[33] *Kongwatthanakul v Ministry of Public Health*, Judgment of 4 June 2021, No. 620/2564.

there was an unsuccessful attempt by Diet members to review a decision by the Japanese government to convene the Japanese Diet only 47 days after the Japanese Cabinet had been requested to do so, and the lack of discussion of central Covid-19 issues when it was convened. It was held that the Diet members lacked standing to request such a meeting[34].

Thirdly, this public order depended upon extensive and reliable information. This required, in part, extensive powers to require truthfulness from subjects. In Singapore, there were successful prosecutions for individuals lying about their whereabouts[35]. More frequently, it was not to spread false information about the pandemic. In Japan, there was successful prosecution of false public claims that an individual had tested positive for Covid-19[36]. Similarly, in the People's Republic of China, there were successful prosecutions for spreading of false information about Covid-19[37]. In Taiwan, Republic of China, a regulator's fine against a TV channel for negligently allowing false information to be broadcast about the spread of Covid-19 was upheld. The Taipei District Court found that this was not protected by freedom of speech because the channel had wrongfully labelled a city and hospital as high-risk leading to some panic[38].

However, there is also some evidence that this public order required some freedom of expression. In the Philippines, a charge that an individual had exaggerated the number of Covid-19 cases in Cebu and was therefore spreading false information about the disease was thrown out as the court found the claim was intended to be satirical[39]. In Taiwan, Republic of China, a charge of spreading false information about Covid-19 was quashed on appeal by the High Court. The court found

[34] *Claim for State Compensation under Article 53 of the Constitution*, Judgment of 24 March 2021 (Tokyo District Ct, No. 392 (u) 2018).

[35] *Public Prosecutor v Oh Bee Hiok* [2021] SGDC 63.

[36] *Forcible Obstruction of Business*, Judgment of 12 August 2020 (Nagoya District Ct. No. 765 (wa) 2020).

[37] *Prosecutor v Liu*, Judgment of 28 February 2020 (Beijing 0112 Criminal 1st Instance No. 229).

[38] *CTI Television v National Communications Commission*, Judgment of 14 September 2021 (Taipei District Court).

[39] *People of the Philippines v M. Beltran aka. «Bambi» (M-CEB-20-1664-CR and M-CEB-20-1665-CR)*, Judgment of 15 September 2020.

that whilst the information may have been false, freedom of speech was a fundamental right which could only be limited where there was a real and immediate risk to the public. That was not the case here[40]. Perhaps, most strikingly, in Thailand the civil court struck down a regulation that prohibited the dissemination of information which risked frightening people on the ground that it was too ambiguous and thus violated Thai constitutional protections on freedom of expression[41].

5. Trust, Public Order, and Bodily Rejection

The picture that emerges from this is that courts in South-East and East Asia allowed administrations considerable powers over their subjects' physical bodies. They did not require these administrations therefore to have a cohesive notion of society, the public, or the nation, or to set out these as embodying certain values which constrained what could be done. Administrations were free to treat subjects highly unequally or impose extremely onerous burdens on some. Furthermore, as measures were rarely based on emergency powers there was little discussion of these powers being necessary because the nation's existence or well-being was threatened. Instead, the dominant narrative was that these powers over individuals could be exercised to protect a public order: a legal and institutional order which served the public interest and was the only game in town for addressing the pandemic. Such an order did not rely on strong sense of «Us» in which people saw themselves as part of a single community. However, it did rely on trust. In the absence of legal constraints, it relied, in particular, on trust that administrations would take care of individual's lives, would distribute risk and costs fairly, and that the pandemic would not be exploited for political ends.

The low involvement of courts and the limited checks and balances did not result in widespread abuses and allowed executives and agen-

[40] *Prosecutor of the Taiwan Taoyuan District Prosecutors Office v Liu Qinzhen* (Taiwan High Court), Judgment of 26 January 2022, Minguo 110 Case No. 1873 Shang-Yi Z.

[41] *Reporter Production v Chan-o-cha*, Judgment of 6 August 2021, No. Por 3618/2564.

cies to respond more quickly and more extensively to the dangers posed by the pandemic. However, the region also illustrated the challenges of such a model. It relies on subjects trusting their governments with their lives and livelihoods, and, as a consequence, being relaxed about the absent of constraints on these. For these subjects, trust brings perceived risk down to manageable levels[42]. They do not need to believe that governments will eliminate danger to trust them but only bring these dangers down to a level and in a way that allows the former to live their lives that leaves them comfortable. What is at play in this calculation is therefore not simply the degree of hazard to which the citizen is exposed but a reflection in how government action will affect the subject's social, economic, and political relations more broadly. This may include whether it will leave her poorer or others richer, disrupt her social networks and friendships, or allow disliked political figures to exercise new power over her.

The region illustrated what happened when judicial protections are thin or absent, and this trust is not present.

In some instances, it took the form of exit from the system of health provided by the government. Most notably, individuals refused to submit their individual bodies to the vaccination that governments had told them would lower risks to themselves and others. In Hong Kong, uptake of vaccines amongst secondary education students was markedly lower in students that did not trust the government than those that did[43]. Fear of the State and health institutions has also been found to affect vaccine uptake in the Philippines.[44] In China, more broadly, it has been argued that whilst fear led to generalized compliance it also resulted in

[42] On this more broadly, N. LUHMANN, *Trust and Power*, Cambridge-Boston-Oxford-New York, 2017, pp. 28-35.

[43] G. CHUNG et al., *The impact of trust in government on pandemic management on the compliance with voluntary COVID-19 vaccination policy among adolescents after social unrest in Hong Kong*, in *Frontiers in Public Health*, Vol. 10, 2022, *https://doi.org/10.3389/fpubh.2022.992895*.

[44] This concerned update of vaccines against dengue in 2007. See G. YU et al., *Fear, mistrust, and vaccine hesitancy: Narratives of the dengue vaccine controversy in the Philippines*, in *Vaccine*, Vol. 39:35, 2021, pp. 4964-4972.

citizens being willing to tolerate non-compliance by others who expressed what many felt they were unable to express[45].

In other instances, it took the form of social dislocation. In Indonesia, heavy fines were levied on those who did not vaccinate. Vaccination rates were correspondingly high but a backlash took place on Tiktok with significant misinformation placed there about both vaccination in general and particular vaccinations. As Sinovac, the Chinese vaccine, was the main vaccine initially available, a significant amount of the anti-vaxxer discourse took on religious (i.e. the vaccine was not halal) and Sinophobic imagery[46]. Debates about vaccination thus tapped into wider debates about the place of Islam and the recognition and treatment of Indonesian Chinese within Indonesia. There was, to be sure, a backlash on Tiktok against this, which emphasized both that the vaccines were safe and a more inclusive vision of Indonesia. However, this polarized debate was undoubtedly a consequence of a combination of individuals feeling that they were deprived of their agency in deciding whether to vaccinate, and anxiety about the vaccine.

Finally, mistrust could take the form of political protest. In 2021, Thai vaccination rates were relatively high compared to its neighbours[47]. However, the government's handling of the pandemic became entangled with wider polarised debates about its authority. For the government's opponents, the pandemic simply became another reason to protest. In August 2021 the opposition proposed a no confidence motion in the government's failure to get adequate and timely supplies of vaccines[48]. This was accompanied by wide-scale protests[49]. This no-

[45] Q. LIU, *«Kill the chicken to scare the monkey»: Heavy penalties, excessive COVID-19 control mechanisms, and legal consciousness in China*, in *Law and Policy*, 2023, early view.

[46] Y. SASTRAMIDJAJA, A. ROSLI, *Tracking the Swelling COVID-19 Vaccine Chatter on TikTok in Indonesia*, Singapore, 2021.

[47] On this A. KITRO et al., *Acceptance, attitude, and factors affecting the intention to accept COVID-19 vaccine among Thai people and expatriates living in Thailand*, in *Vaccine*, Vol. 39:52, 2021, pp. 7554-7561.

[48] «Thai lawmakers' no-confidence debate focuses on pandemic», *Associated Press*, 31 August 2021, *https://apnews.com/article/business-health-pandemics-coronavirus-pandemic-c4a67059293a1747edae9e3eb6ba95d6*.

confidence motion was the third in two years, and debates about governance, economic issues and the management of the pandemic became increasingly intertwined in 2022 with further protests and motions of no confidence[50].

6. Conclusion

All this raises interesting questions about the place of courts in pandemics. South-East and East Asian governments might well point to their general success relative to other regions in protecting lives and livelihoods. The limited role of courts gave governments greater flexibility, prevented judicial intervention when other institutions were better placed to address the issue in hand, and limited opportunistic litigation. And this probably contributed to government successes. However, there were certain costs. Most notably, subject accepting government information was reliable and trusting government risk management strategies. A strong regional awareness of this is evidenced in the concern across the region to sanction the peddling of false information and to enlist courts for that purpose. However, courts can be used to secure trust in information not merely through having them as criminal law enforcers. They can also provide arenas about government authority by providing arenas where others can challenge government narratives, and this can be considered in a dispassionate way. In this, they can also provide assurances about the quality of government information. An independent institution can vouch for it after allowing those who contest it to give it their best shot. This could possibly be achieved, also, without the judicial activism or interventionism that concerns many governments in the region. To be sure, granting courts this vouchsafing role would involve greater debate about government information than is common in a number of States in the region. However, this debate took place anyway during the pandemic. The issue is whether such debate be directed to are-

[49] «Protesters are back, and angrier, as govt fumbles on Covid», *Bangkok Post*, 8 September 2021.

[50] «In Thailand, the COVID-19 Pandemic Unites Old Factions in Discontent», *The Diplomat*, 8 February 2022.

nas which allow it to be addressed in measured and structured ways, or whether it just be left to the hysteria of social media with all the consequences that has for the marginalized and the impressionable.

PANDEMIC AND JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS IN LATIN AMERICA

Natalia Rueda[*]

1. Introduction

Latin America and the Caribbean represent an extensive region that is marked by severe political instability, poverty, and critical human rights situations, along with armed conflicts in various countries. Nevertheless, the COVID-19 pandemic has resulted in an emergency situation that has aggravated some of these issues. The judiciary's action towards state intervention in handling the crisis has highlighted some of the challenges. An examination of litigation trends in the region reveals the varied roles judges perform in exercising control over public authorities.

This paper explores the features of litigation in Latin America while addressing the COVID-19 crisis, drawing on data from the COVID-19 Litigation Database Project. It highlights specific aspects of these actions, including the nature of the parties in litigation, the identification of vulnerable groups and the protection of fundamental rights.

The aim of this chapter is to highlight some of the peculiarities of litigation in Latin America, as these elements may allow a better understanding of the collected data.

[*] Assistant Professor, Universidad Externado de Colombia.

Litigation concerning COVID-19 in Latin America displays particular characteristics despite adhering to certain global trends compiled in the project's database, as per the established methodology and selection criteria. It is worthy of note that the database's intention is not to demonstrate a statistically representative range of cases, but rather accounts for the region's unique features. It tries to take into account the diversity of issues and actions, as well as the diversity of people involved.

The following sections detail the two primary legal measures implemented to address the governments' response to the pandemic. The essay will provide an outline of the constitutional and legal mechanisms for automatically controlling emergency legislation and analyse their impact on fundamental rights. Additionally, we will discuss the general features of the writs of *amparo* and *habeas corpus*, which, in some countries, serve as judicial mechanisms for the immediate protection of human rights. The paper will analyze the nature of the parties involved, the protected fundamental rights, and the impacted areas of law resulting from these actions. Moreover, trends and characteristics will be explored in detail.

2. General considerations about COVID-19 litigation in Latin America

It should be emphasised that the database is not meant to serve as a statistical database, thus the chosen cases do not aim to be a representative sample of litigation in Latin America during the pandemic. It would also be challenging to verify as there are no official statistics available on the number of court cases instituted.

According to the data collected, the intensity of litigation depends on several factors. The first of these is probably related to the geographical factor. In this sense, it is undeniable that Brazil is the country with the largest number of cases in the database, given its continental size. So much so that, according to the World Bank, Brazil will have more than 215 million inhabitants by 2022[1]. Moreover, Brazil is among the

[1] Data available at *https://data.worldbank.org/indicator/SP.POP.TOTL?locations=BR*.

nations heavily impacted by the COVID-19 pandemic. This situation likely contributes to the significant amount of legal disputes observed in the country. Notably, these disputes encompass various fields of law and are prevalent across all geographic areas and judicial tiers (established in the Federal Constitution of 1988, chapter 3 art. 92).

Other countries report a significant number of judicial decisions, in some cases depending on the geographical and population dimension, but also on the impact of the pandemic itself, in terms of number of cases and spread of the disease[2]. Indeed, Brazil is followed in terms of the number of cases by Colombia (51 million inhabitants), Costa Rica (5 million inhabitants), Chile (19 million inhabitants), Argentina (46 million inhabitants) and Mexico (127 million inhabitants). The greater judicial activity in these countries can also be explained by the existence of resources for the urgent judicial defence of fundamental rights. In fact, all these countries have the remedy of *amparo* or comparable measures that enable access to justice in specific circumstances[3].

On the other hand, the countries with the lowest number of cases are the Caribbean islands (around 7 million inhabitants): Virgin Islands, Saint Kitts and Nevis, Anguilla, Antigua and Barbuda. However, there are other countries with very few cases, where the low number of decisions may be related to social and political factors, which are reflected in the limited availability of information.

In this sense, for some countries it is difficult to determine whether they are really less litigious. This applies, e.g., to Venezuela or Dominican Republic, where it is not possible to access a public system for consulting decisions, and to Peru, where judgments are published only at the end of the trial and are not always available for consultation.

Another factor that may have influenced the selection of cases is the difference between presidential (Colombia, Costa Rica, Chile) and federal countries (Brazil, Argentina, Mexico). In the latter, there is not always a uniform system of information from the judiciary. In all countries, cases decided by supreme or constitutional courts are more rele-

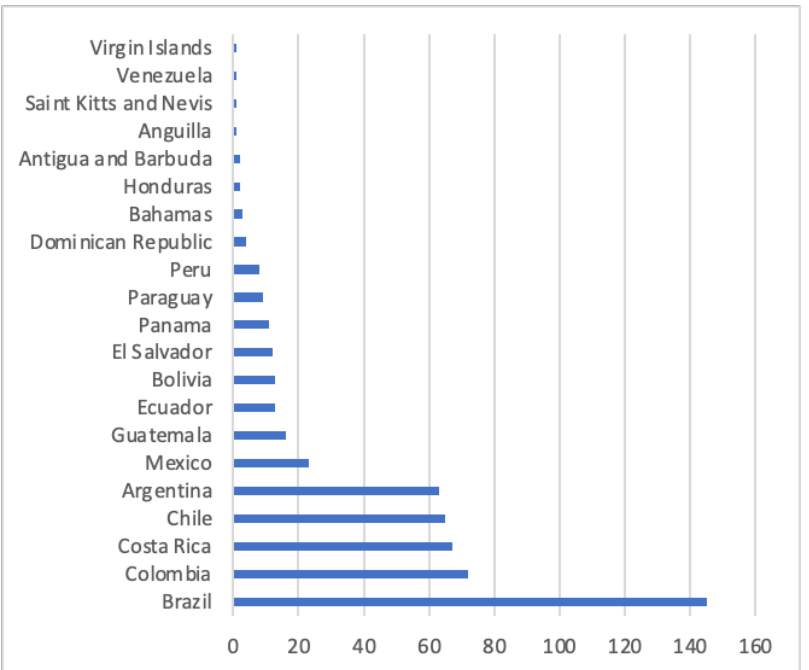
[2] According to data reported on *https://ourworldindata.org/covid-cases* these countries and Brazil are the most affected countries in the region in terms of the number of cases of Covid-19 disease and confirmed deaths.

[3] The data relating to this type of action are presented in the following section 2.2.

vant because of their impact on national jurisprudence, but in federal countries there are also cases from lower courts which are more difficult to find in public consultation systems.

In general, the selection of cases was also based on the relevance of the pandemic for the court's decision. Thus, although in many cases the courts mentioned the pandemic, the economic and social crisis or the COVID-19 disease, the latter were not always a decisive aspect of the decision, or it was not always possible to identify a burden on fundamental rights as a result of a measure adopted by the government to combat the pandemic. All those cases were not selected.

CHART 1. PROPORTION OF CASES PER COUNTRY



Source: Collective elaboration based on data reported in the COVID-19 litigation project

These data refer to global litigation in the region. However, in order to understand some aspects related to the guarantee of the protection of fundamental rights in Latin America during the pandemic, it is neces-

sary to look at the typology of actions and the characteristics of the cases, which are presented below.

3. The type of actions

Regarding the type of actions, the selected cases address both constitutionality control and automatic legal control, along with urgent actions to protect fundamental rights. The following will provide background information on these two mechanisms, in particular the rationale for their use during the pandemic, as well as general aspects of declarations of states of emergency and risks to the protection of fundamental rights.

3.1. Constitutional and legal mechanisms for automatic control of emergency provisions

The majority of cases in 2020 relate to automatic control of constitutionality and legality. The selection has taken into account the decisions issued in 2020, with the courts playing a crucial role in preventing any potential misuse of exceptional powers. The heightened level of such actions during the initial crisis period may have been due to the need for quick responses.

Several countries have instituted states of emergency, enabling the executive branch to implement measures to address the crisis and manage the pandemic. These states of emergency confer temporary extraordinary powers upon the executive, potentially resulting in limitations on fundamental freedoms and rights or a transient shift in the balance of public powers[4]. A number of countries have availed themselves of this

[4] For a comparison of this figure in the region, see M.I. CARRASCOSA, *Estados de excepción en América Latina. Una revisión de la limitación de derechos durante la COVID-19*, Guatemala, 2020 *http://asies.org.gt/pdf/estados_de_excepcion_en_america_latina_una_revision_de_la_limitacion_de_derechos_durante_la_covid_19.pdf*.

option to provide swift solutions in exceptional circumstances. At the outset of the pandemic, this was particularly evident[5].

This shows a trend towards increased public power concentration within the executive branch, which has gained more competencies in managing the crisis. Nonetheless, it seems that there is a shared opinion in Latin America that executives have tried to exceed the use of exceptional privileges that violate constitutional regulations or unreasonably affect essential rights[6].

The disruption of balance among public powers during the emergency may have had a direct impact on the outcome of legal proceedings, hence the rise in cases seeking urgent protection of basic rights. It should also be noted that the closure of courts or parliaments may have

[5] «Constitutional states of emergency have been declared in Honduras, Guatemala, Peru, Colombia, the Dominican Republic, Venezuela, Chile, and Ecuador. Similar measures have been taken through the state of emergency in Bolivia, Brazil, and El Salvador. The legislature has been suspended in Argentina, Brazil, Chile, Colombia, El Salvador, Honduras, Mexico, and Paraguay. Additionally, curfews have been imposed in Bolivia, Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Honduras, and Paraguay. Finally, in Argentina, Chile, Colombia, Costa Rica, the Dominican Republic, Mexico, and the Dominican Republic, the executive was granted exceptional powers to control the crisis triggered by the pandemic»: CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMÉRICAS, CEJA, *Documento de trabajo: acceso a la justicia. Foro permanente sobre acceso a la justicia y derecho a la salud en América Latina en el contexto de la pandemia del covid-19*, Santiago, 2022, 24, available at *https://biblioteca.cejamericas.org/bitstream/handle/2015/5700/A.%20Documento%20Acceso%20a%20la%20Justicia_vf.pdf?sequence=5&isAllowed=y*.

[6] Among others, see J. CABANILLA DE VARGAS, *Restricción de los derechos fundamentales en tiempos del COVID-19*, in *Contribuciones a las Ciencias Sociales*, 68, 2020, 1-8, available at *https://www.eumed.net/rev/cccss/2020/06/derechos-covid.html*; C. FILÁRTIGA CALLIZO, R. AYALA MIRET, *Hiperpresidencialismo y derechos fundamentales en tiempos de Covid-19. Un análisis del caso paraguayo*, in *Derecho y Realidad*, 18(36), 2020, 161-180; doi: *https://doi.org/10.19053/16923936.v18.n36.2020.12162*; J.M. NAVARRO AMELLER, *El dilema del cumplimiento de los derechos fundamentales en cuarentena COVID 19*, in *Revista Jurídica Derecho*, 11(17), 2022, 157-188, available at *http://www.scielo.org.bo/pdf/rjd/v11n17/v11n17_a09.pdf*; R. VICIANO PASTOR, A. RAMÍREZ NARDIZ, *Seguridad sanitaria y limitación de derechos fundamentales en Colombia durante la pandemia de Covid-19*, in *Estudios constitucionales*, 20(2), 2022, 228-256; doi: *http://dx.doi.org/10.4067/S0718-52002022000200228*.

exposed the executive's greater concentration of power and put access to justice at risk, further impacting fundamental rights[7].

Furthermore, on these occasions, the courts have played a crucial role in evaluating whether measures implemented by governments with extraordinary powers comply with constitutional and legal requirements. As such, judicial oversight is a sound mechanism against potential misuse of such exceptional powers.

In fact, proceedings have revealed that various measures failed to meet demands for exceptionality, necessity, proportionality, or temporal boundaries. In some cases, fundamental rights' restrictions were deemed unjustified[8]. It should also be noted that these decisions are based on clear reasoning, with the principles and weighting techniques explained in detail.

In this context, Colombian case is particularly noteworthy as it demonstrates a greater degree of judicial activity in terms of constitutional control over the exercise of extraordinary powers by executives.

In Colombia, the government declared a State of Economic, Social and Ecological Emergency, resulting in the issuance of 115 Legislative Decrees during the initial three months which dealt with various issues. The Constitutional Court undertook a thorough examination of the 115 Decrees. Among these, 57 Decrees (50%) were found to be in full compliance with the Constitution, while 51 Decrees (44%) were de-

[7] Just as an example, during the pandemic in Peru, the judiciary was temporarily closed. It was revealed in January 2021 that there were 3.3 million pending cases awaiting a decision. Information available at *https://gestion.pe/peru/poder-judicial-ha-acumulado-33-millones-de-expedientes-sin-resolver-durante-la-pandemia-nndc-noticia/*.

[8] That is the case in: Ecuador, Constitutional Court of Ecuador, 1 December 2021, No. 23-20-CN and others (accumulated lawsuits), available at *https://www.covid19litigation.org/case-index/ecuador-constitutional-court-ecuador-no-23-20-cn-and-others-accumulated-lawsuits-2021-12*; Brazil, Federal Supreme Court, 7 May 2020, ADI 6387 MC-REF, available at *https://www.covid19litigation.org/case-index/brazil-federal-supreme-court-adi-6387-mc-ref-2020-05-07*; El Salvador, Constitutional Chamber of the Supreme Court of Justice, 8 June 2020, Inconstitucionalidad 21 2020 AC, available at *https://www.covid19litigation.org/case-index/el-salvador-constitutional-chamber-supreme-court-justice-inconstitucionalidad-21-2020-ac*; Panama, Supreme Court of Justice of Panama, 13 March 2021, No. 301-2020, available at *https://www.covid19litigation.org/case-index/panama-supreme-court-justice-panama-no-301-2020-2021-03-13*.

clared conditionally constitutional and subject to certain conditions or interpretation. A total of 7 Decrees (6%) failed to meet the legal standards as specified in the Constitution and were declared unconstitutional. The Constitutional Court carefully examined all 884 articles included in the Decrees. It concluded that most of them, specifically 706 articles (80%) were entirely consistent with the Constitution and therefore constitutional. However, 80 articles (9%) were deemed conditionally constitutional as their validity was dependent on certain circumstances. 98 articles (11%) have been deemed unconstitutional for contravening the fundamental principles entrenched in the Constitution[9]. The infringement of legal necessity, proportionality or unity of matter, which are fundamental constitutional prerequisites of any emergency legislation, were the basis for such unconstitutionality[10].

The constitution serves as the ultimate benchmark for all state actions, even in exceptional circumstances, with fundamental rights acting as limitations on state power. Therefore, in the face of the COVID-19 pandemic and the particularly challenging situation, the possibility of automatic constitutional control of emergency legislation provides a guarantee to protect fundamental rights.

The imperative to combat and contain the virus has tested the normative structure of the constitutional state across all its spheres, exposing democratic institutions to unprecedented situations. Within this context, proportionality tests enable the evaluation of grounds and constitutional justifications for limiting fundamental rights, as well as the establishment of a balance between the imperative to safeguard public health and other fundamental rights[11]. In fact,

[9] M.A. Castro Hernández, *Control constitucional del Estado de excepción y los decretos expedidos en Colombia durante el año 2020 con ocurrencia del Covid-19 y la vulneración de derechos fundamentales*, in *Revista Jurídica Piélagus*, 20(1), 2022, doi: *https://doi.org/10.25054/16576799.3209*.

[10] For example, see Colombia, Constitutional Court, C-155/2020, available at *https://www.covid19litigation.org/case-index/colombia-corte-constitucional-c-15520-2020-05-28*.

