Essays

The Courts and effective judicial protection during the Covid-19 pandemic. A comparative analysis

Paola Iamiceli, Fabrizio Cafaggi*

ABSTRACT: What role have the courts played during the pandemic? How different has this role been across the globe? Can lessons for a better response to health crises and emergencies be learned from litigation? Starting from these questions, the authors present the main findings of an international project on Covid-19 litigation aimed at collecting and comparing caselaw, within an openly accessible database, from more than 80 countries on all continents, concerning the impact of public health measures upon fundamental rights and freedoms of citizens during the pandemic. This comparative analysis, based on a set of around 2000 decisions from 2020-2022, shows that, although courts have faced very similar challenges, distinct legal traditions have led judges to use different balancing techniques with different outcomes in terms of the control of public powers and available remedies. Actions and omissions have been differently addressed and the evolution of science has significantly impacted judicial review. Areas of litigation have changed overtime, mirroring the evolution of the pandemic and the modifications of governmental strategies. More recently, liability claims are emerging and will probably grow in the near future, offering courts from all over the world a further opportunity to learn from each other. Based on the experience of governments, revisited through the lenses of Covid-19 litigation, scholars, scientists, and policy makers have the opportunity to build on this heritage with the objective of building a better response to future health emergencies that fully respect fundamental rights and the rule of law.

KEYWORDS: Fundamental rights; judicial review; proportionality; precaution; liability

SUMMARY: 1. The role of the courts in times of pandemic: the main questions of an international project – 2. Project methodology – 3. Main research findings and insights for comparative analysis – 4. Judicial review in times of pandemic and the effective protection of rights – 4.1. Balancing fundamental rights and freedoms: the

* *Paola Iamiceli: Full professor of Private Law, University of Trento. Mail: paola.iamiceli@unitn.it; Fabrizio Cageggi: Judge of the Italian Council of State, former Professor of Private Law of the University of Trento, and of Comparative Law at the European University Institute and at the National School of Administration. Mail: fabrizio.cafaggi@eui.eu.* *This article reflects part of the results of a project coordinated by the University of Trento, financed by the World Health Organization and created thanks to the efforts of a vast network of scholars and judges who, in various capacities, have contributed to the collection, selection, and examination, comparative included, of the decisions. Assuming all responsibility for errors or omissions, the authors express their heartfelt thanks to all of them. Although they result from joint reflection, sections 2 and 4.3, were drafted by Fabrizio Cafaggi, and sections 3, 4.1, 4.2 and 5 by Paola Iamiceli; sections 1 and 6 were drafted jointly. The article was subject to a double-blind peer review process.*

main approaches – 4.2. The pandemic and the rights of the most vulnerable – 4.3. Uncertainty, scientific evidence, and decision making. Judicial perspectives – 5. The main areas of litigation: from business freedom to vaccination – 6. Lessons learned and the future ahead: concluding remarks.

1. The role of the courts in times of pandemic: the main questions of an international project

The emergence of the novel coronavirus SARS-CoV-2 in 2019 forced the world to grapple with daunting challenges. The pandemic was unprecedented but somewhat foreseeable. Both international and national institutions struggled to cope with the uncertainty related to its origins and its consequences and had a difficult time managing the health, social, and economic emergencies. The difficulty of a centralized crisis management capable of issuing global recommendations to health providers, coordinating the global supply of medical devices, and providing pharmaceutical antidotes, generated local responses with some degree of competition among States and a clear divide between rich and poor countries.

Local responses to global phenomena are certainly suboptimal and the need for more effective international coordination is driving discussion over the reform of international law and international organizations.[1] Policy responses were heterogeneous, often uncoordinated, and had different degree of effectiveness. To learn from different approaches, comparative institutional analysis of different, sometimes opposing, strategies can provide policy makers with suggestions for similar future events.[2] Such analysis can focus on how State's institutions interacted during the crisis and which roles they played during the emergency compared to those defined by the principle of a separation of powers in constitutional democracies during ordinary times.

This article focuses on one institution, often overlooked in the debate on comparative responses to Covid-19: the judiciary. Certainly, legislatures and public administrations have been at the forefront of public choices and their action (or inaction) is today under political and legal scrutiny with the aim of providing a better response to health crises and emergencies in the future. Their interaction with the scientific community was and will surely continue to be pivotal for steering policy making and making it more accountable to citizens. But the courts also played a relevant role. To what extent States can ensure that legislative and executive choices are grounded on scientific evidence and incorporate scientific developments during times of great uncertainty and a continuous evolution of knowledge is difficult to say. Science-based decision making has certainly been among the most critical challenges during the pandemic.

[1] The discussion of a Pandemic Treaty within an Intergovernmental Negotiating Body, established by the WHO Assembly to draft and negotiate a WHO Convention, Agreement or Other International Instrument on Pandemic Prevention, Preparedness and Response, is among the most important initiatives in this regard. See the *Conceptual Zero Draft* for the consideration of the Intergovernmental Negotiating Body at its third meeting, A/INB/3/3, 22 November 2022, available at https://apps.who.int/gb/inb/pdf_files/inb3/A_INB3_3-en.pdf, last visited on 5/3/2023). Parallel initiatives are developing at international level with the purpose to contribute to a better preparedness; see, e.g., J.D. SACHS et al., *The Lancet Commission on lessons for the future from the Covid-19 pandemic*, in *Lancet,* 400, 2022, 1224-80, Published Online September 14, 2022, 1224 (https://doi.org/10.1016/S0140-6736(22)01585-9, last visited on 5/3/2023).

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

The Covid-19 pandemic 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 produced by governmental measures to battle the pandemic. Multiple initiatives emerged to share data and information on national regulatory approaches, making the results available to health researchers, data analysists, economists, social scientists, and policy makers.[3] Other initiatives have sought to rank countries' performances by comparing data related to the control of the contagion.[4] Instead, less attention has been devoted to the role of national and international courts whose review of governmental measures was both quite effective and rather comprehensive.

At a different level and with a different impact, legislatures and public administrations have interacted with the courts. In fact, since the beginning, public decisions, particularly those of executive branches, have been challenged before the courts almost everywhere.[5] Courts managed to intervene in a timely fashion and to adjust to the emergency, often reinterpreting their procedural rules to ensure prompt and effective judicial decisions. As a consequence, governments saw their decisions either upheld, as conforming with overarching principles and legislative frameworks, or quashed as being inconsistent with principles and rules. In both cases an institutional dialogue occurred between executives and the courts. Indeed, some of yesterday's questions concerning an institutional balance and a separation of powers have become relevant issues in possible future global crises.

[3] 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 7/1/2023); 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 7/1/2023); the Oxford Compendium of National Legal Responses to Covid-19 (https://oxcon.ouplaw.com/home/occ19 last visited on 7/1/2023); 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 17/2/2023).

[4] See, for example, the GCI Dashboard (https://Covid-19.pemandu.org/ last visited on 7/1/2023); N. HAUG, P. KLIMEK 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 7/1/2023). 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*, Routledge, 2021, 289 ff.

[5] 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 in 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 (last visited on 5/3/2023).

The courts operated under emergency frameworks. In some instances, a state of emergency was explicitly declared, in others it was not, but usually the powers of the courts were not modified by emergency legislation.[6] Does this imply that constitutional and judicial review in times of emergency (should) operate in the same manner as in ordinary times? Although the courts have often referred to rooted doctrines and long-standing principle-based approaches, it is not always obvious whether continuity or discontinuity was at work.[7] This consideration generates more critical questions for future changes. To what extent do judicial decisions made in relation to a pandemic only refer to the time of the emergency or to what extent are they likely to constitute a new body of law applicable to ordinary times in the future? The scope of institutional learning may vary significantly depending on the answers to these questions.[8]

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, did political decisions lead to a fair result with respect to the rule of law and fundamental rights?

These are among the many questions faced, first by policy makers and then by judges, since the start of the Covid-19 pandemic;[9] not only in Italy, not only in Europe, but all around the world, from North

[6] See, for the USA, L.F. WILEY, S.I. VLADECK, *Coronavirus, Civil Liberties, And The Courts: The Case Against "Suspending" Judicial Review*, in *Harvard Law Review Forum*, 2020, Vol. 133:179, available at https://harvardlawreview.org/wp-content/uploads/2020/07/179-198_Online.pdf (last visited on 17/2/2023), providing arguments against the suspension of ordinary judicial review during emergencies.

[7] For the USA, see, e.g., J. PAGLIALONGA, *The Covid-19 Cover-Up; How Federal Courts Are Changing Constitutional Law to Uphold Unconstitutional State Actions* (May 21, 2020), available at SSRN: https://ssrn.com/abstract=3607298 or http://dx.doi.org/10.2139/ssrn.3607298 (last visited on 20/2/2023), who concludes that, during the Covid-19 pandemic, federal courts have largely failed to apply the strict scrutiny standard of review to state actions, and that, instead, courts have invented an entirely new standard of review specifically for state actions during a 'public health crisis.'

[8] The issues here proposed complement the comparative analysis developed by other scholars on emergency legislation during the pandemic. See, among others, A. VEDASCHI, *Covid-19 and Emergency Powers in Western European Democracies: Trends and Issues*, VerfBlog, 2021/5/05, https://verfassungsblog.de/covid-19-and-emergency-powers-in-western-european-democracies-trends-and-issues/, DOI: 10.17176/20210505-111715-0 (last visited on 20/2/2023), who examines the main tendencies emerging in democratic countries of the Western European area. In her view, while invoking constitutional emergency clauses has represented a minority trend in times of Covid-19, a number of countries has created new emergency regimes or amended existing statutory emergency tools. Italy has represented a fourth distinct path consisting of the use of a variety of tools to tackle Covid-19, creating a fragmented pattern.

[9] There is debate over the beginning of the pandemic. The WHO declared the pandemic on 8 March 2020.

to South, and East to West.[10] Many of these questions were addressed in emergency procedures to provide a timely response and prevent, rather than follow ordinary procedures, an undue limitation of fundamental rights in the context of the pandemic.[11] In some countries, specific procedures were used for this purpose with ex ante control of measures impinging on fundamental rights.[12]

The courts solved individual issues but, especially when constitutional review was involved, they also incidentally provided guidance to the legislature on how to balance the emergency, rule of law, and the protection of fundamental rights. The courts did not refrain from providing responses that could be of guidance to policy makers even when the contested measure was no longer in force but, given the contextual elements, there was a reasonable possibility it would be adopted again in the near future with characteristics similar to those of the contested measure.[13]

While governments and other public authorities had to make immediate decisions, often under the guidance of scientific committees and in contexts of great uncertainty, judges acted as guardians of rights and freedoms, striking new balances in light of the rule of law and 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 parliaments, the courts

[10] For an initial examination of the role of the courts in the context of the pandemic, we refer to 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; ID., *Global Pandemic and the Role of Courts,* in *Legal Policy & Pandemics. The Journal of the Global Pandemic Network*, 2021, 159-180, DOI: 10.53136/979125994435114. On the same topic, albeit from a different perspective, T. GINSBURG, M. VERSTEEG, *The Bound Executive: Emergency Powers During the Pandemic*, in *International Journal of Constitutional Law*, 19, 2021, 1498.

[11] See e.g. in Italy, among many: Council of State, 11 December 2020, no. 7097; Council of State, 2 April 2021, no. 1804; Regional Administrative Court of Campania (Salerno), Piedmont, Emilia Romagna (Bologna), Friuli Venezia Giulia, 8 January 2022; Regional Administrative Court of Sicily, 16 March 2022, no. 351. See also F. PATRONI GRIFFI, *Il giudice amministrativo come giudice dell'emergenza*, in *Giustizia Amministrativa*, 2021, https://www.giustizia-amministrativa.it/documents/20142/4267397/Patroni+Griffi+-+Il+giudice+amministrativo+come+giudice+dell'emergenza.docx/cb4dde87-351c-8396-ce13-d31b48c2aa9e?t=1618321039697 (last visited on 5/3/2023).

[12] Of great relevance in this respect is the procedure activated in Spain for a prior judicial 'ratification' envisaged for all measures adopted by the competent authorities to combat the pandemic having an impact on fundamental rights ("*las medidas que las autoridades sanitarias consideren urgentes y necesarias para la salud pública e impliquen privación o restricción de la libertad o de otro derecho fundamental*"). See, among the former, Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª), no 719/2021, 24 May 2021 JUR\2021\157658; Tribunal Superior de Justicia TSJ de Madrid (Sala de lo Contencioso-Administrativo, Sección 8ª), no 93/2021, 7 May 2021 JUR\2021\142006; Tribunal Supremo, 22 January 2022, no 60/2022. But see, most recently, Tribunal Const., 2 June 2022, no. 70, which declared unconstitutional the rules on the prior ratification or authorisation of legislative measures or administrative acts with an impact on fundamental rights, as they were detrimental to the principle of separation of powers.

Of equal importance is the use of *amparo* in Spain itself and in Latin American countries (e.g., Costa Rica, Supreme Court of Justice, Const. sec, 9 Feb. 2022, No. 02900; Chile, Supreme Court, 18 Jan. 2022, No. 630-2022; El Salvador, Supreme Court, 23 Aug. 2021, No. 17-2021), as well as the *référé liberté* in the French system (e.g., Council of State, 1 Apr. 2021, Ordin. No. 450956). On the latter, see B. FAVARQUE-COSSON, *How did French administrative judges handle Covid-19*, in E. HONDIUS et al. (eds), *Coronavirus and the Law in Europe*, Intersentia, 2021, 81 ff.

[13] See e.g., for Italy, Council of State 13 May 2021, No. 850; for Slovenia, Const. Court, 27 August 2020, No. U-I-83/20-36.

contributed somewhat to rebalancing and counterweighing this imbalance dictated by the emergency.[14] Delegation of power to the executive was implemented both by legislative and administrative decisions and lead to either constitutional or judicial review.[15]

On the one hand, the pandemic forced judges almost everywhere to perform the difficult task of assessing the legitimacy of executive actions (and omissions) in light of formal or informal delegation by parliaments. On the other hand, the intensity and the way this task was fulfilled was by no means uniform, necessarily being affected by the institutional, cultural, social and economic contexts in which litigation emerged.[16] Differences between democracies and autocracies, but also within democratic regimes (depending on whether they took a more active stance or refrained from intervening), also significantly influenced the role(s) of the courts.[17] At the outset of the pandemic, with some notable exceptions, courts were usually more active when governments refrained from acting and more deferential when governments made prompt decisions.[18]

To include courts in the analysis of institutional responses to Covid-19, a network of scholars and judges, coordinated by the University of Trento in collaboration with the WHO, set up a research project aimed at creating a specialized database on the litigation that arose in the context of the pandemic: an ideal forum for dialogue among courts from all over the world which are confronted with similar issues and are committed to balancing the rights and freedoms affected by anti-pandemic measures.[19] At the same time, the purpose was also to create a forum for inter-institutional dialogue, ideally involving policy makers, to confront them with the outcomes of judicial review. The availability of such a large data base also enables them to learn from it for future decision-making in the context of the pandemic and beyond.