[11] In this regard, see D.B. González Carvallo, A.D. Mateos Durán (coords.), *Herramientas para evaluar la restricción de los derechos fundamentales: el test de proporcionalidad y la pandemia por covid-19*, Centro de estudios constitucionales de la Suprema Corte de Justicia de la Nación, 2022, available at *https://www.sitios.scjn.gob.*

> The defining characteristic of a state of emergency is its ability to limit basic rights. In response, the government implements measures that primarily entail curtailing citizens' freedoms in various ways. For instance, freedom of movement is rendered relative, and usually, long periods of immobility are stipulated. Violating these measures can result in the imposition of fines or even criminal prosecution. In yet another aspect of curtailed freedoms, all non-essential social activities in places such as restaurants, bars, cinemas, shopping centres, and others have been prohibited. During this period of restricted mobility, only essential services and activities, including healthcare, purchasing medicines and food, and banking transactions will be permitted[12].

In this context, the state of emergency and state of exception require an assessment of fundamental rights to determine the acceptable scope of any limitations. During a crisis, the draft litigation offers several options regarding the fundamental rights' essential core. At the outset of the pandemic, Latin American courts focused primarily on ensuring uninterrupted health service delivery and supported measures that curtailed personal freedom as appropriate in mitigating the virus's spread. However, this control highlights that even though a state of emergency is temporary, any government-enforced restrictions must be reasonable and appropriate, subject to regulatory oversight.

In this context, Resolution 1/2020 from the Inter-American Court of Human Rights pertaining to the pandemic and human rights in the Americas is of significance. It advised taking all essential steps to safeguard the rights to life, health, and personal integrity of individuals, with a human rights approach that should form the basis of any State strategy, policy, or measure to counter the COVID-19 pandemic. This necessitates, according to the Court's own wording, that rulings align with the values of universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, a gender perspective, diversity, and non-discrimination. Access to opportunity must be fair for all, recognising differences in gender, ethnicity, and other intersecting identities, while promoting inclusion.

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mx/cec/sites/default/files/publication/documents/2022-10/HERRAMIENTAS%20PARA%20EVALUAR%20DERECHOS_DIGITAL.pdf.

[12] E. FIGUEROA GUTARRA, *Estados de excepción, Covid-19 y derechos fundamentales*, in *Revista Oficial del Poder Judicial*, 11(13), 2020, 417.

According to this Resolution, measures limiting rights must adhere to the "pro persona" principles, only carried out when essential, and with the sole purpose of ensuring public health and comprehensive protection. Thus, measures must meet the criteria of legality, necessity, proportionality, and temporality, without impacting the democratic system.

These guidelines were employed by the Latin American Courts when assessing the constitutionality and legality of emergency decrees and subsequent legislation issued as a result.

3.2. Judicial mechanisms for urgent human rights protection

In many countries, the writ of *amparo* and *habeas corpus* hold significant importance. Amidst uncertain balance of powers, these two legal mechanisms provide prompt protection to safeguard fundamental rights that may be under threat by emergency decrees. The expedited procedure ensures speedy resolution of such cases. In addition, some courts have suspended their regular operations to meet the demands[13].

The writs of *amparo* and *habeas corpus* are related with the Inter-American standard of Effective judicial recourse[14]. According to the Article 25.1, American Convention on Human Rights

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such vi-

[13] For example, between March 18th and May 5th, 2020, the Mexican judiciary processed solely "urgent cases" according to public information available at the time. Afterward, from May 6th to May 30th, 2020, the virtual processing of *amparo* procedures and the resolution of pending cases prior to the suspension of activities were permitted. As of July 31st, 2020, new *amparo* processes, excluding non-urgent matters, could be initiated virtually. However, following this period, all procedures resumed without interruption. In response to the growing number of infections, there were occasions where it was essential to reinstate the measures established during the third period. It should be noted that individual judges were responsible for determining what constituted an emergency matter.

[14] IACtHR, Case *Cantoral Benavides*. Judgment of 18 August 2000. Series C No. 69, para. 165.

olation may have been committed by persons acting in the course of their official duties.

In line with the Inter-American Court of Human Rights, effective judicial protection requires States to provide a simple, effective and rapid remedy. It must be primarily a judicial remedy, but may be of another nature if it is effective to protect fundamental rights against acts committed by private or public bodies. The effectiveness of the remedy is determined by its "adequacy" in identifying a violation and offering what is necessary to remedy it[15].

In order to guarantee effectiveness, it is not sufficient that the remedies are formally established, but they must be «capable of producing results or responses to the violations of rights contemplated in the Convention»[16]. An effective remedy therefore means that the judge's analysis cannot be reduced to a mere formality, but must examine the grounds put forward by the applicant. This does not mean that the effectiveness of a remedy is assessed on the basis of whether it produces a favourable result for the applicant[17].

In Advisory Opinion OC9/87 of 6 October 1987 on judicial guarantees in states of emergency, the Court concluded that, in accordance with the provisions of Article 27.2 of the Convention, the judicial guarantees for the protection of human rights which may not be suspended are those expressly referred to in Articles 7.6 (*habeas corpus*)[18] and 25.1 (*amparo*), considered in the context of Article 8 (Judicial guaran-

[15] IACtHR, Case *Durand y Ugarte*. Judgment of 16 August 2000. Series C No. 68, para. 102.

[16] IACtHR, Case *Ximenes-Lopes v. Brazil*. Judgment of 2 July 2006, para. 192.

[17] IACtHR, *Dismissed Employees (PETROPERÚ, MEF AND ENAPU) vs. Peru*. Judgment of 23 November 2017. Series C No. 344. Para. 155.

[18] Anyone deprived of his liberty shall have the right to bring proceedings before a competent court or tribunal in order that the court or tribunal may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that any person who is threatened with deprivation of his or her liberty shall have the right of recourse to a competent court or tribunal in order that the court or tribunal may decide on the lawfulness of such threat, such right of recourse shall not be restricted or abolished. The appeal may be made by the person himself or by another person.

tees). These are inherent to the preservation of the rule of law, even under the exceptional legality resulting from the suspension of guarantees (state of emergency)[19].

The *amparo* actions allow judges to issue many different orders to stop the violation of fundamental rights, e.g. ordering authorities to design or implement COVID-19 regulations[20] or annulling certain administrative decisions[21]. In some cases, the courts have ordered specific measures to remedy discrimination, taking into account the marginalisation of a group[22]. Hence, during pandemic the cases are very diverse

[19] Advisory Opinion OC9/87 of 6 October 1987 on judicial guarantees in states of emergency (Articles 27.2, 25 and 8 of the American Convention on Human Rights) (Series A No. 9. Para. 38).

[20] For example, in cases where the courts have ordered some kind of modification of vaccination plans, stating that someone must be vaccinated. In Mexico, there have been many lawsuits demanding that children be vaccinated because they were not included in the national vaccination plan. See Mexico, First Collegiate Court of the 24th Circuit, 25 October 2021, No. 582/2021 [reg no Tesis XXIV.1o.1 K (11a.)], available at *https://www.covid19litigation.org/case-index/mexico-first-collegiate-court-24th-circuit-no-5822021-reg-no-tesis-xxiv1o1-k-11a-2021-10*. To better understand the potential of amparo in addressing omissions, refer to I. DE PAZ GONZÁLEZ, R.D. AGUILAR SANTIBÁÑEZ, *Avances procesales y de derechos humanos de omisiones legislativas mediante el juicio de amparo en México*, in *Ius Comitiãlis*, 6(11), 2023, 167-184, available at: *http://portal.amelica.org/ameli/journal/137/1374011011/*. Similarly, Uruguay, Contentius Administrative Judge of Montevideo, 7 July 2022, No.41/2022, available at *https://www.covid19litigation.org/case-index/uruguay-contentius-administrative-judge-montevideo-no-412022-2022-07-07*.

[21] As happened with the administrative decisions ordering the expulsion of irregular migrants, without taking into account the conditions in the country of origin and the impact of the expulsion on the break-up of the family. See one example in Chile, Supreme Court of Justice, 1 June 2022, Causa No. 17721-2022, available at *https://www.covid19litigation.org/case-index/chile-supreme-court-justice-causa-no-17721-2022-2022-06-01*.

[22] For example, in Colombia, Constitutional Court, 18 April 2022, T-128/2022, available at *https://www.covid19litigation.org/case-index/colombia-constitutional-court-t-1282022-2022-04-18*, the Court found, among other things, a violation of the fundamental rights of midwives. It considered that the necessary remedies to stop and remedy the violation included: their recognition within the national health system to highlight their cultural contribution and ancestral knowledge; their prioritisation within the national vaccination plan against Covid-19; their training to face the pandemic in their territories.

and expound upon many relevant contextual facts that in typical judicial trials are disregarded[23].

3.2.1. The writ of amparo in Latin America: general characteristics

With differences, the *amparo* is characterised by short deadlines, because of the urgency of the protection; it is also an informal procedure, because the aim is to allow its exercise by any person. General information on this action in some countries in the region is presented below.

In Colombia, art. 86 of the Constitution provides a protective measure enabling any person to claim that their fundamental rights are being violated or threatened by actions or omissions of public authorities (and, in certain cases, by private entities providing a public service or impacting a collective interest). This provision is aimed at safeguarding the rights of individuals and curbing potential abuses by those in positions of power. Any judge can hear a *tutela* case, although there are assignment regulations within the judicial system. In some cases, the parties can appeal to a higher court. Moreover, the Constitutional Court has the authority to review selected cases, in order to standardize case law regarding the safeguarding of specific rights. The judge must determine the granting or denying of protective rights, thereby ordering public authorities to comply. The decision's effects are *inter partes*, but the Constitutional Court can extend them, *inter comunis*, to third parties in similar situations as the plaintiff, exceptionally. The procedural requirements are highly flexible (for example, the plaintiff is not required to retain a lawyer or argue in complex legal terms). When conventional

[23] For example, in the case of utilities, a court may consider that the way to stop the violation of fundamental rights by the unjustified disconnection of the service is to order the reconnection of the service, as in Argentina, Federal Court of Appeals of La Plata, 13 June 2022, *R., M.I. c/Telefonía Móviles Argentina SA*, available at *https://www.covid19litigation.org/case-index/argentina-federal-court-appeals-la-plata-r-m-i-c telefonia-moviles-argentina-sa-2022-06*. In the area of health management, there were many decisions in which the courts ordered a procedure that could not be carried out because of the pandemic, for example in the case of Costa Rica, Supreme Court of Justice, 6 April 2022, No.8036-2022, available at *https://www.covid19litigation.org/case-index/costa-rica-supreme-court-justice-no-8036-2022-2022-04-06*.

legal remedies are inadequate or there is a significant risk of irreparable harm, the judge must hear the case. As this action is solely designed to safeguard fundamental rights, judges should prioritize it above all other cases (excluding *habeas corpus* cases) and ensure prompt proceedings (no more than ten days).

Art. 48 of the Costa Rican Constitution provides a protective measure enabling any person, regardless of their nationality or legal status, to apply for the safeguarding of their fundamental rights. No subjective evaluations shall be considered, unless explicitly marked as such. The Constitutional Chamber of the Supreme Court (the nation's highest court) is responsible for deciding claims of this nature. Exhaustion of standard legal remedies is not a prerequisite. Therefore, individuals may directly seek recourse through this action in the event they believe that their essential rights have been or will imminently be violated by actions or omissions of a public authority, and in exceptional circumstances, private individuals providing public services. Legal representation is not necessary for the proceedings, but it does require individuals to express explicitly how their individual rights are being infringed upon by the omission and actions of public authorities. The *amparo* does not directly safeguard abstract, collective, or popular rights if no personalized harm has been inflicted upon the plaintiff. Similarly, the *amparo* cannot be lodged against statutes or other legal resolutions (unless they harm an individual's application), nor against judicial decisions (including those from the Electoral Tribunal). According to the principles of constitutional jurisdiction, the case law and precedents set by the constitutional court are binding on everyone, except for the court itself.

In Chile, Art. 21 of the Constitution provides a protective measure whereby any individual or group of people can request the safeguarding of their fundamental rights established in Art. 19 of the Constitution. However, this mechanism does not offer protection for the rights to education, safe environment, health, petition, access to public function, social security, freedom, and personal security. In accordance with Art. 21 of the Constitution, concerning the right to freedom and personal security, an *amparo* is established as a means to protect any person who has been deprived of their liberty or whose freedom has been restricted.

This action follows a procedure that is swift and informal, and falls under the jurisdiction of the criminal chambers of the Appeal and Supreme Courts. The Appeal Court of the region in which the act or omission occurred is responsible for hearing a *recurso de protección*. The ruling may be contested before the Third Chamber of the Supreme Court. There is no necessity to go through ordinary remedies nor engage a lawyer. As a result, individuals may directly employ this measure when they believe that their fundamental rights are being violated, disturbed, or endangered by an illegitimate or arbitrary action or omission of either a public or private entity. The proceedings are rapid and easy. The Court may impose any measures deemed necessary to reestablish the Rule of Law and ensure the protection of the affected person or group.

Amparo is an exceptional constitutional appeal in Mexico that can be lodged in federal courts. It permits any individual to assert the safeguarding of the individual guarantees enshrined in the Constitution. The impact of this appeal is far-reaching. For instance, it may be employed to challenge unconstitutional laws, examine the legality of judicial rulings, contest ultimate administrative decisions that impact private individuals, or safeguard communal rights in an agrarian context. This explains why so many *amparo* appeals have been brought before the courts. In 2021, the *Amparo* Law was revised, resulting in the establishment of a new judicial framework[24].

[24] To a more detailed explanation with a comparative perspective with *mandado de segurança* in Brazil, see L.H. URQUHART CADEMARTORI, R. SAMPAR, V. FLORES MELÉNDEZ, *Controle de constitucionalidade e direitos humanos: estudo comparado entre o mandado de segurança brasileiro e o amparo mexicano*, in *Revista da AJURIS*, 50(154), 2023, 293-316, available at: *http://revistadaajuris.ajuris.org.br/index.php/REVAJURIS/article/view/1360*. In Mexico, the situation is very specific. It exists *tesis* (thesis), which are used to establish jurisprudential criteria at federal level. The *tesis* can be issued by the Collegial Courts of the Circuit (which are federal courts composed of three judges each), but in the case of conflicting *tesis* or lack of agreement, the Plenary of the Circuit or the Supreme Court of Justice is asked to replace the jurisprudence according to the procedures established in the law of amparo. The *tesis* can be isolated when the criteria issued by the Supreme Court and the collegiate circuit courts have not yet formed a jurisprudence, because there are not five decisions in the same sense. In the judicial power of the Federation, by the provisions of the law, are authorised to

In Uruguay, individuals have the right to invoke protective measures under Law no. 16011, enacted in 1988. This law safeguards fundamental rights against any actions, omissions or occurrences of public authorities or private entities. The competent judge responsible for *amparo* cases is the first instance judge of the jurisdictional area where the respective activity, omission or fact occurred. Decisions can then be appealed before the second instance judges of the respective jurisdiction. The action may be initiated if a fundamental right established either explicitly or implicitly in the Constitution is violated, restricted, modified or threatened, as long as no other judicial or administrative remedies are available to achieve the same result. It cannot be used to challenge judicial decisions or regional government decisions that are legally binding. The enforceable rulings have effects on all parties involved and their decisions are considered final and binding, but they do not limit any subsequent actions that may be taken by any party despite any *amparo*.

In the legal system of Brazil, a range of constitutional and legal actions are in place to safeguard fundamental rights. Whilst there is no singular course of action to immediately protect these rights, a set of constitutional actions and procedural mechanisms permit the protection of rights from various perspectives, such as through the declaration of constitutionality or unconstitutionality of norms via judicial review. The most relevant actions used during the COVID-19 pandemic were the following: *Arguição de Descumprimento de Preceito Fundamental* (art. 102, § 1º Brazilian Federal Constitution), *Ação Direta de Inconstitucionalidade* (art. 102, §1 (a) Federal Constitution of 1988), *Ação Civil pública* (Act. 7.347/1985) (Art. 13.105/2015 art. 300), and *Mandado de segurança* (Art. 5 LXIX – LXX Federal Constitution of Brazil 1988) (Act. 12016/2009 art. 1).

issue mandatory jurisprudence: The plenary and the chambers of the SCJN; The Supreme Chamber and the Regional Chambers of the Electoral Tribunal of the Judicial Power of the Federation; The Plenary of the Circuit Courts and The Collegiate Courts of the Circuit. The reasoning of the decisions of the Supreme Court is obligatory as long as eight votes are obtained in the plenary session and four votes in the "hall/chamber". In this sense, the theses can be about almost anything, including amparo.

CHART. 2. GENERAL CHARACTERISTICS OF THE WRIT OF AMPARO IN LATIN AMERICA

Country	Colombia	Costa Rica	Chile	Uruguay	México
Name	Tutela	Amparo	Protection	Amparo	Amparo
Object	Protect	Protect/ Repair	Protect	Protect	Protect
Rights	Explicit and implicit fundamental rights.	Constitutional rights	Some constitutional rights	Explicit and implicit fundamental rights	Constitutional rights
Judge	All the judges / High Courts Constitutional Court (just review)	Supreme Court, Constitutional Chamber	Court of Appeal/Supreme Court	First and second instance judges	Federal judicial power/Supreme Court
Against	Public or private individual acts Even judicial decisions	Public or private individual acts	Public or private individual acts	Public or private individual acts	Direct: Public authorities Indirect
Type of procedure	Subsidiary Informal/less than 1 month	Direct Informal/less than 1 month	Direct Informal/less than 1 month	Subsidiary Informal/less than 1 month	Subsidiary Informal/less than 1 month
Effects	Inter partes Exceptionally inter communis	Erga omnes	Inter partes	Inter partes	Inter partes Exception: mandatory precedents

Source: Report of the Latin America group of COVID-19 Litigation Project

3.2.2. Habeas corpus

Habeas corpus (or liberty action) protects personal or physical liberty and integrity against arbitrary detention. It is intended to prevent disappearances or indeterminate detention and to protect the person against torture or other cruel, inhuman or degrading treatment or punishment. It seeks a judicial mandate, addressed to the competent authorities, to bring the detained person before a judge, who will examine the lawfulness of the deprivation of liberty and, if necessary, order his or

her release[25]. It is exercised, for example, when a person is deprived of his or her liberty without a court order or trial after a period of time determined by law. Not all countries have an *amparo* action, which is why, in the face of injuries to liberty, the petition for *habeas corpus* was used to guarantee a quick judicial solution.

These two means were effective in guaranteeing the urgent protection of fundamental rights during the pandemic. However, the definition of what was urgent was left to the discretion of each judge when assessing the admissibility of the case. For example, according to a report on access to justice in Mexico, the number of cases decreased during the state of emergency, but human rights violations remained stable. This conclusion could apply to the rest of the region, especially given the problems identified with online tools that have affected access to justice. For instance:

> a) Ignorance on the part of judicial personnel and litigants about the operation of the online services; b) Limited possibilities and lack of effective mechanisms to resolve in real time technical difficulties in the submission of claims and actions; c) Additional unjustified claims compared to the processing of *amparo* and appeals in person; d) Lack of information on the acceptance of claims and suspension of acts of authority in claims for protection filed without electronic signature for endangering life or referring to other cases provided for in Article 15 of the *Amparo Law*; e) Incomplete or late uploading of electronic files as a result of technical failures, accidental omissions and deliberate decisions by judges; f) The practice of pre-dating transactions and promotions that were not originally published on the transaction list; g) Lack of certainty about the date of notification of agreements due to the lack of issuance of certificates as required by law; and h) Difficulties for litigants to communicate with court officials[26].

[25] For a comparison in some Latin American countries, see C.E. Pinos Jaén, *Análisis comparado del hábeas corpus en Bolivia, Colombia y Ecuador*, in *Foro: Revista De Derecho*, 37, 2022, 139-158, doi: *https://doi.org/10.32719/26312484.2022.37.7*.

[26] Fundación para la Justicia y el Estado Democrático de Derecho and Derechos Humanos y Litigio Estratégico Mexicano, *El acceso a la justicia en México durante la pandemia de covid-19. Análisis sobre la actuación del poder judicial de la federación*, Santiago de Chile, 2022, 24, available at *https://biblioteca.cejamerica*

There were, however, other problems of a functional and infrastructural nature. The first was the closure of the judiciary, at a crucial moment when fundamental freedoms and rights were at risk and the guarantee of the balance of powers was a real need. In addition, States have not adopted plans to increase the capacity of the judicial system, so that «the needs of the judiciary were not explicitly addressed in the emergency regulations and related financial support plans. Most countries did not provide additional financial support to the judiciary»[27]. This has led to a worsening of judicial congestion and, consequently, to significant delays in decisions.

The prevalence of urgent defensive measures can be understood in the light of all these problems and the characteristics of effective judicial protection in the region. It is also likely that this prevalence is due to the prison crisis throughout the continent and to weak states characterised by high levels of corruption, human rights violations and governments with authoritarian tendencies[28].

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s.org/bitstream/handle/2015/5700/A.%20Documento%20Acceso%20a%20la%20Justicia_vf.pdf?sequence=5&isAllowed=y.

[27] With the exception of Guatemala and Trinidad and Tobago. On the contrary, «The judiciaries of the other jurisdictions […] adopted various austerity measures to reduce expenditure. The judiciaries of Chile, Colombia, Costa Rica, Haiti, Mexico and Panama did not receive any additional funding. In Argentina, Chile and Mexico, the judiciary suspended non-essential administrative and fixed costs and reallocated these resources to address specific pandemic-related needs. In other countries, including Mexico and Costa Rica, the government asked the judiciary to return funds from the approved budget. The returned funds were reallocated to other services, such as health, and used for financial relief. In Haiti, the National Association of Haitian Judges raised funds to purchase equipment and self-protection materials to compensate for the judiciary's lack of resources»: INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM (ILAC), *Justicia en el tiempo de COVID-19. Desafíos del Poder Judicial en América Latina y el Caribe*, 2020, 22, available at *http://ilacnet.org/wp-content/uploads/2020/12/ILAC_COVID19_SPANISH_FINAL_WEB.pdf*.

[28] It might be useful to look at the Rule of Law Index in relation to the region. Most countries have a very low index for factors such as "constraint of government powers", "absence of corruption" and guarantee of "fundamental rights" *https://worldjusticeproject.org/rule-of-law-index/global*.

4. The nature of the parties

The nature of the parties involved in litigation refers to the characteristics of the claimants and defendants in the database. According to the available data in Latin America, 59% of claimants were private individuals, 19% were private collectives, and 22% were public entities. The significant proportion of public claimants can be explained by the active role of Attorney General's Offices and the role of Ombudsmen, whose main function is to oversee, promote, and guarantee human rights. In Latin America, these officials played a significant role in litigation, particularly in cases involving vulnerable groups, where actions were often initiated by Ombudsmen[29].

Brazil has the highest number of cases with plaintiffs classified as public. The reasons mentioned earlier also apply to Brazil. However, it is important to note that all cases initiated by public entities or regulatory bodies against government decisions regarding restrictive measures, such as the suspension of in-person classes[30] or state programs[31], rather significant in this country as well. It is noteworthy that cases involving the refund of funds (for example, the decision to reimburse educational

[29] For more details on the general characteristics of this function in Latin America, see G. AGUILAR CAVALLO, R. STEWARD, *El defensor del pueblo latinoamericano como institución independiente de promoción y protección de los derechos humanos: referencia especial a la situación actual en Chile*, in *Revista de Derecho - Universidad Católica del Norte*, 15(2), 2008, 21-65, available at *https://www.redalyc.org/pdf/3710/371041323002.pdf*; J.L. MAIORANO, *El defensor del pueblo en América Latina. Necesidad de fortalecerlo*, in *Revista de Derecho (Valdivia)*, 12(2), 2001, 191-198, available at *http://revistas.uach.cl/pdf/revider/v12n2/art13.pdf*. F.F. BASCH, *Estudio comparado sobre Defensorías del Pueblo y entidades garantes del derecho a la información en América Latina y Europa*, EUROsociAL, 2015, available at *http://www.sia.eurosocial-ii.eu/files/docs/1427456199-DOCUMENTO_27_F%20BASCH(ESPANOL)(Fweb).pdf*.

[30] For example, Brazil, Federal Regional Court of the 4th Region, 1 February 2022, No. 5002733-30.2022.4.04.0000/RS, available at *https://www.covid19litigation.org/case-index/brazil-federal-regional-court-4th-region-no-5002733-30202240400000rs-2022-02-01*.

[31] Brazil, 1st Public Treasury Court, 3 March 2022, Processo No. 1049641-77.2020.8.26.0053, available at *https://www.covid19litigation.org/case-index/brazil-1st-public-treasury-court-processo-no-1049641-77202082600053-2022-03-03*.

tuition fees)[32] and the management of public resources (such as the procurement of vaccines through contractual agreements)[33] are present.

The cases included in the database demonstrate the methodological selection criteria regarding the defendants. The findings indicate that 94% of the legal cases are brought against public entities, with the remaining 6% related to private entities.

Of those cases against private parties, many are related to the provision of healthcare services. This occurrence can be explained by the widespread use of private healthcare providers within the public health system of Latin America. In such cases, although the service provider is not a government entity, the provision of services is influenced by the public interest as delegated by the State. The provision of these services is subject to comprehensive regulation and must adhere to certain principles, including continuity (ensuring uninterrupted provision), regularity (compliance with legal standards), equality (ensuring access for all users and enforcing their right to provision), generality (preventing arbitrary and discriminatory exclusions), and obligation (providers must not deny services to those in need).

The private entity, in all aspects of provision, must act as if it were a public authority. This implies that states can be held responsible for their failure to exercise due diligence in preventing actions by private entities alleged to provide public services. Consequently, the chosen health cases in particular countries relate to decisions made by private entities, which are deemed equivalent to those made by public authorities.

[32] Brazil, Court of Justice of the Federal District and Territories, 5 April 2022, No. 0707656-60.2021.8.07.0001, available at *https://www.covid19litigation.org/case-index/brazil-court-justice-federal-district-and-territories-no-0707656-60202180700 01-2022-04*.

[33] Brazil, Federal Court of Accounts, 16 March 2022, Acórdão No. 552/2022, Processo No. 042.955/2021-1, available at *https://www.covid19litigation.org/case-index/brazil-federal-court-accounts-acordao-no-5522022-processo-no-0429552021-1-2022-03-16*.

5. The vulnerable groups

Based on the data from the database, it has been revealed that 47% of the litigations where a vulnerable group was identified in Latin America correspond to groups that were categorised as "others". Of the cases involving vulnerable groups, children are referred to in 22% of them, while 11% respectively are referred to older adults and people with chronic diseases, 7% are referred to people with disabilities and 2% to asylum seekers.

Concerning the category of "others", the majority of cases pertain to prisoners as a vulnerable group. However, there are also other individuals deemed vulnerable in the Inter-American context due to their situation of weakness, helplessness, or marginalisation. For instance, marginalized groups such as indigenous and Afro-Caribbean communities, women and girls, LGBT individuals, displaced persons or those living in extreme poverty, human rights advocates, and healthcare professionals.

In this regard, the Brasilia Rules on Access to Justice for Vulnerable Persons and the Protocols adopted by the Ibero-American Judicial Summit provide assistance in ascertaining the understanding of the concept of vulnerability[34].

It is also relevant that the Inter-American Court acknowledges that vulnerability is exacerbated by particular *de jure* circumstances, such as legal inequalities, and *de facto* situations, such as structural inequalities, that significantly affect access to public resources[35].

According to the Inter-American Commission on Human Rights, the pandemic is having a differential impact on specific vulnerable groups. For that reason, it has adopted the Resolution 1/2020 on the pandemic and human rights in the Americas. In the document, the Commission affirms that the pandemic poses a threat to the protection of human

[34] *Ibero-American Protocol for Judicial Action to Improve Access to Justice for Persons with Disabilities, Migrants, Girls, Boys, Adolescents, Communities and Indigenous Peoples*, Santiago, 2014, and *Protocol for Judicial Action in Cases of Gender Violence against Women*, Santiago, 2014.

[35] IACtHR, *Advisory Opinion Legal status and rights of undocumented migrant workers*, OC-18/03, 17 September 2003.

rights, particularly in light of the deep-seated inequalities prevalent in the region[36].

6. The fundamental rights protected

The Inter-American Commission of Human Rights has expressed its concern at the adoption by the Member States of various measures restricting fundamental freedoms such as «freedom of expression, the right of access to public information, personal freedom, inviolability of the home and the right to private property» by using «surveillance technology to monitor the spread of the coronavirus and massive data storage»[37].

In addition, the assessment of constitutionality and legality of legislative decrees issued by executive officials under extraordinary powers, as well as *amparo* and *habeas corpus* proceedings, have a shared concern for the potential violation of fundamental rights and freedoms.

[36] «The Americas are the most unequal region in the world, characterised by deep social inequalities, with poverty and extreme poverty being a pervasive problem in all the countries of the region, as well as lack of or insecure access to drinking water and sanitation, food insecurity, environmental pollution, and lack of housing or decent places to live. Added to this are high rates of labour informality and precarious work and income, which affect a large number of people in the region and make the socio-economic impact of COVID-19 even more worrying. This makes it difficult or impossible for millions of people to take basic preventive measures against the disease, especially when it affects the most vulnerable groups, and the region is characterised by high rates of generalised violence, especially violence based on gender, race or ethnicity, and the persistence of scourges such as corruption and impunity. Similarly, the exercise of the right to social protest by citizens is prevalent in the region, in a context of repression through the disproportionate use of force, as well as acts of violence and vandalism; serious prison crises affecting the vast majority of countries; and the deeply worrying expansion of the phenomenon of migration, forced internal displacement, refugees and stateless persons, as well as structural discrimination against groups in situations of particular vulnerability»: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *Pandemia y derechos humanos en las Américas, Resolución 1/2020*, Costa Rica, 3 available at *https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf*.

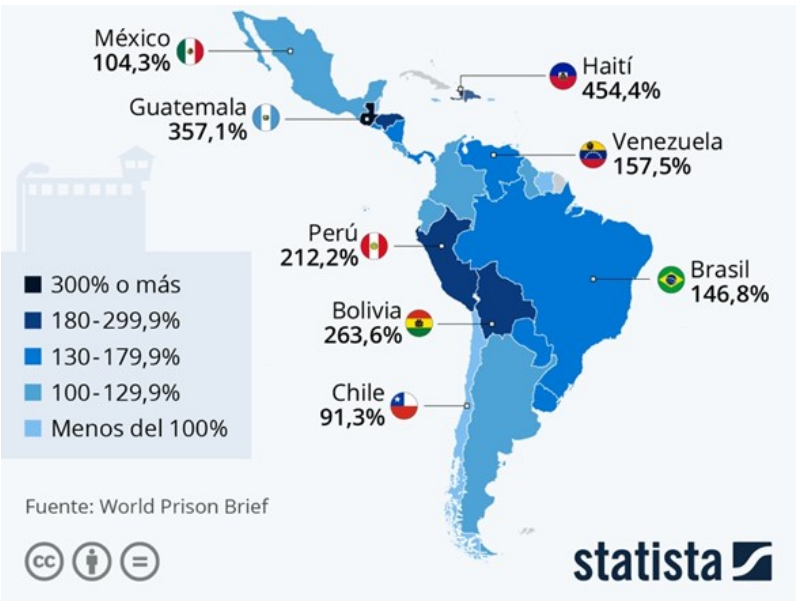
[37] *Ibid.*, p. 4.

Thus, it is important to examine trends related to the protection of these rights and freedoms.

A prevalent issue in the region during the pandemic involves cases related to the rights of prisoners, *habeas corpus* petitions, and actions for freedom. Additionally, the pandemic situation in prisons is of concern, particularly in countries including Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Uruguay, and Paraguay. This has led to significant litigation on the matter, in conjunction with the availability of *amparo* actions as expedited processes for securing protection of fundamental rights.

During the pandemic, requests were prioritized to convert preventive detention or internal punishment to house arrest or detention to prevent the spread of COVID-19. These requests highlighted the urgent need to address the human rights crisis in Latin America's prison system, compounded by overpopulation and dismal health conditions in detention centres. Moreover, the justice system faced significant strain, resulting in unwarranted delays. Indeed, the region is currently facing an unparalleled prison crisis, with remarkably high levels of overcrowding rates, as illustrated in Figure 1.

FIGURE 1. PRISON OVERCROWDING IN LATIN AMERICA.
PERCENTAGE OF PRISON CAPACITY OCCUPIED IN 2021



Source: S. Chevalier Naranjo, El hacinamiento carcelario, un problema persistente en América Latina, 2022, available at https://es.statista.com/grafico/18213/porcentaje-de-capacidad-carcelaria-ocupada-en-america-latina/

For this reason, it is clear that the prison population in the region lives in conditions that threaten their human rights and is therefore in a position of vulnerability in the face of the state's lack of interest in guaranteeing minimum conditions of dignity.

In general, several cases have been identified where the applicant has made efforts to obtain freedom, taking into consideration the presence of co-morbidities[38].

[38] Brazil, Court of Justice of the State of Santa Catarina, 5 April 2022, No. 5003891-48.2021.8.24.0006/SC, available at *https://www.covid19litigation.org/case-index/brazil-court-justice-state-santa-catarina-no-5003891-48202182400 06sc-2022-04-05*; Dominican Republic, Constitutional Court, 29 June 2021, No. TC-0242-21, available at *https://www.covid19litigation.org/case-index/dominican-republic-constitutional-court-no-tc-0242-21-2021-06-29*; Paraguay, Supreme Court of Justice, Chamber

In all countries, the judiciary tended to follow the government-issued decrees aimed at reducing prison populations through release petitions. This was done either by granting conditional liberty or by allowing for the execution of preventive detention or sentences under the condition of house arrest, in exceptional circumstances. In these instances, the matter under consideration concerned a detainee's appeal to enforce the government's decree. The plaintiff typically asserts meeting one parole or home detention requirement and challenges the prison administration's denial of the benefit. However, judges often reject the petitions due to the inability of petitioners to satisfy government-established prerequisites, such as belonging to a risk group or having engaged in minor crimes. In general terms, these requests have not been granted, although, in the cases of preventive detentions, they have[39].

Additionally, numerous *habeas corpus* and *amparo* rulings are linked to the relocation of individuals to containment facilities as a penalty for not adhering to quarantine regulations, with people, including migrants, being subjected to arbitrary and prolonged detention in overcrowded conditions[40] and without adherence to COVID-19 prevention protocols[41] in containment facilities and other locations.

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of Agreements, 31 March 2021, Decision n. 308, available at *https://www.covid19litigation.org/case-index/paraguay-supreme-court-justice-chamber-agreements-decision-n-308-2021-03-31*.

[39] In this way, Bolivia, Plurinational Constitutional Court, 27 August 2021, 0482/2021-S2, available at *https://www.covid19litigation.org/case-index/bolivia-plurinational-constitutional-court-04822021-s2-2021-08-27*; Antigua and Barbuda, Eastern Caribbean Supreme Court, High Court of Justice (Civil), 13 August 2021, No.2021/0294, available at *https://www.covid19litigation.org/case-index/antigua-and-barbuda-eastern-caribbean-supreme-court-high-court-justice-civil-no-20210294*.

[40] Guatemala, Constitutional Court, 24 February 2021, No. 1731, *https://www.covid19litigation.org/case-index/guatemala-constitutional-court-no-1731-2021-02-24*.

[41] For example, Chile, Arica Appel Court, 23 April 2021, No. 127.2020, available at *https://www.covid19litigation.org/case-index/chile-arica-appel-court-no-1272020-2021-04-23*. The case concerned the cruel and degrading treatment of a man who was «handcuffed while unconscious due to being ill from Covid-19». In its decision «the Court upheld the claim and ordered […] to immediately lift the security measure of shackling hospitalized inmates in unconscious states and to avoid applying the measure in the future». Costa Rica, Supreme Court of Justice, Constitutional Chamber, 20 November 2020, No. 22378 – 2020, available at *https://www.covid19litigation.org/case-*

There were also requests for visits without social distancing and biosafety measures[42] or for bringing food into the prison[43]. Additionally, inmates commonly requested vaccinations or medical treatment for different clinical conditions[44]. Defence lawyers were also purportedly authorized to visit[45]. In exceptional cases, authorization was sought for attending courses[46] or instructing the authorities to provide the necessary materials for studying at university[47].

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index/costa-rica-supreme-court-justice-constitutional-chamber-no-22378-2020-2020-11-20. Costa Rica, Supreme Court of Justice. Constitutional Chamber, 20 November 2020, No. 22292 (reg no. 20-017133-0007-CO), available at *https://www.covid19litigation.org/case-index/costa-rica-supreme-court-justice-constitutional-chamber-no-22292-reg-no-20-017133-0007*. In the latter case, «the Court concluded that the lack of compliance with COVID-19 regulations negatively impacted the right to life, to health and to not be inhumanely treated by inmates. It also ordered public authorities to implement a corrective plan addressing the sanitary failures».

[42] Costa Rica, Supreme Court of Justice, 12 August 2022, No.18668-2022, available at *https://www.covid19litigation.org/case-index/costa-rica-supreme-court-justice-no-18668-2022-2022-08-12*.

[43] Costa Rica, Supreme Court of Justice, 5 August 2022, No.18045-2022, available at *https://www.covid19litigation.org/case-index/costa-rica-supreme-court-justice-no-18045-2022-2022-08-05*.

[44] Costa Rica, Supreme Court of Justice, 29 April 2022, Resolucion No. 9723-2022, available at *https://www.covid19litigation.org/case-index/costa-rica-supreme-court-justice-resolucion-no-9723-2022-2022-04-29*.

[45] Mexico, Ninth Collegiate Criminal Court of the First Circuit, 9 September 2021, No. 93/2021, available at *https://www.covid19litigation.org/case-index/mexico-ninth-collegiate-criminal-court-first-circuit-no-932021-2021-09-09*. In this case, the court concluded that «the right to counsel could not be denied under any circumstance, not even in the face of the Covid-19 pandemic».

[46] Costa Rica, Supreme Court of Justice, Constitutional Chamber, 4 June 2021, No. 2021012732, available at *https://www.covid19litigation.org/case-index/costa-rica-supreme-court-justice-constitutional-chamber-no-2021012732-2021-06-04*. This claim was partially upheld because the court found no justification for excluding older people from some courses.

[47] Colombia, Constitutional Court, 20 January 2022, T-009/2022, available at *https://www.covid19litigation.org/case-index/colombia-constitutional-court-t-0092022-2022-01-20*. In this case, the authorities denied the plaintiff a computer and internet access to complete a thesis, but the court ordered that the necessary resources be provided.

Considering the fundamental rights at stake, the data also indicate a greater occurrence of legal disputes connected to the right to healthcare, with 58% of cases in this area. This trend can be attributed to grievances surrounding the availability of health services for both COVID-19 and chronic illnesses. This is due to the fact that non-essential medical services were often halted in order to provide care for COVID-19 patients[48]. Furthermore, upon the implementation of vaccination strategies, there was a frequent demand for the incorporation of individuals who were not initially considered in the vaccination programs[49]. Plaintiffs also challenged measures aimed at restricting access to certain locations[50] or suspending employment contracts for those without proof of vaccination[51].

In addition, one of the guarantees reviewed by the courts was the freedom of movement for people, goods, and capital. This applied to extended quarantines in the region, with some exceptions, that limited freedom of movement[52]. This resulted in automatic checks on the legal-

[48] For example, Costa Rica, Supreme Court of Justice. Constitutional Chamber, 8 April 2022, No.08389, available at *https://www.covid19litigation.org/case-index/costa-rica-supreme-court-justice-constitutional-chamber-no-08389-2022-04-08*; Colombia, Constitutional Court, 18 June 2021, Sentencia T-195/21, available at *https://www.covid19litigation.org/case-index/colombia-constitutional-court-sentencia-t-19521-2021-06-18*.

[49] For example, Mexico, 2nd Collegiate Court in Criminal and Administrative Matters of the 17th Circuit, 21 February 2022, Queja No. 55/2022, available at *https://www.covid19litigation.org/case-index/mexico-2nd-collegiate-court-criminal-and-administrative-matters-17th-circuit-queja-no*; Guatemala, Constitutional Court, 18 May 2022, Exp. 5128-2021, available at *https://www.covid19litigation.org/case-index/guatemala-constitutional-court-exp-5128-2021-2022-05-18*.

[50] For example, Colombia, Constitutional Court, 26 September 2022, T-337/2022, available at *https://www.covid19litigation.org/case-index/colombia-constitutional-court-t-3372022-2022-09-26*.

[51] For example, Costa Rica, Constitutional Court, 9 August 2022, No.18514-2022, available at *https://www.covid19litigation.org/case-index/costa-rica-constitutional-court-no-18514-2022-2022-08-09*.

[52] See J. GALINDO, *Las cuarentenas infinitas de América Latina*, in *El País*, August 25th, 2020, available at *https://elpais.com/sociedad/2020-08-25/las-cuarentenas-infinitas-de-america-latina.html*. See Argentina, Supreme Court of Justice of the Nation, 19 November 2020, *L. C. y otro c/Provincia de Formosa s/Amparo Colectivo*, available at *https://www.covid19litigation.org/case-index/argentina-supreme-court-justice-nation-l-*

ity of isolation orders, as well as actions regarding individual freedoms, such as those brought on by confinement in isolation centres or by closure of the frontiers[53].

c-y-otro-cprovincia-de-formosa-samparo; El Salvador, Constitutional Chamber of the Supreme Court of Justice, 8 June 2020, Inconstitucionalidad 21 2020 AC, available at *https://www.covid19litigation.org/case-index/el-salvador-constitutional-chamber-supreme-court-justice-inconstitucionalidad-21-2020-ac*; Panama, Supreme Court of Justice of Panama, 28 January 2021, No. 573-2020, available at *https://www.covid19litigation.org/case-index/panama-supreme-court-justice-panama-no-573-2020-2021-01-28*; Brazil, Federal Court of Accounts, 16 February 2022, Acórdão 335/2022 – Plenário, Processo No. 014.182/2021-7, available at *https://www.covid19litigation.org/case-index/brazil-federal-court-accounts-acordao-3352022-plenario-processo-no-0141822021-7-2022-02*.

[53] For example, Argentina, National Court of Appeals for Criminal and Correctional Matters, 4 August 2021, CCC 32621/2021/CA1 - CA2, available at *https://www.covid19litigation.org/case-index/argentina-national-court-appeals-criminal-and-correctional-matters-ccc-326212021ca1-ca2*.

CHART 3. PROTECTION OF FUNDAMENTAL RIGHTS DURING COVID-19 PANDEMIC IN SOME COUNTRIES

Country	Colombia	Costa Rica	Chile	Uruguay	México
Rights generally claimed	Freedom (against penitentiary authorities). Access to fundamental public utilities (internet, water and electricity). Access to healthcare services (e.g., prescription drugs).	Freedom (against penitentiary authorities/lockdowns). Vaccination. Access to healthcare services.	Equality Freedom.	Vaccination Access to healthcare services.	Freedom (against penitentiary authorities). Access to fundamental public utilities (internet, water and electricity). Vaccination Prior consultation
Groups generally protected	People deprived of liberty.	People deprived of liberty.	People deprived of liberty. Immigrants		People deprived of liberty. Children Indigenous peo-
Decision	Usually upheld	Usually upheld	Upheld/reject	Usually reject	Usually upheld

Source: Report of the Latin America group of COVID-19 Litigation Database

7. Conclusions

This chapter has outlined some characteristics regarding the litigation in Latin America during the COVID-19 pandemic. It has illustrated different types of actions used to protect fundamental rights as well as economic, social and cultural rights. Although there are some differences across the countries, there are also common elements.

In this way, it is possible to see the relationship between the two types of action that have been prevalent in the region during the pandemic: constitutional actions relating to the declaration of states of emergency, and actions for the urgent protection of fundamental rights. In both cases, the aim of judicial review is to verify whether there is a threat to fundamental rights and freedoms.

In the case of states of emergency, the main objective is to determine whether the restrictions on fundamental rights that may arise in such cases are justified and comply with the principles of necessity, proportionality and temporality.

On the other hand, based on the assumption that state emergency measures may restrict fundamental rights, the purpose of emergency measures is to focus judicial control on determining whether there has been an impermissible infringement of fundamental rights.

The actions for the urgent protection of fundamental rights are aimed to satisfy the requirement, derived from the American Convention on Human Rights, that States guarantee an effective remedy for the protection of human rights.

An analysis of these dynamics allows for the identification of certain peculiarities. One such instance involves the courts, which are often plagued by an extensive backlog of cases. Additionally, the necessity of resolving *amparo* or *habeas corpus* cases with urgency provides further insight into why many decisions within the region lack a comprehensive articulation of principles.

It could almost be said that in many cases the application of principles is taken for granted, leading to a proliferation of superfluous invocations of principles.

Another relevant point worth mentioning is the extreme importance of an instrument such as the COVID-19 litigation database. Such an instrument, which can certainly continue to be enriched, offers an immense information base. This is certainly a contribution to future research.

The experience of identifying and analysing cases from Latin America and the Caribbean has demonstrated the potential and the perfectibility of the database. Perhaps one of the most important lessons of the pandemic crisis, which the COVID-19 Litigation Database project

makes concrete, relates to the richness of dialogue based on diversity, without the need to demonise the cultural baggage that the tradition and experiences of each region have given us.

TRENDS IN COVID-19 LITIGATION IN AFRICA

Emmanuel Kasimbazi[*]

1. Introduction

The outbreak of COVID-19 in Wuhan, China in late December, 2019 became a threat to international public health[1]. The World Health Organization declared the outbreak a Public Health Emergency of International Concern on 30 January 2020 and as a pandemic on 11 March 2020[2]. Countries adopted both soft and hard response measures after the COVID-19 was declared a pandemic, some of which were challenged in courts of law. This chapter analyses the trends in COVID-19 litigation Africa. It specifically examines the courts approach to government and other public authorities' decisions and regu-

[*] Professor of Law, School of Law, Makerere University, Kampala, Uganda.

[1] Y.C. WU, C.S. CHEN, Y.J. CHAN, *The outbreak of COVID-19: An overview*, in *Journal of the Chinese Medical Association*, 83, 2020, 217-220.

[2] WORLD HEALTH ORGANISATION, *https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen* (accessed on 15th March 2021).

lation in handling COVID-19 cases. It identifies the challenges to COVID-19 litigation and provides recommendations.

2. Trends in COVID-19 litigation and court pronouncements

2.1. Access to Personal Protective Equipment (PPEs) for frontline health workers

The health care systems in most African countries were overwhelmed at the beginning the pandemic in 2020 because of large numbers of COVID-19 cases[3]. This posed a challenge to the frontline health workers who were on the frontlines providing treatment and care to COVID-19 positive populations because they had personal protective equipment (PPE) to keep them safe[4]. In most African countries, the frontline health workers treated COVID-19 patients with limited PPE[5]. In some countries, cases were filed to protect the frontline health workers. In South Africa, in the case *National Education Health and Allied Workers Union (NEHAWU) v Minister of Health and Others*[6] the court reaffirmed the role of the State to provide PPEs to frontline health workers. It noted that:

[3] A.D. JULIANO et al., *Trends in Disease Severity and Health Care Utilization during the Early Omicron Variant Period Compared with Previous SARS-CoV-2 High Transmission Periods, December 2020-January 2022*, in *Morb. Mortal. Weekly Rep.*, 71, 2022, 146-152.

[4] J. COHEN, Y. VAN DER MEULEN RODGERS, *Contributing factors to personal protective equipment shortages during the COVID-19 pandemic*, in *Prev. Med.*, 141, 2020, 106263.

[5] S.D. SIMONOVICH et al., *US Nurses' Challenges with Personal Protective Equipment during COVID-19: Interview Findings from the Frontline Workforce*, in *Psych*, 4(2), 2022, 226-237.

[6] *National Education Health and Allied Workers Union (NEHAWU) v Minister of Health and Others* (J423/20) [2020] ZALCJHB 66; 2020 (6) BCLR 767 (LC); (2020) 41 ILJ 1724 (LC); [2020] 8 BLLR 788 (LC) (11 April 2020), available at the link *http://www.saflii.org/za/cases/ZALCJHB/2020/66.html*.

> At the outset, I must state that this Court (and the respondents) acknowledge that all health workers remain in the frontline of the fight against Covid-19 (and, I dare say, heroically so) and fully agree that they are entitled to PPE so that they are not exposed to avoidable risks.

In Zimbabwe, the doctors, represented by Zimbabwe Association of Doctors for Human Rights (ZADHR), filed an application seeking government to ensure that health practitioners across the country are provided with personal protective equipment (PPE) and to adequately equip public hospitals to protect them from COVID-19 as they execute their duties and help slow the spread of the epidemic.

2.2. Conducting of elections amidst the pandemic

According to the African election calendar, citizens from about 20 countries were supposed to go to the polls for presidential and parliamentary elections in 2020 and 2021[7]. The Pan African Lawyers Union sought an opinion from the African Court on Human Rights on the possible way forward for countries. The African Court on Human and People's Rights held that:

> States may decide to conduct or not to conduct elections in the context of a public health emergency or a pandemic. Such a decision requires prior consultation with health authorities and political actors, including representatives of civil society[8].

The court went on to state that where a country chooses to postpone the elections, that postponement of an election because of a public health emergency or a pandemic must comply with Article 27(2) of the Charter[9].

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[7] E. ASPLUND, O. AKINDURO, *The COVID-19 electoral landscape in Africa*, 2020, available at the link *https://www.idea.int/news-media/news/covid-19-electoral-landscape-africa*.

[8] Advisory Opinion on Request by The Pan African Lawyers Union No. 001/2020 - African Court on Human and Peoples' Rights.

[9] *Ibidem*.