The *Covid-19 Litigation Database*, characterized by the almost daily update of news on the most recent cases, today presents around 2,000 decisions issued by courts on every continent in more than 80 countries: it is the result of international collaboration that, also thanks to financial support from the

[14] T. Ginsburg, M. Versteeg, *op. cit.*; F. Cafaggi, P. Iamiceli, *Uncertainty, Administrative Decision-Making and Judicial Review*, cit.

[15] See for example the judgments concerning OSHA and FTC in the US. See United States, US Supreme Court, 13 January 2022, n°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.

[16] T. Ginsburg, M. Versteeg, *The Bound Executive*, cit.; F. Cafaggi, P. Iamiceli, *Uncertainty, Administrative Decision-Making and Judicial Review*, cit.

[17] For a comparative analysis related to the initial period of the pandemic management 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 ff. summarizing the results of national reports published in the same issue. In particular, on the Chinese approach see J. Delisle, S. Kui, *China response to Covid-19*, in *Administrative Law Review*, 73, 2021, 19 ff.

[18] With some notable exceptions like, for example, England where, despite the initial approach taken by the government, Courts have not become more interventionist.

[19] The 'Covid19 Litigation' project is coordinated by the University of Trento (Faculty of Law) with funding from the World Health Organisation. The case law database, the page dedicated to updates (News) and other materials produced within the project are freely accessible at https://www.covid19litigation.org/.

World Health Organization, now involves eight universities, multiple young researchers, as well as a broad network of scholars and judges who have contributed to the initiative.[20]
The objective is 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 aims 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 the impact they have on the fundamental rights of individuals and the community.[21]
These are ambitious goals, the value of which can be measured over time well beyond the present pandemic context which is not yet over. This is not only in the event that similar emergencies should unfortunately recur, but also in the event that other types of global challenges, including environmental or geopolitical ones, should force public decision-makers to make new tragic choices that temporarily limit the fundamental rights of individuals and communities in the interest of public health or security.

2. Project methodology

The Covid-19 Litigation Project does not aim to map all available case law. It is neither aimed at comprehensiveness, nor at statistical representativeness.[22] Instead, the approach is selective, not over-

[20] 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).

[21] 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, G. Giordano et al, *Data-Driven Methods for Present and Future Pandemics: Monitoring, Modelling and Managing?*, https://arxiv.org/pdf/2102.13130.pdf, (last visited on 7/1/2023); N. Haug, P. Klimek 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 7/1/2023); J. M. Brauner, Jan Kulveit et al., *Inferring the effectiveness of government interventions against Covid-19*, 10.1126/science.abd9338, (last visited on 7/1/2023). Multidisciplinary research on the impact and the effectiveness of anti-pandemic measures has grown overtime; see. e.g.: E. Han, M. Mei Jin Tan 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 7/1/2023); T. Hale et al., *op. cit.*; T.J. Bollyky, E.N. Hulland 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 7/1/2023).
However, there are no known interdisciplinary approaches that incorporate the impact of anti-pandemic measures on fundamental rights.

[22] Therefore, the graphical representations of some quantitative estimates of the cases taken from the Database, which can be seen at https://www.Covid-19litigation.org/case-index/database-charts, have no statistical ambition.

inclusive. Case selection is question-based, and is meant to reflect the main issues faced by policy-makers on a qualitative basis during the different waves of the pandemic and that found their way to the courts for judicial review or related judicial claims.

Within case selection, particular 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 particular innovative character. The choice of judgments has sought to anticipate potential trends in litigation so that judges may find some indications in the database surrounding issues they must decide on. Furthermore, selection has prioritized judgments that would enable researchers to compare different balancing techniques and different applications of general principles. The methodology also favored adequate geographical distribution among countries and world regions and a certain differentiation among areas and topics that emerged during the various phases of the pandemic: from the focus on lockdowns, trade closures, and schooling typical of the first few months, the project moved on to topics surrounding access to vaccines and the vaccine mandate, the use of certifications, the impact on labor relations, and government liability for actions and omissions.[23]

In order to feed the comparative analysis and taking inspiration from comparative law methodology, the Database required the development of 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 and highlight specificities across legal families. To this end a "Covid-19 Litigation Comparative Glossary" was developed to establish correlations in the use of legal terms (e.g. judicial review, constitutional review, emergency decision making, standing, etc.) with due regard to national legal traditions in the framework of different legal families.

The template for judgment analysis reflects, where possible, the varieties of judicial systems and procedural rules that exist across the world. Clearly, there is a trade-off between comparability and accuracy. The objective was to ensure sufficient comparability between judgments of different legal systems and the accuracy of each legal tradition, by taking the substantive and terminological differences within a single lingua franca, English, into account.

Litigation is also a process that can involve multiple stages and choices were made to publish judgments that were adopted according to emergency procedures and that could subsequently be overturned. The goal was not to reflect what the law, as applied by the courts, was in each country at a particular time. Rather, it was to represent the evolution of case law during the different stages of litigation that, to some extent, reflected the evolution of the pandemic. Where the database centered around a single judgment, it has attempted to summarize the history of the case and its entire life cycle. The project also refrained from clustering judgments but in the template some references to previous judgments were made to shed light on the jurisprudential evolution.

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

[23] See par. 5 below.

decision making consistent with a science-based approach. This line of analysis will be developed in the forthcoming phase of the project.

3. Main research findings and insights for comparative judicial analysis

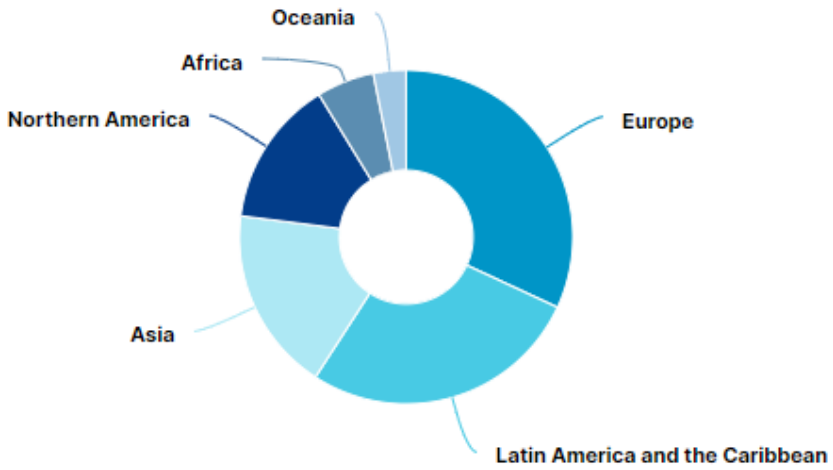
The above methodological introduction rules out any statistical ambition of the project. However, it does not exclude the possibility of a qualitative (and partly quantitative) analysis of some of the trends emerging from the set of selected decisions.

Up to December 2022, 1973 cases were selected, reported in full, and uploaded onto the Database.[24] 40% of these decisions are from 2020, while 44% are from 2021, whereas a more limited fraction (16%) are cases from 2022. Conversely, cases from 2022 are more extensively featured on the News page, which was conceived (more recently) as a means of providing a concise update on more recent litigation streams. More specifically, out of the 400 news updates reported up to December 2022, around 88% refer to cases that were decided in 2022. 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.

More generally, the data feeding the Database confirm that the intensity of litigation has varied depending on world regions and, within world regions, depending on the legal and political features of the States.

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

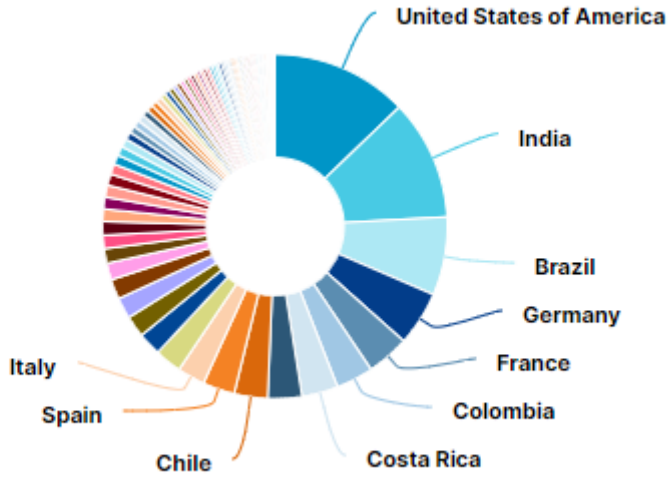


[24] In fact, Database development continues on a rolling basis. At the time this article is submitted the cases uploaded on the Database are 1,973.

This evidence is not only linked to the number of decisions but also to different access 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 accessing court decisions remained for quite a number of jurisdictions (e.g., in Central Asia).

The outcome changes once 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 the highest concentration of litigation has been observed.[25] In South America, Brazil was the country with the highest number of cases;[26] in Europe, Germany[27] and France,[28] followed by Spain[29] and Italy;[30] in Oceania, Australia;[31] in Africa, South Africa[32] and Kenya.[33]

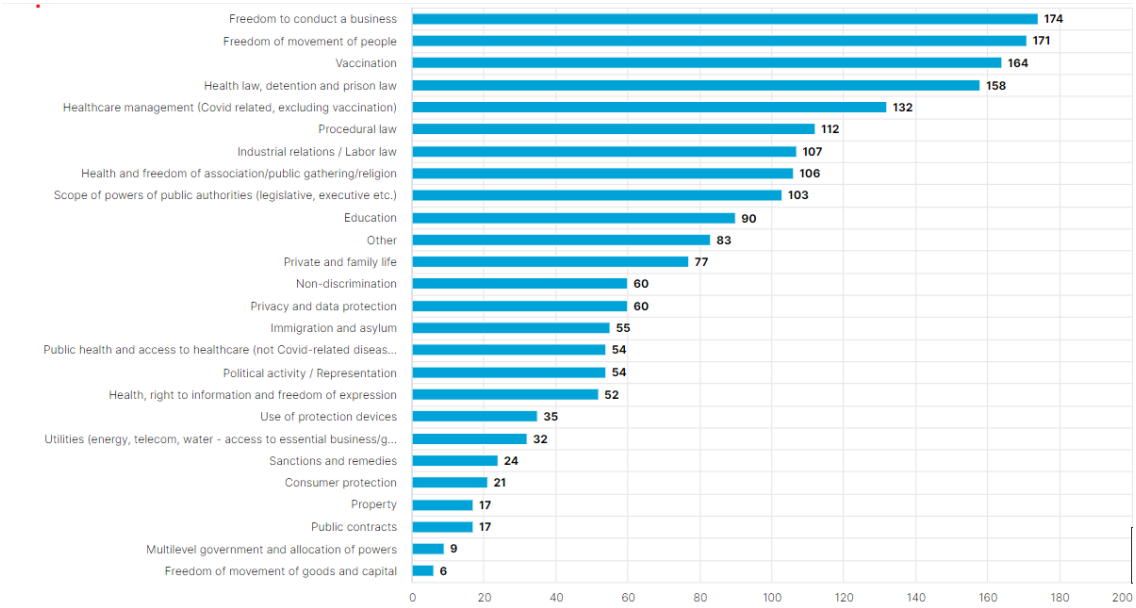
Cases by countries



The issues addressed were also partly different, both with respect to time and country. The global picture shows that freedom of movement and freedom to conduct a business were at the top of Covid-19 litigation areas within the Project dataset; which were closely followed by detention-related matters, vaccination, and Covid-19-related healthcare management.

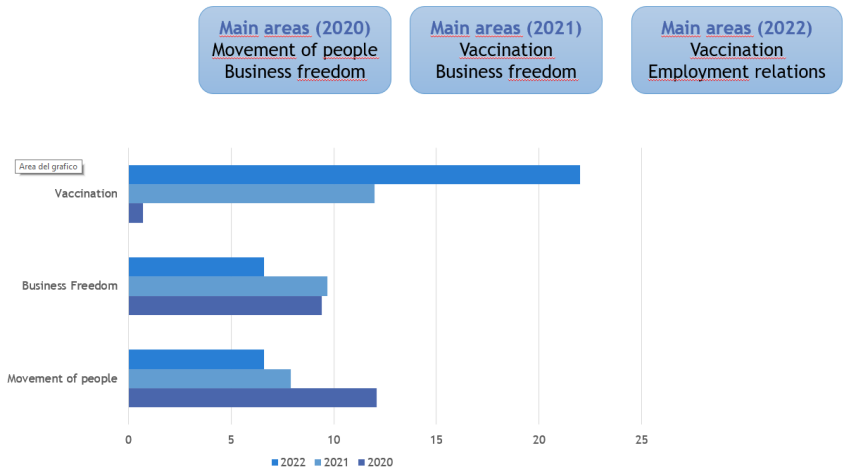
[25] Out of the 1973 selected cases (update: December 2022), 253 cases are from the United States and 223 from India.
[26] With 145 cases out of the 1973 selected cases (update: December 2022).
[27] With 101 cases out of the 1973 selected cases (update: December 2022).
[28] With 79 cases out of the 1973 selected cases (update: December 2022).
[29] With 590 cases out of the 1973 selected cases (update: December 2022).
[30] With 51 cases out of the 1973 selected cases (update: December 2022).
[31] With 53 cases out of the 1973 selected cases (update: December 2022).
[32] With 25 cases out of the 1973 selected cases (update: December 2022).
[33] With 21 cases out of the 1973 selected cases (update: December 2022).