Some countries postponed their elections and rescheduled them for a later date. These include Senegal, Sudan, Ethiopia, Somalia, Libya, Burkina Faso, Mauritius, and Angola[10]. Despite organisational challenges and barriers to participation, others held their elections as scheduled. These include Malawi, Burundi, Cameroon, Ghana, Liberia, Mali, Namibia, Togo, Zambia, Ivory Coast, Tanzania, and Uganda[11]. Like presidential and parliamentary elections, lower-level elections in most countries were equally affected and positioned. The pandemic put political leaders and decision-makers to the test regarding the handling of elections during this time[12]. They were supposed to make careful planning, risk mitigation and significant operational adjustments while protecting the integrity of the democratic process by increasing inclusivity while protecting democratic rights[13].

Governments in Zambia and Uganda took the approach of banning campaign rallies as a measure justifiable in the fight against COVID-19. A Zambian court refused to grant an applicant leave to apply for judicial review of the 1st Respondent's decision to ban Campaign Rallies during the "Campaign Period" leading up to the General Elections scheduled for 12th August, 2021[14]. The court however, granted the Applicant leave to apply for judicial review in respect of this decision of the 1st Respondent not to prescribe the amount of airtime in any given language on public television, radio and electronic media to be allocated to all the participating political parties including but not limited to the Applicant[15].

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[10] M. OSWALD, *COVID-19 pandemic and electoral participation in Africa*, in *Journal of African Elections*, 21, 2022, 23.

[11] *Ibidem*.

[12] CSPA, *Preparing for Elections in the Shadow of COVID-19*, The Center for State Policy Analysis, 2020, available at the link *https://cspa.tufts.edu/our-reports/preparing-electionsshadow-covid-19*.

[13] V. ATKINSON, M. APPLEGATE, R. AABERG, *Inclusion and Meaningful Political Participation*, 2020, available at the link *https://www.ifes.org/sites/default/files/ifes_covid19_briefing_series_inclusion_and_meaningful_political_participation_july_2020.pdf*.

[14] *Batuke Imenda (suing in his Capacity as Secretary General of the United National Development Party (UPND) v The Electoral Commission of Zambia & Attorney General)* 2021/HN/158.

[15] *Ibidem*.

In Uganda, *Lukwago Erias Versus Electoral Commission*[16] challenged the Electoral Commission orders suspending campaigns in major cities countrywide on the eve of the election as a COVID-19 control spreading measure. The court found that the decision of the Respondent contained in a press statement dated 26th December 2020 indefinitely suspending campaign meetings in Kampala Capital City and some other districts was a violation of freedoms of expression, Assemble and association but the limitation of the enjoyment of those freedoms was demonstrably justifiable due to the prevailing COVID-19 infections in those areas at the time[17].

2.3. Travel restrictions on freedom of movement

While the onset and evolution of reported cases varied by country, all governments took some precautionary measures to avoid the spread of the virus. These spanned from restrictions on public gatherings, curfews, closures of establishments such as restaurants, as well as to significant restrictions on international and national travel and transport more generally. Some countries closed their airports, ports, and national borders, while others implemented restrictions on inner- and interurban travel only.

Tanzania reported no significant measures concerning public transport, while Kenya and Mozambique recommended closing or significantly reducing the volume, route or means of transport available for significant amounts of time[18]. In Kenya, motorcycle taxis (*boda-boda*) were forbidden to carry more than one passenger and in Mozambique, after initial restrictions had been lifted for a few months, a rise of

[16] *Lukwago Erias v Electoral Commission*, Miscellaneous Cause No. 393 of 2020.

[17] *Ibidem*.

[18] GLOBAL ALLIANCE OF NGOS FOR ROAD SAFETY, *COVID-19 impact on transport and mobility in Africa - A review of policy and practice in seven African countries*, Global Alliance of NGOs for Road Safety HVT029.L3L017, 2021, available at the link *https://securouteafrica.org/wp-content/uploads/2021/07/L3L017_GANGOs_C19RRTRF_Final.pdf*.

positive cases informed the government to recommend a renewed closure[19].

In Uganda, public transport was closed from 25th March onwards until 1st July 2020[20]. Additionally, at the end of March 2020, restrictions were implemented that only allowed movement to certain areas, which coincided with the national lockdown, which lasted for over three months[21]. Movement during the lockdown was only permitted for essential workers, e.g., doctors, government workers, and by using their private vehicle. It was necessary for them to acquire special stickers from the Ministry of Works and Transport and to place those visibly on their car[22]. A maximum number of three passengers, including the driver, with proper identification were permitted. Other people moved by walking or cycling to buy essential goods during the curfew. These measures were enforced by the police to ensure compliance.

All countries, apart from Tanzania, implemented some sort of containment and closure policies in the form of restrictions on internal movement between cities and regions[23]. These different measures restricted freedom of movement and several persons sought judicial remedies in either to challenge or seek exemption from them. For example, the High Court in South Africa granted an exception to an applicant who wished to travel to Cape Town and be with his mother during her last days[24]. The court noted that:

> the courts may grant orders that allow for a deviation from the regulation; obviously this must not be done lightly, and any deviation should be determined on a case by case basis. It is obvious that it will be impossible for the Executive to make regulations for every conceivable

[19] *Ibidem*.

[20] *Ibidem*.

[21] *Ibidem*.

[22] *Ibidem*.

[23] *Ibidem*.

[24] *Ex parte: M Swanepoel, High Court of South Africa*, Gauteng, Pretoria [2020] JOL 48132 (GP).

> event and that is, in my view, where the courts come in to apply the law but also to grant orders that may assist people (…)[25].

However, in another case, the High Court dismissed a similar application by an applicant for a temporarily exemption to travel in order to support his mother and to assist with his grandfather's funeral. The judge noted that they had extreme sympathy for the applicant but had to uphold the law[26].

2.4. Failed attempt to challenge imposition of restrictions

The national governments in Sub-Saharan African countries initially implemented COVID-19 containment measures such as national lockdowns and curfews among others. Courts were put to a high task when some of these restrictions were challenged in some jurisdictions.

In Kenya the High Court held that the government cannot be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precautionary principle[27]; that the use of the Public (State Curfew) Order to restrict the contact between persons as advised by the Ministry of Health is a legitimate action[28]; that the use of a Curfew Order to restrict the contact between persons as advised by the Ministry of Health is a legitimate action[29].

In Malawi an applicant prayed for a judicial review order quashing the President's directives with the effect of closure of universities[30]. The court agreed with the applicants that the directives of the President were not law but went ahead to state that they were only instructions or

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[25] *Ibidem*.

[26] In the *Ex Parte Application of: Karel Willem Van Heerden*, High Court of South Africa, Mpumalanga Division (Main Seat) 1079/2020 [2020] ZAMPMBHC 5.

[27] *Law Society of Kenya v Attorney General* Petition No. 120 of 2020.

[28] *Ibidem*.

[29] *Ibidem*.

[30] *Ex parte: Steven Mponda (The State, The President of the Republic of Malawi, Council of The University of Malawi, Attorney General)* Judicial Review No. 13 OF 2020.

recommendations and as such the application to reopen the university was denied[31].

In Lesotho the applicants sought an order from court for the removal of the Prime Minister and a declaration against the issued Legal Notice on prorogation of Parliament and restricting of gatherings to 50 people following the outbreak of COVID-19[32]. Court found merit in the application and held that it was irrational for the Prime Minister to decide to prorogue Parliament before reporting the matter to said Parliament[33]. It however found that Court did not have jurisdiction to judge the Prime Minister's fitness to remain in office nor to order his dismissal[34].

2.5. Restrictions to conducting of businesses and court intervention

Several restrictions were imposed on movement of persons and goods and this has implications for the conducting businesses. In some cases, the courts intervened. The court in South Africa held that the government agencies had no authority to issue "Essential Service Permits/Certificates" to businesses for them to be able to conduct essential or permitted services[35]. It found that at the time there was currently no provision or need for the issuing of such certificates; that even if their issuance was previously lawful[36]. That no enforcement officer was therefore entitled to demand the production of such certificates by any business, whatever the nature of the business, and that they would act unlawfully if they did so or if they arrested or fined or took any action against any person for failing to produce such a certificate[37].

In Kenya, the court issued an order of mandamus to compel the Cabinet Secretary for Interior and Coordination of National Govern-

[31] *Ibidem*.

[32] *All Basotho Convention (A.B.C.) & Ors v The Prime Minister, The Deputy Prime Minister, His Majesty The King & The Attorney General*, Constitutional Case No. 0006/2020.

[33] *Ibidem*.

[34] *Ibidem*.

[35] *Sakeliga NPC v President of the Republic of South Africa & Others* [2020] JOL 47363 (GP).

[36] *Ibidem*.

[37] *Ibidem*.

ment to amend, within five days from the date of the judgement, the Schedule to the Public Order (State Curfew) Order, 2020 so as to include the members of the Law Society of Kenya and the Independent Police Oversight Authority in the list of «services, personnel or workers» exempted from the provisions of the Public Order (State Curfew) Order, 2020[38].

With the outbreak of COVID-19, the President of Namibia issued a proclamation suspending certain provisions of the Labour Act, 2007, which included regulation 19. Regulation 19 of the Suspension Regulations made it an offence during the surge of COVID-19 period for an employer to terminate employment, force leave, reduce remuneration or refuse to reinstate an employee under specific circumstances. Associations of employees applied to court contending that the effect of Regulation 19 of the "Suspension Regulations" was to retrospectively regulate the conduct and actions of the employers[39]. Court held that the Regulations that had been enacted were unconstitutional and thus invalid[40].

The government of South Africa passed a law prohibiting the sale of tobacco products, e-cigarettes, and related products in the country stating that since COVID-19 is a respiratory disease, smokers are at a higher risk of more severe COVID-19 health outcomes; such as progressing to a more severe form of the disease. The Tobacco farmers, processors, manufacturers, retailers, and consumers, situated at every level of the supply chain for tobacco and related products successfully challenged this law and the Minister appealed to the Supreme Court.

The Supreme Court considered the concerns raised by the appellants in justification of the tobacco ban and found that the ban was not shown to effectively address those concerns[41]. It held that there was no scientific justification for the continued ban on the sale of tobacco prod-

[38] *Law Society of Kenya v Attorney General* Petition No. 120 of 2020.

[39] *Namibian Employers' Federation Ors v President of the Republic of Namibia Attorney General of the Republic of Namibia*, High Court of Namibia, HC-MD-CIV-MOT-GEN-2020/00136.

[40] *Ibidem*.

[41] *Minister of Co-operative Governance and Traditional Affairs and Another v British American Tobacco South Africa (Pty) Ltd and Others* [2022] 3 All SA 332 (SCA).

ucts[42]. Furthermore, the purpose behind Regulation 45 was found not to outweigh the limitation of the rights; that instead, Regulation 45 was an unjustifiable limitation of the rights to dignity, and bodily and psychological integrity[43]. The extent to which Regulation 45 limited the rights in issue, particularly given the lack of factual and scientific evidence to support its promulgation, was disproportionate to the nature and importance of the rights infringed[44]. The appeal was accordingly dismissed and the Regulation remained *ultra vires*.

2.6. Cost of COVID-19 testing and treatment

The private hospitals took advantage of desperate patients by charging exorbitant fees for medical care. Some hospitals have refused to release patients until they have paid. As a result, families were forced to offer up land and vehicle titles in order to cover the costs of medical care. The Center for Health, Human Rights and Development[45], a non-profit that advocates for the health rights of vulnerable communities, sued the Ugandan government for failing to protect Ugandans from the excessive fees for COVID-19 treatment charged by private hospitals. The High Court ordered the government and the Uganda Medical and Dental Practitioners Council to draft regulations limiting how much private hospitals can charge for COVID-19 treatment. However, the Court didn't specify a timeline for drafting or implementing these regulations.

The High Court of Uganda granted an order of mandamus compelling the Uganda Medical and Dental Practitioners Council to make recommendations to the Minister of Health on reasonable fees chargeable for the persons seeking and accessing COVID-19 treatment in hospitals[46].

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[42] *Ibidem*.

[43] *Ibidem*.

[44] *Ibidem*.

[45] *Mulumba Moses & Center for Health, Human Rights and Development (CEHURD) v Attorney General, The Medical and Dental Practitioners Council & The Minister of Health*, High Court Miscellaneous Cause No. 198/2021.

[46] *Ibidem*.

2.7. Provision of essential services to communities during the pandemic

During COVID-19 pandemic most households were not able to pay bills for utilities and some were disconnected for non-payment. The court intervened in some countries. In Zimbabwe, it ordered for the re-connection of electricity which was to be used for pumping water in the Arda-Transau community[47]. The court noted that absence of water naturally posed a threat to personal hygiene during the lockdown period and worse still spelt doom to the intended containment of the national disaster and would be further obstructive to the global efforts to successfully fight against this deadly scourge pandemic COVID-19[48]. It also held that none availability of water disrupts the efforts to contain the spread of COVID-19, and that there would be irreparable harm occasioned to the respondents because the applicants were not seeking to be exonerated from the debt neither were they seeking the debt to be written off but were seeking an interim relief for restoration of electricity supply to Zimbabwe National Water Authority pumps for them to access clean and portable water for personal hygiene during the lockdown period only.[49] It held that therefore the balance of convenience leaned in favour of granting the interim relief sought; and accordingly the interim relief sought was granted.

In another Zimbabwe case applicants argued that the measures under the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, Statutory Instrument 83/2020 were inadequate as they did not make provision for safety nets for the vulnerable and therefore sought a court order to compel the passing of regulations for the provision of emergency relief[50]. The court, in rejecting

[47] *The Trustees of The Arda-Transau Relocation Development Trust v Zimbabwe Electricity Transmission and Distribution Company (Zetdc) (Pvt) Ltd* [2020] ZWMTHC 29.

[48] *Ibidem*.

[49] *Ibidem*.

[50] *Allan Norman Markham, Mfundo Mlilo v Minister of Health and Child Care, Minister of Finance and Economic Development, Minister of Local Government, Rural and Urban Development, & The President of the Republic of Zimbabwe*; HH 263-20, HC 2168/20 [2020] ZWHHC 263.

the application, held that what the applicants sought was *fait accompli* since the Ministry of Public Service, Labour and Social Welfare was already seized with the exercise of providing relief to those worst affected by the lockdown[51].

In another the applicants sought a declaration that the first Respondent's failure to ensure supply of adequate constant clean and potable water to residents of Rujeko, Mucheke, Zimre Park, Rhodene and Cloverly in Masvingo during the COVID-19 pandemic be declared as a violation of Applicant's right to clean, safe and potable water[52]. Applicants also claimed that in light of the COVID-19 pandemic there were guidelines issued by the World Health Organisation specifically encouraging individuals to wash their hands using running water including hand washing facilities. The court however found that the irreparable harm had not been proved by the applicants.

2.8. Closure of schools during the pandemic

Closing schools was one of the measures applied to control the spread of COVID-19. Online classes were conducted in schools. However, with limited internet coverage especially in rural areas, some learners didn't study. Cases were taken to court in some countries to seek redress regarding limitations in studying.

In Malawi the High Court found that the physical closure of a university was not a limitation in the strictest sense of the law because there are so many other ways it can still be enjoyed even with the Applicants being at home such as digital learning[53]. The court directed the University to ensure that they find alternative means of continuing of

[51] *Ibidem*.

[52] *Nevermind Mutamba & Musekiwa Sungano Zvarebwanashe & Masvingo United Residents and Ratepayers Alliance v City of Masvingo; Minister of Local Government, Public Works and National Housing; Minister of Health and Child Care; Minister of Finance* [2020] ZWMSVHC 19.

[53] *Ex parte: Steven Mponda (The State, The President of The Republic of Malawi, Council of The University of Malawi, Attorney General)* Judicial Review No. 13 of 2020.

the students' education as the right to education requires access as well as availability, acceptability and adaptability[54].

In Kenya an individual sought a declaration, injunction, orders of mandamus, certiorari and prohibition on grounds that closure of schools by President through the Presidential "Address to the Nation" had implications on school-going children's Fundamental rights and freedoms in relation to their Education[55]. Court held that prolonging the open-ended closure of schools and learning institutions in Kenya without any consultations with the parents, guardian of school-enrolled children, affected learners in diverse learning institutions, in conjunction with the National Education Board and respective County Education Boards, by the Ministry of Education, Science & Technology, the Cabinet Secretary, in charge of Education in Kenya was an action ultra vires to the Basic Education Act[56].

In South Africa a group of university students alleged that the University's directive that all residences be closed and students to vacate their residences within 72 hours was a negligent and reckless response to the pandemic[57]. They contended that the University must satisfy that the students have been tested for COVID-19 and are safe to go home and that the university must extend the evacuation notice until a mechanism is devised to limit the rapid spread of the virus[58]. Court held that University had followed precisely all protocols recommended by WHO, the National Institute for Communicable Diseases (NICD), the President and the renowned experts in the field[59].

In another South African court case the applicants sought to prevent government from re-opening public schools until precautionary condi-

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[54] *Ibidem*.

[55] *Joseph Enock Aura v The Cabinet Secretary, Ministry of Education, Science & Technology, The Cabinet Secretary, Ministry of Health, Attorney General* Constitutional Petition No. 2189 OF 2020.

[56] *Ibidem*.

[57] *Lerato Moela & Matsobane Shaun Matlhwana v Vice-Chancellor: University of the Witwatersrand & Dean of Students: University of the Witwatersrand. 2020/9215* [2020] ZAGPJHC 69 (19 March 2020).

[58] *Ibidem*.

[59] *Ibidem*.

tions are met[60]. Court held that while the right to life is implicated in the re-opening of schools, the available evidence at the time indicated that the risk of COVID-19 infection in children was low and that even if infected, children seldom presented with serious illness[61], and that the schools simply could not stay closed indefinitely[62].

2.9. Immigration

Some form of travel restrictions was imposed by almost all countries in the world. The restrictions included ban on entry in the countries and the court intervened. In Malawi, Chinese immigrants through judicial review sought orders of certiorari quashing the aforementioned decisions of the Director General Immigration and Citizenship Services; a permanent order of injunction compelling the Director General Immigration and Citizenship Services to allow the Claimants entry into the country upon satisfying all immigration requirements[63]. Also sought for an order of injunction restraining the Director General Immigration and Citizenship Services from expelling the Claimants from the Country; a declaration that the implementation of the Director General Immigration and Citizenship Services' decision is unlawful as it does not comply with section 43 of the Constitution as no reasons for the refusal to enter the Country were given despite previously granting them a letter that they would get a visa on the point of entry[64]. And that all necessary and consequential directions be given as this Court may deem fit in the circumstances.

Court held that the balance of justice tilted in favour of preserving the status quo; and accordingly, the application for the continuation of

[60] *One South Africa Movement & Mmusi Maimane v The President of the Republic of South Africa & Ors* High Court of South Africa 24259/2020.

[61] *Ibidem*.

[62] *Ibidem*.

[63] *The State (On application of Lin Xiaoxiao Ors v The Director General Immigration and Citizenship Services & Attorney General)* High Court of Malawi Judicial Review Cause No. 19 of 2020.

[64] *Ibidem*.

the interlocutory injunction was allowed[65], and that the order was to remain in force until the main action is determined or until a further order of the Court[66].

2.10. State highhandedness in implementation of COVID-19 restrictive measures

Some Governments urged security authorities to enforce measures in response to the COVID-19 pandemic. The security forces used excessive force to enforce the government measures and the courts intervened.

In a South African case concerning members of the defence force employed to assist the police and municipal police in enforcing the lockdown, they were said to have entered upon the property where a citizen resided, accused him of violating the lockdown regulations, and ordered him outside. There they proceeded to assault him, of which injuries caused his death[67].

The applicants sought and were granted a declaration that: all persons are entitled to the rights to dignity, to life, and not to be tortured or treated in a cruel, inhuman or degrading way; that the defence force, police and metropolitan police be required to act in accordance with the law, respect, protect, promote and fulfil the rights in the Bill of Rights[68]; that their members be required to use minimum force, and suspend the members of the defence force who were at place of residence of the citizen on the night he was assaulted[69].

Court granted the prayers sought and the Minister of Defence and Minister of Police were required to publish a code of conduct and operational procedures regulating the conduct of their forces in giving effect

[65] *Ibidem*.

[66] *Ibidem*.

[67] *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others*; [2020] ZAGPPHC 147.

[68] *Ibidem*.

[69] *Ibidem*.

to the state of disaster, and to publish in newspapers and other media certain guidelines[70].

In Uganda a Member of Parliament was arrested, unlawfully searched, detained and tortured at a police station for distributing food to people without following the Ministry of Health Covid-19 Standard Operating Procedures[71]. He sued and court granted a declaration that the infliction of pain and injury on the applicant during his detention by the Police infringed on his fundamental human rights to dignity and freedom from torture and cruel, inhuman or degrading treatment or punishment protected under Articles 20, 24, 44 (a) of the 1995 constitution[72]. Another declaration was issued that the period in which the Applicant was detained for more than forty-eight hours before he was arraigned in the Chief Magistrate's Court, constituted unlawful and illegal detention and was in violation of his personal liberty under Article 23(4) (b) of the Constitution of Uganda[73]. And finally the court ordered that the 1st Respondent pays a sum of UGX 75,000,000 (Seventy-five Million Shillings only) and costs of the application to the Applicant in compensation for violations of his rights and freedoms[74].

3. Courts Approach in handling COVID-19 cases

3.1. Use of adversarial and not and inquisitorial approach

Most commonwealth jurisdictions use an adversarial approach and not inquisitorial. This poses a challenge to litigation. An adversarial approach is that where the court act as a referee between the two oppos-

[70] *Ibidem*.

[71] *Hon. Zaake Francis v The Attorney General of Uganda, Kagarura Bob (RPC-Wamala), Alex Mwiine (DPC -Mityana District), Elly Womanya (Commandant SIU, Musa Walugembe (OC - SIU), Twesigye Hamdani, Mulungi Haruna Nsamba, Abel Kandiiho (Head, CMI)* Miscellaneous Cause No. 85 of 2020 High Court of Uganda at Kampala.

[72] *Ibidem*.

[73] *Ibidem*.

[74] *Ibidem*.

ing parties. The whole process is a contest between the two parties. On the other hand, an inquisitorial approach is a legal approach where the court is actively involved in proof of facts by taking investigating of the case. This approach is tailored to resolving disputes and achieving justice for individuals and society.

A court in South Africa dismissed a case for lack of evidentiary basis for challenging the Minister's failure to ensure that health workers were provided with PPEs and issue guidelines for their use[75].

3.2. Necessity as a justification

Courts have applied the principles of necessity, public interest and precaution to dismiss most of the filed cases notwithstanding the extent of vulnerability. For example, a court in Kenya held:

> I find as a general principle public interest should be able to trump any individual or personal interest of the Petitioner whether in private law or in public constitutional law and that there is a public law duty of the court not to interfere with the constitutional functions of public bodies traceable to the Constitutional doctrine of separation of powers[76].

In the above case the Petitioner had challenged COVID-19 Orders on the grounds of discrimination against the poor and vulnerable who could not afford to buy masks, cremating the bodies of those who died from the virus does not accord them with dignity and respect to their families[77]. The petitioners had also challenged the Rules for lacking parliamentary approval and not being gazetted before operation[78].

In another Kenyan case the court took the side of precaution to uphold government imposed restrictions[79]. Court held that the government cannot be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precau-

[75] *National Education Health & Allied Workers Union ("NEHAWU") v Minister of Health*, Labour Court of South Africa J 423-20 [2020] ZALCJHB 66.

[76] *Law Society of Kenya v Attorney General & Ors* Petition no. 132 of 2020.

[77] *Ibidem*.

[78] *Ibidem*.

[79] *Law Society of Kenya v Attorney General* Petition No. 120 of 2020.

tionary principle; the use of a curfew order to restrict the contact between persons as advised by the Ministry of Health is a legitimate action[80].

4. Challenges to COVID-19 Litigation

4.1. Lack of detailed legislation

The African Court on Human and Peoples' Rights advised African governments to have proper laws enacted by the competent bodies, based on prior consultation with political actors, including representatives of civil society.[81] This was after many national laws where found not to provide for what happens upon expiry of a term of government at the time of a public health emergency or a pandemic[82].

Following a large outcry by the public in Uganda on exorbitant charges by private health centres amidst the pandemic, the High Court of Uganda granted an order of mandamus compelling the Uganda Medical and Dental Practitioners Council to make recommendations to the Minister of Health on reasonable fees chargeable for the persons seeking and accessing Covid-19 treatment in hospitals[83].

A country's emergency law response is determined by the available legal options. In some cases, states do not have a constitutional provision to declare a "state of emergency". In other cases, the pandemic did not constitute an "emergency" within constitutionally permitted grounds. In such scenarios, the instrument adopted to facilitate emergency measures might be explained by the inability to resort to a constitutional state of emergency. For example, in Uganda, the constitutional grounds to declare a state of emergency (section 110) do not include

[80] *Ibidem*.

[81] Advisory Opinion on Request by The Pan African Lawyers Union No. 001/2020 - African Court on Human and Peoples' Rights.

[82] *Ibidem*.

[83] *Mulumba Moses & Center for Health, Human Rights and Development (CEHURD) v Attorney General, The Medical and Dental Practitioners Council & The Minister of Health*, High Court Miscellaneous Cause No. 198/2021.

disease; it therefore based its response on the Public Health Act of Uganda (Cap 281, 2000)[84].

In the Democratic Republic of Congo, observers have criticized the Constitutional Court for failing to rule unconstitutional the president's failure to obtain approval for a state of emergency from both the Senate and the National Assembly, as required by law[85].

4.2. Pandemic unpredictability

The emergency law response might also be dictated by the pandemic itself. This can be demonstrated by examining the variations in legal responses of various countries as the severity of the pandemic has evolved. Angola, for instance, declared a state of emergency on 27 March 2020, enacted through Presidential Decree no. 81/20 of 25 March 2020[86]. This was in line with the state of emergency legal framework as laid down in the country's Constitution and in Law 17/91 of 11 May 1991[87]. It was extended three times through presidential decrees, remained in place until 25 May 2020, and was then terminated[88]. The country undertook measures of relaxation of the restrictions and eventually many of the restrictions were dropped[89].

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[84] S. MOLLOY, *Emergency law responses to Covid-19 and the impact on peace and transition processes: Seventh Edinburgh dialogue on post-conflict constitution-building*, International Institute for Democracy and Electoral Assistance (International IDEA), 2021.

[85] T.M. MAKUNYA, *DRC's Constitutional Court: Broken shield in overseeing the executive in emergencies?*, in *Constitution Net*, 27 May 2020, available at the link *https://constitutionnet.org/news/drcsconstitutional-court-broken-shield-overseeing-executive-emergencies* (accessed 8 March 2023).

[86] LEXOLOGY, *Coronavirus: Angola-State of public calamity and state of emergency*, 8 June2020, available at the link *https://www.lexology.com/library/detail.aspx?g=63b71d23-b66f-4690-adbd-567d1ee8bffc* (accessed 13 March 2023).

[87] *Ibidem*.

[88] *Ibidem*.

[89] Angola, Presidential Decree No. 152/23, 14 July 2023.

4.3. Case backlog

Courts take long to hear and determine the filed cases. This poses a challenge to the guarantee of rights and freedoms from continuous violation. The Judiciary in Uganda for instance, issued guidelines on administration of justice by the courts of judicature during the existence of COVID-19 pandemic which had implication delayed COVID-19 case handling. On March 19, 2020 the then Chief Justice of Uganda issued a circular which contained guidelines to be followed by the courts during the 32 days of the lockdown[90]. Some of these guidelines included suspension of all court physical hearings and appearances for 32 days (however, for cases partly heard, written submissions were to be adopted for a quicker disposal)[91]. During this period prisoners on remand were not to be brought to courts but the proceedings to be conducted using video links[92]. Also, all execution proceedings were suspended for the same period except where attachment had already taken place[93]. Certificates of urgency together with plea taking for serious crimes and bail application were allowed[94]. Here only the applicant and their lawyer, or in the case of bail application, the sureties were allowed in court[95].

The current Chief Justice on 7th June 2021 issued a revision of the guidelines on conduct of court business during the lockdown[96]. These included: immediate scale down of operations to 30% physical presence in all courts and departments and ensuring that only critical staff remain to attend to court business[97]. Court registries were to remain open to

[90] B. KATUREEBE, *Administrative and contingency measures to prevent and mitigate the spread of corona virus (covid-19) by the judiciary*, available at *http://judiciary.go.ug/files/downloads/Chief%20Justice%20Circular%20on%20COVID-19.pdf* (accessed on 19th March 2023).

[91] *Ibidem*.

[92] *Ibidem*.

[93] *Ibidem*.

[94] *Ibidem*.

[95] *Ibidem*.

[96] A.C. OWINY-DOLLO, *Revised contingency measures by the Judiciary to prevent and mitigate the spread of covid-19*, Reference Number CJ/C.7 of 7th June 2021.

[97] *Ibidem*.

allow filing of cases[98]. The suspension of court hearings, appearances as well as execution proceedings remained[99]. This delayed many cases in the system. The lack of technological improvements to deal with legal disputes during the pandemic is also one of the major reasons for a growing backlog of COVID-19 cases in some of the counties in the region.

4.4. Limitations to litigation

Some countries like Tanzania in the region have restrictions on public interest litigation. This restricts NGOs which are the most supporters of litigation in public interest since many personally affected persons may not be able to sue on their own behalf[100]. In other countries NGOs are under-funded, which hinders litigation. Curbs on NGOs working in Africa, particularly those that focus on human rights and governance, are being imposed in the context of a global assault on democracy that often appears to be coordinated across borders[101]. Anti-democratic African governments are not only copying or drawing inspiration and succor from one another, but may also be finding comfort in the shadow of illiberalism cast by major actors on the global stage[102].

Uganda has not yet passed the Legal Aid Bill which is meant to provide funding to legal aid and pro bono services to the poor[103]. NGOs face additional challenges in settings where the registration process includes a probationary period, as in Rwanda, or where there is mandato-

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[98] *Ibidem*.

[99] *Ibidem*.

[100] O. NYEKO, *Public Interest Litigation under Threat in Tanzania: Latest in Restrictions on Political and Civil Rights*, 2020, available at *https://www.hrw.org/news/2020/06/18/public-interest-litigation-under-threat-tanzania*.

[101] G. MUSILA, *The Spread of Anti-NGO Measures in Africa: Freedoms Under Threat: Special Report 2019*, available at *https://freedomhouse.org/report/special-report/2019/spread-anti-ngo-measures-africa-freedoms-under-threat*.

[102] *Ibidem*.

[103] A. OLUFEMI, *Regulating legal aid in Uganda: A bill seeking the regulation of legal aid services in Uganda is finally before the country's parliament*, 2022, available at *https://www.africa-legal.com/news-detail/regulating-legal-aid-in-uganda/*.

ry periodic renewal[104]. Renewal may be annual, as in South Sudan, every two years, as in Sudan and Burundi, or every five years, as in Rwanda, Uganda, and Egypt[105]. Periodic renewal is not problematic per se, but it creates room for abuse, and groups that hope to continue their legal existence must tread carefully around sensitive topics. Additional opportunities for violations of freedoms of association and assembly appear where security personnel, usually intelligence officials, are inserted into the registration process-usually to "clear" applicants, as is the case in some of the states surveyed – or where applicants require documents such as "certificates of good conduct" (of NGO officials and board members), "recommendation letters", or "clearance letters" from agencies other than the one that issues operating licenses, as in Uganda, Burundi, Sudan, and Kenya[106].

4.5. Government actions on COVID-19 legislation

Governments in the region undertook actions that either were not provided for under the domestic legislations or failed to take proper steps required by law. For example, in Sudan, a State of Health Emergency was declared, supported by articles 40-41 of the Constitution[107]. The declaration of a state of emergency was not legitimate if the Legislative Council did not ratify it[108]. However, Sudan does not have a legislature and therefore the emergency response could not be approved as required by its Constitution[109].

In South Sudan, government measures were not announced within the context of a state of emergency in terms of article 189(1) or 101(e) of the Transitional Constitution, 2011 (as amended)[110]. Acting under these articles would have required legislative approval since it would

[104] G. MUSILA, *op. cit.*
[105] O. NYEKO, *op. cit.*
[106] G. MUSILA, *op. cit.*
[107] S. MOLLOY, *op. cit*.
[108] *Ibidem*.
[109] *Ibidem*.
[110] *Ibidem*.

constitute a state of emergency. Instead, the country's response has been grounded in decrees without parliamentary approval[111].

In the Central African Republic, the National Assembly did not enact any special or *ad hoc* legal measures to support these measures[112]. The President exercised *de facto* exceptional powers during the early stage of the COVID-19 crisis[113]. In Rwanda, national and local lockdowns have been implemented on the basis of presidential statements and Cabinet resolutions without requiring parliamentary approval or formal allowances as set out in the Constitution[114]. Somalia has taken measures to combat COVID-19 without referencing specific legal instruments[115].

5. Conclusion

From the above analysis of approaches taken by courts of law in some African countries it is evident that there were steps taken by individuals and organisations to challenge or seek clarity from the COVID-19 measures taken by their governments. COVID-19 being an emergency in global public health, it called for speedy measures. Governments faced challenges such as absence of, or, the inadequacy of legislations to handle public health emergencies at the level of a pandemic. Different countries and different courts in the same country addressed similar cases differently.

[111] *Ibidem*.
[112] S. MOLLOY, *op. cit.*
[113] *Ibidem*.
[114] *Ibidem*.
[115] *Ibidem*.

PART IV

CROSS COUNTRY ANALYSES

THE COMPARATIVE AND INTERNATIONAL LAW DIMENSION OF QUARANTINES AGAINST COVID-19

Pedro A. Villarreal[*]

1. Introduction

The global response to the COVID-19 pandemic has shown the scope and limits of international law concerning the imposition of public health measures for mitigating the spread of the disease. The main reason being, there is no so-called «global health police», that is, an international authority capable of mandating states which measures they should adopt and when. The World Health Organization (WHO), the international organization with the core mandate in the field of human health[1], does not have such powers. At most, under the Constitution of the WHO and the International Health Regulations (2005) – the latter being so far the only legally binding instrument focusing on the cross-border spread of disease – allows the WHO Director-General to issue either temporary[2] or standing[3] recommendations. These recom-

[*] Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law.

[1] See art. 2, Constitution of the World Health Organization.

[2] See art. 15, International Health Regulations (2005).

mendations may include public health measures that authorities *may* adopt when facing particular diseases[4]. This falls squarely into a "soft law" approach in the field of global health, which can at times be even more effective than the "hard law" alternative[5].

Against this backdrop of an absent «global health police», this paper focuses on quarantines as an example of legal measures adopted in the absence of that are, or may become legally relevant, with an emphasis on the practice during the COVID-19 pandemic. The term *quarantine* is based on the definition under international law, visible in art. 1 of the International Health Regulations of 2005: «the restriction of activities and/or separation from others of *suspect persons who are not ill*… in such a manner as to prevent the possible spread of infection or contamination» (emphasis added)[6]. A distinction is made with the similar, albeit qualitatively different measure of *isolation*, defined as the «the separation of *ill or contaminated persons* (…) from others in such a manner as to prevent the spread of infection or contamination» (emphasis added)[7].

Despite the available definition under the International Health Regulations (2005), applicable to 196 States Parties, the implementation of quarantines remains a national or domestic matter. Given the high number of countries that adopted these measures during the COVID-19 pandemic, a scrutiny of this practice can help identify variations of what is conceptually one and the same public health measure.

Thus, the first section addresses the general justification of quarantines by explaining why they should be understood as «imperfect measure(s) for an imperfect world». Some basic understandings from medicine and public health are put forward. Afterwards, the guidelines issued by the WHO on the use of quarantines against COVID-19 are described more in depth. In spite of their soft law status, they may provide

[3] See art. 16, International Health Regulations (2005).

[4] For a non-exhaustive list of measures that the WHO Director-General may recommend, see art. 17, International Health Regulations (2005).

[5] S. SEKALALA, *Soft Law and Global Health Problems. Lessons from Responses to HIV/AIDS, Malaria and Tuberculosis*, Cambridge, 2017, p. 3.

[6] See art. 1, International Health Regulations (2005).

[7] *Ibidem*.

valuable criteria on when and how to implement quarantines. The following lines draw insights from the comparative law study Lex-Atlas: Covid-19[8], a collaboration between multiple institutions and scholars to. This will help highlight important legal differences in the design and implementation of quarantines between countries. The variation in practice raises the question of whether we can devise, in the future, an appropriate legal concept of quarantine and what conditions would then apply.

2. Elements for a Normative Assessment of Quarantines

Beyond the legal definition, in the field of public health «quarantine» means the

> restriction of activities of well persons… who were exposed to a case of communicable disease during its period of communicability (i.e., contacts) to prevent disease transmission during the incubation period if infection should occur[9].

The purpose of these measures is, thus, to prevent the spread of a disease to other persons. The specific characteristics of these measures, i.e. their modality of implementation, may vary. These variations are, in turn, legally relevant. When quarantines are mandatorily imposed on their addressees, so that it is no longer optional for them to follow them, a rights-based analysis is needed.

Any normative assessment of quarantines must be based on a basic understanding of their factual components, i.e. the medical, epidemiological and public health rationales. Drawing from these, we can attest how we currently live in an "imperfect world" in terms of available knowledge and technologies. Only by appraising this factual/empirical

[8] J. KING, O. FERRAZ et al., *Lex-Atlas: Covid-19: A global academic project mapping legal responses to Covid-19*, available at *https://lextlas-c19.org/*.

[9] M. PORTA, *Quarantine*, in *A Dictionary of Epidemiology*, 6th ed., Oxford, 2016, available at *https://www.oxfordreference.com/display/10.1093/acref/9780199976720.001.0001/acref-9780199976720-e-1563?rskey=kD6LXV&result=1767*.

dimension can we make a nuanced assessment of the legality of quarantines, including their proportionality.

Quarantines can indeed be effective measures to contain the spread of a communicable disease, but only under certain circumstances. Not all communicable diseases warrant the use of quarantines[10]. Empirical data is needed to verify their potentially successful use. For example, the onset of community transmission of COVID-19 in Germany demonstrates how timely implementation of individual quarantines can help contain infection across the population. In January 2020, the first imported cases of infection with the new SARS-CoV-2 virus within Europe were reported in France[11]. In Germany, the first case of the disease was discovered in the district of Starnberg in the German state of Bavaria, on the premises of a company after one of its employees returned from Wuhan[12]. After learning of this, local authorities managed to conduct an effective contact tracing, and later subjected those who were in contact with the known infected person to mandatory quarantines[13]. The company's activities were temporarily suspended. Thanks to these measures, the spread of COVID-19 was temporarily contained.

The successful surveillance and control measures in Bavaria in January 2020 bought the German authorities valuable time to improve pandemic preparedness. Ultimately, however, this could not prevent the disease from eventually spreading to the German population. The decisive turning point occurred at the end of February 2020. At a press conference, the health minister of North Rhine-Westphalia informed the public about the unmitigated spread of COVID-19. According to him, it

[10] A.V. BOGDANDY, P.A. VILLARREAL, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis*, MPIL Research Paper Series No. 2020-07, p. 18.

[11] A. GOLIA, L. HERING, C. MOSER, T. SPARKS, *Constitutions and Contagion – European Constitutional Systems and the COVID-19 Pandemic*, in *Heidelberg Journal of International Law*, Vol. 81, 2021, pp. 147-234.

[12] Robert Koch Institute, *Beschreibung des bisherigen Ausbruchsgeschehens mit dem neuartigen Coronavirus SARS-CoV-2 in Deutschland*, in *Epidemiologisches Bulletin*, Vol. 7/2020, 2020, pp. 3-4.

[13] M. BÖHMER et al., *Investigation of a COVID-19 outbreak in Germany resulting from a single travel-associated primary case: a case series*, in *Lancet Infectious Diseases*, Vol. 20, 2022, pp. 922-927.

was no longer possible to reconstruct the transmission chain of each individual case by tracing contacts[14]. This prompted the then-federal health Minister of Health to declare that a national epidemic was now inevitable[15]. What followed was the nationwide spread of COVID-19.

The onset of the COVID-19 epidemic in Germany in early 2020 sheds light on the normative justification for mandatory quarantines of contacts. The latter's effective use in individual cases in Bavaria delayed the imposition of population-level quarantines affecting individual rights. Eventually, when a communicable disease spreads through a community, authorities may lack the means to effectively locate all contacts of infected individuals[16]. In comparative terms, Germany has one of the most robust health systems in the world. And even there, an exhaustive, "traditional" contact tracing by interrogation to reconstruct the chain of transmission of COVID-19 became impossible. Countries with less robust health infrastructures will have to overcome additional hurdles to meet the burden of individual risk identification[17]. Thus, arguably, no health authority in the world is able to indefinitely conduct in-depth surveys to manually reconstruct transmission chains in the face of general waves of infection.

3. Why are Quarantines Necessary? Imperfect Measures for an Imperfect World

The normative justification for quarantines as legal measures is based primarily on the state of current knowledge in microbiology, medicine, and public health. Quarantines become necessary when there

[14] *Fünf Coronavirus-Fälle in NRW: Land will Ausbreitung stoppen*, in *Süddeutsche Zeitung*, 27 February 2020, *https://www.sueddeutsche.de/gesundheit/krankheiten-duesseldorf-fuenf-coronavirus-faelle-in-nrw-land-will-ausbreitung-stoppen-dpa.urn-newsml-dpa-com-20090101-200226-99-82498*.

[15] *Ibidem*.

[16] S. ALANOCA, N. GUETTA-JEANRENAUD, I. FERRARI, N. WEINBERG, B. ÇETIN, N. MIAILHE, *Digital contact tracing against COVID-19: a governance framework to build trust*, in *International Data Privacy Law*, Vol. 11, 2021, p. 4.

[17] PEDRO A. VILLARREAL, *International Law and Disease Surveillance in Pandemics: At the Margins of Regulation*, in *German Law Journal*, Vol. 24, 2023, pp. 603-617.

are no alternatives for preventing disease transmission in a community, for example through effective pharmaceutical products. Indeed, quarantines are redundant when medical technology is sufficiently advanced and new, more effective means against the spread of communicable diseases are available. Consequently, the need to physically separate people had diminished in recent decades preceding COVID-19[18].

Quarantines are not the only measures designed to separate individuals from society to prevent the spread of a disease. Other so-called *lockdown* measures may include banning people from gatherings or from being in certain facilities open to the public, such as schools[19]. Although these are not technically quarantines, they serve a similar purpose: preventing physical proximity between persons who may be infected and contagious. Similarly to quarantines, these restrictive measures are highly controversial due to their impact in society[20].

3.1. An Imperfect World: Gaps in Scientific Knowledge about Pandemics

To explain why we live in an "imperfect world", one must consider the gaps in knowledge in microbiology, medicine, and public health that are relevant to justifying quarantines. They are the main reason why "imperfect measures" such as quarantines are eventually necessary.

3.1.1. Gaps in Microbiology: The Features of Pathogens

Microbiology deals with the taxonomy and understanding of microorganisms, not just those that cause disease, but all microorganisms that populate our planet. Microorganisms are ubiquitous in nature. Some of

[18] K. UNDERHILL, *Public Health Law Tools: A Brief Guide*, in K. PISTOR (ed.), *Law in the Time of COVID-19*, New York City, 2019, p. 61; on the need for new public health tools in the wake of COVID-19, W. PARMET, M. SINHA, *Covid-19: The Law and Limits of Quarantines*, in *The New England Journal of Medicine*, Vol. 382, 2020, e28.

[19] European Centre for Disease Prevention and Control, *Considerations relating to social distancing measures in response to COVID-19 – second update*, 23 March 2020, pp. 2-3.

[20] W. PARMET, M. SINHA, *supra* at note 18.

them, particularly pathogens, are harmful to humans given how they can lead to the onset of disease when present in the human body.

To date, there is no complete inventory of microorganisms found in nature, including those that may pose a threat to human health. According to some estimates, there are probably more than quintillions (10^{31}) of virus particles on Earth[21]. Only a tiny fraction of these viral particles pose a threat to humans. Microbiology has not yet reached the point where we know with certainty how many of them pose a risk. Moreover, viruses are only one of many pathogenic microorganism species, which also comprise bacteria, parasites, *fungi* and other threats. At this point, viruses are considered the likeliest source of pandemics[22], but this does not preclude the possibility that other pathogens also pose a risk.

The coronavirus SARS-CoV-2, which causes the disease COVID-19, belongs to a family not completely unknown to mankind before 2020. Coronaviruses had already caused one crisis, the SARS outbreak in 2002/2003, and they nearly caused another, through MERS in Saudi Arabia and South Korea in 2012/2013 and 2015[23]. Furthermore, in its research and development plan for epidemics and pandemics, the World Health Organization (WHO) warns of a possible future disease caused by a pathogen completely unknown to mankind, calling it Disease X. In sum, we do not know exactly which of these pathogens have the potential to infect humans and be transmissible, thus causing a new pandemic. Therefore, it is currently not possible to develop medical agents that will be effective against all future pathogens[24].

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[21] A.R. MUSHEGIAN, *Are there 10^{31} Virus Particles on Earth, or More, or Fewer?*, in *Journal of Bacteriology*, Vol. 202, 2020, p. 1.

[22] S. MORSE et al., *Prediction and prevention of the next pandemic zoonosis*, in *The Lancet*, Vol. 380, 2012, p. 1956; Z. GRANGE et al., *Ranking the risk of animal-to-human spillover for newly discovered viruses*, in *Proceedings of the National Academies of Science*, 1, 2021.

[23] S. PAYNE, *Viruses: From Understanding to Investigation*, London, 2017.

[24] WHO, *Targeting research on diseases of greatest epidemic and pandemic threat*, 2022, *https://www.who.int/teams/blueprint/who-r-and-d-blueprint-for-epidemics*.

3.1.2. Gaps in Medicine: Clinical Treatment of Individual Patients

As far as clinical medicine is concerned, available knowledge about as-yet unknown diseases cannot help us especially in the following two cases. First, whether an exposure or even an infection with a pathogen will lead to the appearance of symptoms in a period of time, known as the "incubation period"[25]. It is possible that individuals who have been exposed to a pathogen will not develop any symptoms at all. After exposure to a communicable disease, persons may develop symptoms and possibly become infectious during this incubation period. This timeframe is key for the normative rationale for quarantines – namely, for those suspected of having the disease: however, medical knowledge cannot show with certainty in advance whether a person will develop symptoms during the incubation period. In the meantime, avoiding contact between that person and others can help prevent further spread of the disease.

Second, and closely related to the last point, is the question of whether a person will develop severe symptoms, that is, whether a particular person will eventually develop mild or severe symptoms, or whether the onset of the symptoms will result in death[26]. This knowledge gap is relevant to the question of where and how seclusion should be maintained. It is related to whether a person who has been in contact with a known case of infection is at risk of developing severe symptoms and therefore should already be placed under medical care.

Ideally, we would be able to know, first, whether the exposure will result in an infectious case, and second, whether that outbreak will be severe, such that a person should receive immediate medical attention. In the case of COVID-19, research is currently underway to identify biomarkers, such as the presence of antibodies after infection with

[25] M. PORTA, *Incubation Period*, *supra* at note 9, *https://www.oxfordreference.com/display/10.1093/acref/9780199976720.001.0001/acref-9780199976720-e-1007?rskey=7DoJ0g&result=1132*.

[26] For a severity index in the case of COVID-19, see YING SUN et al., *Characteristics and prognostic factors of disease severity in patients with COVID-19: The Beijing experience*, in *Journal of Autoimmunity*, Vol. 112, 2021, at Table 1.

COVID-19 or vaccination against it[27], that can be used to better assess the likelihood of severe symptoms when a person becomes infected. But the output of research is not yet definitive, hence we still do not have complete certainty.

3.1.3. Public Health: Measuring the Effectiveness of Community-Level Interventions

The knowledge gaps in public health – the subject that deals with the health status of a population[28] – in measuring the effectiveness of quarantines imposed at the population level are a key component of any normative assessment. The question is to what extent quarantines actually reduce or mitigate the spread of disease at the local, state, or national level. In this public health dimension, there are a multitude of variables that cannot be studied in controlled environments, so the success criteria of microbiological and medical research are not applicable. Such a factor becomes relevant when quarantines are imposed. Thus, the effectiveness of quarantines is directly related to the distinction characterized in the sociology of law as law in books and law in action: the formal establishment of a quarantine does not say much about how exactly that quarantine is implemented in practice[29].

3.2. Quarantines: An Imperfect Measure

Given our imperfect world, it is possible to understand why imperfect measures like quarantines are needed. They cannot be mathematically precise, because needs may vary from one person to the next and from one communicable disease to another. It may be that a person who has been exposed to a sick person has been restricted in exercising his or her basic rights, even though that person has never developed symptoms of a disease.

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[27] R. WIJAYA et al., *Predicting COVID-19 infection risk in people who are immunocompromised by antibody testing*, in *The Lancet*, Vol. 402, 2023, p. 99.

[28] M. PORTA, *Public Health*, in *supra* note 9.

[29] R. POUND, *Law in Books and Law in Action*, in *American Law Review*, Vol. 44, 1910, p. 12.

Even more problematic from a legal perspective is mandating quarantines when a disease has spread to such an extent, that authorities are no longer able to identify all cases of individual exposure to the pathogen[30]. This is decisive from a normative perspective because authorities may not be able to provide individual justification for quarantine measures. In these cases, they may have to resort to community-level quarantines, in which all residents of a particular place, city, region or even an entire country are ordered to stay home. The design of these orders can be adjusted, for example by including exceptions that allow for ensuring access to basic or essential medical services[31].

While literally every country in the world faced the COVID-19 pandemic, not all resorted to the same set of public health tools. The different perspectives of countries in imposing quarantines were not only based on actual capacity to implement them. From a normative perspective, it could be that they are interpreted differently in terms of what is legally proportionate. Consequently, countries may choose to strengthen or weaken the case-by-case assessment requirement; they may decide to declare a state of emergency or even a human rights restriction exception, or not to do so; they may impose quarantines for the full duration of the incubation period and limit isolations to the period during which individuals show symptoms; and finally, they can enforce quarantines by imposing fines (of varying amounts depending on the burden they impose on the addressees) or even criminal sanctions, which can include prison sentences[32].