Cases by area of litigation



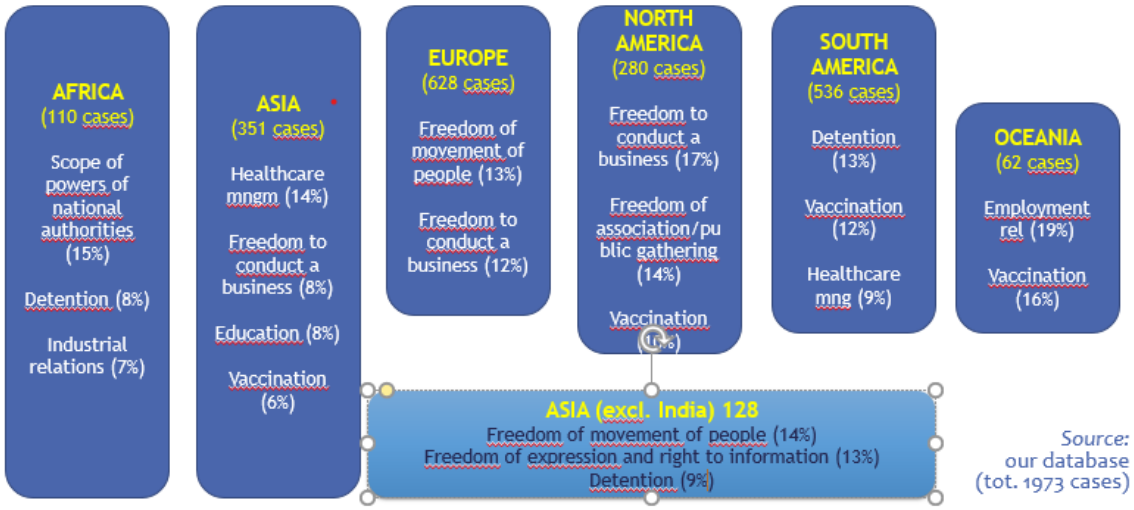
Not surprisingly, some of these data have changed over time, being a reflexive outcome to some extent of changes in regulatory approaches. Whereas freedom to conduct a business remained the most litigated issue throughout 2020 and 2021, vaccination soon reached the top by 2021 and continued to be highly relevant throughout 2022 when a high number of cases concerning employment relations shed further light on the implications of vaccination mandates on the former. 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, 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.

Cases by areas and by year



Research conducted within the Covid-19 Litigation Project also shows that litigation areas have been rather different with respect to country. Whereas in Europe most cases from our dataset have emerged with regard to freedom of movement and freedom to conduct a business (including business closures), in North America, business freedom, public gatherings (including those held for religious services), prisoners' rights, and vaccination have been the most prominent areas of litigation. Comparatively, in South America, the courts have mostly dealt with prisoners' rights, vaccination, and healthcare management. Cases from Oceania have mainly concerned employment relationships (with special regard for dismissals linked to the vaccination mandate) and vaccination, followed by freedom of movement (being the most litigated until 2021) and private and family life. African cases in particular have been identified in areas concerning the scope of powers of national authorities, followed by detention, and industrial relations. Asian cases, which were predominantly Indian (64% of all Asian cases reported in our dataset), 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; 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.

Cases by areas and by country



Among other aspects, the identity of litigants is illustrative of the drivers of litigation and reflects when and how adjudication is used to solve disputes. A radical difference concerns litigation between private parties and public administrations and between different public bodies. The former should be differentiated depending on whether litigation is brought by individuals and businesses or by non-profit entities including churches, schools, hospitals, and collective bodies like associations. Most of the litigation examined thus far 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 comparative analysis is suggestive; collective proceedings have been relatively more important in Africa (32%), Asia (29%, mainly India, 32%) and North America (30%), and less in South America, Europe, and Oceania (19-21% of the total number of cases).[34] Actions launched by public entities have been limited in all regions except 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.

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,[35] 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.[36] In federal states, litigation has involved disputes between federal governments and States.[37] 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.[38]

Typically, divergences among public entities within the same administration are not resolved by litigation but other forms of dispute resolution. Adjudication thus represents a last resort when political settlements cannot be reached.

Differences in the distribution of claimants contribute to defining how adjudication is used in times of emergency and may not necessarily reflect the use of adjudication in ordinary times.

Nature of claimants: private v. collective v. public

Claimants	*Individuals (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%

[34] 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. FAVAROUE-COSSON, *How did French administrative judges handle Covid-19*, cit., 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.

[35] In the USA *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.

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

[37] 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.

[38] 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 20/2/2023); G. DELLEDONNE, *C. PADULA, The impact of the pandemic crisis on the relations between the State and the regions in Italy*, in E. HONDIUS et al. (eds), *Coronavirus and the Law in Europe*, Intersentia, 2021, 301 ff.

Europe	68%	20%	12%
Oceania	76%	21%	3%

How have courts reviewed legislative and administrative decisions? The intensity of judicial review and the balance between judgments granting and rejecting claimants' requests has changed over time. The database allows us 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. Clearly the significance of a rejection of a private claim differs from the rejection of a claim made by a public entity against another public entity. 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.

Whether the claims brought to court by these parties are upheld by judges depends on many factors. On the whole, research outcomes have escaped a clear polarization. In fact, although the majority of claims examined in the Database were rejected,[39] 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 bringing public decision-making back on track with respect to fundamental rights, as these have otherwise been systematically violated.[40] The data on outcomes 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 duty to provide evidence-based decisions, reflected in the increasing number of annulments.[41] This data varies across jurisdictions. For Oceania, North America,[42] Asia (excluding India) and Europe the percentage of cases in which claims were rejected is more than 60% (between 62% in Europe and

[39] 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.

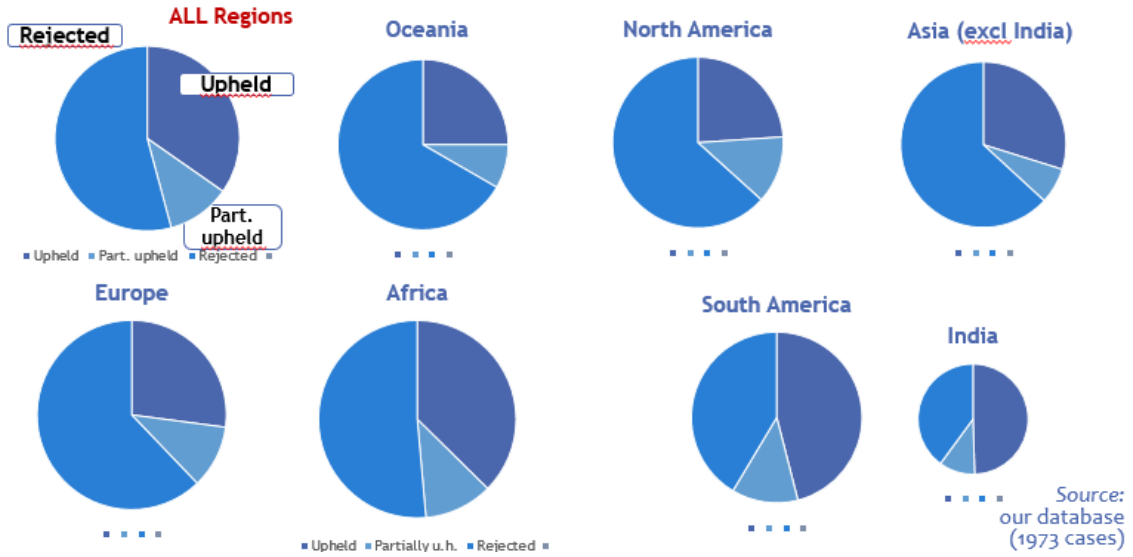
[40] For a broader examination: F. CAFAGGI, P. IAMICELI, *Uncertainty, Administrative Decision-Making and Judicial Review*, cit.

[41] 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*, 2021, https://doi.org/10.1017/err.2021.7 (last visited on 5/3/2023): "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*, 2021, 271-278 See also B. FAVARQUE-COSSON, *How did French administrative judges handle Covid-19*, cit., 88 f., illustrating the different approaches of the French Council of State during the different phases of the pandemic.

[42] For an analysis on success rate in the US litigation concerning nonreligious 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.

66% in Oceania), whereas in South America and in India (excluded from the rest of Asia) the percentage is between 40% (India) and 41% (South America). The average data of South America is very similar to that of India and 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. Courts have upheld claims to a greater extent in South America, Africa, and in Asia in the Indian context. As shown above, significant distinctions exist within South America and Asia but the overall comparison shows that courts have rejected claims to a higher extent in Oceania, North America and Europe. This data, if adequately refined and verified, could provide a conceptual framework of 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. The key distinction to explore is the correlation between action and omissions and the degree of rejection in either case. Has court intervention changed depending on whether they scrutinized actions or omissions? The most difficult issue concerns the justiciability of governmental decisions not to act. By upholding private claims that requested administrative actions, especially when fundamental rights were at stake, have courts forced governments to act? In cases of persistent inertia, have courts substituted governments to guarantee that fundamental rights are protected? Along these lines, one could investigate whether the outcome of litigation represented partial compensation for a lack of

A. Posner, *Constitutional Challenges to Public Health Orders in Federal Courts During the Covid-19 Pandemic*, in *Boston University Law Review*, 102, 1729 ff., showing judicial deference toward states during emergencies.

activism by States in their policies and responses in battling the pandemic. 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.[43]

4. Judicial review in times of pandemic and the effective protection of rights

During the Covid-19 pandemic, the courts have certainly acted as the guardians of fundamental rights. This was clear not only because public health (itself a fundamental right in some legal traditions though not all) was at the core of judicial review of containment measures and health regulation, but also because the courts had to systematically balance public health with several other fundamental rights and freedoms.[44]

Balancing techniques were at the core of constitutional and judicial review. The sections below will examine and compare different approaches taken by the courts depending on their legal traditions and legal frameworks in constitutional and judicial review (section 4.1). Both common trends and national specificities will be considered with a focus on possible intersections across countries or regions. Among common factors that influenced judicial review across jurisdictions were the level of vulnerability of rights affected by public health measures (section 4.2) and the evolution of scientific knowledge during the different phases of the pandemic (section 4.3).

4.1. The balancing of fundamental rights and freedoms: the main approaches

The research conducted thus far by the Covid-19 Litigation Project has emphasized some common trends in the examined caselaw, though with different approaches depending on the legal tradition.

The first notable element is the role played in most systems, with differing intensity, by general principles and open-ended concepts. Specifically, in many areas of continental Europe and South America, judges made extensive use of general principles such as proportionality and precaution, first and foremost, to assess the legitimacy of administrative measures and the conformity of laws and regulations with the Constitution.[45] It is quite remarkable that the tripartite test of proportionality (largely based

[43] Cf. T. GINSBURG, M. VERSTEEG, *The Bound Executive: Emergency Powers During the Pandemic*, cit.

[44] V. TRSTENJAK, *The Corona Crisis and Fundamental Rights from the Point of View of EU Law*, in E. HONDIUS et al. (eds), *Coronavirus and the Law in Europe*, Intersentia, 2021, 1 ff.; A. DONALD, P. LEACH, *Human Rights – the Essential Frame of Reference in Response to the Covid-19 Pandemic*, in J. GROGAN, A. DONALD (eds.), *Routledge Handbook of Law and the Covid-19 Pandemic*, 101 ff. An interesting comparative analysis is developed on balancing of rights in the context of the two global crises, namely the pandemic one and the climate change one, by J. FROESE, *The State's Duty to Protect the Right to Life in the Context of Present Crises*, in *Journal of European Tort Law*, 12, 2, 2021, 162 ff., part. 183 ff.

[45] See e.g., for Spain, Tribunal Supremo, 14 September 2021, 1112/2021, concerning the use of a Covid passport for access to bars and restaurants, where the Court held that the measure is adequate to avoid contagion (pubs, restaurants and bars are, by their very nature, high-risk premises, since protective devices cannot be used permanently, it is difficult to maintain a safe distance and people usually speak louder or even sing, which contributes to the transmission of Covid-19. Secondly, the Court held that the Covid passport was a necessary measure, as no other measure less restrictive of fundamental rights could help to contain the risk of contagion in this type

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.[46] The tripartite structure of the proportionality principle, as it was developed at the EU level and in different European legal traditions, quite extensively guided the judicial review of Covid-19 measures across the globe.[47] For example, the Colombian Constitutional Court ruled on the suspension of extradition terms, holding that judicial assessment must concern (i) the constitutionality of the purpose to be fulfilled and the suitability of the measure to achieve proposed objectives; (ii) its necessity in the absence of other less harmful but equally suitable means; and (iii) its proportionality in the strict sense.

The relationship between precaution and proportionality also gained special attention in the context of pandemic legislation and caselaw, particularly in Europe.[48] While the principle of proportionality is mostly employed as a balancing technique in order to compare the benefits expected from a measure, in terms of containing risk or preventing harm, with the sacrifices imposed on the rights of the individual or the community,[49] the latter comes into play whenever such a comparison cannot rely on certain

of premises. Thirdly, it considered the measure to be strictly proportional, since the benefits brought are greater than the sacrifice involved in having to show documents at the entrance to the establishments. Furthermore, the measure does not apply indiscriminately to the entire region, since it varies according to different incidence rates, nor is it permanent, since it is subject to change according to the evolution of the pandemic.

See the judgments of the Italian constitutional court 14/2023 and 15/2023 published on 9 February 2023, where the Court held that vaccination mandates for specific professional categories like health care professionals reflect a correct balancing between the right to work and the right to health protection. Indeed, the right to work does not imply a right to perform when the worker's performance generates risks for public health and safety (Const. court, decision no 15/2023, par. 12.2).

[46] On the EU dimension, V. TRSTENJAK, *The Corona Crisis and Fundamental Rights from the Point of View of EU Law*, cit., 9.

[47] Colombian Constitutional Court, 25 June 2020, no. 201. For another clear application of the proportionality test according to the parameters of appropriateness of the measure, necessity and proportionality in the strict sense as a balance between costs and benefits, see, 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); for Italy (at least in relation to the criteria of adequacy and proportionality in the strict sense), Constitutional Court, 22 October 2021, no. 198.

[48] On the role of the precautionary principle in EU law well beyond the environmental law area (art. 192(2) TFEU), see ECJ Case C-616/17 Blaise and others, para 41 referring to Case C41/02 Commission v Netherlands [2004] ECLI:EU:C:2004:762, para 45 et al. On the role of the precautionary principle, with prevailing regard to the first anti-pandemic legislation, 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 (last visited on 7/1/2023).