[30] B. QUILTY et al., *Quarantine and testing strategies in contact tracing for SARS-CoV-2: a modelling study*, in *The Lancet Public Health*, vol. 6, 2021, pp. e175-e183.

[31] L. GOSTIN, L. WILEY, *Governmental Public Health Powers During the COVID-19 Pandemic: Stay-at-home Orders, Business Closures, and Travel Restrictions*, in *Journal of the American Medical Association*, Vol. 323, 2010, p. 2137.

[32] For instance, see *Italy – Criminal sanctions for violation of quarantine measures compatible with the right to personal freedom*, in *Covid-19 Litigation: Open Access Case Law Database* (7 June 2022) available at *https://www.covid19litigation.org/news/2022/06/italy-criminal-sanctions-violation-quarantine-measures-compatible-right-personal*.

4. The International Dimension: Between (Soft) Global Health Law and Human Rights

As affirmed in the introduction, the International Health Regulations (2005) are a legally binding international law instrument. It currently has 196 States Parties and is the subject of ongoing negotiations for their amendments in the wake of the COVID-19 pandemic[33]. Whereas art. 1 of the International Health Regulations (2005) enshrine a definition of quarantines[34], States Parties may still differ on the extent to which they follow such a definition[35].

The WHO issued a number of guidelines on how countries should implement quarantines against the spread of COVID-19. Under art. 17 of the International Health Regulations (2005), national authorities are certainly not obliged to follow recommendations on whether and when to implement quarantines. Such recommendations, however, may play an important role in their normative assessment. A key consideration put forward in these guidelines is the need to adjust measures to national, and ideally local contexts[36]. It is an argument against a "one-size-fits-all" approach towards public health measures in general, and quarantines in particular.

Available information on the effectiveness of quarantines against COVID-19 have evolved in time. Taking these changing circumstances into account, the WHO published three different guidelines – in 2020[37],

[33] The amendment process was officially launched at the 75th World Health Assembly, Resolution WHA 75.12, *Amendments to the International Health Regulations (2005)*, 28 May 2022.

[34] *Supra* at note 6.

[35] See also W. PARMET, M. SINHA, *supra* at note 18.

[36] WHO, *Considerations for implementing and adjusting public health and social measures in the context of COVID-19. Interim Guidance*, 30 March 2023, *https://www.who.int/publications/i/item/who-2019-ncov-adjusting-ph-measures-2023.1*.

[37] WHO, *Considerations for quarantine of contacts of COVID-19 cases. Interim guidance*, 19 August 2020, *https://apps.who.int/iris/bitstream/handle/10665/333901/WHO-2019-nCoV-IHR_Quarantine-2020.3-eng.pdf?sequence=1&isAllowed=y*.

2021[38] and 2022[39] – for the adoption of quarantines that its Member States i.e. national authorities could take into consideration, albeit were not legally obliged to follow. Recommendations in these guidelines show important variations in time. Perhaps the most salient one has to do with the questions of *whom* authorities should subject to quarantines, when, and for how long. The 2020[40] and 2021[41] guidelines suggested all contacts with confirmed cases of COVID-19 ought to be placed in quarantines, either in devoted facilities or at home. Conversely, the 2022 version[42] suggested limiting quarantines to persons at risk who were contacts of positive cases, and even to allow for reducing the duration of these measures below the higher end of the incubation period i.e. fewer than 14 days. The main reason for this change was the rising global immunity against COVID-19[43], which basically allowed for shifting from a strategy of stopping all chains of transmission to one of reducing morbidity and mortality as much as possible[44]. The latter approach implies a recognition that identifying any and all cases of contacts with confirmed COVID-19 infections is not practical, raising questions of whether widespread community-level quarantines were necessary. This shift in the WHO's recommendations was certainly not a major catalyst for changes in practice across its Member States. At that point, it was mostly a validation of emerging data regarding the public health measures that states were choosing to adopt and which

[38] WHO, *Considerations for quarantine of contacts of COVID-19 cases. Interim guidance*, 25 June 2021, *https://apps.who.int/iris/bitstream/handle/10665/342004/WHO-2019-nCoV-IHR-Quarantine-2021.1-eng.pdf?sequence=1&isAllowed=y*.

[39] WHO, *Contact tracing and quarantine in the context of COVID-19. Interim guidance*, 6 July 2022, *https://www.who.int/publications/i/item/WHO-2019-nCoV-Contact_tracing_and_quarantine-2022.1*.

[40] WHO, *supra* at note 38, p. 2.

[41] WHO, *supra* at note 39, p. 2.

[42] WHO, *supra* at note 40.

[43] The WHO cited existing studies on the effectiveness of immunization ie vaccination against the newest strains of the SARS-CoV-2 virus. See N. ANDREWS et al., *Covid-19 Vaccine Effectiveness against the Omicron (B.1.1.529) Variant*, in *New England Journal of Medicine*, Vol. 386, 2022, pp. 1532-1546.

[44] WHO, *supra* at note 2.

were validated as effective in existing research[45]. Moreover, certain governments openly disregarded the advice provided by the WHO, and it was in their legal purview to do so. Such was the case of China, where the government continued to impose a zero-COVID policy until December 2022, months after the WHO had issued its guidance recommending to considerably limit the use of quarantines[46].

Other aspects of the WHO's guidelines on quarantines remained stable throughout the different iterations. Since their first version, these guidelines have recommended a maximum duration of 14 days for individualized cases of quarantines due to exposure to COVID-19, which is the higher-end of the incubation period[47]. Such consistency can be partly understood as preventing quarantines from lasting longer than necessary. The WHO expanded upon this reasoning in its guidelines of 2022, by affirming that the duration of quarantines for mitigating the spread of future communicable diseases similar to COVID-19 should be directly linked to that disease's eventual incubation period[48].

The public health criteria for adopting quarantines can also be assessed under an international human rights perspective. The Principles and Guidelines on Human Rights in Public Health Emergencies[49], developed jointly by the International Commission of Jurists and the Global Health Law Consortium, caution against the excessive imposition of sanctions in quarantines. Particularly problematic are those that rely upon criminal sanctions, at times even resorting to custodial measures[50]. The Principles and Guidelines also reaffirm the need to allow for judicial review whenever these sanctions are imposed.

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[45] On the effectiveness of possible alternatives to quarantines, see B. QUILTY et al., supra at note 31, pp. e175-183.

[46] FRANCES MAO, *China abandons key parts of zero-Covid strategy after protests*, in *BBC News*, 7 December 2022, *https://www.bbc.com/news/world-asia-china-63855508#.*

[47] WHO, *supra* at note 38, p. 2.

[48] ID., 9.

[49] International Commission of Jurists/Global Health Law Consortium, *Principles and Guidelines on Human Rights and Public Health Emergencies*, 4 May 2023, *https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/PGs-on-Human-Rights-and-Public-Health-Emergencies-26-June-2023.pdf.*

[50] *Ibid.*, at paras. 19.1-19.4.

5. Comparative Legal Studies on Quarantines: A Building Block for Normative Assessments

In-depth comparative legal studies can help identify the underlying features of quarantines in terms of both commonalities and contrasts. The goal is not inherently normative, as it is not a matter of finding the best possible approach to these measures. Yet, according to the WHO´s recommendations, differences in the design and implementation of quarantines are justified depending on how they are adapted to multiple contexts[51]. At the same time, differences in the application of these measures may sometimes indicate excessive restriction of individual rights[52]. Again, that will depend on what is allowed for under national standards of proportionality, and thus legality. Liberal democracies usually have more demanding criteria for implementing quarantines than authoritarian regimes[53].

Other authors have proposed to bring about an "empirical turn" in legal research[54]. This approach can be useful when assessing quarantines from a normative perspective. In order to ascertain their conformity with criteria of legality in specific cases, recourse must be made to the findings of microbiology, medicine, and public health. Furthermore, a normative assessment employing legal criteria requires looking beyond the nominal framing of quarantines. "Nominal" here refers to a general term (such as "quarantine") that prima facie refers to one and the same measure, but which can in fact be very different depending on where it is implemented, and by whom. Therefore, although a quarantine in one country, state, or county is nominally the same as a quarantine in another place, they can have major distinctive legal features.

[51] WHO, *supra* at note 37.

[52] Conrad Nyamutata, *Do Civil Liberties Really Matter During Pandemics? Approaches to Coronavirus Disease (COVID-19)*, in *International Human Rights Law Review*, Vol. 9, 2020, p. 66.

[53] ILAN ALON, MATTHEW FARRELL, SHAOMIN LI, *Regime Type and COVID-19 Response*, in *FIIB Business Review*, Vol. 9, 2020, pp. 152-160.

[54] NIELS PETERSEN, *Braucht die Rechtswissenschaft eine empirische Wende?*, in *Der Staat*, Vol. 49, 2010, pp. 435-455.

Such awareness can be summarized by the statement, «There are quarantines and then there are quarantines».

The considerations presented thus far should lead to caution in assessing whether quarantines adopted during the COVID-19 pandemic are legal or not. Relevant data on quarantines can be found in the reports available in *Lex-Atlas:Covid-19*. The main results of the project are published as the Oxford Compendium of National Legal Responses to COVID-19 (the "Oxford Compendium")[55]. Initially, the legal responses of an initial 36 countries[56] and one Special Administrative Region[57] were examined. It is worth noting that this selection encompasses all six regions of the WHO[58]. Various authors who are legal experts in and from a particular jurisdiction contributed to country reports by answering a series of standardized questions – based on what was labelled an Author Guidance Code[59].

Authors' contributions to the Oxford Compendium so far have made it possible to describe in detail the ways in which quarantines were legally imposed. Although some common features were noted, there was generally no "one size fits all" approach. The findings of this comparative study provide useful information for future cases where quarantines may be deemed necessary. Although there are no specific binding commitments at the international level on the duration of quarantines, a common practice seems to be emerging. Statutory quarantines have been imposed in all countries surveyed, with the exception of Sweden. With two exceptions – Hong Kong and Peru – the maximum duration of quarantines corresponded to the COVID-19 incubation period of 14 days. Conversely, quarantines of shorter duration were reported in sev-

[55] J. KING et al. (eds.), *Oxford Compendium of National Legal Responses to COVID-19*, 2021-2023, *https://oxcon.ouplaw.com/home/OCC19*.

[56] Specifically, Argentina, Austria, Belgium, Brazil, Canada, Chile, China (People's Republic of), Colombia, Ethiopia, Finland, France, Hungary, Ireland, Israel, Italy, Jamaica, Latvia, Mexico, New Zealand, Norway, Pakistan, Peru, Portugal, Romania, Russia, South Africa (Republic of), Serbia, Singapore, Spain, Taiwan, Thailand, Turkey, United Kingdom and United States of America.

[57] Namely, Hong Kong.

[58] Africa; Americas; Europe; Middle East; South East Asia; and Western Pacific.

[59] *Author Guidance Code*, in *Oxford Compendium of National Legal Responses to COVID-19*, *https://oxcon.ouplaw.com/page/925*.

eral countries[60] to mitigate the social and economic burden of such measures. This indicates that the incubation period has become a *de facto* legal benchmark by which the appropriate duration of a mandatory quarantine is normatively assessed. Judicial review of the imposition of these measures confirmed this point. The incubation period is an incipient common legal criterion by which the adequacy of the duration of quarantines can be judged.

However, the rationale for setting a maximum quarantine period does not apply to community quarantines, that is, when individual assessment is absent and they are justified on the basis of society-level factors. The mass spread of a pathogen in a community is an external factor that can be cited as justification for imposing (home) quarantines until the rate of transmission has decreased – a strategy commonly known as "flattening the curve"[61] – or stopped altogether through a "zero COVID" policy[62]. In a number of countries where community quarantines were imposed, the duration was more than 14 days, as high transmission rates outlasted this period[63].

There was greater variation in the imposition of administrative or criminal sanctions for a quarantine violation. Countries in the sample that reported enforcing quarantines through sanctions included both administrative and criminal sanctions, although the latter were rarely enforced[64]. Conversely, no common practice was found in the country sample regarding the conditions for maintaining these quarantines.

The discrepancy between existing law and practice prevents a common approach to quarantines from emerging. In at least four country reports from the Oxford Compendium, variations in compliance were

[60] Belgium, Hungary, Israel, Latvia, Norway, Austria, Portugal, Spain, Thailand and the United Kingdom.

[61] MARCEL BOUMANS, *Flattening the curve is flattening the complexity of Covid-19*, in *History and Philosophy of the Life Sciences*, Vol. 43, 2021, p. 18.

[62] ZICHENG WANG, KIT CHAN, ADRIENNE POON, YAN GUO, *An equitable route forward from China's 'zero COVID' policy*, in *Nature Medicine*, 10 January 2023, *https://www.nature.com/articles/d41591-023-00002-0*.

[63] China (People's Republic of), Colombia, Italy and Peru.

[64] Country reports indicated the imposition of criminal sanctions in Hong Kong, Israel and Romania.

directly linked to existing institutional and economic capacities[65]. Legal measures such as quarantines are ultimately imposed against a broader social and institutional backdrop. Public health capacities, as well as the overarching legal framework, must play a role in the development and implementation of these measures.

It seems obvious, but it is still worth emphasizing, that a quarantine in Germany is different from a quarantine in Italy, France, or New Zealand, let alone China with its zero COVID policy. This raises the question: What were the features of the quarantines in all these countries that are legally relevant? How long were the quarantines implemented? Were the quarantines domestic or in special facilities? Did health authorities clearly explain why individual or community-level quarantines were necessary[66]? Were the living conditions (the "minimum core")[67] of the affected individuals assured? Were these individuals able to appeal the implementation of such measures if they did not agree? All these aspects are crucial to assess the legality as well as the proportionality – and, as said, all remain "quarantined" in the end anyway. Available data in *Lex-Atlas:Covid-19* is generally not as granulated so as to give an answer to all of these questions. Future studies could explore these aspects with more detail.

6. Conclusion: The Normativity of Quarantines at the International and National Interface

The findings presented in this contribution raise the question of whether it is possible to develop a context-sensitive normative assessment of quarantines. The wide diversity in the factual and legal bases for their justification make it increasingly difficult. A concept capable of conveying the nuances that distinguish it from one jurisdiction to another, or even from one disease to another.

[65] Argentina, Belgium, Pakistan and Peru.

[66] An issue that authorities should consistently communicate to the population at large, in accordance with WHO, *supra* at note 39.

[67] K. YOUNG, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, in *The Yale Journal of International Law*, Vol. 33, 2008, p. 128.

Comparative legal studies of quarantines may provide useful insights for more general normative assessments. From the study conducted in *Lex-Atlas:Covid-19*, it appears that for the imposition of quarantines, only the duration of the maximum incubation period seems to be a common denominator useful beyond the specific case of COVID-19. In other past, present and future outbreaks of communicable diseases, the maximum incubation period is both longer and shorter. Both Ebola and monkeypox have an incubation period of 21 days[68], whereas for influenza it is only 5 days. In these cases, individual quarantines must include that factor as a basis for their duration. In contrast, the duration of population-level quarantines is more uncertain because it depends on external factors that may no longer operate in a predictable time frame. In these cases, continuous review of the epidemiological situation must be provided to minimize restrictions on individual freedoms. The more extreme cases of zero COVID policies reflect a potentially long-lasting duration of general restrictions.

Whether future health emergencies require the use of quarantines will depend on the nature of the disease. Experience gained in the early years of the COVID-19 pandemic may be useful for this purpose. In the fall of 2022, a set of measures deemed to be a "lockdown" was implemented in Uganda to deal with an Ebola outbreak[69]. The disease was not wholly unknown to authorities. While the outbreak was eventually contained, the restrictions were onerous for the affected communities.

The missing link, then, is how to develop a legal approach to quarantine and isolation that is as transboundary as a pandemic. In Geneva, neither a new binding "pandemic treaty" – an international agreement for pandemic preparedness and response that can be approved by its

[68] G. CHOWELL, H. NISHIURA, *Transmission dynamics and control of Ebola virus disease (EVD): A review*, in *BMC Medicine*, Vol. 12, 2014, p. 197; F. MIURA et al., *Estimated incubation period for monkeypox cases confirmed in the Netherlands*, in *Eurosurveillance*, Vol. 27, 2022, p. 2.

[69] European Centre for Disease Prevention and Control, *Communicable Disease Threats Report*, in *Weekly Bulletin*, Vol. 43, 2022, *https://www.ecdc.europa.eu/sites/default/files/documents/Communicable-disease-threats-report-29-oct-2022.pdf*.

member states under the WHO's authority[70] – nor the proposed amendments to International Health Regulations of 2005[71], both legally binding instruments of international law, are expected to regulate when and how quarantines are imposed. Instead, the proposed pandemic treaty reaffirms the principle of sovereignty as the basis for national public health action. This means that states can decide for themselves whether and when to take restrictive measures, which will, of course, still fall within the scope of other applicable national, regional, and international legal norms, especially those concerning human rights.

Further theoretical and empirical work is needed for a definitive answer to the question of whether there can be a single legal approach to quarantines that captures cross-national diversity. Any attempt must address both the factual and normative dimensions that have been presented in this contribution. This is the only way to ensure that the legal framing of quarantines is adaptable and accurately reflect diversity without compromising its indispensable feature: protecting the population against the spread of diseases.

[70] World Health Assembly Special Session, *Decision SSA2(5): The World Together: Establishment of an intergovernmental negotiating body to strengthen pandemic prevention, preparedness and response*, 1 December 2021.

[71] World Health Assembly, *supra* at note 34.

PRIVATE INSURANCE SCHEMES AND COVID-19 PANDEMIC. LESSONS FROM A COMPARATIVE ANALYSIS

Gianmatteo Sabatino[*]

1. Introductory remarks

Seemingly, none of the major institutes of private law came out unscathed from the economic consequences of the Covid-19 pandemic.

The impact of such enormous event upon the regulatory frameworks for market competition, state aids, investments, etc. was to some extent foreseeable[1]. Similarly, the self-regulating efforts of private economic

[*] Lecturer in Comparative Law, School of Law and Economics, Zhongnan University of Economics and Law, Wuhan, People's Republic of China.

[1] A. ROSANÒ, *Adapting to change: Covid-19 as a factor shaping EU State Aid Law*, in *European Papers*, 5(1), 2020, 621-631; I. OTTAVIANO, *Il ruolo della politica di coesione sociale, economica e territoriale dell'Unione europea nella risposta alla COVID-19*, in *Eurojus*, 3, 2020, 125-129; European Commission, Temporary Framework for State Aid Measures to Support the Economy in the Current Covid-19 Outbreak (2020/C 91 I/01), Point 10; T. WILSON, P. GNATZY, *Covid-19 and EU State Aid Recapitalisation*, in *Kluwer Competition Law Blog*, 15 May, 2020; VV.AA., *L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive*, in *Eurojus Special Issue*, 2020; T. PAPADOPOULOS, *COVID-19 crisis and screening of foreign direct investments in EU privatized companies*, in *International Trade Law & Regulation*, 27, 2021, 54-75; F. COSTA CABRAL, *From Crisis Cartels to Covid-19 State Aid and Cooperation: The Non-Exceptionality of Crisis Management by EU Competition Law*,

operators *vis-à-vis* the health emergency, including the reorientation of credit policies of banks and financial institutions, were to be expected[2]. Indeed, the majority of such changes mirrored corresponding interventions from states[3].

More interestingly, at least from the perspective of this paper, is the influence exerted by Covid-19 on the interpretive dimension of general theories and principles governing the application of the pillars of inter-private legal rules[4]. That of liability is a paradigmatic example. A quick comparative overview of some judicial decisions would suffice to prove that courts have extensively been dealing with the reconsideration of concepts such as causation and fault in the light of claims brought against states whose emergency measures – taken to tackle Covid-19 – inevitably had adverse effects not only on the business revenues but also on individual fundamental rights, invoked by parties before judges so to challenge allegedly unlawful provisions[5].

The evolving applications of liability standards, however, are not limited to claims against states. They also directly concern purely private claims brought forward in the context of the insurance market, dealing with both economic losses due to mandated business closure and other losses, in the first place those brought by death or disease of insured subjects due to Covid-19.

The institutional interplay underlying the reaction of the insurance market to Covid-19 represents an additional element of interest. Liability standards for private insurance, when assessed in judicial proceedings, mirror the inherent conflict of interest between insured subjects

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TILEC Discussion Paper, no. 2023-06, 2023, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4411326* (last access: 29 May 2023).

[2] OECD, Insurance sector responses to COVID-19 by governments, supervisors and industry, available at *https://www.oecd.org/pensions/Insurance-sector-responses-to-COVID-19-by-governments-supervisors-and-industry.pdf* (last access: 29 May 2023).

[3] *Ibidem*; see also the issues no. 1-2-3 of Vol. 1 of *Legal Policy & Pandemics-The Journal of the Global Pandemic Network*, 2022.

[4] K. NOUSIA, *The COVID-19 pandemic: contract and insurance law implications*, in *Journal of International Banking Law and Regulation*, 2020; J.H. HERBOTS, *Covid-19 and contracts in China and Europe*, in *China-EU Law Journal*, 8, 2022, 1-9.

[5] See the issues no. 1-2-3 of Vol. 1 of *Legal Policy & Pandemics-The Journal of the Global Pandemic Network*, 2022.

and insurers, whose arguments tend to limit as much as possible the risks covered by policies, especially when instances such as pandemics are not explicitly contemplated[6].

On the other hand, however, the judicial interpretation of insurance policies in times of pandemic inevitably reflects the stance of the judges, as independent actors, towards the social consideration of the pandemic's consequences, especially in terms of protection of weak and disadvantaged parties *vis-à-vis* the restrictions imposed by emergency provisions[7].

From such perspective, the potential of a comparative analysis may be better appreciated: different degrees of judicial interventionism, different exposures – in historical terms – to extensive insurance markets, as well as different interests in terms of business regulation and control may justify varying outcomes in terms of expansion or restriction of the scope of insurance policies[8].

This brief paper draws inspiration from the aforementioned perspectives and tries to provide a comparative outlook on judicial trends concerning liability of private insurers in the face of Covid-19 related damages, both economic and non-economic.

The analysis is mainly based on the materials collected within the context of the Covid-19 Litigation Project, co-funded by the World Health Organization and coordinated by the University of Trento, in cooperation with other academic and research institutions in several countries[9]. In particular, most of the materials studied and examined in this paper draws from the collection of "breaking news", concerning

[6] N.E. DE LATOUR, *Insuring the "uninsurable": business interruption insurance coverage & Covid-19*, in *Georgia State University Law Review*, 37(5), 1-48.

[7] The debates imply a more general reflection upon the social role of insurance in terms of social balance and solidarity, as explained, for instance, in S. TALESH, *Insurance Law as Public Interest Law*, in *UC Irvine Law Review*, 2, 2012, 985-1009; T. KIMMO-LEHTONEN, J. LIUKKO, *Producing Solidarity, Inequality and Exclusion Through Insurance*, in *Res Publica*, 21, 2015, 155-169.

[8] J.E. THOMAS, *Insurance Law Between Business Law and Consumer Law*, in *The American Journal of Comparative Law*, 58 (Supp. 1), 2010, 353-367; J.H. HERBOTS, *op. cit.*

[9] For more information about the project's content, structure and achievements see its official website at *https://www.covid19litigation.org/*.

Covid-19, which were regularly posted on the official website of the project[10]. Other decisions have instead been extracted from the project's database.

The reliance on the project database allows for the construction of a relatively comprehensive landscape in terms of judicial decisions dealing with claims against private insurance companies. At the same time, however, such a landscape is also relatively unbalanced, especially in quantitative terms, a trait which is necessarily reflected in the structure of the paper. Indeed, most of the decisions examined are from U.S. courts, to the point that it seems reasonable to dedicate a distinct paragraph to them[11].

Such structural choice, however, is relevant from a comparative perspective, since it frames a substantial part of the material assessed within the connoting traits of a specific legal tradition, especially as far as some clauses and concepts – e.g. that of «direct physical loss» – are concerned[12].

The paper, apart from this introduction, is divided into four paragraphs: in the second paragraph, the analysis will focus on the selection of relevant legal issues, with special attention to the values and interests at stake in the interpretation of insurance policies *vis-à-vis* Covid-19.

The third paragraph will be dedicated to the analysis and assessment of some relevant judicial decisions, so to provide insight on how courts, all around the world, have dealt with private insurance claims. The fourth paragraph will follow the same logic, but focusing solely on U.S. case law and the development of the doctrine of direct physical loss in the light of Covid-19.

Lastly, the fifth paragraph will attempt to draw some conclusions, not only concerning the impact of Covid-19 on the interpretation of insurance law, but also on the possible methodological implications of such kind of assessment for a contemporary outlook on comparative economic law.

[10] *https://www.covid19litigation.org/news* (last access: 16 October 2023).

[11] The trend is, indeed, confirmed also with regard to Covid-related litigation in general terms. A quick look at the database of the project shows that the United States are first in terms of documents collected, with 253 cases analyzed and assessed.

[12] See § 4.

2. The legal issues and the interests at stake

The potentially huge consequences of the pandemic on the structure and dynamics of the insurance market were an object of debate immediately after the first outbreak of the disease in the spring of 2020[13].

The full awareness of such impact was due to the recognition of different categories of interests hindered by the pandemic itself as well as by the emergency measures taken by governments in response to the health crisis. Each one of these interests, from the perspective of insurance law, mirrors an actual or potential risk coverable by insurance policies.

One macro-category of interests touched by the pandemic is that of the economic interests of business owners, whose shops, plants, establishments etc. were closed during lock-downs or suffered due to emergency restrictions[14]. From a legal perspective, their experience raises the issue of balancing between economic freedoms, often enshrined in constitutional texts, and public health in times of emergency, an endeavor engaged in by several courts[15].

However, business owners are also insured subjects, and most of them invoked the clauses of their respective insurance policies to obtain relief in view of the income loss brought by the pandemic. The potential reliance on insurance policies, however, was destined to deal with the reaction of the insurance industry, whose attitude towards the pandemic is affected by the historical precedent of the SARS epidemic started in 2003[16].

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[13] N. DE LUCA, *COVID-19, rischio sanitario e assicurazioni. Prime riflessioni*, in *Danno e responsabilità*, 25(3), 2020, 334-340; J. WENANCJUSZ PRZYBYTNIOWSKI, S. BORKOWSKI, A. PAWLIK, P. GARASYIM, *The Risk of the COVID-19 Pandemic and Its Influence on the Business Insurance Market in the Medium and Long-Term Horizon*, in *Risks*, 10, 2022, 100 ff.

[14] M.C. APEDO-AMAH et al., *Unmasking the Impact of COVID-19 on Businesses. Firm Level Evidence from Across the World*, World Bank Policy Research Working Paper no. 9434, 2020.

[15] G. SABATINO, *Covid-19 and Freedom to Conduct a Business*, in *The Journal of the Global Pandemic Network*, Vol. 1(1-2-3), 2021, 225-269.

[16] N.E. DE LATOUR, *op. cit.*

In the wake of that health crisis, insurers in some countries were keen on excluding such kind of unpredictable sanitary events from the policies' coverage[17]. Therefore, the business trend commenced almost two decades ago impacted upon the confrontation between insurers and insured in the Covid-19 era. The exclusion of pandemics from the coverage of policies, indeed, makes scholars wonder about the potential re-extension of the insurance scope through the interpretation of other clauses contained in policies, such as those concerning natural disasters. In the specific case of U.S. law, the issue mainly revolves around the interpretation of the concept of "direct physical loss"[18].

A further issue stems from the possible juxtapositions between insurance schemes and support schemes enacted by governments to aid business harmed by lockdowns. In this case, obviously, the undesirable consequence to be avoided is that of a double compensation insisting upon the same economic loss, covered both by private insurance and by public support schemes. When dealing with the management of relief payments and subsidies, both government and courts have been particularly keen on preventing cases of unjust enrichment from occurring[19]. It is therefore reasonable to wonder whether a double coverage (public and private) of the same economic loss in case of insured business activities would amount to an unlawful gain and would thus deserve to be impeded. A British decision has explicitly adopted such stance, ruling that business operators cannot ask insurers to tackle losses already cov-

[17] *Ibidem*. See also the assessment of UK practices as carried out by the High Court of England and Wales in *FCA v Arch Insurance (UK) Ltd and others*, [2020] EWHC 2448 (Comm).

[18] C.M. MILLER, R.P. LEWIS, C. KOZAK, *Covid-19 and business income insurance: the history of "physical loss" and what insurers intended it to mean*, in *Tort, Trial & Ins. Prac. L. J.*, 57, 2022.

[19] See for instance the Report of the European Platform tackling undeclared work from the Platform webinar on COVID 19: combating fraud in short-term financial support schemes, published in May 2021. See also the decision from the High Court of Singapore of 16 February 2023, whose related-news is available at the link *https://www.covid19litigation.org/news/2023/03/singapore-court-rules-business-owners-receiving-covid-19-relief-subsidies-cannot-claim* (last access: 29 May 2023).

ered by government furloughs payments, within the context of relief schemes implemented during the pandemic[20].

Apart from losses caused by business closures, other private economic interests often covered by insurance policies have been affected by the pandemic. Noticeably, travel insurances have dealt with the disruption of travel routes after March 2020[21]. The cancellation of flights and the issuance of individual or generalized quarantine orders are, however, distinct situations potentially covered by insurance policies, thus deserving a separate assessment. Could a general quarantine order, meant as an instrument of public health policy, justify compensation under a disease clause of a travel insurance in the same way as an individual quarantine order, due to the traveler falling ill?

On the other side of the spectrum, especially when reasoning in terms of quantitative relevance within the insurance market, one finds issues concerning life and health insurance policies, in the light of the huge death toll brought by the pandemic as well as by the rise in sudden hospitalizations[22]. It is fair to assume – but it is an assumption seemingly supported by practice – that the coverage of life and health insurance policies in times of pandemic plays a greater role in those legal systems which do not regulate a universal or extensive public healthcare system or where such system is not well developed. However, the diffusion of private health insurance even in countries connoted by traditionally strong social states justifies an extensive approach to the issue. Thus, interpretive probes into the scope of health insurance policies have been

[20] High Court of England and Wales, *Stonegate Pub Company -v- MS Amlin and others / Various Eateries Trading -v- Allianz Insurance / Greggs -v- Zurich Insurance*, [2022] EWHC 2549.

[21] See the ICAO presentation about the *Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis*, 2023, available at the link *https://www.icao.int/sustainability/Documents/Covid-19/ICAO_coronavirus_Econ_Impact.pdf* (last access: 5 June 2023).

[22] J. BANTHIN et al., *Changes in Health Insurance Coverage Due to the COVID-19 Recession: Preliminary Estimates Using Microsimulation*, in *Timely Analysis of Immediate Health Policy Issues*, 2020, available at the link *https://www.urban.org/sites/default/files/publication/102552/changes-in-health-insurance-coverage-due-to-the-covid-19-recession_4.pdf* (last access: 5 June 2023).

carried out, for instance, in order to assess which kind of hospitalization is indeed covered[23].

Incidentally, it is worth noting that even with regard to life insurance policies some potential issues of double compensation could arise, if one considers those legal systems, such as the Indian one, where both the government and the courts have extensively issued orders for *ex gratia* payments to the relatives of some victims of Covid-19[24].

A peculiar situation arose instead with regard to the Chinese insurance market, deeply affected by the implications of the so-called "zero-Covid policy" pursued by the Chinese government until early December of 2022[25]. As known, such policy revolved around strict limitations in movements and swift lockdown measures in case of handful of cases detected in districts and sub-districts all over the country[26]. Such regime of restrictions corresponded to a widespread fear of contagion among the population, which prompted several people, especially starting in 2022 (when the highly transmissible omicron variant spread), to stipulate health insurance policies providing for payment of lump sums in case of infection[27].

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[23] See § 3.

[24] See, among several decisions, Supreme Court of India, 30 June 2021, *Reepak Kansal And Another v. Union of India and others*; Supreme Court of India, 4 October 2021, *Kumar Bansal v. Union of India*, Writ Petition (Civil) No. 539 of 2021; High Court of Madras, 9 November 2021, No. 9858 and 9931.

[25] YUXI ZHANG et al., *Chinese Provincial Government Responses to COVID-19*, Version 1, Blavatnik School of Government Working Paper, 2021, available at the link *www.bsg.ox.ac.uk/covidtracker* (last access: 5 June 2023); Z. WANG, J. CHEN, *The People's Republic of China: Legal Response to Covid-19*, in J. KING, O. FERRAZ et al. (edited by), *The Oxford Compendium of National Legal Responses to Covid-19*, Oxford, 2021.

[26] LIU CHANGQIU (刘长秋), ZHAO ZHIYI (赵之奕), 论紧急状态下公民健康权的克减及其限度 (*On the derogation and limitation of citizens' right to health during the state of emergency*), in *faxue luntan*, 9, 2020, 30-39.

[27] LIU YI (刘轶), DONG MIN (董敏), 重大疫情风险治理中的保险路径及其法律供 (*The insurance path and its legal supply in the risk management of major epidemics*), in *xiandai jingji tan tao*, 6, 2020, 7 f.; X. QIAN, *The impact of COVID-19 pandemic on insurance demand: the case of China*, in *The European Journal of Health Economics*, 22, 2021, 1017-1024. See also the news *Chinese insurers pull coronavirus coverage as*

After the country opened up, the virus spread very quickly infecting an outstanding number of people in a short period of time, thus leading to requests for compensation which suddenly overloaded insurance companies' capacity. In several cases, compensation requests were turned down, prompting insured people to file lawsuits[28].

In some contexts, such as in China, the issue of the interpretation of insurance contracts in the light of changes in circumstances also has to deal with a peculiar role designed for insurance during the pandemic, as fueled by concerns of public policy, in a country connoted by advanced forms of state coordination over the economy but also by a somewhat underdeveloped social security system.

A brief overview of the interests at stake in the disputes concerning insurance policies and the Covid-19 pandemic shows how the assessment of interpretive criteria for contracts, while constituting the common legal issue to be addressed, is to different extents affected not only by the inherent characteristics of the legal system examined but also by the specific policy orientation authorities intended to pursue with regard to remedies against the consequences of the pandemic, in terms of distribution and redistribution of wealth *vis-à-vis* both economic and non-economic damages.

The next part of the analysis must therefore focus on the specific responses given by courts to these questions.

3. Case law overview and standards of contract interpretation

When dealing with the aforementioned disputes, courts refer to rules of contract interpretation according either to general standards, thus

cases mount at *https://www.ft.com/content/7b965b03-c473-47b8-87f9-941ee056ddab* (last access: 5 June 2023).

[28] ZHENG SHUQIAN (郑舒倩), "新冠险"理赔胜诉案 (*Successful case in claim about the novel coronavirus*), in *Peking University Financial Law Research Centre* (WeChat official page), 16 April 2023, available at *https://mp.weixin.qq.com/s/Q9pu3chI6xbUEU9s70-6lg* (last access: 5 June 2023).

taking into account their wording, context and purpose[29], or to specific frameworks of rules pertaining insurance contracts which define and limit the liability of insurers. The first choice is the usual one in jurisdictions more influenced by common law standards; the second one is, for instance, the one embraced by French courts, which rely on the provisions of the Insurance Code (*Code des assurances*).

Notwithstanding this difference, it is worth noting that even when adjudicating on the basis of general principles, courts in some countries acknowledge the specific purpose and social function of insurance contracts, that is one of indemnity. Therefore, any subsequent interpretation should be carried out in the light of such orientation[30].

Under such theoretical premises, it appears that the landscape of judicial decisions is quite fragmented. However, some general trends are worth highlighting. The following subparagraphs try to assess them, focusing, in the first place, on how courts in different countries reacted to the issue of balancing economic and social instances in business and health policies affected by Covid-19 through contract interpretation. The analysis of some relevant U.S. decision, albeit ideally connected to the first point, is presented in a separate part.

3.1. Weighing contractual freedom and economic balance in business insurance policies

Courts acknowledge that business policies often include disease clauses which limit coverage to events happening within a certain dis-

[29] R. CATTERWELL, *Striking a Balance in Contract Interpretation: The Primacy of the Text*, in *Edinburgh Law Review*, 23, 2019, 52 f.; C. MITCHELL, *Interpretation of contracts*, London, 2020.

[30] Supreme Court of Appeal South Africa, *Guardrisk Insurance Company Limited v Café Chameleon CC* (Case no 632/20) [2020] ZASCA 173 (17 December 2020), § 13, also referring to *Norwich Union Fire Insurance Society Ltd v South African Toilet Requisite Co Ltd*, 1924 (AD), § 212 at 222. On the decision see also J. KATZEW, *The role of insurance at the intersection of Covid-19 and inequality through the lens of the cases: Cafe Chameleon CC v Guardrisk Insurance Company Ltd and Ma-Afrika Hotels (Pty) Ltd v Santam Limited*, in *South African Journal on Human Rights*, 37(4), 2021, 492-511.

tance from the business premises[31]; in other cases, policies exclude coverage for losses caused by infectious diseases and only take into account losses linked to actions of authorities directly impacting over business activities[32]. In this last case, obviously, the interpretive issue is whether or not to attribute the loss to the government-imposed lockdowns rather than to the pandemic.

That between the disease, government restrictions and losses is a triadic relation at the core of most disputes concerning business insurance.

So, the causal connection between the event (i.e. the disease) and the losses suffered by business premises must be filtered through the government response (i.e. the lockdown) which is indeed the proximate cause of most losses but is at the same time inevitably connected with an infectious outbreak. Therefore, an interpretation of a disease clause within an insurance policy which excludes coverage due to the fact that losses were caused not by the disease itself but rather by the government-imposed business restrictions would be unreasonable[33]. Such stance, embraced in South Africa, echoes a logic found also in other countries, such as Spain, where courts, while not discussing the presence of specific «disease clauses», confirmed that business losses due to closures which followed a declaration of state of alarm are to be covered by insurance policies, emphasizing the direct causal relation between the closure and the economic damages suffered[34]. Additionally, the Tribunal of Pamplona pointed out that when the delivery of the policy and the exact knowledge (by the insured party) of the limitations

[31] Supreme Court of Appeal South Africa, *Guardrisk Insurance Company Limited v Café Chameleon CC*; High Court of England and Wales, *Corbin et al. v. Axa Insurance UK Plc*, [2022] EWHC 409 (Comm); High Court of South Africa, *43 Air School Holdings (PTY) LTD v. AIG South Africa LTD*, CASE NO: 30404/2021, 20 February 2023.

[32] Several policies of this kind are quoted and assessed in High Court of England and Wales, *Corbin et al. v. Axa Insurance UK Plc.*

[33] Supreme Court of Appeal South Africa, *Guardrisk Insurance Company Limited v Café Chameleon CC*, §§ 14-17.

[34] See First Instance Tribunal no. 3 of Leon, decision no. 35/2022, which interpreted the concept of "extensive risks" as included in the policy in the sense most favorable to the insured party, so that the termination of activity due to COVID-19 must be covered by the policy.

herein set is not proven, the scope of the policies is to interpreted as covering the damages causally related to business closures[35].

In presence of clauses not concerning diseases but only decisions from authority – including the so-called "prevention of access" clauses[36] – the interpretive effort appears much more complex, depending on the geographical scope of the coverage. The High Court of England and Wales, for instance, pointed out that clauses requiring that government actions be taken due to an emergency in the vicinity of the premises require that the insured proves «it was an emergency by reason of Covid-19 in the vicinity, in the sense of the neighborhood, of the insured premises» which prompted the public response. Given that lockdown measures are taken in the light of the overall situation of a pandemic and not on the basis of cases localized within a certain area from the premises, it would be very difficult to satisfy such burden of proof[37].

On the other hand, when policies require that «the actions or advice of the government were "in the Vicinity of the Insured Locations"», it may be assumed that measures taken at the national level, thus affecting all businesses in all areas, inevitably are in the vicinity of the insured locations[38]. In other words, the coverage of the government response *per se* implies different consequences than the coverage of the government response as a reaction to a specified emergency.

An attempt at a unifying interpretive stance was carried out by the UK Supreme Court, which embraced positions generally favorable to insured subjects by stating that although «in the present case it obviously could not be said that any individual case of illness resulting from Covid-19, on its own, caused the UK Government to introduce restrictions», the restrictions «were taken in response to information

[35] *https://www.covid19litigation.org/news/2023/04/spain-insurance-company-ordered-compensate-hotel-losses-suffered-during-pandemic*.

[36] These clauses are those which cover losses caused by circumstance which prevent access to the business premises and are due to actions or advice of a government, in the light of an emergency which is likely to endanger life or property.

[37] High Court of England and Wales, *FCA v Arch Insurance (UK) Ltd and others*, [2020] EWHC 2448 (Comm), § 466.

[38] *Ivi*, § 471.

about all the cases of Covid-19 in the country as a whole»[39]. As such, in principle, each localized case may be regarded as an emergency directly linked to the enactment of the restrictions ultimately causing the loss[40].

The decision of the Supreme Court had a notable echo in the UK[41]. However, a quick comparative analysis, even limited to common law countries, immediately shows divergent stances. The High Court of Ireland, for instance, even if recognizing that in principle a "prevention of access" clause may be triggered by a local outbreak of a highly dangerous disease, excluded that the "danger" or "disturbance" required to trigger the clause may be, in concrete, linked to a nationwide pandemic[42]. In doing so, the court mirrored the reasoning of those English decision upholding a narrow interpretation of the policies' geographical scope[43]. Furthermore, it was also noted how at the moment of the conclusion of the policy, a reasonable man would have never thought a disease like Covid-19 could be included under the notion of "danger" or "disturbance" leading to prevention of access to premises[44].

The diverging orientations of these common law courts seem to reflect a struggle between the perceived exigence of addressing the pandemic's consequences and the adherence to strict standards of objective interpretation specified through the references to the exact wording of the policies as well as their interpretation in the eyes of a reasonable man at the time of their negotiation and conclusion[45].

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[39] Supreme Court of the United Kingdom, *FCA v Arch Insurance*, [2021] UKSC 1, § 176. The case is the appeal of [2020] EWHC 2448.

[40] Ö. GÜRSES, *The Supreme Court on Business Interruption Insurance and COVID-19: Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1*, in *King's Law Journal*, 32(1), 2021, 71-83.

[41] High Court of England and Wales, *Corbin et al. v. Axa Insurance UK Plc*.

[42] *Brushfield Limited (t/a The Clarence Hotel) v AXA Insurance Designated Activity Company & Anr* [2021] IEHC 263.

[43] High Court of England and Wales, *FCA v Arch Insurance (UK) Ltd and others*, [2020] EWHC 2448 (Comm).

[44] *Brushfield Limited (t/a The Clarence Hotel) v AXA Insurance Designated Activity Company & Anr*.

[45] L.A. DI MATTEO, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, in *South Carolina Law Review*, 48(2), 1997, 293-356.

Such adherence, indeed, supported the approach taken by an Australian decision which excluded that a clause covering action taken in response to a "conflagration or other catastrophe" could be used to counteract a disease clause which explicitly excluded some diseases on the basis of criteria which may be applied to Covid-19 as well[46]. In this case, the preservation of the logic coherence of the policy as constructed at the moment of its negotiation requires the exclusion of Covid-19 from the coverage, in the light of the wording of disease clause.

The comparative landscape, however, varies also depending on the socio-economic context and the specific role courts are used to playing within it. In countries whose adoption of common law traditions is mixed with civilian/customary/religious backgrounds and whose economic ideology eschews purely liberal paradigms, courts are much more at ease in working as social engineers, thus favoring evolutionary and composite interpretation of insurance policies[47].

South Africa is a perfect example[48]. Its courts, as already noted, highlighted the specific nature of insurance contracts as contracts of indemnity. Such stance justified on the one hand an extensive interpretation of the causal link between localized pandemic outbreaks and government restrictions, to the point that coverage was upheld even when cases within the radius considered by the insurance policies occurred only after the enactment of those restrictions directly linked to

[46] Federal Court of Australia, *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* [2022] FCAFC 16. The case revolves around the interpretation of two *memoranda* annexed to an insurance policy. The first one (no. 9) essentially works as a disease clause, and the court notes that «the term Notifiable Disease has an express exclusion for any occurrence that arises directly or indirectly from a category of disease defined by reference to the Biosecurity Act 2015 (Cth). COVID-19 is such a disease». On the other hand, *memorandum* no. 7 states that «The word 'Damage' under Section 2 of this Policy is extended to include loss resulting from or caused by any lawfully constituted authority in connection with or for the purpose of retarding any conflagration or other catastrophe». The policyholder's argument points out that that, pursuant to *memorandum* no. 7 a conflagration or other catastrophe may also include Covid-19, but such view, as just noted, is rejected by the court.

[47] On the notion of mixed legal systems see, *ex multis*, V.V. PALMER (edited by), *Mixed Jurisdictions Worldwide: The Third Legal Family*, 2 ed., Cambridge, 2012.

[48] J. KATZEW, *op. cit.*

economic losses[49]. On the other hand, South African case law, following general criteria of reasonableness, extended coverage to business premises not directly mentioned in the insurance policy but functionally linked to the insured party in terms of branches of its operative business activities[50].

Incidentally, South African law shares tendencies with at least another country connoted by a mixed jurisdiction (though oriented towards common law) and a state capitalist economic model, i.e. India[51]. The activism of Indian courts on socio-economic matters is well-known and has experienced a decisive surge during the pandemic, whose widespread consequences were repeatedly addressed by judges through the issuance of orders directed at both public and private parties so to alleviate the misfortunes of students, business operators, etc.[52].

From a purely comparative perspective, therefore, the conflict of positions within common law (or common law-oriented) jurisdictions, or

[49] High Court of South Africa, *43 Air School Holdings (PTY) LTD v. AIG South Africa LTD*. The decision quotes *Guardrisk Insurance Company Limited v Café Chameleon CC* and states «The common law test is thus applied flexibly, recognising that "common sense may have to prevail over strict logic" in the contractual context it has long been accepted that causation rules should be applied "with good sense to give effect to, and not to defeat the intention of the contracting parties"» (§ 39).

[50] «Thus, to make a determination whether the policy was a composite one, counsel submitted, was a factual determination. Having regard to the insurance policy, it is evident that it refers to companies which are managed and controlled as well as subsidiaries which are clearly under the control of Holdings which replaced NAC and 43 Air School which manages some subsidiaries and arranges insurance» (§ 25).

[51] On the general features of the Indian legal system in the light of general taxonomies of comparative law see U. KISCHEL, *Comparative Law*, Oxford, 2019, 752 ff.; D. AMIRANTE, *India*, Bologna, 2007.

[52] High Court of Manipur, *All Manipur School Student… vs The State Of Manipur Represented*, 14 October 2020, WP (C) 459/2020; see also the news at the links *https://www.covid19litigation.org/news/2023/05/india-court-directs-state-government-take-appropriate-steps-order-bring-drop-out*; *https://www.covid19litigation.org/news/2023/01/india-court-orders-school-fees-paid-during-pandemic-be-adjusted-or-refunded*; *https://www.covid19litigation.org/news/2023/02/india-medical-students-doing-super-specialty-courses-may-serve-reduced-compulsory*; *https://www.covid19litigation.org/news/2022/12/india-court-orders-university-charge-only-half-rent-students-hostels-and-refund-money* (all accessed on 19 October 2023).

even within the same country, is evident. It is not, however, a prerogative of one group of countries or legal systems. In Europe, the relatively wide approach favored by Spanish courts is to some extent opposed by a group of French decisions, which instead upheld insurers' argument by relying on a narrow interpretation of the Insurance Code. Indeed, Art. L.113-1 of the code requires that exclusion clauses in policies must be *formelle* and *limitée*.

In principle, both requirements serve a purpose favorable to insured parties, by preventing insurers to either invoking implicit restrictions to policies' coverage or interpreting uncertain exclusion clauses so to extend their scope.

During the pandemic, several business owners claimed compensation in the light of policies protecting against closure due to administrative orders, which, however, contained an exclusion clause for cases when, at the moment of the order, at least another premise located in the territory of the insured party's department – regardless of its nature and activity – is the object of the same order on identical grounds. The French court of cassation deemed such clauses both formal and limited, pointing out that they did not have the effect of voiding the indemnity function as a whole, and therefore were perfectly reasonable[53].

3.2. A closer look at U.S. judgments. The interpretation of clauses about "direct physical loss or damage"

The U.S. case law concerning business insurance policies amounts to thousands of cases which, obviously, cannot be examined one by one. Nevertheless, these judgments, meant as a logic and systemic ensemble, deserve a separate assessment for two closely intertwined reasons: one "institutional" and one substantial.

Indeed, U.S. disputes revolve, for the most part, around the clause requiring "direct physical loss or damage" to the insured property in order to trigger the policy and justify payments. The interpretation of such notion, therefore, acquires a capital importance and has been

[53] Decisions no. 21-19.341, 21-19.342, 21-19.343, 21-15.392, all taken on 1 December 2022. See also decision no. 21-21.516 of 19 January 2023.

widely debated by courts, with different positions embracing both narrow and extensive stances[54]. Ultimately, the underlying choice appears to be that between a standard interpretation, guided by general principles of contract law and therefore keen on preserving the original intent of the parties, and an evolutionary one, more in line with the judicial experiments seen in other countries and aimed at extending coverage of policies[55]. Obviously, such interpretive debate reflects an institutional struggle, carried out in courts as well as through forms of lobbying, between insurance companies which typically champion standard and narrow interpretation, and insured parties, i.e. business entities, consumers, etc.[56].