[49] On the lack of proportionality of the limitation of freedom of movement in Switzerland, see ECHR, ECHR, AFFAIRE COMMUNAUTÉ GENEVOISE D'ACTION SYNDICALE (CGAS) c. SUISSE, March 15, 2022, Requête n. 21881/20. Among national courts, the Italian Constitutional Court considers proportionality as a criterion placed to safeguard an adequate balance between general and individual interests and refers to this end to the case law of the ECHR; see Italian Const. Court. 19 October 2021, no. 213 on the suspension of eviction proceedings: "The significant temporal extent of the emergency made it necessary, moreover, to progressively adapt the measures taken to deal with it, so as to take due account of the concrete evolution of the epidemiological situation and always ensure the proportionality of the measures themselves in relation to that situation. [...] With reference to the disproportionate impact of the measure in question on the landlord's right to property, it should be recalled that this Court, also in recent rulings, has reiterated that an interference with the right to peaceful enjoyment of

measurements: since the value of the interests at stake (life, public health) is high, then, even the uncertain possibility of the benefit brought by the measure justifies its adoption at the expense of limitations on rights or freedoms.[50]

The need to complement precaution and proportionality was similarly established in caselaw, in the European context in particular. In fact, a lack of complete evidence on the extent of risk and the possible impact of each alternative measure did not vest public authorities with arbitrary powers.[51] To the contrary, in times of scientific uncertainty, the rule of law calls for the due consideration of general principles more than ever as guidance for decision-making which has an impact on fundamental rights and freedoms. In this context, if precaution mandates the adoption of measures, influencing the "if" (*an*) of public action, the proportionality principle may contribute to defining the "how" (*quomodo)* of such measures, based on available knowledge, however limited.[52]

This principle-based jurisprudence, echoes of which were found in India both in terms of the balancing of rights and the application of general principles (e.g. of proportionality),[53] is on the whole rarer in other Asian countries. In these countries (China first and foremost*),* not only is litigation more limited (or decisions are more difficult to come by), but the dispute also tends to shift from the lawfulness of a rule to the lawfulness of a sanction imposed against the violation of the rule.[54]

property is permissible where there is a fair balance between the requirements of the general interest of the community and the protection of the rights of the individual (*ex multis*, judgments n. 46 of 2021, n. 276, n. 235 and n. 167 of 2020). The case-law of the European Court of Human Rights (ECHR) has long been along the same lines in its interpretation of the guarantee expressed in Article 1 of the Additional Protocol to the ECHR (European Court of Human Rights, Grand Chamber, judgment of 6 October 2005, *Maurice v. France*, paragraph 86)". For Italy, see also Council of State 13 May 2021, no. 850, cit.

[50] Cf., in Italian pre-pandemic jurisprudence: Const. Court 18 January 2018, no. 5 ("Faced with an unsatisfactory vaccination coverage in the present and prone to criticality in the future, this Court considers that it falls within the discretion – and political responsibility – of the governing bodies to appreciate the supervening urgency to intervene, in the light of new data and epidemiological phenomena that have since emerged, also in the name of the precautionary principle that must guard such a delicate area for the health of every citizen as that of prevention".). 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.

[51] K. Meßerschmidt, *Covid-19 legislation in the light of the precautionary principle*, cit., 283.

[52] Cf. ECJ Joined Cases C-78/16 and C-79/16 Pesce and others, para 48: "[the precautionary principle] must, in addition, be applied having regard to the principle of proportionality, which requires that measures adopted by EU institutions should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. For an application in the context of the Covid-19 pandemic, see also below par. 4.3.

[53] See e.g., for 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.

[54] See e.g., for China: Tianjin No.1 Intermediate People's Court, 13 October 2020, C., L. v. Police Department Wen'an Street; Intermediate People's Court of Chenzhou City, 29 September 2020, Administrative Decision (Appeal) No. 105 of 2020; Yanchuan People's Court Shan''xi Province, 8 September 2020, Ma, Rui v. Police Department Baota, Yan'an, (2020) 0622 45; for Japan, Naha District Court (1st Criminal Department), 24 February 2021, No. 361 (wa) 2020; for Thailand, Thoeng Provincial Court, 2 June 2020, No. Aor 182/2563; for India, High Court of Delhi, New Delhi, India, 16 November2021, No. 3268/2021; 2497/2021; 935/2021; 3346/2021; 1217/2021.

In other contexts (particularly in US jurisprudence) emphasis was more on the legitimate exercise of power by the competent authority rather than on a balance between rights and freedoms, although the latter came into play at least indirectly.[55] In fact, US caselaw on Covid-19 litigation was largely influenced by the *Jacobson* doctrine developed in the early XX century.[56] According to *Jacobson*, police power of a State must be held to embrace, at least, such *reasonable* regulations established directly by legislative enactment as will protect the public health and safety. If there is any room for judicial review of legislative action in this field, it may only be exercised if one of two conditions occurs: (*i*) either the statute has no real or substantial relation to the intended objects to protect the public health, the public morals, or the public safety; or (*ii*) it determines "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[57] If the first test displays some similarity with the adequacy test embraced in the proportionality principle, the second condition seems to define the scope of judicial review within more limited boundaries than those allowed in the principle of proportionality applied in the European tradition: not solely because only 'plain and palpable invasions' ('beyond all question') are relevant, but also because the array of constitutional rights in US law does not correspond with the fundamental rights in the European Charter; the right to work is a relevant example in this regard.[58]

[55] From a comparative law point of view, it is relevant to highlight that, e.g., the judicial review enacted by French courts has been described as not restricted to ensuring the existence of the legal competence of the administration to act (*l'état de droit* in the narrow sense) but to ensure proportionate respect for fundamental rights (the rule of law in the wide sense). See B. FAVAROQUE-COSSON, *How did French administrative judges handle Covid-19*, cit., 89.

[56] USA, Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[57] See, e.g., U.S., Hopkins Hawley LLC v. Cuomo, No. 20-CV-10932 (PAC), 2021 WL 1894277 (S.D.N.Y. May 11, 2021): "[...] The court found that "Plaintiffs' [c]onstitutional claims against the Governor's Dining Policy fail under the deferential standard set forth in *Jacobson v. Massachusetts*," which held that during public health crises, a public health law should only be struck down if it had "no real or substantial relation" to public health or was "a plain, palpable invasion of rights secured by the fundamental law." *Id*. (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)). "The Dining Policy bears a relation to the public welfare by seeking to curb the transmission of COVID-19 in higher risk settings such as restaurants. Moreover, the Plaintiffs have not shown that the Dining Policy is 'beyond all question, a plain, palpable invasion of rights secured by fundamental law.'" *Id*. (quoting *Jacobson*, 197 U.S. at 31). Even under a traditional "tiers of scrutiny" analysis, though, the court concluded that Plaintiffs' claims would fail. *Id*. "Plaintiffs' claims do not implicate any fundamental rights under the Constitution and therefore do not trigger a heightened standard of judicial review. Accordingly rational basis review applies," and the Dining Policy was undoubtedly a rational measure intended to slow the spread of COVID-19. *Id*."

[58] Indeed, the right to work is not a fundamental right under some *common law* jurisdictions. E.g., United States District Court for the District of Hawai'i, 26 February 2021, Kelley O'Neil's Inc. v. Ige, where, premised on the fact that the Fourteenth Amendment on *Due Process* protects only fundamental freedoms, the right to choose employment is excluded as a fundamental right; it follows that the only permissible judicial review is whether the authority had a legitimate reason to act; High Court of New Zealand, 25 February 2022, Yardley v Minister for Workplace Relations and Safety [2022] NZHC 291; BC202260255), where it is concluded that the right to work has only indirect relevance in the jurisdictional review relating to the vaccine mandate because the right to work is not recognised in New Zealand's 1990 *Bill of Rights*.

Beyond its link with consolidated doctrines, such as in *Jacobson*, reasonableness was widely used in Covid-19 litigation across the globe, both in common law[59] and in civil law jurisdictions.[60] Compared to other principles, reasonableness steered judicial discretion by stimulating a flexible and contextual approach with due consideration for scientific evidence and the social impact of measures being challenged. Where appropriate, it complemented rather than replaced the principle of proportionality.[61] In some decisions, especially in the European context, the distinction between reasonableness and proportionality becomes more defined.[62] For example, the Italian Council of State considered vaccination requirement for health workers to be both reasonable and proportionate: reasonable since, in the

[59] See, e.g., in Australian caselaw, Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 3: while the Respondent's power was exercised on the basis of the Minister's consideration on the risk to *health, safety or good order* posed by the applicant's presence in Australia so that it was in the public interest for the visa to be cancelled, the Court considered whether it was illogical, irrational or legally unreasonable to do so. The Court concluded that there were sufficient grounds for the Respondent to cancel the Applicant's visa. Further, the Parliament had intended for the discretion to be exercised in accordance with legal reasonableness. It could not be concluded that the exercise of discretion by the Respondent was made unlawfully.
For the US, see Dixon v. De Blasio, Case No. 21-cv-5090, 2021 WL 4750187 (E.D.N.Y. Oct. 12, 2021). United States District Court for the Eastern District of New York (Eastern District of New York). 12 October 2021, regarding restrictions to freedom of religion, that the court found facially neutral, because they are not directed against a specific religious practice, and constitutional because they do not require vaccination but merely place reasonable restrictions on those who choose not to get vaccinated.

[60] See, e.g., for Austria, Constitutional Court, 29 April 2022, V23/2022, concluding that an ordinance-issuer was authorized by law to exercise its discretion as long is complied with the law's scope and provided records, facts and weighing procedures, which justified the adopted measures. These requirements should be determined by what was possible and reasonable in the specific situation. In this sense, the time of the ordinance's adoption and the records, on which the ordinance was based, are a decisive element of the decision, according to the Court. The challenged ordinance contained a technical explanation, with included data, such as the number of new infections and the vaccination progress in the overall population. The Court has underlined that with this, the ordinance-issuer has complied with the prescribed law's requirements.

[61] ECHR, ECHR, AFFAIRE COMMUNAUTÉ GENEVOISE D'ACTION SYNDICALE (CGAS) c. SUISSE, March 15, 2022, Requête n. 21881/20: "As for the merits of the case, while acknowledging that a State enjoys a certain margin of appreciation in deciding which measures to implement while facing exceptional circumstances, the Court found that the general prohibition on all activities carried out by the CGAS was not proportional and reasonably justifiable in light of the competing interests at stake. In particular, the Court noted that, while prohibiting public gatherings, the Swiss government still allowed for workers to go to the workplace, provided that employers set up health and safety arrangements in loco. Hence, it found unreasonable a generalized ban on open-air activities while going to work was still allowed".

[62] On the validity of the vaccination requirement for psychologists, the Administrative Regional Court of Lombardia (Milan, 30 March 2022, Order 712/2022) referred a question to the Italian Constitutional Court, doubting the compatibility of the provision with the principle of reasonableness, a corollary of the principle of substantive equality set forth in Article 3, Paragraph 2, of the Constitution, and therefore the rationality of extending the prohibition of professional activity to all activities that require prior registration in the professional register, including those that do not pose any risk of spreading Sars-CoV-2 contagion, in relation to the primary purposes of protecting public health and maintaining "adequate safety conditions in the provision of care and assistance" during the Sars-CoV-2 epidemic situation. In addition to reasonableness, the Court referred to proportionality. In fact, in the view of the Court, the legislative choice of affixing an absolute preclusion to the performance of professional activity carried out on a self-employed basis seems to have gone far beyond what is necessary to achieve the objective of protection prefigured by the rule, which could have been achieved, with equal effectiveness, even with the milder prohibition of proximity contacts with the patient or from which a concrete risk of

Court's view, it was already amply clarified that the four vaccines were effective and safe, according to the state of knowledge acquired and clinical trials carried out (so-called trials), and fully responded to the purpose pursued by the legislature; and proportionate because other measures, though useful, were not decisive in limiting the contagion.[63]

From a comparative perspective, the use of general principles and open-ended standards has offered a greater chance for an ideal dialogue among courts facing similar issues through similar legal tools,[64] sometimes well beyond their distinct legal traditions.

Future research can examine the extent to which this opportunity has translated into a transformative process, in its ability to spread the use of general principles, such as precaution and proportionality, in jurisdictions in which they were less common or non-existent.

4.2. The pandemic and the rights of the most vulnerable

One of the lessons learned during the pandemic concerns the attention paid, first by policy makers and then by the courts, to the most vulnerable segments of the population. Pre-existing vulnerabilities forced fragile persons to bear much higher costs during the pandemic than others. Thus, for children, the elderly, chronic disease patients, persons with disabilities, refugees, and homeless persons, the necessity of adopting specific measures and to fairly allocate the burdens imposed by restrictive governmental measures were scrutinized by the courts.

New vulnerabilities emerged, such as for teenagers, who were drastically separated from physical contact in their communities, or for those living as single residents or in small and remote communities who were cut-off from essential services and contact when restrictive measures were adopted. Special consideration for the most vulnerable is one of the key recommendations developed by current initiatives for better preparedness and responsiveness strategies for future global health crises.[65]

spreading Sars-CoV-2 infection in any case derives. The constitutionality question has been considered inadmissible due to the lack of jurisdiction of the administrative court in the case. However, in another decision of the same Constitutional Court, the latter has concluded that the vaccination mandate for healthcare worker introduced in 2021 is both reasonable and proportionate and, on the relation between reasonableness and proportionality, based on consolidated constitutional caselaw, has affirmed: "when there is a question concerning the balancing of two rights, the assessment of the reasonableness of legislative choices makes use of the so-called proportionality test, which requires an assessment of whether the rule under scrutiny, with the extent and manner of application laid down, is necessary and appropriate for the attainment of legitimately pursued objectives, in so far as, among several appropriate measures, it prescribes the least restrictive of the rights under comparison and establishes burdens which are not disproportionate in relation to the pursuit of those objectives".

[63] Council of State, 20 October 2021, No. 7045.

[64] For an example of this ideal dialogue, see Italy, Council of State, 20 October 2021, No. 7045 (unofficial translation): "Again, the balancing act does not appear unreasonable, given the comparison of the opposing values, and here it is only worth mentioning that the Conseil constitutionnel in France, ruling in Decision no. 824 of August 5, 2021 on a similar law which provides that the worker, who does not present the *passe sanitaire* and does not choose to use paid vacation and leave, is notified on the same day of the suspension from work, held that the question of constitutionality was unfounded because the legislature pursued the objective, of constitutional value, of protecting health by limiting the spread of the epidemic."; and, more recently, Italian Const. Court, 9 February 2023, no 14, par. 12.4 and 13.3, referring to German, French and US caselaw on vaccination mandate.