Such conflict is even more interesting when observed from the historical perspective of the policies interpretation's development. Indeed, the inclusion of "loss" apart from damage in standard insurance policies occurred in the 1980s with the explicit purpose, for the insurance industry, to offer protection to situations not involving tangible destruction or damage, but nonetheless interfering with the use of the property[57]. At that time, therefore, insurers had envisioned a concept of loss distinguishable from that of damage so to extend the coverage of policies, following a logic which has indeed been accepted by some courts dealing with Covid-19 related disputes[58].

Surprisingly enough, however, it was courts which, in Covid-related disputes, often interpreted narrowly the new text of clauses, by all means unifying the concepts of loss and damage and considering physical alterations to property as a requisite to trigger payments[59]. Some authors blame, for this judicial trend, the view held by the treatise *Couch on insurance law* which was widely relied on by courts and was recently supported by a media campaign launched by insurance compa-

[54] C.M. MILLER, R.P. LEWIS, C. KOZAK, *op. cit.*

[55] *Ibidem*.

[56] *Ibidem*.

[57] *Ibidem*.

[58] *Kingray Inc. v. Farmers Group Inc.*, 523 F. Supp. 3d 1163, 1171-74 (C.D. Cal. 2021).

[59] R.P. LEWIS, L.S. MASTERS, S.D. GREENSPAN, C.E. KOZAK, *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, in *Tort, Trial & Ins. Prac. L.J.*, 56, 2021, 621 ff.; C.M. MILLER, R.P. LEWIS, C. KOZAK, *op. cit.*

nies themselves, eager to uphold a narrow interpretation so to exclude from coverage Covid-related losses, even if contradicting with their own decisions from the 1980s[60].

Be that as it may, by the time the pandemic had triggered disputes, a firmly entrenched interpretive position considered "direct physical loss or damage" as implying physical and tangible alteration, thus excluding, at least theoretically, closures due to Covid-19 from coverage, given the absence of such alteration. Such position, which also relied on previous precedents, confirmed the view that a mere loss of use to the insured property does not trigger coverage[61]. In some cases, courts even distanced themselves from precedents which admitted "physical loss" in absence of structural damage to the property[62], upholding instead a strictly literal interpretation of the contract[63].

However, especially in cases since 2022, such a view was not held unanimously by courts. The concern for the economic consequences of the emergency measures and the protection of insured parties' interests prompted more flexible interpretations. In some cases, the doctrine of physical loss was not denied or equated with mere loss of use, but it was held that since a virus bonds to surfaces it causes material alteration to property and therefore falls within the scope of concept of "physical loss"[64]. In other cases, instead, courts chose to rely on general principles for the interpretation of contracts by considering that the in-

[60] L.R. RUSS, T.F. SEGALLA, *Couch on insurance law*, 3rd ed., Deerfield, 1995; R.P. LEWIS, L.S. MASTERS, S.D. GREENSPAN, C.E. KOZAK, *op. cit.*; E.S. KNUTSEN, J.W. STEMPEL, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, in *Conn. Ins. L. J.*, 2020, 186 f.

[61] Supreme Court of New York, Onondaga County, 6593 *Weighlock v. Springhill Smc Corp.*, 13 April 2021, 71 Misc. 3d 1086, which quotes *Roundabout Theatre Co., Inc. v. Continental Cas. Co.*, 302 AD2d 1, 6, 751 N.Y.S. 2d 4 (1st Dep't 2002).

[62] Supreme Court of Appeals of West Virginia, *Murray v. State Farm Fire & Cas. Co.*, 29 April 1998, Nos. 24759 & 24760. The decision was relied on by the insured party in *Uncork & Create LLC v. The Cincinnati Ins. Co.*

[63] United States Court of Appeals for the Fourth Circuit, *Uncork and Create LLC v. The Cincinnati Insurance Co.*, 7 March 2022, No. 21-1311.

[64] Seventh Division of the Second Appellate District of the Court of Appeal of California, *Marina Pacific Hotel and Suites LLC vs. Fireman's Fund Insurance Company*, 13 July 2022.

terpretive effort should take into account not only the intent of the parties but also the reasonable expectations of the insured subjects in terms of coverage and, in the second place[65]. Furthermore, the very notion of "direct physical loss or damage" was considered ambiguous by some judges, to the point of invoking the *interpretatio contra proferentem* in case of uncertainty[66], in favor of the insured party[67].

The judicial landscape is therefore extremely fluid, with different trends in open conflict with each other, each one, one could say, backed by different sets of socio-economic interests. It is not rare, indeed, that, even within judicial sub-systems able to rely on codified rules, discrepancies occur. One example is that of Louisiana law, as exemplified by the case of *Cajun Conti LLC v. Certain Underwriters at Lloyd's*. In a dispute concerning an insurance policy for restaurants, the Court of Appeal of Louisiana reverted the judgment of the district court and upheld the insured party's claim by invoking the relevant provisions of the Louisiana civil code, in particular those concerning the interpretation saving the contract's effectiveness (Art. 2049) and those concerning the interpretation of ambiguous terms in standard contracts against the party who furnished the contractual text (Art. 2056)[68].

Such decision was, however, overruled by the Supreme Court of Louisiana, which ruled that the notion of "physical loss" cannot be considered ambiguous and that the presence of the adjective "physical" must be given its importance in adherence with general criteria of interpretation[69]. Therefore, "physical loss" may only indicate that a tangible alteration of property is required to trigger coverage. A narrow interpre-

[65] United States District Court for the Central District of California, Southern Division, *Sunstone Hotel Invs. v. Endurance Am. Specialty Ins. Co.*, 15 June, 2022, 607 F. Supp. 3d 1006.

[66] J. McCunn, *The contra proferentem rule: Contract law's great survivor*, in *Oxford Journal of Legal Studies*, 39(3), 2019, 483-506.

[67] Court of Appeal of Louisiana, Fourth Circuit, *Cajun Conti LLC v. Certain Underwriters and John Edwards*, 15 June 2022, 2021-CA-0343; *Sunstone Hotel Invs. v. Endurance Am. Specialty Ins. Co.*

[68] Court of Appeal of Louisiana, *Cajun Conti LLC v. Certain Underwriters and John Edwards*.

[69] Supreme Court of Louisiana, *Cajun Conti LLC v. Certain Underwriters and John Edwards*, 2022-C-01349.

tation of the policy is thus compliant, according to the Supreme Court, with Art. 2047 of the civil code, requiring contracts to be interpreted according to the general prevailing meaning of the words they contain.

3.3. Travel insurance policies

Relevant issues of interpretation appear also with regard to travel insurance policies, as customers forced to cancel travel plans due to the pandemic or the subsequent restrictions claimed compensation. Again, a general judicial trend in common law countries would suggest a certain reluctance of courts to uphold insured parties' claims and to use extensive interpretation[70]. Notably, the concept of quarantine, regulated in a policy as covered by the scope of the insurance, was restricted by a U.S. court to the quarantine undergone by a subject found to be ill[71]. As a consequence, the insurance could not cover the cancellation of travel plans due to a general stay-at-home order issued by the competent authorities.

A different outcome was reached in a Canadian dispute which, however, did not result in a judgment but in an out-of-court settlement. Insured parties obtained compensation on the basis of an insurance policy whose literal meaning, objectively speaking, left little space to argue, given that among Non-Medical Covered Causes for Cancellation it included

> written formal notice issued by the Department of Foreign Affairs and International Trade of the Canadian government after the Insured Person's Covered Trip is booked, advising Canadians not to travel to a country, region, or city originally ticketed for the Covered Trip for a period that includes an Insured Person's Covered Trip.

Under such circumstances, even a narrow interpretive approach would have indeed upheld coverage from the insurance policy.

[70] United States Court of Appeals, 8th Circuit, 9 February 2022, *Bauer v. AGA Serv. Co.*, 25 F. 4th 58.

[71] United States District Court, Southern District of Ohio, 6 May 2021, *Depasquale v. Nationwide Mutual Insurance Company*.

3.4. Health insurance policies

Compared to business insurance policies, health policies imply the consideration of other values, leading to different reactions both from the general public and the courts. As a consequence, courts are often driven to take up a much more active role in terms of social engineering, thus displaying a rather uniform inclination towards upholding insured parties' reasons.

India is maybe the most representative country with regard to such trend. Its courts, as already noted, have been very active in issuing orders to public authorities so to tackle the adverse economic effects of the pandemic. Several of these orders concerned *ex gratia* payments to be issued in favour of relatives of workers dead due to Covid-19[72].

It is therefore easy to understand that Indian case law offers several examples of broad interpretation of health insurance policies, so to cover a wide array of occurrences. The High Court of Kerala rendered an interesting judgment which interpreted the meaning of "hospitalization" so to include treatment in first-line centers and not only proper hospitals, rejecting the narrow view upheld by the insurance company[73]. The court did not reject a purely literal interpretation, but combined it with a systemic one, by referring to a government order entrusting COVID Health Care Centres with the treatment of mild and moderate cases[74].

Similarly, the local sections of the India Consumer Redressal Commission in more than one instance condemned insurers to pay compensation to insured parties hospitalized for Covid-19, by embracing inter-

[72] See, among others, Supreme Court of India, 30 June 2021, *Reepak Kansal And Another v. Union of India and others*; Supreme Court of India, 4 October 2021, *Kumar Bansal v. Union of India*, Writ Petition (Civil) No. 539 of 2021; Supreme Court of India, December 17, 2021 No. 1805/2021 in W.P.(C) No. 539/2021; High Court of Delhi, 15 December 2022 (see the related news at the link *https://www.covid19litigation.org/news/2023/01/india-high-court-states-government-cannot-further-delay-ex-gratia-payment-family*).

[73] *Star Health and Allied Insurance Company LTD. v. Avinash and Permanent Lok Adalat*, WP(C) no. 29049 of 2021.

[74] The court referred to clause 3.6.iv. of the policy which stated that «For the purpose of this policy any other set-up designated by the government as hospital for the treatment of COVID-19 shall also be considered as hospital».

pretive stances aimed at reducing the company's discretion in favoring narrow applications of policies' text[75]. Thus, it was held that an insurer cannot argue that a hospitalization was not necessary, given that the patient acted under a doctor's advice, whose opinion is the only one certified to assess the necessity of a treatment[76]. Again, the mere fact that a hospitalization does not imply an active cure cannot be invoked as a ground to withhold compensation[77].

With specific regard to health insurance policies, decisions in favour of insured parties are found also in the People's Republic of China, where the circumstances of the insurance market were deeply affected by the change in state health policies. Between the end of November and the beginning of December 2022, the previous "zero-covid policy" was dismantled in favour of an abrupt relaxation of almost all the restrictions. Subsequently, a huge wave of infections hit the country. Insurance companies had issued policies whose economic sustainability relied also on the consideration of very low numbers in infections and suddenly faced several requests for payments. In cases of refusal to pay, courts issued appropriate orders in favour of insured parties[78].

An overview of the case law of non-Western countries, therefore, confirms an approach to insurance disputes which also implies a consideration of insurance market regulation keen on comprehensive assessment, also from the point of view of the social role played by insurance policies in terms of social protection[79]. As judicial styles, especially when compared with British or American decisions, focus less on the literal interpretation of clauses and more on a system-oriented or pur-

[75] The District Consumer Disputes Redressal Commission are established according to Sec. 28 of the 2019 Consumer Protection Act as public authorities and are in charge of enforcing consumer rights (also related to trade practices and advertisement practices prejudicial to consumers) at the local level.

[76] See, also for further references, the news at *https://www.covid19litigation.org/news/2023/07/india-insurance-company-ordered-pay-compensation-customer-hospitalized-due-covid-19* (last access: 16 October 2023).

[77] See, also for further references, the news at *https://www.covid19litigation.org/news/2023/06/india-district-consumer-forum-orders-insurance-company-pay-compensation-insured* (last access: 16 October 2023).

[78] Z. SHUQIAN, *op. cit.*

[79] J. KATZEW, *op. cit.*

pose-oriented one, the case law of these countries (which, incidentally, also belong to the BRICS group)[80] display trends which, at least to some extent, find a correspondence in both in continental Europe (e.g. Spain), where contract interpretation was also often in favour in insured parties[81], and in other civil law countries such as Argentina, whose National Labor Chambers of Appeals upheld an injunction which ordered a health insurance company also to implement safety measures for injured parties so to prevent contagion[82].

An extensive interpretation of insurance company's duties has been upheld in Italy as well, with specific regard to the definition of Covid-19 as, alternatively, an injury or an illness. In cases concerning life insurance policies for people dead of Covid-19, insurance companies argued for the classification of Covid-19 as an illness or an infection, as such excluded from the scope of policies which only covered death due to injuries[83]. The interpretive stance was criticized by courts, not only because of the fuzzy nature of the distinction between injury and illness, but also in the light of the rules on the interpretation of insurance contracts as upheld by the Italian Court of Cassation. In particular, such contracts are subjected to Art. 1370 of the Italian civil code which, for general and standard terms in contracts prepared by one party and accepted by the other, requires, in case of ambiguity, an interpretation that is favorable to the party who did not prepare the terms[84].

[80] About the BRICS as a topic of research in comparative law see L. SCAFFARDI (edited by), *BRICS: Paesi emergenti nel prisma del diritto comparato*, Torino, 2012. With specific regard to contract law see S. MANCUSO, M. BUSSANI (edited by), *The Principles of BRICS Contract Law*, Cham, 2022.

[81] With regard to life insurance a notable decision from the Madrid Tribunal stated that the contagion from Covid-19 should be considered as a sudden inoculation to the purpose of a life insurance policy stipulated by a doctor (see the news at the link *https://www.covid19litigation.org/news/2022/02/spain-madrid-court-orders-insurer-compensate-family-doctor-who-died-covid* (last access: 29 May 2023)).

[82] Chamber IX, 12 June 2020, No. 9704/2020.

[83] Turin Tribunal, decision of 19 January 2022 no. 184; Tribunal of Vercelli, decision of 3 August 2022.

[84] Decision of 17 January 2008 no. 866.

In cases of Covid-19 infection occurred on the workplace, its classification as injury is also confirmed by emergency legislation[85].

4. Comparative remarks

Judicial reflections upon the interpretation of insurance contracts invoked for pandemic-related reasons consist of a wide array of positions, not classifiable into fixed ensembles. There are, though, some general and identifiable trends which are worth discussing.

In the first place, the variety of positions concerning the interpretive rules of insurance contracts mostly regards business policies. As far as health insurance policies are concerned, notwithstanding the systemic differences between the jurisdictions taken into account, the outcome of the disputes was constantly in favor of the injured persons. The most obvious explanation would point directly to the fundamental values underlying such policies (i.e. life and/or health), as well as to the imbalance which connotes them, given that they (in most cases) stipulated by a company and an individual/consumer, while business actors are at least presumed to be more economically savvy. On the other hand, it must be noted that each one of the aforementioned jurisdictions embraces either a widespread judicial activism in terms of social engineering (India), or it has a substantial legal tradition advocating social welfare (Italy, Spain) or it adopts a state capitalist and heavily regulated development model (China).

In the second place, the general approaches to contract interpretation tend to sketch a basic distinction between three groups of countries. The first one comprises a set of «Anglo-American» legal systems (United Kingdom, United States and Australia) which strongly rely on the literal and systemic interpretation of contract, while generally refraining from employing general principles, in line with the tradition of common law. Statistically speaking, such stance seems to favour insurer-friendly interpretations, albeit with a wide grey area represented by

[85] Art. 42 § 2 of Law Decree no. 18 of 2020. See also Tribunal of Vercelli, decision of 3 August 2022.

the ongoing judicial debate in the U.S. concerning the «direct physical loss» clause. Interestingly enough, when subverting the narrow interpretation of the clause, a few decisions directly refer to general principles or to the actual fairness of contractual relations which underlies the reference to the principle of reasonable expectations[86]. Other cases, instead, interpret the literal meaning of «physical loss» in a way compatible with the material effects of a virus upon a surface[87].

The second group of countries includes mixed jurisdictions. The judicial structure of these countries is usually heavily influenced by common law; at the same time, either due to the presence of a constitution protecting socio-economic rights or due to the instances brought forward by the unbalanced development of their economies, they display a high degree of judicial activism, so to properly address those instances. This is the case of India and South Africa, whose adherence to common law techniques and remedies is inherently changed by reliance on general principles concerning equity and fairness, as well as on a purpose-oriented approach which, beyond the text of the contract, emphasizes its social function.

The third group of countries comprises those European jurisdictions entrenched in the civil law family, such as France, Italy or Spain, with the addition of the Louisiana legal system in the U.S. Here, the interpretation of the contract is mediated by established principles which provide solutions to correct imbalances (such as the *interpretatio contra stipulatorem*, as incorporated in Art. 1370 of the Italian civil code) and applied by courts to extend the coverage of insurance policies. However, as the Louisiana debate proves, the presence of such principles does not necessarily lead to extensive interpretations, given that they have to be combined and balanced against other codified principles, such as

[86] United States District Court for the Central District of California, Southern Division, *Sunstone Hotel Invs. v. Endurance Am. Specialty Ins. Co.*, 15 June, 2022, 607 F. Supp. 3d 1006; Court of Appeal of Louisiana, Fourth Circuit, *Cajun Conti LLC v. Certain Underwriters and John Edwards*, 15 June 2022, 2021-CA-0343; *Sunstone Hotel Invs. v. Endurance Am. Specialty Ins. Co.*

[87] Seventh Division of the Second Appellate District of the Court of Appeal of California, *Marina Pacific Hotel and Suites LLC vs. Fireman's Fund Insurance Company*, 13 July 2022.

those emphasizing the literal meaning of the words and those saving the effectiveness of the contract. The French court of cassation follows a similar reasoning when interpreting the notions of formality and limitedness of exclusion clauses in insurance policies, pursuant to the provisions of the Insurance Code.

The absence of regular trends in the examined case law cannot be surprising. Given the variety of factual circumstances involved, courts are inevitably drawn towards a case-by-case approach, thus oscillating between the stability of contracts and their adjustment in the light of the values involved and the status of the contractual parties.

From a substantial point of view, however, the most valuable information emerging from the comparative analysis concerns the entrenchment of proactive judicial attitudes in relatively «young» global powers such as India and South Africa, aimed at directly affecting the management of the pandemic. Such attitudes are maybe more pronounced with regard to state liability and public policies[88], but the mere fact that private insurance policies are also taken into account is worth noting. The interpretation of the contract, thus, becomes a functional instrument to balance the insurance market in a moment of great upheaval. In other countries, such as the U.S., the policy role often taken by courts must deal with the entrenchment of lobbying positions and of competing interest groups which, as previously seen, are able to directly influence the very nature and scope of the founding concepts of insurance law.

[88] D. ELOFF, *The rationality test in lockdown litigation in South Africa*, in *African Human Rights Law Journal*, 21, 2021, 1158-1180; S. ABDOOL KARIM, P. KRUGER, *Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence*, in *Constitutional Court Review*, 11, 2021, 533-560; S. PANDITA, *Violation of Human Rights during COVID-19 and the Role of Indian Judiciary* (May 31, 2022). Available at SSRN: *https://ssrn.com/abstract=4123821* or *http://dx.doi.org/10.2139/ssrn.4123821* (last access: 19 October 2023).

5. Conclusions

The paper has tried to offer a brief overview of the critical issues concerning the interpretation of insurance contracts in the light of the pandemic crisis.

The very structure of the insurance markets creates an inescapable clash between the interests of insurers and insured. Such clash is mirrored by different stance concerning the application of general rules about contract interpretation to policies triggered by events directly or indirectly related to the pandemic. While noting that the dialectic between narrow and extensive interpretation occurs in several different legal systems, it should also be noted that the study of judgments coming from jurisdictions structurally influenced by common law standards offers a perhaps more valuable insight, since it highlights very deeply the logical conflict between canons of interpretation based upon the objective meaning of the words and parties' intent and evolutionary trends which take into account the social impact of interpretive practices, the role of courts as socio-economic engineers, the protection of weaker parties *vis-a-vis* powerful insurance companies.

From such perspective, the development of insurance law during Covid-19 is a testing field for the advancement of progressive (or, alternatively, conservative) interpretive trends of private law against the background of the respective models of economic development, which in the United Kingdom and the United States may be more respectful of neo-liberal principles, while in India or South Africa are surely best defined as state capitalist and interventionist.

Ultimately, the most valuable lesson provided by the debate seems to be a methodological one, concerning the role that comparative approaches in economic law may play not only to understand the choices of different legal orders, but also to promote or criticize certain stances. It is therefore particularly interesting to note how the High Court of England and Wales in *Corbin et al. v. Axa Insurance UK Plc.*, while developing its dialogue with the Supreme Court in *FCA v Arch Insurance (UK) Ltd* and others, also takes into account judicial decisions

coming from Ireland[89] and New Zealand[90], as well as an arbitration award[91]. On the other hand, in a judicial system widely known for its use of comparative law such as the South African one, the Supreme Court of Appeal in *Guardrisk Insurance Company Limited v Café Chameleon CC* has quoted *FCA v Arch Insurance (UK)* Ltd and others, though opting for a different outcome in concrete[92].

The judicial use of comparative law is, as known, one of the most fascinating topics among lawyers in recent decades[93]. In economic law, such topic must be filtered through the relational dimension which underlies the conflicts among market operators, be they insurance companies or businesses and consumers[94]. The simultaneous consideration of these elements leads to assume that, notwithstanding frequent resistances, the pandemic has promoted and stimulated the affirmation of certain progressive tendencies in the interpretation of insurance contracts, partially as a reaction to the behaviour of companies which openly sought to exclude, in a way or another, Covid-related damages from insurance coverage.

It is not, obviously, a uniform and unquestionable tendency. Future developments may depend not only on the entrenchment of interpretive standards (more or less progressive), but also on the decisions of the insurance industry, in terms of policy drafting, especially in contexts, such as the U.S. one, where the history of drafting would indeed uphold extensions of coverage[95].

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[89] § 109.

[90] § 125. The case quoted is Supreme Court of New Zealand, *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Inc* [2015] NZSC 59, and is used by the EWHC to clarify the notion of composite insurance policy.

[91] §§ 115 ff. The award quoted is the *China Taiping* one. To justify such reference, the judge explicitly says that «It is perhaps unusual to cite an arbitration award; but these are unusual times – and the China Taiping Award is an unusual award».

[92] § 52 ff.

[93] On the topic the literature is extremely rich. See, *ex multis*, M. ANDENAS, D. FAIRGRIEVE (edited by), *Courts and comparative law*, Oxford, 2015.

[94] On the relational and institutional dimension of economic law see G. DI GASPARE, *Diritto dell'economia e dinamiche istituzionali*, Milan, 2017.

[95] C.M. MILLER, R.P. LEWIS, C. KOZAK, *op. cit.*

A second and final methodological lessons drawn from the comparative analysis concerns classifying efforts. While traditional and commonly known legal taxonomies may still play a role in contextualizing trends, the mere conceptual association between trends in insurance law and common law/civil law/mixed law, etc. does not provide useful insight about the connection between courts' attitudes and socio-economic values underlying the insurance market[96]. It is, therefore, necessary to combine traditional perspectives with new ones, such as, for instance, those inspired by studies of comparative political economy[97]. Mapping trends in comparative insurance law on the basis of structural differences in the systems of political economy – thus distinguishing neo-liberal economies from social market economies and from state capitalist economies – is an experiment which not only sketches a rational picture of pandemic-driven judicial developments, but also attaches the due importance to the institutional dimension of economic law.

Future events, with different degrees of catastrophic consequences, will surely once again challenge the coherence of insurance law in the light of unequal market relations. This brief paper has tried to prove that the potential instrument to understand and address such future issues may lie in the conjunction between comparative and economic law.

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[96] On the relativity of traditional taxonomies in comparative law see M. PARGENDLER, *The Rise and Decline of Legal Families*, in *The American Journal of Comparative Law*, 60, 2012, 1043-1074.

[97] G. MENZ, *Comparative Political Economy*, Oxford, 2017; G. DE GEEST (ed.), *Economics of Comparative Law*, Cheltenham, 2009; A. BECKERS, K.H. ELLER, P.F. KJAER, *The transformative law of political economy in Europe*, in *European Law Open*, 1, 2022, 749-759; P.A. HALL, D. SOSKICE (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford, 2001; D. BOHLE, B. GRESKOVITS, *Varieties of Capitalism and Capitalism «tout court»*, in *Arch. Eur. Sociol.*, Vol. 3, 2009, 355-386; R. DORE, W. LAZONICK, M.O' SULLIVAN, *Varieties of Capitalism in the Twentieth Century*, in *Oxford Review of Economic Policy*, Vol. 15(4), 1999, 102-120; G.M. HODGSON, *Varieties of Capitalism and Varieties of Economic Theory*, in *Review of International Political Economy*, Vol. 3(3), 1996, 380-433. On the application of political economy models to comparative law see also A. SOMMA, *Introduzione al diritto comparato*, Turin, 2019.

CONCLUDING REMARKS

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

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

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

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

[**] Professor of Private Law, Faculty of Law, University of Trento.

[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

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

[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

[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

[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

[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-

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

[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,

[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-

[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

[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].

[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-

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].

[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

[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

[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-

[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

[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. FAVAROQUE-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

[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-

[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

[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-

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

[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

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.

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