[65] See *Conceptual Zero Draft* for the consideration of the Intergovernmental Negotiating Body of the WHO Assembly, Art. 4(13), Principles, on the rights of individuals and groups at higher risk and in vulnerable situations. See also one of the recommendations developed by the Lancet Commission (see J.D. SACHS et al., *op. cit.*, p. 3:

In litigation, the principle of non-discrimination was also invoked to assess the validity of measures distinguishing (or not distinguishing) different classes of vulnerable people from those who were not, as frequently emerged when access to vaccination was concerned.[66] With regard to vaccination, the principle of solidarity played an important role, whenever self-determination of individuals was limited in order to ensure the benefits of mass vaccination in favor of those who could not be vaccinated or who were more vulnerable to infection.[67] These limitations were considered 'tragic choices' in favor of the most fragile and required applying the principle of equality to take such vulnerabilities into account.[68]

Accessibility to healthcare, both preventive and as treatment, for vulnerable people was also at the core of 'tragic choices' made by hospitals when assigning slots for intensive care to different types of Covid-19 patients. The position taken by the German Constitutional Court was remarkable in this light, in that it not only called for an explicit intervention by the legislature to set the specific criteria for such tragic choices, but it also established that such criteria should ensure equal protection of the rights of persons with disabilities, concluding that their vulnerability should not put them at a (further) disadvantage in this context.[69]

Accessibility to health care and drugs, vaccines included, was not the only issue faced by courts regarding vulnerabilities. Exemptions from restrictive measures, e.g. masks or home schooling, also required courts to look at old and new fragilities. With regard to schools and social contexts in particular, inclusion rather than mere exemption was the key, with effects sometimes involving 'community-based' approaches to vulnerabilities such as those concerning the participation of non-disabled pupils in in-person schooling along with pupils with disabilities.[70]

Comparative analysis sheds light on the role of courts as guardians of the rights of the most vulnerable as they sought to respect both equality and solidarity. If fundamental rights may not be suspended in times of crises, this is doubly so for those who have more a limited means for facing societal challenges.

"Preparedness plans should include improved surveillance and monitoring; definition and protection of vulnerable groups").

[66] On the principle of non-discrimination concerning access to vaccination see, for India, Supreme Court of India, 9 September 2021, WP(C) No. 16501 of 2021; for France, France, Council of State, 5 February 2021, No. 449081.

[67] 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 according to which each individual may be required to accept a low health risk associated with vaccination, in order to provide protection for vulnerable people. See also the Italian Constitutional Court, in decision no. 14/2023, par. 5.1. "In the context of this balancing of the two declinations, individual and collective, of the right to health, the imposition of compulsory health treatment finds justification in that principle of solidarity which represents 'the basis of social coexistence normatively prefigured by the Constituent Assembly' (Judgment No 75 of 1992).".

[68] See the Italian Constitutional Court, in decision no. 14/2023, referring to a previous decision (no. 118/1996): "In the event of an ineliminable conflict […] the law imposing the obligation to vaccinate […] deliberately makes an assessment of the collective and individual interests at stake, bordering on what have been called the 'tragic choices' of law: the choices that a society believes it is making with a view to a good (in our case, the elimination of polio) that entails the risk of an evil (in our case, the infection that, albeit very rarely, affects some of its members). The tragic element lies in this, that suffering and well-being are not equally shared among all, but are entirely to the detriment of one or to the benefit of the other."

[69] German Constitutional Court, 16 December 2021, No. 1 BvR 1541/20 -, Rn. 1-131.

[70] Italy, Council of State, 27 April 2021, A.A. c/ Ministry of education, n. 780/2021.

4.3. Uncertainty, scientific evidence, and decision making. Judicial perspectives

The pandemic has highlighted the relationship between the availability of scientific evidence and the features of decision making. The importance of scientific institutions like the Centre for Disease Control (CDC) has grown compared to the role they play in ordinary times. However, the necessity of making evidence-based decisions has not translated into a formal delegation of decision making from political and administrative bodies to scientific ones.[71] The relationships have been different depending on approaches by government.[72]

The importance of mutual trust between scientific communities and governments was a main pillar of the credibility of Covid-19 policies and courts have been sensitive to the necessity of preserving this trust, where it existed, and promoting it, where it did not.[73]

The most difficult issue has been the management of the pandemic in the context of scientific uncertainty. How have institutions that have had to make decisions based on scientific evidence coped with such uncertainty?

Scientific uncertainty has forced decision makers to make choices based on probabilistic scenarios. Predictions based on algorithms have been used by governments to anticipate the potential effects of alternative measures and evaluate their reasonableness and proportionality.[74] Many choices concerning closures and restructuring public spaces to reduce contagion were often contingent upon the availability of scientific knowledge and based upon simulations defining the potential impact of the measures.[75]

[71] These institutions have their statutory powers and the exercise of their powers has been challenged before courts. See for example in relation to the US CDC the litigation concerning decisions made by CDC and their conformity to the statutory federal framework. See District Court for the Middle District of Florida, 18 April 2022, vacating Biden Administration's mask mandate in transportation.

[72] Clearly, when governments have refrained from taking action tensions have arisen with scientific bodies usually inclined to suggest the adoption of preventive measures. The example of the first year of pandemic in the US is illustrative of a non-cooperative relationship between the executive and the Center for Disease Control. See in a comparative perspective C. COGLIANESE, N.A. MAHBOUBI, *Administrative Law in a Time of Crisis: Comparing National Responses to Covid-19*, in 73 *Administrative law review*, 2021, 3 ff.

[73] On the relationship between trust and policy making related to Covid-19 see 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*, Routledge, 2021, 289 ff., part. 293/4.

[74] See W. NAUDÉ, *Artificial Intelligence against Covid-19: An Early Review*, IZA DP No. 13110, April 2020, available at https://www.iza.org/publications/dp/13110/artificial-intelligence-against-covid-19-an-early-review (last visited on 18/2/2023); S. VON STRUENSEE, JD, MPH, *Mapping Artificial Intelligence Applications Deployed Against Covid-19 Alongside Ethics and Human Rights Considerations*, Working Paper, July 2021, available at https://www.researchgate.net/publication/353347512_Mapping_Artificial_Intelligence_Applications_Deployed_Against_Covid-19_Alongside_Ethics_and_Human_Rights_Considerations (last visited on 13/2/2023).

[75] T. ALAMOA, G. GIORDANO et al, *Data-Driven Methods for Present and Future Pandemics: Monitoring, Modelling and Managing?*, https://arxiv.org/pdf/2102.13130.pdf, (last visited on 7/1/2023); N. HAUG, P. KLIMEK 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 7/1/2023); J. M. BRAUNER, JAN KULVEIT et al., *Inferring the effectiveness of government interventions against Covid-19*, https://doi.org/10.1126/science.abd9338, (last visited on 7/1/2023); M. CHINAZZI, J.T. DAVIS et al., *The effect of travel restrictions on the spread of the 2019 novel coronavirus (Covid-19) outbreak*, in *Science*, 368, 2000, 395–400; M. LIU, R. THOMADSEN, S. YAO, *Forecasting*

Scientific uncertainty has also modified the features of administrative decision making, its duration, and effects.[76] Decisions have to be evidence based, limited in time, and continuously monitored to evaluate how the evolution of scientific knowledge may affect reasonableness and proportionality.[77] Court scrutiny has contributed to ensuring that legislation and decisions were crafted on the basis of objective scientific data and not mainly driven by the pressures of public opinion.

Scientific evidence is not only generated by voluntary research activities of the scientific community; there is also a state obligation to generate scientific knowledge in order to make evidence-based decisions that have an impact on the collective health. Failure to monitor and collect updated data can translate into the invalidity of administrative decisions and the liability of any governmental entity that has failed to act based on new evidence.[78]

Courts have instructed administrations to engage in continuous monitoring to ensure that scientific evidence continued to support their decisions: the monitoring of the Covid-19 vaccination by the German government[79] for instance, or for children's obligation to wear masks in Italy.[80] There might also be disagreements within the scientific world that the scientific community is unable to solve. When scrutinizing the existence and reliability of scientific evidence, Courts have distinguished between instances where there is scientific consensus and other instances where there is disagreement within the scientific world, leading to uncertainty. In the latter scenario, a US court concluded that doctors cannot be sanctioned for allegedly disseminating misinformation about Covid-19 for example; more specifically, in the context of the pandemic, "the term scientific consensus lacks a sufficient statutory definition, narrowing context, or settled legal meaning and fails to provide sufficiently objective standards to focus the statute's reach, rendering the definition of 'misinformation' unconstitutionally vague."[81] In the former scenario, the scrutiny focuses on transparency, in the latter, the courts have gone deeper and evaluated how an administration should make a choice in the context of scientific disagreement.[82]

---

the spread of COVID-19 under diferent reopening strategies, in *Nature Scientific Reports* | (2020) 10:20367 | https://doi.org/10.1038/s41598-020-77292-8 (last visited on 5/3/2023).

[76] See, for Argentina, Federal Court of La Plata, 26 January 2022, FLP 416/2022.

[77] See, in relation to the vaccination and the scope of monitoring obligation by technical and administrative institutions, the judgment of the Italian Constitutional Court 14/2023, published on February 9th 2023, where it is stated that legislative discretion on mandatory vaccination must be exercised in light of the available scientific knowledge. The legislative rules must be modified when the evolution of the scientific knowledge suggests that the evidence upon which legislation was drafted is no longer the same.

[78] On the obligations to monitor data on the negative consequences of the vaccines see for example the Italian Constitutional Court, decision no 14/2023.

[79] In relation to vaccination, see for Germany the Federal administrative Tribunal, BVerwG 1 WB 2.22 - decision of 7 July 2022.

[80] Italian Council of State (decree 6795/2020).

[81] See *Hoeg et al. v. Newsom (Governor of the State of California) et al.*, Eastern District Court of California, 25 January 2023.

[82] See Canada, Federal Court, 14 January 2022, 2022 FC 44. The Court has first stated that judicial notice is when the courts, faced with an obvious fact, assume its existence without requiring any evidence. This happens when the fact in question is "beyond reasonable dispute". While this category includes facts of scientific nature, the Court has recognized how within the scientific field there can be disagreements. As a result, judicial notice is not taken when a scientific consensus is missing. The Supreme Court has established the test for taking judicial notice of a fact as when this is either notorious or immediately demonstrable. The test requires stricter application

Knowledge about the pandemic has evolved over time and changes in scientific knowledge have imposed limitations on time and the conditionality of legislative and administrative measures.[83]
The initial stage was characterized by a limited scientific knowledge of the origins and factors affecting the spread of the contagion.[84] Scientific uncertainty decreased over time and some consensus within the scientific community was reached over the mechanisms of spread and the modes of control of Covid-19.[85] The increase in available scientific knowledge also influenced the quality of constitutional and judicial review.[86] Many courts modified their approach over time and have become more demanding when it comes to transparency as the increase of scientific certainty has progressed.[87] In other situations, they have upheld legislative decision-making when it was possible to change and adapt to the different phases of the pandemic and to the evolution of science.[88]
The degree of available scientific knowledge has also influenced governmental decisions concerning the prevention of contagion and instrument choices to protect health, often by limiting other (fundamental) rights.

when the fact is central to the case. The Court has affirmed that while the subject can be debated by the parties, when something is beyond reasonable dispute it is a threat to the reputation of the administration of justice to allow challenges to it. The Court has affirmed that in the present case, the existence of Covid-19 is beyond reasonable dispute and has chosen to take judicial notice of it. The fact is central to the case, therefore requiring the test to be applied strictly and it has concluded that it has been met. The Court has found that the existence of Covid-19 is a notorious fact. The level of public attention on the topic would have taken notice of any scientific debate on the existence of the virus, instead, there is clear scientific consensus on the subject. There is also a large amount of case law in which Canadian courts took judicial notice of the existence of the virus, and the lack of challenge on the subject. Finally, the third reason has been the evaluation of the evidence presented by the Applicant. The Court has found it not only insufficient but also irrational.

[83] See the Italian Constitutional court's decision, no 14/2023. "The genetic and original transitional nature of the regulation, as well as the provision of elements of flexibilization and monitoring that allow the measures to be adjusted to the changing factual situation it is intended to address, are elements that affect the verification of the constitutionality of the legislation" (unofficial translation).

[84] For a detailed analysis, 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, Published Online September 14, 2022, 1224 https://doi.org/10.1016/S0140-6736(22)01585-9 (last visited on 5/3/2023), part. 1231 ss. (Hereinafter Lancet Commission Lessons).

[85] See See Lancet Commission Lessons, cit.

[86] See for example, in relation to USA, H. Hershkoff, A.R. Miller, *Courts and civil justice in the time of COVID: emerging trends and questions to ask*, 23 Legislation and public policy, 2021, 322 ff. In relation to Israel, E. Albin, I. Bar-Siman-Tov, A. Gross, T. Hostovsky-Brandes, *Israel: Legal Response to Covid-19*, in *The Oxford compendium of national legal responses to Covid-19*, available at https://oxcon.ouplaw.com/home/OCC19 (last visited on 5/3/2023).

[87] See the Austrian example on the vaccination requirement to access public places: firstly, the Constitutional Court rejected a challenge to this rule, mainly based on the consideration that recovered/vaccinated people are not subject to a high risk to catch and suffer from Covid-19 (Austria, Constitutional Court, 29 April 2022, n°V 23/2022-25); later, the same court considered unconstitutional to restrict access to hairdressers with the 2G rule (Austria, Constitutional Court, 30 June 2022, n°V 3/2022-19), and the same for the decision to close the cultural sector (when allowing religious gatherings), as it was contrary to the principle of equality (Austria, Constitutional Court, 30 June 2022, n°V 312/2021-15). For a wider comparative analysis, 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-19litigation.org/resources (last visited on 5/3/2023).

[88] So, e.g., for Italy, Constitutional Court, judgment no. 15/2023 of 9 February 2023.

Differences in strategy between suppression and mitigation are primarily the result of political and legal choices rather than science-driven solutions.[89] However, the role of scientific evidence clearly changes depending on the regulatory strategy adopted for battling the pandemic. The same index can lead to different measures depending on whether suppression or mitigation is chosen as a strategy.

The link between scientific evidence and regulatory models may affect the role of the former depending on the choices made by the policy maker.[90]

Both legislation and administrative decisions have been scrutinized by courts in relation to their scientific grounds.

Limited knowledge and related uncertainty concern not only the pandemic but also the effects of restrictive measures. This knowledge has increased over time thanks to more sophisticated predictive models and mutual learning. Mutual learning among countries experimenting with different approaches has been of utmost importance even where comparative assessment of restrictive measures by international institutions was limited.[91] Countries were able to learn from one another given that the spread of the contagion did not occur at the same time.

A link between scientific uncertainty and the precautionary principle has also been established.[92] Some courts have reinterpreted the principle of precaution in light of scientific uncertainty, reaching the conclusion that it applies differently depending on the existence of probabilistic scientific certainty.[93] In times of emergency and when the protection of health is at stake, the precautionary principle requires the adoption of restrictive measures even in situations where they might be found to be disproportionate ex post.[94]

Proportionality should be evaluated in relation to the available scientific knowledge at the time of a decision.[95] The correlation between the content of the measure and its objective must be evaluated considering the level of available scientific knowledge and its impact on the balancing of fundamental

[89] Comparative analysis suggests that in some regions (South East Asia) the dominant strategy has been suppression. In particular, the Chinese example until December 2022 has been the zero COVID strategy with highly restrictive measures. Recently the Chinese government has changed the regulatory approach leading to a much higher level of contagion and deaths. "The countries of the Western Pacific region generally adopted suppression strategies, and were broadly successful in their implementation" Lancet Commission lessons, cit., 1238. Other countries have moved from suppression to mitigation (in Europe and in the Americas suppression was not the main strategies. "Governments in the European region did not aim to suppress the pandemic, only to slow the transmission of the virus.", Lancet Commission lessons, cit., 1242.

[90] See C. COGLIANESE, N. MAHBOUBI, *Administrative law in a time of crisis. Comparing national responses to Covid 19*, in *Administrative law review* 2021, 1 ff.

[91] See the Oxford Covid-19 Government Response Tracker (see fn no 4 above). On the dynamics of mutual learning and the possible instruments of international cooperation aimed at facilitating mutual learning see Lancet Commission.

[92] See the 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.

[93] See the Italian Council of State, Ord. 38/2022 and also Id. Ord. 351/2022.

[94] On the relationship between the precautionary and the proportionality principle see Italian Council of State 7547/2022 referring to the case law of the CJEU.

[95] See Italian Constitutional Court, judgment No. 15/2023.

ISSN 2284-4503

rights.[96] A measure can be found to be disproportionate once new scientific knowledge about its effects becomes available. Although the evaluation of scientific knowledge must be made at the time of a given decision, there is an obligation on the part of the administration to adapt to new scientific knowledge and, if necessary, to adapt a piece of legislation or an administrative measure to the implications of the precautionary principle.[97]

For instance, a decision to approve vaccines with accelerated procedures and the obligations on health care personnel were held to be compliant with the principle of precaution.[98] But an obligation to continuously monitor the effects of vaccines should also provide governmental bodies the possibility of changing the evidentiary basis should new data become available.[99] In case serious negative consequences become known, the necessity for pre-vaccination testing could be required.[100]

The principle of transparency was also quite often the pillar upon which decisions to quash or annul were made: courts often scrutinized the failure to refer to the scientific basis of a decision or the inadequacy of scientific evidence related to a challenged measure.[101] Not only does transparency require that decisions be evidence-based but that administrations expressly indicate the scientific evidence that drives their choices. Failure to disclose the scientific basis for a decision may lead to state liability in addition to an eventual quashing of the measure.[102] Hence courts have tried to reduce administrative arbitrariness by requiring that the scientific evidence upon which a measure is based be clearly specified in the decision itself.

A measure that has seen litigation surrounding its scientific basis is that of the Covid-19 status certification or Covid Pass.[103] Challenges to the scientific basis of certification requirements were typically rejected by arguments that sufficient scientific evidence existed to justify such a requirement.[104] Specifically, in claims brought before the courts that no sufficient evidence existed to prove that Covid-19

[96] See Italian Council of State, decision no. 7547/2022 reforming the first instance judgment that had quashed the decision to establish distance teaching in schools for lack of scientific basis. The Council of State reformed the judgment and held that the government and the President of the Region grounded the decision on sufficient scientific evidence.

[97] See CJEU France v. Commission 601/11, 11 July 2013.

[98] See the Italian Council of State, decision no. 7045/2021.

[99] See for Italy, Administrative Justice Council for the Region of Sicily, 16 March 2022, Order no. 351/2022; Request for a preliminary ruling from the Tribunale ordinario di Padova (Italy) lodged on 13 December 2021 – D.M. v Azienda Ospedale-Università di Padova, (Case C-765/21), pending.

[100] On the lack of necessity to adopt pre vaccination testing on the basis of the current state of scientific knowledge, see the Italian Constitutional Court 14/2023.

[101] See for example, Italian Council of State, N. 07547/2022REG.PROV.COLL., N. 02010/2022 REG.RIC., 21 July 2022.

[102] See Italian Council of State, decision np. 7547/2022, referring to the case law of the European Court of Human rights.

[103] See A. Alemanno & L. Bialasiewicz, *Certifying health. The unequal legal geographies of Covid-19 certificates*, in *European journal of risk regulation*, 2021, 273 ff.

[104] See, for Israel, HCJ 2254/21, *Individual Freedom Protectors v. Director of Health Ministry* (Interim decision), (4 April 2021); for the United Kingdom, High Court of Justice in Northern Ireland, 16 February 2022, [2022] NIQB 13, in which, considering the scientific evidence upon which the vaccination requirement had been based and the possibility of not being limited by the policy through a negative Covid-19 test, a minor inconvenience when compared with the aim of protecting public health, the Court has concluded the challenged measure to be both reasonably necessary and proportionate.

certification would reduce the spread of the contagion,[105] courts have usually held that, though evidence on the degree of effectiveness might have been uncertain, there was established evidence that vaccination reduced the spread of the virus and so the requirement of a certification pass was found to be reasonable.[106]

Vaccination is an area where the evidentiary basis of decision making was often challenged well beyond the use of Covid passes. The adequacy and efficacy of vaccines and access to information concerning the negative consequences of vaccines was litigated[107] and the overwhelming majority of judgments upheld technical and administrative decisions.[108] However, the reasoning has differed.

The necessity to decide promptly in conditions of uncertainty has modified the relationship between legislative and administrative discretion and the scientific evidence required to rationally justify such choices. The necessity of factoring in the costs and benefits of a measure and to predict not only its short but also its long-term effects has become part of judicial review. Whether distinctions between ordinary times and times of emergency are likely to stay is an open question.

A second, related stream of litigation concerns the right to access scientific evidence by individuals and organizations. Litigation concerning access is instrumental to the possibility of evaluating whether an administrative decision was grounded on sufficient scientific evidence. Courts have usually granted access to scientific documents for example that included data concerning the effects of measures taken by the government on the contagion or the effects of vaccines on the pandemic.

The principle of transparency not only requires that administrations disclose their scientific evidence but it also obliges them to make that evidence accessible to interested parties, unless there are reasons

[105] See, for Argentina, Federal Court of La Plata, 26 January 2022, FLP 416/2022, where the Court stated that the arguments put forward by the claimants failed to prove that the measures in question implied an unjustified or impertinent infringement of individual rights since the "Pase Libre COVID" requirement was justified by the pandemic emergency, the guidelines issued by the World Health Organization, and the scientific criteria governing the matter.

[106] See High Court of Justice in Northern Ireland, 16 February 2022, [2022] NIQB 13 highlighting the distinction between the evidence that a vaccinated person is less likely to transmit the virus than a not vaccinated person and the precise and conclusive evidence related to the effectiveness of vaccination in reducing the contagion.
See on the reasonableness and proportionality of the requirement of pass certification, for France, Constitutional Council, 5 August 2021, n°2021-824 DC; Council of State, 19 May 2022, n°454621; for Austria, Constitutional Court, 29 April 2022, n°V 23/2022-25. On these issues 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-19litigation.org/resources (last visited on 5/3/2023).

[107] See Italian Administrative Tribunal CGARS, no 351/2022.

[108] See, for Austria, Constitutional Court, 23 June 2022, G37/2022, V137/2022-11, examining the constitutionality of the mandatory vaccination introduced in the Austrian legislation.

in the public interest that preclude such disclosure.[109] Similarly, disclosure obligations also involved private firms when supplying medical devices and drugs, especially vaccines.[110]

5. The main areas of litigation: from business freedom to vaccination

Balancing between the protection of health and fundamental rights resulted in different outcomes of the review. Scrutiny concerned the choice of measures, their content, and duration.

A distinction between economic and non-economic rights played a role in many legal systems and a balance in favor of health was more pronounced in relation to economic rights, because states also indemnified enterprises forced to make temporary closures or to reduce their schedules.[111]

A different balance operated when non-economic rights were at stake. The right to data protection, privacy, education, and freedom of religion all led to a different balance with the objective of health protection. In the latter scenario, the essence of fundamental rights could not be compressed. Balancing concerned both the choice of measures, whether hard or soft law should be used, and the content of restrictive measures.

Litigation has covered many different topics. It has mainly dealt, at least in the first two years of litigation, with questions concerning the legitimacy of legislative and administrative acts with special regard, where relevant and applicable, for the protection of fundamental rights. Particularly in the first phase, restrictive measures affecting the freedom of movement,[112] the freedom of religion, the freedom of association,[113] as well as in the political sphere[114] took on a certain prominence. At the same time, an important strand of jurisprudence led judges all over the world to confront the challenges of balancing

[109] See, for Germany, Administrative Court of Hamburg, 24 February 2022, No. 17 E 5455/21 (concerning the access to information supporting the Major's statement that the rise of Covid-19 was due to non-vaccinated persons); for Panama, Supreme Court of Panama, 12 March 2021, No. 7033-2021 (on a citizen's request to the Minister of Health to answer a questionnaire about the scientific and medical evidence that justifies the measures taken to control the spread of Covid-19; the claim has been rejected for procedural reasons since the Habeas Data writ has not been considered the appropriate tool to this end; for Brazil, see Court of Justice of the Federal District, 1 March 2021, No. 0733567-14.2020.8.07.0000 1.a Câmara Cível, where the Court heard an action "Mandado de segurança" filed by a local parliamentarian against the Secretary of Health of the Federal District (on the data disclosure on the fatalities of the Covid-19 pandemic in the Federal District); for Italy, see Regional Administrative Court of Lazio, 22 January 2021, No. 879 Ministero della Salute. in C. n. R.G. 20200768 (concerning the delivery by the Ministry of Health of the "National Emergency Plan" and of documents relating to the meetings of the task force regarding the Covid-19 measures).

[110] See, for Chile, Constitutional Court's decision Rol. 268-2022 of 3 January 2023, in which the Chilean Constitutional Court orders pharmaceutical company to disclose information regarding the composition of Covid-19 vaccines.

[111] See, e.g., for Latvia, Constitutional Court, No. 2020-26-0106, 11 December 2020, concerning the prohibition of gambling, where, in assessing the lawfulness of the restrictive provision, the Court considered the existence of compensation and of mechanisms aimed at mitigating the consequences of the restrictions imposed in an emergency.

[112] E.g., USA, U.S. District Court for the District of Colorado, 2 December 2020, Lawrence v. Polis; Italy, Regional administrative court of Lombardy, 28 July 2020, No. 993.

[113] E.g., Belgium, Council of State, 22 December 2020, No. 249.314 (A. 232.469/AG-149); Slovenia, Const. Court., 21 December 2020, U-I-473/20-14.

[114] E.g., Switzerland, Federal Court, 22 December 2020, 1C_169/2020.

public health protection with economic freedoms, which were strongly impacted by trade closures.[115] The principle of non-discrimination was invoked repeatedly so that judges could ascertain *ex post* whether the logic of selective restrictions (on some categories more than others) or the provision of derogations and exceptions were justified and reasonable.[116] The introduction of tracking systems, first, and vaccination certificates, later, brought the issue of balancing public health protection with the protection of personal data, including health data, to the forefront.[117] As the health emergency exacerbated the migration phenomenon and undermined international protection procedures, courts soon had to deal with health protection for migrants and asylum seekers,[118] as well as, in other contexts, that of detainees whose detention conditions were less and less suited to guaranteeing their health and safety.[119]

Central issues, almost all over the world, concerned access to essential services such as education and health services in particular.

To what extent does a pandemic justify limiting the right to education? Under what circumstances can distance learning be said to be an appropriate instrument for guaranteeing this right during a state of emergency and when instead is the reopening of schools a necessary act?[120] The economic and non-economic aspects of education deserve attention in different ways. Non-economic implications were considered first. Whereas public health has always been a determining element in judicial decision-making concerning education, over time some courts were more severe in assessing the scientific grounds of school closures and more open to considering the impact caused by distance teaching on childhood education in the medium-long run.[121] Relational aspects of education were valued in this

[115] See, e.g., South Africa, The High Court of South Africa (Western Cape High Court), Dec. 11, 2020, 6118/2020; Italy, Cons. St., 27 Apr. 2020, Decree No. 2294; Italy, Cons. St., 22 February 2021, No. 886.

[116] By way of example: for Italy, Regional Administrative Court of Lombardy - Milan, 30 March 2022, ord. 712/2022. For the Netherlands, Corte distr. De The Hague, 6 October 2021, C-09-618078-KG ZA 21-892. For the USA, United States District Court for the District of Montana, 18 March 2022, CV 21-108-M-DWM; Austria, Const. Court., 17 March 2022, No. V294/2021; Argentina, App. adm., 8 July 2021, Case No. 28425-P CCALP.

[117] CJEU, 30 November 2021, T-710/21 R; for Italy, Council of State, 17 September 2021, No. 5130; France, Const. Court, 9 November 2021, No. 2021-828; Israel, Supreme Court, 1 March 2021, HCJ 6732/20; Israel, Supreme Court, 1 March 2021, HCJ 6732/20.

See on this topic, C. WENDEHORST, *Covid-19 Apps and Data Protection*, in E. HONDIUS et al. (eds), *Coronavirus and the Law in Europe*, Intersentia, 2021, 157 ff.

[118] Italy, Trib. Naples, 25 June 2020, No. 23602 (6068/2020); France, Council of State, 10 April 2021, No. 450928; Chile, Supreme Court, 4 February 2022, No. 3253-2022; Australia, Federal Court, 16 January 2022, VID 18 of 2022.

[119] CtEDU, 1 March 2022, No. 19090/20; Italy, Const. Court, 24 November 2020, No. 245; United States District Court for the District of New Jersey, 28 March 2022, No. 18-578-01 (KM); Mexico, Criminal Court, 9 September 2021, No. 93/2021.

[120] See Italy, Regional administrative court of Calabria, 18 December 2020, A.A. v. Regione Calabria in C. no. R.G. 303001383; Regional Administrative Court of Napoli, 28 September 2021, no. 7351.

[121] See, e.g., Italian Council of State, N. 07547/2022REG.PROV.COLL., N. 02010/2022 REG.RIC., 21 July 2022. About the implications of the COVID-related challenged for the Italian education system in the post-COVID era, see R. CALVANO, *The Italian education system. A chronically ill patient facing the coronavirus pandemic*, in E. HONDIUS et al. (eds), *Coronavirus and the Law in Europe*, Intersentia, 2021, 1047 ff.

balance with due regard for pupils with special educational needs as well.[122] In other contexts, especially in India and in North America, litigation mainly focused on the economic implications of distance teaching, particularly in terms of fees due for tuition and(or) for meals and other services.[123] This is an area in which, especially for higher education in the United States, disputes were often solved through settlements.[124]

Access to essential services in times of pandemic raised similar questions related to health treatments other than those inherent to the Covid-19 situation. For example, considering services intrinsic to the termination of a pregnancy;[125] while acknowledging a violation of the duty to provide abortion service, a court in Northern Ireland considered the delay justified due to the pandemic.[126] Access to preventive healthcare (vaccines) and to treatments (e.g., antiviral therapies) for Covid-19 also generated important litigation both from the point of view of equal treatment of those entitled,[127] as well as from the point of view of the right to choose to vaccinate or not to vaccinate;[128] or the choice to take or to prescribe a certain treatment.[129] For example, a United States court denied the existence of a right to receive a particular antiviral therapy against the physician's decision, made in good conscience, holding that there is not a substantive right "to compel a hospital, physician, or medical staff to administer treatment against their medical judgment." [130]

[122] See, e.g., in Italy, Council of State, 27 April 2021, A.A. c/ Ministry of education, n. 780/2021. For a different balancing: United States of America, U.S. District Court, Central District of California, 14 October 2020, E.M.C. v. Ventura Unified School District.

[123] See, e.g., in India, India, High Court of Delhi, 31 May 2021, W.P.(C) 7526/2020; in the United States, United States of America, United States Court of Appeals, District of Columbia Circuit., 8 March 2022, Shaffer v. George Washington Univ.; Court of Appeal of Florida, 22 November 2022, University of Florida Board of Trustees v. Rojas.

[124] Among the latest cases, see the news about the pending settlement concerning Brown university, available at https://www.Covid-19litigation.org/news/2022/09/usa-another-settlement-reached-covid-19-tuition-lawsuit (last visited on 5/3/2023).

[125] E.g.: France, Council of State, 16 December 2020, No. 440214; United Kingdom, Northern Ireland High Court, 14 October 2021, Re The Northern Ireland Human Rights Commission, 16 December 2020, No. 440214; USA, U.S. District Court, Eastern District of Arkansas, Central Division (E.D. Ark.)., 7 May 2020, Little Rock Family Planning Services v. Rutledge.

[126] United Kingdom, Northern Ireland High Court, 14 October 2021, Re The Northern Ireland Human Rights Commission.

[127] See for example the case decided by BVerfG, Beschluss des Ersten Senats, 16 December 2021, 1 BvR 1541/20, Rn. 1-131 on the issue of possible discrimination of disabled persons in access to intensive care, an issue on which the German Constitutional Court asked the Parliament to intervene, since the use of mere recommendations related to the exercise of the medical profession would not suffice to avert the risk of discrimination against disabled persons.

[128] For the Netherlands, Court distr. De The Hague, 6 October 2021, C-09-618078-KG ZA 21-892; for Germany: Amtsgericht Frankfurt am Main, 12 February 2021, no 5 L 219/21.F; Adm Court Gelsenkirchen, 18 February 2021, no 20 L 182/21; Amtsgericht Schleswig-Holstein, 17 February 2021, no 1 B 12/21.

[129] See the case decided in Italy by Council of State, 11 December 2020, no. 7097 concerning the administration of hydroxychloroquine.

[130] For the United States, *Pisano v. Mayo Clinic Fla.* No. 1D22-43, 2022 WL 245437 (Fla. Dist. Ct. App. Jan. 27, 2022).

From a comparative point of view, vaccination represents a relevant area of interest.[131] Accessibility and prioritization within given populations were disputed in the first phase of vaccination campaigns at different times and in different regions of the world, depending on the availability of vaccines and supply management as well.[132] In this regard, judicial review was mainly grounded on the principle of non-discrimination, at least within the boundaries of national jurisdictions.

Fairness in vaccine accessibility across states and world regions, a largely debated issue in the international context,[133] only indirectly influenced litigation: when courts dealt with vaccination mandates in countries in which shortages in supply offered individuals additional grounds to challenge those mandates.[134]

In countries where accessibility to vaccines was less critical, vaccination mandates, where adopted, were challenged on a different basis, namely that of self-determination and the right to a private life. In this regard, balancing between the latter and public health led some courts to complement proportionality and reasonableness with the solidarity principle which is specifically designed for incorporating public interest into this type of assessment.[135] Several factors were considered relevant by courts dealing with vaccination mandates: the severity of contagion and the urgency of limiting its spread;[136]

[131] See S. FASSIAUX, *Vaccination litigation and impact of government measures on fundamental rights*, University of Trento, 2023, cit.; A. R. GLUCK, D. BARAK-EREZ, M. CARTABIA, *Global 2022 Covid-19: Waves, Mandates, and Public Health, in Weighing Judicial Authority*, Yale Law School, 2022, 96 ff.

[132] Similar disputes arose, e.g., in Europe (see, e.g., in Germany, Administrative Court of Frankfurt am Main, Feb. 12, 2021, No 5 L 219/21.F) and, later on in other continents (see, e.g., in 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.

[133] As lately reflected in the WHO Conceptual Note prepared for the Zero Draft of the Pandemic Treaty (see p. 8, no 31).

[134] E.g., in Kenya the vaccination mandate has been strongly opposed based on this argument (see the news published at https://www.hrw.org/news/2021/12/13/kenya-vaccine-requirements-violate-rights, last visited on 5/3/2023). The High Court of Kenya suspended the regulation issued by the Ministry of Health imposing a vaccine requirement to access public transportation, education, hospitals, national parks, hotels, restaurants, and prisons (Kenya, High Court, 14 December 2021).

[135] 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 in 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 the Russian Supreme Court, emphasizing that constitutionally permissible and necessary temporary restrictive measures aimed to aid the self-organization of society and was 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. АПЛ21-565).
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 and teachers). The Italian legislation has been upheld constitutional in relation to the rule that makes vaccination a legal requirement to exercise the profession.

[136] See, e.g., Austrian Constitutional Court G37/2022, V137/2022-11; in Germany, Federal Administrative Court, 7 July 2022, BVerwG 1 WB 2.22.

the existence of exceptions for individuals who could suffer ill-health effects from the vaccination itself;[137] the strength of scientific evidence concerning the effects of vaccination;[138] and the duration and scope of possible limitations connected to a lack of vaccination.[139]

In fact, rather than imposing vaccination generally on the whole population or to specific groups of individuals (e.g. based on age), vaccination was primarily mandated as a prerequisite for access to public places or services, whose use could imply physical contact which could then have an impact upon the spread of the virus. Of course, the more the activity made conditional upon vaccination was linked with the exercise of fundamental rights or with access to essential services (e.g. healthcare, education, etc.), the more these types of 'passes' resembled genuine mandates.

The impact of passes or vaccination mandates on the right to work is probably the most relevant example.[140] In fact, requesting vaccination as a requirement of work certainly led to some of the most critical litigation in many countries, which most often upheld the public decision as a protection of public health in workplaces.[141] The (less common) imposition of child vaccination as a prerequisite for school access had a similar impact. In this circumstance, based on European caselaw, courts balanced

[137] See, e.g., Austrian Constitutional Court G37/2022, V137/2022-11. Regarding a non-COVID vaccination, European Court of Human Rights, Vavřička and Others v. the Czech Republic [GC], no. 47621/13 and 5 others, 8 April 2021.

[138] See, e.g., Brazil, Federal Supreme Court, 17 December 2020, ADI 6.586/DF, https://www.covid19litigation.org/case-index/brazil-federal-supreme-court-adi-6586df-2020-12-17; see also the Italian Council of State, 20 October 2021, No. 7045: "The reserve of science, to which the public decision-maker at both regulatory and administrative levels must make necessary reference in adopting health measures to deal with the epidemiological emergency, leaves this, because of the inevitable margin of uncertainty that also characterizes scientific knowledge in the construction of truths that can be acquired only over time, at the cost of strict studies and rigorous experimentation and subjected to the criterion of verification-falsification, an undeniable room for discretion in the balancing of the values at stake, the free self-determination of the individual, on the one hand, and the need to preserve public health and with it the health of the most vulnerable subjects, on the other, a discretion that must undoubtedly be used in a reasonable and proportionate manner and, as such, subject in our system at the normative level to the legitimacy review of the judge of laws and at the administrative level to that of the administrative judge" (unofficial translation).
See, more recently, Italian Constitutional Court judgments no. 14/2023 and 15/2023, examining the reasonableness of vaccination mandate, first and foremost, on the basis of scientific evidence concerning their effectiveness and the balance between risks and expected benefits.

[139] Administrative Regional Court of Lombardia (Milan, 30 March 2022, Order 712/2022) referring to the Constitutional court that issued the 15/2023 judgment and held the Italian Legislation conforming to the Constitution (see Italian Constitutional Court, 9 February 2023, n. 15).

[140] See High Court of New Zealand, 25 February 2022, Yardley v Minister for Workplace Relations and Safety [2022] NZHC 291; BC202260255; in the Court's view, the Order was considered unlawful as it was an unjustified limit on fundamental rights protected by the New Zealand Bill of Rights Act 1990. The right to work is not directly protected in the New Zealand Bill of Rights Act 1990 and the court accepted that given it is a right contained in international instruments, it can only have indirect relevance. However, it is linked to the right to refuse medical treatment as the consequence for refusing vaccination is employment termination. So, the associated pressure to give up their job involves a limit on their right to retain that employment.

[141] See, among the latest decisions: 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.

the self-determination of parents with the need to protect the most vulnerable, including those children and family members who could not be vaccinated.[142] The question regarded to what extent school attendance could be impaired by a lack of vaccination was assessed differently by courts in different jurisdictions.[143]

Unlike in other domains, where, within existing emergency legislation, the exercise of executive power was admitted as a means for the adoption of urgent measures against the outbreak, this was an area in which courts were generally quite severe in upholding the rule of law and separation of powers, thus requesting a legislative act as the legitimate basis for vaccination mandates.[144] As a consequence and on a more substantive basis, courts were normally quite deferential to parliaments, once the latter introduced a vaccination mandate in full respect of the rule of law and the principle of proportionality.[145] Of course, distinctions were also made for individual cases, with special attention to particular health conditions that might increase the risk of side effects;[146] more rarely, courts were sympathetic with exemptions based on religious beliefs.[147]

Definitively, these are all issues which courts will need to address again in the future, although hopefully in different contexts. Vaccination mandates, in a pandemic or out of it, have significant implications. However, the principles and balancing techniques used during a pandemic may certainly be applied to other health emergencies, with due consideration for different contextual elements, once the pandemic is over. Not surprisingly, Covid-19 litigation has built on pre-Covid-19 decisions exactly in this domain.[148]

An aspect that has not raised much litigation so far but that certainly deserves more attention in the future regards the use of sanctions (both monetary and non-monetary) and incentives as a means of promoting voluntary vaccination.[149] In fact, proportionality should not only be applied to define the

[142] European Court of Human Rights, Vavřička and Others v. the Czech Republic [GC], no. 47621/13 and 5 others, 8 April 2021, ECLI: CE:ECHR:2021:0408JUD004762113; Germany, Constitutional Court, 21 July 2022, n°1 BvR 469/20.

[143] For a positive answer, in the instances at stake see, e.g.: Puerto Rico, Supreme Court, 2 February 2022; Brazil, Supreme Court, 31 December 2021, n°ADPF 756. For a negative one, in the given circumstances: United States, Superior Court of California, County of Los Angeles, 5 July 2022, n°21STCP03381; South Korea, Administrative Court of Seoul, 4 January 2022. For a wider comparative analysis, see S. FASSIAUX, *Vaccination litigation and impact of government measures on fundamental rights*, cit.

[144] See, for Slovenia, Constitutional Court of the Republic of Slovenia, 29 November 2021, Decision No. U-I-210/21; United States, US Supreme Court, 13 January 2022, n°21A244 and 21A247.

[145] But see in the USA, US Supreme Court, 13 January 2022, n°21A244 and 21A247, where vaccination mandates have been held contrary to the legislation delegating power to the agency (non delegation theory).

[146] See, e.g., in South America, Colombia, Council of State, 24 February 2022, Rad. 11001-03-15-000-2021-07661-00; Costa Rica, Supreme Court of Justice. Constitutional Chamber, 5 January 2022, No. 000374 – 2022.

[147] See, e.g., United States District Court, 11 May 2022, Steven Church et al. vs. Joseph R Biden et al.

[148] ECtHR, 8 April 2021, Vavřička and Others. For Italy, see Const. court, 18 January 2018, no. 5. See the many references to earlier constitutional caselaw included in the recent decision of the Italian Constitutional court, no. 14/2023, published on 9 February 2023.

[149] Failure to comply with vaccination mandates has different consequences. For example, in relation to health care professionals in some countries it results in termination of the employment relationship, in other countries only in a temporary suspension. For a comparative analysis see the Italian Constitutional Court, decision no. 14/2023. See also the Italian Constitutional Court's decision no. 15, that examines the proportionality of

scope of vaccination requirements and their exemptions, but also the forms of regulation (whether they be soft or hard law) and their enforcement. Soft law regimes have been deployed to promote pro-social behavior when administrative or even criminal sanctions were considered ineffective or disproportionate.

Comparative analysis developed within the Covid-19 Litigation Project has focused on the exercise of public powers when defining measures aimed at combating the pandemic. Although such measures have primarily affected relationships with public authorities, they have also impacted private relationships and led to other streams of litigation. In the first phase of the pandemic in particular, contract law came into play in relation to both BtoB and BtoC and especially banking and financial loans.[150] Force majeure and impossibility led to legislative and judicial interventions to allocate the costs of emergency measures that affected the performance and enjoyment of contractual parties.[151] Family law was also affected in decisions of parents concerning the protection of health of their children.[152] Labor law was one of the main areas affected by the pandemic and by measures to combat contagion in the workplace: at the outset to protect workers in the workplace and subsequently in relation to the Green pass and vaccination.[153]

Whereas in the first phase of the pandemic the primary legal issues concerned contractual contingencies and deferred payments, in the current context it is civil liability that could gain primacy, eventually as a complement to criminal liability adjudication. Again, this stream of litigation could relate to torts supposedly committed by public or private parties (e.g. governments, employers, hospitals, healthcare professionals, etc.).

Though cases are still relatively limited on a quantitative basis, several lines of liability litigation are already emerging. Some regard the shortcomings of public health management by governments and public authorities,[154] the consequences of distance learning imposed in schools by the same,[155] or the disproportionate application of public health measures by enforcement authorities as inhuman and

healthcare workers' suspension as a consequence for lack of vaccination and concludes that such consequence does not amount to a "sanction".

[150] See E. HONDIUS et al. (eds), *Coronavirus and the Law in Europe*, cit., 461 ff., 833 ff.

[151] See for example the CJEU's ruling in NS v. FTI Touristik GmbH, C- 396/21, stating that Article 14(1) of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, must be interpreted as meaning that a traveller is entitled to a reduction in the price of his or her package holiday where a lack of conformity of the travel services included in the package is due to restrictions that have been imposed at the travel destination to fight the spread of an infectious disease and such restrictions have also been imposed in the traveller's place of residence and in other countries due to the worldwide spread of that disease. In order for that price reduction to be appropriate, it must be assessed in the light of the services included in the package concerned and must correspond to the value of the services for which a lack of conformity has been found.

[152] See, e.g., Australia, Federal Circuit and Family Court of Australia, 15 March 2022, Cranston and Persson (No 2) [2022] FedCFamC1F 187; Canada, Court of Queen's Bench of Alberta, 21 January 2022, No. 2022 ABQB 62.

[153] Among many, see, e.g., Costa Rica, Constitutional Court, 9 August 2022, No. 18514-2022; Australia, Federal Court of Australia, 27 June 2022, [2022] FCA 741.

[154] E.g., pending case in Thailand, Civil Court, 27 September 2021, No. Por 4412/2564.

[155] E.g., Italy, Adm. Reg. Trib. Naples, 28 September 2021, n. 7351, dismissed.

degrading;[156] others concern medical practice and hospital failures to provide adequate healthcare services,[157] or adverse reactions to vaccination.[158] Another important stream of cases regards employer failures to adopt health and safety measures in the workplace,[159] or infections contracted by the families of employees.[160]

Within the domain of Covid-19 liability litigation, the question is not only *how* the liability assessment should be structured to provide justice to those who were harmed by unlawful conduct and acts,[161] but also (and principally) *whether* liability was the right response to damages that occurred during the pandemic or whether other means should be in place, starting with compensation schemes based upon *ad hoc* legislation or, looking at future possible crises, public insurance schemes.[162] Forms of state compensation, applicable in times of emergency which are not based on a state's liability, have been developed in some jurisdictions, including Germany, Poland, and Switzerland, even before the Covid-19 pandemic;[163] others have been introduced to specifically tackle compensation claims in cases of an adverse reaction to vaccination.[164] The role of private insurers should also be considered which was

[156] E.g., High Court of Kenya - Constitutional and Human Rights Division, 30 June 2021, Petition No. 8 of 2020.

[157] E.g., Russian Federation, Shatura District Court of the Moscow Region, 19 August 2021, Decision No. 2-32/2021; India, High Court of Orissa at Cuttack, 23 March 2022; Lithuania, Regional Administrative Court 23 July 2020, case No. I1-4907-342/2020.

[158] E.g., Korea, Seoul Administrative Court, Aug-Sept 2022, upheld. A different case has been recently decided in Italy on damages suffered due to polio vaccination (Court of cassation, 18 November 2022, n. 34027); here the main issue has regarded the causal link, a question that the Court has decided based on the Court of Justice's ruling in Sanofi Pasteur (C-621/15).

[159] E.g., Spain, Labor court of Alicante, 7 January 2022, upheld; Court of Appeal of Valparaiso, Chile, 20 June 2022, upheld.

[160] E .g., pending case before the Supreme Court of California, USA.

[161] The list of issues for a possible research agenda is rather dense: whether only personal injuries affecting health and lives should matter or also the (merely economic) damages from loss of profit (e.g. for business interruption); how fault and negligence shall be assessed and who should bear the burden of proof; what is the role for strict liability, if any; what kind of causality will be 'adequate' along the chain of events (and contagions) of the pandemic; what role the state of necessity will play; how the rules on joint liability will be applied in cases where the damage is linked to the actions of regulators (of various levels and kinds), scientific committees, administrators (public and private), operators (not only health workers), individuals, whose compliance or non-compliance with safety rules may have had an impact on individual and social costs paid during the pandemic. On some of these issues, see A. RUDA, *Tort Law and the Coronavirus: Liability for Harm Caused by the Covid-19 Outbreak*, cit., 323 ff.; F. ZOLL, K. POŁUDNIAK-GIERZ, W. BAŃCZYK, *State Liability for Damages Caused by Covid-19 Restrictions under Polish Law*, cit., 358 f.

[162] See R.A. Epstein, *Beware of Tort Liability For COVID Cases*, 15 June 2020, available at https://www.hoover.org/research/beware-tort-liability-covid-cases (last visited on 5/3/2023). On State's compensation scheme in Germany and Switzerland, see A. RUDA, *Tort Law and the Coronavirus: Liability for Harm Caused by the Covid-19 Outbreak*, cit., 340 f. On Polish legislation see F. ZOLL, K. POŁUDNIAK-GIERZ, W. BAŃCZYK, *State Liability for Damages Caused by Covid-19 Restrictions under Polish Law*, cit.

[163] A. RUDA, *Tort Law and the Coronavirus: Liability for Harm Caused by the Covid-19 Outbreak*, cit., 323 ff. For Poland, see F. ZOLL, K. POŁUDNIAK-GIERZ, W. BAŃCZYK, *State Liability for Damages Caused by Covid-19 Restrictions under Polish Law*, cit., 348 ff.

[164] See K. WATTS, T. POPA, *Injecting Fairness into Covid-19 Vaccine Injury Compensation: No-Fault Solutions*, in *Journal of European Tort Law*, 12, 1, 2021, 1–39.

profoundly challenged during the pandemic by massive requests for indemnities presented by businesses and individuals, who were often rejected by insurers in light of a rather restrictive interpretation of policies stipulated before the outbreak.[165]

Although the above analysis is not exhaustive,[166] it demonstrates that Covid-19 litigation has so far involved nearly all possible areas of law, causing courts to question whether and to what extent global crises, such as the pandemic, should impose the adoption of new balancing techniques or, as has mostly emerged, their adaptation in light of new circumstances. Fundamental rights (or their equivalent qualification depending on applicable law) have entered the courtroom to a larger extent than before and their balancing has become a necessary process even in cases normally linked to purely economic interests, such as in most private law litigation. The need to protect the most vulnerable requires a new consideration for equality and non-discrimination in light of the solidarity principle. With due attention to the different legal traditions across the globe, these changes may definitively play a role once new challenges emerge as is already becoming clear in relation to the current climate crisis.[167]

6. Lessons learned and the future ahead: concluding remarks

Governments have learned over time; their tools for preventing contagion and for curing people have adapted accordingly. Case law reflects these changes both in relation to the subject matter of litigation and to the objectives of the litigants. National courts have played an important but discrete role in managing the Covid-19 health crisis as their contributions have never been disruptive but usually constructive. The main lesson from analysis is that prevention, remedy, and recovery should all be characterized by an active role of the judiciary. Judicial intervention can occur *ex ante*, before a legislative or administrative decision is made, or *ex post*, after a decision is made.

[165] The case law is not uniform. In the US recovery from insurance companies has usually been denied by Federal Courts (see, e.g., Court of Appeals for the Sixth Circuit, 23 February 2022, https://www.Covid-19litigation.org/news/2022/04/usa-sixth-circuit-rules-favor-insurer-covid-related-business-interruption-claim - last visited on 20/2/2023), while being admitted by State Courts (Superior Court of Pennsylvania, 30 November 2022, https://www.Covid-19litigation.org/news/2022/12/usa-another-victory-policyholders-covid-related-business-interruption-case-state - last visited on 20/2/2023). In the UK a broader interpretation of the language in insurance contracts has allowed enterprises to recover for losses suffered because of the governmental measures to contrast the pandemic. See High Court of Justice of England and Wales, 25 February 2022 ([2022] EWHC 409 (Comm), Case No. CL-2021-000235), concluding that insurance policyholders were entitled to compensation from their insurer due to the forced closure of their many well-known restaurants and cafés in London during the three lockdowns in March, September, and November 2020; 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 (Comm), acknowledging the right to compensation but reducing the amount in regard of losses covered by the government's furlough payments.

[166] E.g., it does not cover criminal litigation, nor, among other areas, completion law and intellectual property law cases.

[167] See, for a joint examination of the two crises, J. FROESE, *The State's Duty to Protect the Right to Life in the Context of Present Crises*, cit.

In some countries, *ex ante* judicial control has been used to verify the conformity of governmental measures with fundamental rights. However, in the majority of legal systems, judicial review and control of governmental measures only occur *ex post*.

Courts have adapted procedural rules, designed for ordinary times, to work within the framework of emergency. They were able to act promptly and exercise effective control over governmental measures to ensure that the concentration of power was limited and proportionate, and that fundamental rights be respected even in times of emergency.

The impact of the pandemic as well as measures to combat it upon fundamental rights is without question. Whether and how fundamental rights should enter the picture of public choices in times of pandemic is a more critical issue. In this regard, Covid-19 litigation represents a treasure trove for legal scholars, scientists, and policy makers, offering them the opportunity to look at the impact of choices upon the rights of individuals, groups, and entities, as examined through a judiciary lens. The Covid-19 Litigation Database complements other analytical databases and platforms, which in law and other domains (including medicine, public health, social and economic sciences) are aimed at collecting and sharing knowledge developed on and during the pandemic as a legacy for future emergencies.

With coverage, at the end of 2022, of around 2,000 decisions in more than 80 countries and on every continent, the Covid-19 Litigation Database provides unique resources for comparative analysis in the field of public health and fundamental rights. Caselaw analysis enables policy makers to observe the entire cycle of statutory acts or administrative decisions, subject to their constitutional and judicial review. Analysis has focused on differences concerning the identity of litigants, the subject matter of litigation, and the outcomes. These three variables have shown that variations are significant among countries, even those with similar legal traditions. Comparative analysis has shown that, although courts have faced very similar challenges and fundamental rights have been effectively protected through judicial review, distinct legal traditions have led judges to use balancing techniques which in turn have led to different outcomes in terms of interference with public powers. Depending on the legal tradition and judicial infrastructure, various measures and remedies have been used to protect fundamental rights: from injunctions to suspensions or invalidity and, less frequently so far, compensation for governmental liability.

Litigation has followed different waves partly connected to the different evolution of the pandemic in various countries, and partly dependent upon governmental strategies to contrast the spread and effects of Covid-19. Judicial review has changed across the different phases of the pandemic. With different approaches depending on the legal system, it has been more deferential in the first phase and relatively deeper later on. Among the factors that have dynamically influenced judicial review over time were the evolution of scientific knowledge and the availability of scientific data (both on causes and effects of the pandemic and its countermeasures) as a (concurring) basis for public choices.

More can be learned starting from the several paths explored by the project.

Crises pose unanticipated challenges but can, to some extent, be predicted. Pandemic preparedness has become a key issue for future events and there is consensus over a lack of preparedness for managing SARS-CoV-2.[168] Litigation over liability concerning failures to prepare is ongoing and there is no

[168] See Lancet Commission, cit.

clear set of patterns to evaluate governmental liability for failure to properly prepare and address future pandemics. Clearly, (lack of) preparedness plays a role in the definition of governmental liability when immunity is not granted.

The lessons from the SARS-CoV-2 crisis are manifold.[169] Trust is a key resource for effective international cooperation and for inter-institutional cooperation within States. There is a need to increase the scope and impact of international cooperation and revise the WHO governance system to make it more effective. International cooperation is necessary to coordinate measures concerning the movement of people and goods, to collect and provide information about the effectiveness of measures, to ensure the fair global supply of medical and pharmaceutical products, and that access is fairly granted to countries with different health care capacities.

At the national level, decision making encompasses a cycle where courts are called upon to ensure that legislation and administrative decisions comply with the rule of law and respect for fundamental rights. It has become clear that ordinary times should be used to prepare for emergencies. Preparedness plans should reflect different regulatory options connected with the availability of scientific knowledge. At the same time, emergencies help to revise what is needed in ordinary times. Even though the notion of emergency might be changing, it is important to maintain this distinction.

In times of emergency, when decisions have to be made rapidly, it is of utmost importance to prevent authoritarian turns from concentrating decision-making power in the hands of executives and diminishing transparency. But it is also important to ensure judicial self-restraint, since courts might not be equipped to evaluate the limited scientific evidence available during an emergency. The correlation between the level of uncertainty and the quality rather than the intensity of judicial review is a pillar of the institutional learning that comes from the pandemic.

The relationship between policies and scientific evidence should be redefined in light of the lessons taught by the pandemic, both in terms of the governance of the decision-making process and of the allocation of liability for mistaken decisions made by scientific bodies and policy makers. Excessive liability threats in times of emergency may lead to defensive actions that result in the under-protection of health. Immunity from liability on the other hand can lead to under protection of fundamental rights. The redefinition of the precautionary principle in times of emergency can reduce the threat of government liability and permit innovative administrative decision making, especially when consolidated scientific knowledge and available expertise are not sufficient enough to contrast a pandemic. The issue of immunity for scientific bodies that support governments should be openly addressed in particular.[170] Should these bodies be immune from liability even when they make mistakes? How

[169] 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 ff.

[170] A linked though distinct issue relates to professionals' liability under emergency. On this point, see the European Law Institute (ELI) Principles for the Covid-19 Crisis, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_for_the_Covid-19_Crisis.pdf, (last visited on 5/3/2023), part. Principle 14, *Exemption from liability for simple negligence*: "1) Given the urgent and dramatic circumstances in which doctors, healthcare professionals, and other providers in the medical sector have to provide services, States should ensure that these professionals are not held liable for adverse events related to the Covid-19, except in the case of at least gross negligence. 2) The same applies with respect to other professionals and holders of public offices who had to take quick and difficult decisions directly related to the Covid-19 crisis. 3) These exemptions from liability do not apply to the liability of the State, which remains liable pursuant to the

should they be accountable? There is a clear mismatch between the power and the responsibility of scientific bodies during the emergency; but legal liability for negligent decisions is not the answer to the accountability deficit. Liability for intentional wrongful conduct should, instead, be preserved.
The contributions of the courts to pandemic management show that the law in times of emergency needs adjustments to ensure that uncertainty does not undermine the rule of law and the protection of fundamental rights. At the same time, they show that legal traditions and practices matter when defining the role of courts and their scope for intervention. Identical or similar questions have received different answers. It is from these differences that institutional learning can profit most.

existing specific regime of liability." On professional liability limited to gross negligence, see also the Italian decree no. 44/2021, conv. by law no. 71/2021, art. 3 and art. 3-*bis*. With regard to USA, UK and Australia: AM. KELLY, *Covid-19 and medical litigation: More than just the obvious*, in *Emergency Medicine Australasia*, 32, 2020, 703–705.

ISSN 2284-4503